AGRICULTURE DECISIONS

Volume 60

July – December 2001

UNITED STATES DEPARTMENT
OF AGRICULTURE

AGRICULTURE DECISIONS

Preface

Agriculture Decisions is an official publication by the Secretary of Agriculture consisting of decisions and orders issued in adjudicatory administrative proceedings conducted for the Department under various statutes and regulations. 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.

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Direct all inquiries regarding this publication to: Editor, Agriculture Decisions, Office

of Administrative Law Judges, U.S. Department of Agriculture, Room 1082 South Building, Washington, D.C. 20250-9200, Telephone: (202) 720-6645, Fax (202) 690-0790, and e-mail address of Editor.OALJ@usda.gov.

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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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No. CIV-S-97-0973 DFL PAN.

Filed September 30, 1998.

AMAA – Standing, representational interest – Discovery of mental processes, *Morgan rule* – Enumerated powers, when not improper delegation of – Rule making, when not required – F.O.I.A., when not subject to – Nickel, fiscal control of assessment.

The Secretary of the California Department of Food and Agriculture ("CDFA") brought suit on behalf of the California Milk Producers Advisory Board ("CMAB"), a west coast oriented milk producers organization, alleging that the creation of an intermediary not-for-profit private corporation, Dairy Management, Inc. ("DMI") based in Washington, DC, has greatly diminished their sphere of influence regarding the policies of the National Dairy Promotion and Research Board ("Board"). CMAB, one of 13 geographical regions, asserts that milk producers in regions other than the west coast now unduly influence decisions of the Board. The various programs administered by the Board are sponsored by the United Dairy Industry Association ("UDIA"). UDIA, an Illinois not-for-profit corporation, is a federation of 18 state and regional boards that pay dues to the UDIA. In a secret ballot meeting, the UDIA and the Board jointly created DMI to handle administrative matters common to both the Board and UDIA. The U.S. District Court determined that:

(1) CMAB has representational standing to sue - citing three criteria.

(2) ALJ did not err in denying examination of the mental processes/motives of administrative officers of Board, citing *U.S. v Morgan*.

(3) Formation of DMI did not violate Government Corporation Control Act (31 U.S.C. § 9102) nor exceed the enumerated powers of the Board under 7 C.F.R. § 1150.139.

(4) Board did not improperly delegate its powers and duties to DMI when Board retained power to review and fund DMI.

(5) Board is not required to seek review and comment under A.P.A. (5 U.S.C. § 553).

(6) DMI (a private corporation) is not subject to F.O.I.A. requests.

(7) Petitioner failed to show actionable conflicts of interest by the Board.

(8) Petitioner failed to show that Board exceeded the maximum amount allowed for administrative expenses under 7 C.F.R. § 1150 by creation and delegation to DMI.

United States District Court
Eastern District of California

MEMORANDUM OF OPINION AND ORDER

Plaintiffs Ann M. Veneman, Secretary of the California Department of Food and Agriculture, and Frank Hilarides, a California dairy farmer, bring this action for judicial review of a decision by a Judicial Officer of the United States Department of Agriculture ("USDA") dismissing their Petition to Modify or Be Exempted From the Provisions of the Dairy Promotion and Research Order ("Petition"). Plaintiffs challenge the legality of an arrangement between the National Dairy Promotion and Research Board and the United Dairy Industry Associates ("UDIA") to create a private not-for-profit corporation, Dairy Management, Inc. ("DMI"), for the purpose of performing administrative, financial, and management functions for both the National Dairy Promotion and Research Board and UDIA. Plaintiffs and defendant Dan Glickman, Secretary of USDA, make cross-motions for summary judgment.

I. FACTUAL BACKGROUND

A. THE PARTIES

Congress authorized the creation of the National Dairy Promotion and Research Board[1] in Title I, subtitle B, of the Dairy and Tobacco Adjustment Act of 1983 ("Act"), Pub. L. 98-180, 97 Stat. 1128, codified at 7 U.S.C. § 4501, *et seq.* The Act provides for the issuance of a dairy products promotion and research order by the Secretary of USDA. 7 U.S.C. § 4503. The Act also requires that the Secretary's order contain certain terms and conditions, for example setting the size and composition of the National Board, establishing the Board's powers and duties, and authorizing the Board to collect an assessment from milk producers. *See* 7 U.S.C. § 4504.

The National Board was formally created on March 28, 1994 by the Dairy Research and Promotion Order ("Order"). 7 C.F.R. Part 1150. The Board has thirty-six members who are milk producers appointed by the Secretary of USDA for the purpose of representing thirteen geographic regions within the United States. 7 C.F.R. 1150.131. Defendant Dan Glickman, the Secretary of USDA, is responsible for the administration of the Board. (Pls.' Fact 4).

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[1]The cognoscenti refer to the National Dairy Promotion and Research Board as "the NDB" or just "NDB." In a surely bootless effort to avoid undue and confusing use of acronyms in this opinion, the court will generally refer to the National Dairy Promotion and Research Board as the "National Board" or the "Board."

The National Board is funded by mandatory assessments on the payments by wholesale purchasers of milk to milk producers. 7 U.S.C. § 4504(g). The total assessment is fifteen cents per hundredweight of milk. *Id*. Milk producers who participate and contribute funds as members of active, qualified state or regional dairy product promotion programs may receive a credit on the assessment of up to ten cents per hundredweight of milk. *Id*. The ten cents per hundredweight, which is assigned to state and regional programs, is commonly referred to as the "dime," and the five cents reserved for the National Board is called the "nickel."

Plaintiff Ann Veneman brings this suit in her official capacity as the Secretary of the California Department of Food and Agriculture ("CDFA") and on behalf of the California Milk Producers Advisory Board ("CMAB"). CMAB is an unincorporated advisory board representing all California dairy farmers who pay assessments to the National Board.[2] CMAB is an instrumentality of the State operating under the umbrella of the CDFA. (Pls.' Facts 1, 2). Secretary Veneman is responsible for collecting the mandatory assessments payable to the National Board from California dairy farmers and for the administration of CMAB. (Pls.' Fact 1). Frank Hilarides is a California dairy farmer and is CMAB's chairman of the Board. (Pls.' Fact 3). CMAB is a qualified state or regional program under the Act.[3] (Administrative Record ("Rec.") at 1200-01).

Although not a party, the United Dairy Industry Associates ("UDIA") is a central figure in the events that serve as the basis of this litigation. UDIA is an Illinois not-for-profit corporation. (Def.'s Fact 3; Pls.' Fact 7). It is a federation of eighteen state and regional dairy research promotion boards that pay annual dues to UDIA. (Pls.' Facts 8-9). Members also make payments to UDIA–known as "user pays" and "pools"[4]–to pay for their share of various programs sponsored by

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[2]CMAB was established by Order of the Secretary of the CDFA pursuant to the California Marketing Act of 1937, codified at California Food & Agriculture Code § 58601, *et seq*.

[3]The requirements necessary to become a qualified state or regional dairy regional programs are set forth in 7 C.F.R. § 1150.153.

[4]A "user pay" represents the state or region's share of the cost of a particular program in which it elects to participate. (Pls.' Fact 11). A "user pool" represents the ideal or required amount of funding necessary for a particular program: when it is in their interest to do so, participants may contribute more than their proportionate share. (Pls.' Fact 12).

UDIA. CMAB and qualified state or regional dairy promotion boards in four other states–Oregon, Washington, Wisconsin, and Louisiana–operate independently of UDIA.[5]

B. THE ESTABLISHMENT OF DMI

On March 16, 1994, staff members of the National Board and UDIA orally presented the concept of consolidating the staffs of the two organizations at an executive session of the National Board. (Pls.' Fact 74). The proposed merger of the National Board and UDIA staffs allegedly generated apprehension in some quarters that the consolidation would work to the disadvantage of West Coast milk producers. (*See* Pls.' Fact 79). In a vote by secret ballot, the National Board adopted the staff recommendation by a vote of twenty-seven to seven. (Pls.' Facts 75-76). The Board and UDIA publicly announced the proposed creation of DMI on March 17, 1994.

The two organizations entered into a formal agreement to create DMI on April 27, 1994. Under the terms of the agreement, DMI has a number of enumerated purposes:

> (1) To implement joint programs and projects between NDB and UDIA;
> (2) To provide funding, management, staff and other resources, and to plan, develop, and implement programs authorized under federal and state dairy check-off programs;
> (3) To provide resources for program evaluation and market research to the NDB and UDIA;
> (4) To manage benefit programs for employees of the Corporation, the parties, and related organizations;
> (5) To implement specific NDB- and UDIA-funded programs; and
> (6) To carry out the administrative, financial and management functions of NDB and UDIA and the Corporation.

(Rec. at 1251A).

DMI was formed as a not-for profit corporation in Washington, D.C. on May 31, 1994. (Pls.' Fact 14). Silvio Capponi, Jr., the Acting Director of the Dairy

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[5]California, Oregon, Washington and Wisconsin have formed COWW, a regional federation for these four states that is analogous to UDIA.

Division, Agriculture Marketing Service, USDA, approved the agreement on June 8, 1994, one week after the incorporation of DMI. (Pls.' Fact 82). A budget for DMI had not been prepared at that time but was subsequently approved by the USDA.[6] (Pls.' Fact 83).

The board of DMI consists of twenty members, ten representing the interests of the National Board, and ten representing the interests of UDIA. (Rec. at 65). The duties of the DMI board are as follows:

> In addition to those duties required by law, its specific duties shall include, without limitation:
>
> (1) Implementation of a joint planning process;
> (2) Development and, following approval by the parties, implementation of an Annual Business Plan and Annual Budget for the Corporation;
> (3) Management of all funds and assets of the Corporation, and development of all budgets of the Corporation;
> (4) Development and approval of joint personnel policies and compensation and benefit programs for employees of the Corporation;
> (5) Development and approval of by-laws and operating rules for the Corporation;
> (6) Selection, hiring, firing, and overall management of the officers and employees of the Corporation, which authority may be delegated to appropriate corporate officers.

(Rec. at 1252-53). The National Board representatives on the DMI board are selected by the National Board from among its 36 members and are subject to later removal by the Board.[7] (Pls.' Fact 86; Rec. at 1252). Significant overlap is possible; three of the current directors serve on the boards of the National Board, UDIA, and DMI. (Rec. at 68).

The National Board and DMI entered into an agreement for services to be

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[6]The National Board approved a budget for DMI in November 1994, and the USDA approved this budget in December 30, 1994. (Pls.' Fact 93). USDA approved subsequent amendments to the budget made by the National Board in January 1995 and May 1995 on June 30, 1995. (*Id.*).

[7]The Secretary of USDA has no power to remove directors from the DMI board other than by removing a National Board representative on the DMI board from the National Board. (Rec. at 945).

provided by DMI to the National Board on December 30, 1994.[8] (Pls.' Fact 87). The agreement has resulted in several changes in the administration of the National Board's duties although the significance and extent of these changes is disputed by the parties. First, as intended, DMI took over many of the functions previously performed by the National Board staff; however, defendant disputes plaintiffs' claim that DMI performs all administrative functions formerly performed by the Board's staff. (*See* Pls.' Fact 107). Tom Gallagher, the CEO of DMI, repots to the DMI board, which in turn is accountable to the National Board and UDIA. (*See* Pls.' Facts 110-111). Gallagher is responsible for establishing DMI staff salaries. (Pls.' Facts 148, 150). DMI is authorized to administer the funds budgeted under the December 30, 1994 agreement and to write checks on the National Board's checking account. (Pls.' Facts 125-127). DMI is responsible for maintaining the National Board's books and records, as well as coordinating meetings of the National Board, DMI, UDIA, and their committees. (Pls.' Facts 132-133). DMI coordinates all national advertising. (Pls.' Fact 134). Almost all of the National Board's contracts are now entered into and administered through DMI. (Pls.' Facts 139-140).

Second, the creation of DMI reduced the direct oversight of the Secretary of USDA in some measure. Prior to the formation of DMI, all National Board contracts received approval from USDA. While all National Board contracts are still approved by USDA, DMI contracts do not receive formal approval by USDA. (Pls.' Facts 135-137). Further, the Secretary of USDA has no authority to hire or fire DMI staff.[9] (Pls.' Fact 147-148). (Pls.' Fact 141). On the other hand, USDA attends all DMI board meetings and activities, reviews all of DMI's contracts even if it does not formally approve them,[10] and must approve all expenditures of the nickel. The USDA planned to perform an audit of DMI in calendar year 1996. (Rec. at 1192). More fundamentally, the USDA must approve the National Board's annual budget on which DMI depends for its existence.

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[8] Aggie J. Thompson, Acting Director of the Dairy Division, Agriculture Marketing Service, USDA, approved the agreement and made it effective for 1995. (Pls.' Fact 87).

[9] DMI also asserts that as a non-governmental entity it is not subject to the Freedom of Information Act ("FOIA"). Gallagher, the CEO of DMI, similarly contends that he is not a government employee or official. (Pls.' Fact 149).

[10] USDA has objected to DMI contracts in the past. (Rec. at 1188). Although no precise legal basis is identified, Richard McKee, Director of the Dairy Division of USDA, testified that USDA can and would require DMI to modify any contract violating the Act or the Order. (Rec. at 1195).

Third, after the agreement, the National Board's supervision of contracts and projects is accomplished primarily at the Board level and through joint subcommittees with UDIA, rather than by its own staff and committees. (*See* Pls.' Facts 142-144). Plaintiffs assert that the creation of DMI has curtailed activities of the National Board and its committees, and that the statutory requirement of geographic diversity in committee representation is no longer followed. (*See* Pls.' Facts 120-124, 143-44). The National Board now meets four times a year, with each meeting lasting two to four hours, which is a reduction from six or seven meetings of six hours each held in 1994. (Pls.' Fact 112-115). The Board is only required to meet once a year. 7 C.F.R. § 1150.140(a). According to defendant, despite these changes, the National Board maintains significant oversight and control over DMI and has not abdicated its responsibilities. DMI cannot approve programs or appropriate funds on its own. (Rec. at 906). Programs that are funded by the nickel must be approved both by the National Board and the USDA. (Rec. at 940). Further, UDIA has no access to the funds from the nickel except where it participates in the programs approved by the National Board. (Rec. at 977). The National Board and the Secretary may unilaterally dissolve the corporation on one year's notice or trigger a dissolution by declining to approve the budget prepared by DMI staff for the National Board or refusing to contribute required funds. (*See* Rec. at 1256-1258).

Fourth, the arrangement resulted in certain possible benefits to UDIA. Because UDIA appoints half of the DMI board and because the National Board relies on DMI staff to advise it and to prepare the National Board's budget, it is possible that UDIA has some enhanced ability to exert influence, albeit indirectly, over the National Board including its budget. Further, because the cost of collecting dues and monies are considered core costs,[11] which are shared equally between DMI and

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[11]"Core costs" are defined as

> the basic cost of salaries and benefits for employees of [DMI] and general administrative costs for the operation of [DMI], and shall also include the costs of planning activities. Core costs shall not include NDB/USDA direct compliance costs, including without limitation, costs charged by USDA for oversight of NDB.

(Rec. at 1254). "Program" costs, on the other hand, are

> the costs attributable to expenditures, not including core costs, of implementing the program contained in the Annual Business Plan and the Annual Budget.

(continued...)

the National Board, the National Board technically pays for half of UDIA's collection costs just as UDIA pays for half of the National Board's collection costs. (Pls.' Facts 170-171). Whether this is a net gain for UDIA or the National Board is unclear although it is likely that both have benefitted from resulting economies. The most significant cost saving to UDIA has been in the area of staff and in the costs of developing promotion programs.[12] (Pls.' Facts 157-161). Indeed, UDIA members recently received a refund from the organization. (Pls.' Fact 162). Finally, UDIA's influence within DMI has allegedly increased its national influence in the promotion program planning and distribution process, as well as in the marketplace. (Pls.' Facts 155-156). On the other hand, despite the alleged increase in UDIA's power and prestige, plaintiffs are notably unable to point to any particular decision by the National Board, or DMI for that matter, that discriminates against California producers.

C. THE ADMINISTRATIVE PROCEEDINGS

On April 5, 1994, CMAB and Henry J. Voss, the Secretary of the CDFA at that time, filed an Administrative Petition to challenge the legality of the creation of DMI. Plaintiffs filed the Petition pursuant to 7 U.S.C. § 4509(a).[13] Petitioners later added Frank Hilarides, a California dairy farmer, as an individual petitioner, and substituted Ann Veneman for Voss, when Veneman became Secretary of the CDFA. During the administrative proceedings, plaintiffs were not permitted to examine officials from the USDA regarding the approval of the agreements that created DMI. (*See* Rec. at 795-96, 1166-1169, 1174-1177).

USDA Administrative Law Judge Victor W. Palmer dismissed the Petition on

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[11](...continued)
(*Id.*).

[12]UDIA no longer maintains its own staff separate frm that of DMI. (Pls.' Fact 163).

[13]Section 4509(a) creates a petition process as follows:

> Any person subject to any order issued under this subchapter may file with the Secretary a petition stating that any such order or any provision of such order or any obligation imposed in connection therewith is not in accordance with law and requesting a modification thereof or an exemption therefrom. The petitioner shall thereupon be given an opportunity for a hearing on the petition, in accordance with regulations issued by the Secretary. After such hearing, the Secretary shall make a ruling on the petition, which shall be final if in accordance with law.

March 20, 1996. Judge Palmer found that plaintiffs possessed standing to challenge the agency action under 7 U.S.C. § 4509(a), but found for defendant on all of plaintiffs' claims. Judicial Officer ("JO") William G. Jenson affirmed Judge Palmer's decision, as modified, on May 6, 1997. The JO reversed the ALJ's finding on the standing question with respect to CMAB and Secretary Veneman. Plaintiffs filed this action seeking judicial review of the administrative proceedings on May 23, 1997.

II. STANDING

Plaintiffs invoke federal jurisdiction under 7 U.S.C. § 4509(b).[14] (Compl. ¶ 7). Under § 4509(b), the court has jurisdiction to review an administrative ruling made under 7 U.S.C. § 4509(a). The JO found that CMAB and the Secretary of CDFA have no standing to challenge the creation of DMI under § 4509(a) because they are not persons "subject to" the Order.[15] (Rec. at 723). However, because Hilarides is an individual dairy farmer who pays assessments to the National Board, he is certainly subject to the Order and a proper petitioner under § 4509(a). Moreover, because Secretary Veneman and CMAB jointly represent California dairy farmers, all of whom are subject to the Order, Secretary Veneman and CMAB have representational standing.[16] An organization may have representational standing to sue on behalf of its members when three requirements are met: 1) at least one member of the organization has standing to sue; 2) the interests which the organization seeks to protect are germane to its purpose; and 3) neither the claim asserted nor the relief requested require participation in the suit by the organization's members. *Warth v. Seldin*, 422 U.S. 490, 511 (1975); *Salmon River Concerned Citizens v. Robertson*, 32 F.3d 1346, 1352 n.10 (9th Cir. 1994). All of

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[14]Section 4509(b) provides in relevant part:

> The district courts of the United States in any district in which such person is an inhabitant or carries on business are hereby vested with jurisdiction to review such ruling, if a complaint for that purpose is filed within twenty days from the date of the entry of such ruling.

[15]The JO found that such entities are not "subject to" the order because "no provision in the Dairy Order, and Petitioners have cited none, . . . governs, regulates, controls, obligates, or binds the Secretary of CDFA." (Rec. at 724).

[16]Veneman is required by California law to bring the lawsuit on behalf of CMAB, because CMAB is only an advisory board and is not authorized to bring suit on its own behalf. *See* Cal. Food & Agric. §§ 58713, 58845, 58846, 614171 [so in original], 61893.

these factors are met by CMAB in this litigation. Accordingly, CMAB and Secretary Veneman, acting on behalf of CMAB, have representational standing.

Furthermore, CMAB and Secretary Veneman have standing in their own capacity. State and regional programs such as CMAB are within the definition of "person" in 7 C.F.R. § 1150.105.[17] CMAB is also a qualified regional program under the Order. As a regional program, the Order enables CMAB to receive its share of the "dime" and to nominate representatives to serve on the National Board. 7 C.F.R. §§ 1150.152, 1150.153, 1150.133, 1150.108. The Order also provides financial incentives, by way of the nickel, for the formation of joint promotional programs between CMAB and the National Board, and establishes requirements for coordination of joint promotional activities. 7 C.F.R. §§ 1150.152(c), 1150.140(i).

Section 4509(a) is broadly drafted to provide review of "any order," "any provision of such order," or "any obligation imposed in connection therewith." Any "person" may sue who is "subject to an order." The statute does not require that the person "subject to any order" and who seeks review of "any obligation" necessarily be subject to that obligation. The agreement creating DMI is an obligation imposed in connection with the Order. CMAB and Secretary Veneman are subject to the Order; they collect assessments and participate in programs under the Order. It follows that as persons subject to the Order they may seek review of the agreement creating DMI.

For these reasons, the JO's finding that CMAB and Secretary Veneman lack standing appears clearly erroneous. CMAB and Secretary Veneman are proper petitioners, in their own behalf and on behalf of CMAB's membership, with standing to proceed under § 4509(a).[18]

III.

Plaintiffs seek review of the agency decision on plaintiffs' petition challenging the creation of the DMI. Under 5 U.S.C. § 706(2)(A) the decision of the Secretary

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[17] "Person" is defined as "any individual, group of individuals, partnership, corporation, association, cooperative or other entity." 7 C.F.R. § 1150.105.

[18] Article III standing requirements are met. *See Lujan v. Defenders of Wildlife*, 501 U.S. 555, 561-62 (1992). Plaintiffs complain that the assessments on California diary [so in original] farmers are being spent in violation of the Act and the Order. They want their assessments returned or halted so long as the DMI agreement is in effect. This constitutes injury that is fairly traceable to the conduct of the defendant and that may be redressed if the court grants relief. Moreover, plaintiffs contend that the creation of DMI gives UDIA members a competitive advantage in procuring federal support for programs that may have greater benefit for UDIA members than for CMAB members.

of USDA should not be disturbed unless "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[19] The court is limited in its review to the administrative record. *Camp v. Pitts*, 411 U.S. 138, 142 (1973); *see also Washington State Farm Bureau v. Marshall*, 625 F.2d 296, 305 (9th Cir. 1980). In reviewing factual findings of the Judicial Officer, the court must determine whether the findings are supported by substantial evidence. 5 U.S.C. § 706(2)(D).

A. DEVELOPMENT OF THE RECORD

Plaintiffs complain that the ALJ improperly precluded examination of government officials with respect to the decision to form DMI. In *United States v. Morgan*, 313 U.S. 409, 422 (1941), the Supreme Court held that administrative officers may not be examined as to their mental processes in order to protect the integrity of the administrative process. *See id*. Questions going to the mental processes of an administrator are improper "absent exceptional circumstances," and "[o]nly where there is a clear showing of misconduct or wrongdoing." *Franklin Savings Ass'n v. Ryan*, 922 F.2d 209, 211 (4th Cir. 1991); *see also Singer Sewing Machine Co. v. National Labor Relations Bd.*, 329 F.2d 200, 208 (4th Cir. 1964).

In the present case there is no evidence of misconduct justifying an exception to the Morgan rule. Furthermore, plaintiffs' reliance on *In re Franklin Nat'l Bank Sec. Litig.*, 478 F. Supp. 577 (E.D.N.Y. 1979), and *United States v. Hooker Chemicals & Plastics Corp.*, 123 F.R.D. 3 (W.D.N.Y. 1988), is misplaced.[20] The JO did not err in affirming the ALJ's decision to restrict examination of agency officials on *Morgan*. Defendant's motion for summary judgment is **GRANTED**, and plaintiffs' cross-motion for summary judgement is **DENIED**, as to whether the ALJ improperly restricted examination under *Morgan*.

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[19]This is the same as the "not in accordance with law" standard of review set forth in 7 U.S.C. § 4509.

[20]The *Franklin Nat'l Bank* court, considering the official information privilege with respect to government documents, expressly distinguished the *Morgan* line of cases, stating that the mental processes privilege is "a related, though still distinct principle." *In re Franklin Nat'l Bank Sec. Litig.*, 478 F. Supp. at 581. In *Hooker Chemicals & Plastics*, 123 F.R.D. 3, the court held that the mental process privilege and the deliberative process privilege are not coextensive where the issue is judicial review of administrative action. *See id.* at 11. Because the administrative process is at issue in this case, the mental process privilege is squarely implicated.

B. AUTHORITY TO CREATE DMI

Plaintiffs contend that the National Board acted without statutory authority when it created DMI. Plaintiffs advance two lines of argument to attack the validity of the National Board's decision: first, that Congress did not confer power on the National Board to form DMI, and second, that the National Board's creation of DMI violated the Government Corporations Control Act.

1. Statutory Authority

An initial question is whether the USDA's interpretation of the Act and the Order should be accorded deference. Courts generally accord great deference to an agency's interpretation of the statutory and regulatory provisions that it is responsible for administering, and the general rule would appear applicable here.[21] *Forest Guardians v. Dombeck*, 131 F.3d 1309, 1311 (9th Cir. 1997). The plaintiffs' arguments to the contrary are unpersuasive. The agency's interpretation is clear from administrative practice, in that the Secretary of USDA formally approved the creation of DMI. This is not a case where the court is asked to defer to "an agency's convenient litigating position" where "the agency itself has articulated no position on the question. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988). Nor does the present case raise the same concerns expressed in the concurring opinion in *California Rural Legal Assistance, Inc. v. Legal Servs. Corp.*, 937 F.2d 465, 466 (9th Cir. 1991) (Farris, J.), where the statutory and regulatory provisions at issue defined the jurisdictional limits of the agency's authority.

Accordingly, defendant's interpretation of the Act and Order are entitled to deference. Because the Act and Order are silent as to the means by which the National Board may provide for performance of its administrative functions, plaintiffs' challenge can be sustained only if the Secretary's interpretation is an impermissible construction of the relevant provisions.

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[21] Under *Chevron*, the first stop in reviewing an agency's interpretation of a statute is to determine whether congressional intent is clear. *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). An agency interpretation must be rejected where "contrary to clear congressional intent." *Id.* at 843 n.9. *Dombeck*, 131 F.3d at 1311. If the statute is silent or ambiguous, the court must consider whether the agency construction is permissible. *Chevron*, 467 U.S. at 843. Congress may expressly delegate authority to an agency to enact regulations formulating policy, or it may implicitly delegate authority on a particular question. *Id.* at 843-44. In the latter case, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Id.* at 844.

Plaintiffs' argument that the creation of DMI exceeded the Secretary's statutory authority is grounded in 7 U.S.C. § 4504(c), which provides, in relevant part, that

> The order shall define the powers and duties of the Board that shall include only the powers enumerated in this section. These shall include, in addition to the powers set forth elsewhere in this section, the powers to (1) receive and evaluate, or on its own initiative develop, and budget for plans or projects to promote the use of fluid milk and dairy products as well as projects for research and nutrition education and to make recommendations to the Secretary regarding such proposals, (2) administer the order in accordance with its terms and provisions, (3) make rules and regulations to effectuate the terms and provisions of the order, (4) receive, investigate, and report to the Secretary complaints of violations of the order, and (5) recommend to the Secretary amendments to the order.

7 U.S.C. § 4504(c). Plaintiffs argue that because the statute does not expressly authorize the National Board to create a private corporation for the reasons that DMI was created, the National Board acted outside the scope of authority conferred by § 4504.

Defendant contends that the powers conferred by § 4504 are not so limited. Section 4504(c) provides that the list of powers in that subsection are "in addition to the powers set forth elsewhere in this section." The National Board has authority under § 4504(f) to enter into contracts with respect to the "development and conduct of the activities authorized under the order as specified in subsection (a)."[22] 7 U.S.C. § 4504(f). Section 4505(a) in turn confers broad authority on the Secretary in promulgating the order to "provide for the establishment and administration of appropriate plans or projects for advertisement and promotion of the sale and consumption of dairy products, for research projects related thereto, for

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[22] 7 U.S.C. § 4504(a) provides:

> The order shall provide for the establishment and administration of appropriate plans or projects for advertisement and promotion of the sale and consumption of dairy products, for research projects related thereto, for nutrition education projects, and for the disbursement of necessary funds for such purposes. Any such plan or project shall be directed toward the sale and marketing or use of dairy products to the end that the marketing and use of dairy products may be encouraged, expanded, improved, or made more acceptable. No such advertising or sales promotion program shall make use of unfair or deceptive acts or practices with respect to the quality, value, or use of any competing product.

nutrition education projects, and for the disbursement of necessary funds for such purposes."[23] Defendant argues that this authority was implicitly conferred on the National Board by § 4504(c) and 7 C.F.R. Part 1150.

The powers of the National Board as established by the Secretary are codified at 7 C.F.R. § 1150.139. In particular, the Board is authorized "[t]o receive and evaluate, or on its own initiative develop, and budget for plans or projects to promote the use of fluid milk and dairy products as well as projects for research and nutrition education and to make recommendations to the Secretary regarding such proposals," and "[t]o administer the provisions of this subpart in accordance with its terms and provisions," 7 C.F.R. §§ 150.139(a), (b). The power to enter into contracts is provided by 7 C.F.R. § 1150.140(i):[24]

> With the approval of the Secretary, to enter into contracts or agreements with national, regional or State dairy promotion and research organizations or other organizations or entities for the development and conduct of activities authorized under §§ 1150.139 and 1150.161, and for the payment of the cost thereof with funds collected through assessments pursuant to § 1150.152.

The National Board's authority to employ and define the duties of an administrative

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[23]Section 4504 also permits the Secretary to include in the promulgating order any "terms and conditions, not inconsistent with the provisions of this subchapter, as necessary to effectuate the provisions of the order." 7 U.S.C. § 4504(1).

[24]Section 1150.140(i) further provides that "[a]ny such contract or agreement shall provide that:

> (1) The contractors shall develop and submit to the Board a plan or project together with a budgets or budget which shall show the estimated cost to be incurred for such plan or project;
>
> (2) Any such plan or project shall become effective upon approval of the Secretary; and
>
> (3) The contracting party shall keep accurate records of all of its transactions and make periodic reports to the Board of activities conducted and an accounting for funds received and expended, and such other reports as the Secretary or the Board may require. The Secretary or employees of the Board may audit periodically the records of the contracting party.

staff is established in 7 C.F.R. § 1150.140(c).[25] Taken together these statutory and regulatory provisions give wide latitude to the Secretary and the National Board to engage in projects and promotions for the benefit of the milk industry. The Secretary has broad authority in drafting the Order and has delegated expansive administrative authority to the National Board, which acts under the supervision and on behalf of the Secretary.

In order to reach the result urged by plaintiffs, the court must find that the exercise of any power not explicitly provided for by the Act is prohibited. The language of the Act does not compel such a conclusion. The language of 7 U.S.C. § 4504 is sufficiently broad to confer power on the National Board to create and maintain DMI. It is readily apparent from the Act that Congress implicitly left the precise manner of administering the Order to the National Board. The creation of DMI falls within this area of discretionary authority. Particularly in light of the deference due to the Secretary's interpretation of the Order and the statutory framework, the court finds that the creation of DMI was within the National Board's statutory authority.

In a related argument, plaintiffs contend that the power of the National Board to enter into contracts is limited to contracts directly connected with plans and projects where accompanied by a budget. However, the power to contract is not so narrowly defined in the Act: The Board "may enter into agreements for the development and conduct of the activities authorized under the order as specified in subsection (a)." 7 U.S.C. § 4504(f). Contracts to receive administrative support for development and implementation of programs are fairly categorized as agreements within the language of 7 U.S.C. §§ 4504(a) & (f).[26]

Because defendant's interpretation of the Act and Order are not contrary to the clear congressional intent underlying the Act, the court does not disturb the JO's finding that the National Board acted within its statutory power in forming DMI to

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[25] 7 C.F.R. § 1150.140(c) authorizes the National Board "[t]o appoint or employ such persons as it may deem necessary and define the duties and determine the compensation of each."

[26] Plaintiffs advance two further arguments. Noting similarities between DMI and the boards created by two other legislative acts, plaintiffs assert that Congress could have expressly conferred authority to create DMI, but chose not to do so in § 4504. This argument is not convincing, especially because the Beef Promotion and Research Act of 1985 and the Soybean Promotion, Research, and Consumer Information Act of 1990 were adopted after the Dairy and Tobacco Adjustment Act of 1983. Plaintiffs also assert that the DMI board does not comply with the geographic representation requirements of § 4504. But the Order and Act require geographic diversity only for the National Board, not for its support staff.

assist in implementing the Board's statutory duties.

2. Government Corporation Control Act

Plaintiffs also assert that the creation of DMI violates the Government Corporation Control Act ("GCCA"): "An agency may establish or acquire a corporation to act as an agency only by or under a law of the United States specifically authorizing the action." 31 U.S.C. § 9102. The GCCA restricts "the creation of all Government-controlled policy-implementing corporations." *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 396, 115 S. Ct. 961, 973 (1995) (emphasis in original). The critical question in determining the applicability of the GCCA is whether the corporation is truly private or if it acts as a government agency. "Agency" is defined as "a department, agency, or instrumentality of the United States Government." 31 U.S.C. § 101.

In determining whether a corporation acts as an agency, a number of factors may be considered: whether it was created to further federal government goals, whether the federal government possesses permanent authority to appoint a majority of the directors, whether the government owns shares in the corporation, whether the government subsidizes the losses of the corporation, whether the employees of the corporation are employed by the federal government, and whether the government-appointed directors exert control as policymakers or in some other aspect such as creditors. *See id.* at 397-99, 115 S. Ct. 973-74; *see also Varicon Int'l v. Office of Personnel Management*, 934 F. Supp. 440, 447 (D.D.C. 1996).

DMI is a private corporation whose principal function is to provide staff and administrative support to the National Board and UDIA. Although the National Board and UDIA partly created DMI to perform the National Board's administrative, financial, and management functions, DMI was equally intended to perform the same services for UDIA, a private entity. The National Board has authority to appoint only ten of the twenty directors, not a majority of the DMI board, and the National Board owns no stock in DMI. DMI employees are not federal employees. The National Board retains all of its statutory policymaking responsibilities such that the DMI board is not empowered to act independently of the National Board or UDIA as to matters of policy.

Other facts might indicate that DMI should be classified as a federal agency. First, the possibility of federal subsidization of DMI losses exists because an unanticipated shortfall in revenue could conceivably cause DMI to enter a period of deficit spending, resulting in subsidization by the National Board of DMI's losses. (*See* Rec. at 1272). Second, National Board representatives on the DMI board do not represent the National Board merely as a creditor of DMI; the

representatives possess limited but significant policymaking power. (*See* Rec. at 1252-1253). Finally, the National Board and the Secretary retain the right to unilaterally cause DMI's dissolution on one year's notice. (Rec. at 1257-1258). DMI's Annual Plan and Annual Budget must be approved by the Secretary of USDA before it becomes effective. (Rec. at 1471). The National Board's failure to approve the Annual Plan or the Annual Budget for DMI is also grounds for dissolution. (*See* Rec. at 1256).

Although not free from doubt, on balance these factors suggest that DMI does not constitute or act as a government agency. Rather, it is more like a government contractor, providing staff support to the National Board under an annual contract. As the JO observed, DMI's activities are supervised by the National Board and the Secretary of USDA, and the corporation "performs tasks that could be performed by an outside contractor for UDIA and NDB." (Rec. at 704). The scope of DMI's authority and responsibilities with respect to National Board-funded activities is limited by contract, and the National Board maintains supervision and final policy-making authority over DMI.

For the reasons stated above, defendant's motion is **GRANTED**, and plaintiffs' cross-motion is **DENIED**, as to whether the National Board possessed authority to create DMI.

C. IMPROPER DELEGATION

As conceded by the plaintiffs, the nondelegation doctrine has lost much of its strength since the 1930s. The doctrine, based on the principle of separation of powers, now requires only that the delegation contain an "intelligible principle" or sufficient minimal standards permitting a determination "'whether the will of Congress has been obeyed.'" *Mistretta v. United States*, 488 U.S. 361, 379 (1989), *quoting Yakus v. United States*, 321 U.S. 414, 426 (1944). The Ninth Circuit recently observed that "no modern case appears to have struck down a delegation." *Wileman Bros. & Elliot, Inc. v. Giannini*, 909 F.2d 332, 337 n.9 (9th Cir. 1990).

The delegation of duties from the National Board to DMI does not violate the minimum requirements of the nondelegation doctrine. In the first place, the terms of the delegation are established and bounded by the terms of a detailed agreement between DMI and the National Board. (*See* Rec. at 1222-1278). This agreement satisfies the requirement that the delegation be guided by an "intelligible principle." Second, plaintiffs fail to establish that the National Board has delegated any lawmaking power to DMI. Rather, the nondelegation doctrine is inapplicable in this context because the National Board has retained sufficient control and supervision

over DMI with respect to program planning and financial matters.[27] *See United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990). Federal agencies properly may employ a private corporation in an administrative capacity for the purpose of executing laws. *Crain v. First Nat'l Bank of Oregon, Portland*, 324 F.2d 532, 537 (9th Cir. 1963), *citing Berman v. Parker*, 348 U.S. 26 (1954).

Plaintiffs also assert that the National Board's delegation of duties to DMI is an improper delegation of duties to an interested private party, relying on *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), and *Pistachio Group of the Ass'n of Food Indus.*, 671 F. Supp. 31 (Ct. Int'l Trade 1987). In particular, plaintiffs contend that the Board has "abdicated" its responsibility to regulate promotion and marketing of milk products to DMI, in turn controlled by UDIA, and that the Board's actions have forced plaintiffs "to support, and participate in, UDIA sponsored or dominated programs despite their longstanding unwillingness to do so." (Pls.' Opp'n and Counter Mot. at 43:17-19, 44:2-5).

In *Carter Coal*, the Court invalidated a provision of the Bituminous Coal Conservation Act of 1935 providing that the maximum daily and weekly hours for all producers of bituminous coal could be set by contract, where the contract was agreed to by producers representing two-thirds of the annual tonnage of production from the prior year. The Court found that this delegation conferred on the majority of producers "the power to regulate the affairs of an unwilling minority" in violation of the due process clause of the Fifth Amendment. *Carter Coal*, 298 U.S. at 311.

Similarly, in *Pistachio Group* the court invalidated a federal regulation using exchange rate set by the Federal Reserve Bank of New York, a private corporation, for the purpose of administering the antidumping laws. The court held that "[d]elegations of administrative authority are suspect when they are made to private parties, particularly to entities whose objectivity may be questioned on grounds of conflict of interest." *Pistachio Group*, 671 F. Supp. at 35. The agency had improperly delegated all of its authority to determine the exchange rate to an outside party over which it had no power of review. *Id.* at 35-36. However, the court noted

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[27] In *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990), the court upheld the delegation of duties under the Beef Promotion Act to the Cattlemen's Board, a board of industry members appointed by the Secretary of USDA in a manner similar to the National Board, and the Operating Committee, consisting of ten members elected by the Cattlemen's Board and ten members representing qualified State beef councils. The key inquiry was whether Congress had unlawfully delegated lawmaking ability to the agency. *Id.*, *citing Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940). The court found that the Beef Act did not entrust legislative authority to the beef industry because "the Act and the Order render the actions of the Cattlemen's Board subject to the Secretary's pervasive surveillance and authority." *Frame*, 885 F.2d at 1128-29.

that delegation may be proper where ultimately subject to some form of scrutiny. *Id*. at 36.

Plaintiffs fail to establish that the National Board has abdicated any of its responsibilities to DMI.[28] The administrative record contains compelling evidence that the National Board and the Secretary maintain oversight and control over DMI. The Annual Business Plan and Annual Budget drafted by the DMI Board for the upcoming year are ineffective without approval by the National Board and the Secretary of USDA. (Rec. at 14/1). The National Board maintains final responsibility for collecting assessments, financial management, and program approval. (Rec. at 1267, 1270). The Board may modify or reject any program plans and materials without limitation. (Rec. at 1276). DMI must regularly report its activities to the National Board. (Rec. at 1268-1269).

In short, the National Board maintains significant power of review over the implementation of its statutory duties, and has not abdicated its duties in the manner found improper in *Carter Coal* and *Pistachio Group*. UDIA is a potentially interested private party and may reap certain benefits from the arrangement between the National Board and DMI. But without evidence that the National Board has yielded its overall supervisory authority, UDIA's participation in DMI does not vitiate the delegation of certain duties by the National Board to DMI. *See Sierra Club v. Lynn*, 502 F.2d 43, 59 (5th Cir. 1974), *cert. denied*, 421 U.S. 994 (1975).

Defendant's motion is **GRANTED**, and plaintiffs' cross-motion is **DENIED**, as to whether the creation of DMI effected an improper delegation.

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[28]The evidence most strongly supporting plaintiffs' view is testimony by Tony Souza, a member of the National Board:

> Well, a lot of things have changed. The committee structure a lot of times that develop programs with staff input, and this is where a lot of things were determined, and then it would be up to the board level for approval. Now a lot of things come in, the committee's all pre-determined.
>
> A lot of the board members are concerned that we're like a rubberstamp board and not involved so much with the planning. Hopefully maybe this will change.

(Rec. at 1139). Souza further testified that evaluation of staff progress is no longer done on the committee level. (Rec. at 1155-1156). This evidence is insufficient to show abdication by the National Board of any of its lawmaking duties.

D. NOTICE AND COMMENT

Plaintiffs contend that the agreements between the National Board and UDIA establishing DMI are invalid because they were not adopted pursuant to the notice and comment rulemaking procedures provided by the Administrative Procedure Act in 5 U.S.C. § 553.[29] The notice and comment process is required whenever an agency proposes to formulate, amend, or repeal a rule.[30] See *id.*; 5 U.S.C. § 551(5). Defendant contends that even if the establishment of DMI constitutes a rule, two exceptions to the notice and comment requirement apply.

A threshold question is whether the creation of DMI constitutes a rule under § 551(4).[31] Section 551(4) defines a "rule" as

> the 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 thereof or of valuations, costs, or accounting, or practices bearing on any of the foregoing.

Read literally, the definition of "rule" is broad, including "virtually every statement an agency can make." *National Treasury Employees Union v. Reagan*, 685 F. Supp. 1346, 1356 (E.D. La. 1988), *quoting Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897 (5th Cir. 1983); *see also Batterson v. Marshall*, 648 F.2d 694, 700 (D.C. Cir. 1980).

The JO held that the agreement between the National Board and UDIA to create DMI did not trigger the notice and comment provisions of the APA:

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[29] It is undisputed that defendant did not follow notice and comment procedures.

[30] Plaintiffs also contend that the changes are amendments to the Order, and that the Order requires notice and comment for all such amendments. But the fact remains that the Order has not been amended.

[31] A substantive rule creates a rule of law, "usually implement[ing] existing law, imposing general, extrastatutory obligations pursuant to authority properly delegated by Congress." *Southern California Edison Co. v. FERC*, 770 F.2d 779, 783 (9th Cir. 1985) (citing *Alcaraz v. Block*, 746 F.2d 593, 613 (9th Cir. 1984).

> DMI is a private, not-for-profit corporation formed under the laws of the District of Columbia. It is not an agency as that term is defined for the purposes of the Administrative Procedure Act (5 U.S.C. § 551), and the agreement between NDB and UDIA to form DMI . . . does not describe the organization, procedure, or practice requirements of an agency.

(Rec. at 736). While this may be an accurate statement of those portions of the agreement relating to DMI, the agreement also imposes obligations on the National Board which is an agency.

The December 1994 agreement between the National Board and DMI formalizing the new staffing relationship includes provisions directly affecting the Board's organizational structure and internal operations. The agreement transferred duties from the National Board staff to DMI staff and altered the Board's prior procedures and practices in important areas such as collecting assessments, accounting, preparing financial and program reports, preparing proposed drafts of the Annual Business Plan and Annual Budget, and managing the implementation of approved programs.

Nonetheless, even if the agreements creating DMI are "rules," the agreements are within the exception to the notice and comment requirement provided for "interpretative rules, general statements of policy, or rules of agency organization, procedure or practice."[32] 5 U.S.C. § 553(b)(3)(A); *Lincoln v. Vigil*, 508 U.S. 182, 196 (1993). This exception applies to "agency actions that do not themselves alter the rights or interests of parties, although it may alter the manner in which the parties present themselves or their viewpoints to the agency." *Batterson*, 648 F.2d at 707; *see also Pickus v. United States Board of Parole*, 507 F.2d 1107, 1113, 1114 (9th Cir. 1974) (notice and comment not required for "technical regulation of the form of agency action and proceedings"). That a procedural rule also has a substantive impact does not trigger the notice and comment requirement. *Southern California Edison*, 770 F.2d at 783, *citing Rivera v. Becerra*, 714 F.2d 887, 889-91 (9th Cir. 1983).

The agreements creating DMI and shifting the National Board's staff functions to DMI relate to agency organization, procedure, and practices and were therefore not subject to the notice and comment requirement. There is no persuasive evidence in the record that the agreements affected the rights and interests of the parties. The plaintiffs must now communicate with the National Board first through

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[32]The JO held that even if the creation of DMI were a rule, it fell within this exception. (Rec. at 736-37).

the staff of a private organization, and that DMI now performs functions previously performed by National Board staff, is but a change in organization and procedure however distasteful to plaintiffs. *See, e.g.*, *Guardian Federal Sav. & Loan v. Federal Sav. & Loan Ins. Corp.*, 589 F.2d 658, 665-66 (D.C. Cir. 1978). The assignment of staff duties to DMI, in the absence of a shift in policy-making responsibility, is not subject to the notice and comment requirement. *See Pickus*, 507 F.2d at 1114. Accordingly, defendant's motion is **GRANTED**, and plaintiffs' cross-motion is **DENIED**, as to the APA claim.[33]

E. FREEDOM OF INFORMATION ACT

Plaintiffs complain that DMI views itself as a private entity not subject to FOIA's disclosure requirements.[34] However, FOIA does not provide plaintiffs a private right of action to invalidate the agreements creating DMI. *See* 5 U.S.C. § 522. Plaintiffs concede that FOIA provides no independent right to the relief requested.[35] (*See* Pls.' Opp'n and Counter Mot. at 36:3-22). Accordingly, defendant's motion is **GRANTED**, and plaintiffs' cross-motion is **DENIED**, as to the FOIA claim.

F. CONFLICTS OF INTEREST

Similar to the alleged violation of FOIA, the claim that the creation of DMI was rife with conflicts of interest is presented primarily as further support for the need for notice and comment. It does not provide an independent ground for plaintiffs to invalidate the establishment of DMI. Although 18 U.S.C. § 208(a) makes it a crime for government employees to enter into government contracts in which they have a financial interest, and the government may disclaim any such contracts, no court has ever interpreted the statute to confer standing on third parties to challenge

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[33] Defendant invokes the public contact exception to the APA as an alternative ground. Notice and comment is not required in "a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts." 5 U.S.C. § 553(a)(2). However, the USDA has waived its right to rely on this exception as a matter of agency policy. 36 Fed. Reg. 13,804 (1971); *see also United States v. Sunny Cove Citrus Ass'n*, 854 F. Supp. 669, 682 n.15 (E.D. Cal. 1994), *citing Cal-Almond, Inc. v. United States Dep't of Agric.*, 14 F.3d 429, 446 n.17 (9th Cir. 1993).

[34] A FOIA request is currently pending before the USDA.

[35] Plaintiffs contend only that the important policies underlying FOIA should have been considered before the creation of DMI as part of the notice and comment process.

allegedly tainted government contracts. *See United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 563 (1961) (permitting government disaffirmance protects the public interest).

Similarly, plaintiffs present no legal argument in their papers to support the proposition that the provisions in the Order regarding a nominee's agreement to serve on the National Board provide a basis for a third party to set aside an agreement entered into by the National Board.[36] Even if National Board members face what plaintiffs term "continuing conflicts of interest" as a result of their joint venture with UDIA, prohibition of such a situation is not addressed by any provision of the Order. Moreover, by regulation, National Board members must be milk producers drawn from different geographic regions; to this extent there is a potential conflict of interest in any decision that the National Board makes that could benefit producers in one part of the country more than others.

Defendant's motion is **GRANTED**, and plaintiffs' cross-motion is **DENIED**, as to whether conflicts of interest require invalidation of the creation of DMI.

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[36]A producer nominated to serve on the National Board is required to file, at the time of nomination, a written agreement with the Secretary of USDA agreeing to:

> (a) Serve on the Board if appointed
> (b) Disclose any relationship with any organization that operates a qualified State or regional program or has a contractual relationship with the Board; and
> (c) Withdraw from participation in deliberations, decision-making, or voting on matters where paragraph (b) apples.

7 C.F.R. § 1150.134. The only remedy expressly provided in the Order for violation of § 1150.134 is a civil penalty of $1,000. 7 C.C.R. [so in original] § 1150.156(b).

Even assuming that § 1150.134 could provide a basis for invalidating the vote to establish DMI, its application would not have changed the outcome of the vote, which was 27 members in favor and 7 members opposed. Because the regulation does not define "relationship," the court defers to the National Board's interpretation of the term:

> A "relationship" exists whenever a member of the Dairy Promotion and Research Board is a board member or an employee, of an organization that operates a qualified State or Regional program or an organization which has a contractual relationship with the Board. Also, a "relationship" can exist if the Board member stands in a position to gain financially from the operations of such other organization.

(Rec. at 2421). Plaintiffs do not challenge the JO's factual finding that at most two members of the National Board were required to withdraw under this definition of relationship.

E. THE 5% LIMIT

Plaintiffs assert that the National Board violated 7 C.F.R. § 1150.151 by spending more than 5% of its projected assessment revenue for administrative expenses in 1995. Plaintiffs claim that DMI achieved compliance only by selectively categorizing core costs in the Annual Budget as program operations expenses instead of administrative expenses, a breakdown of core expenses that allegedly violates the April 1994 agreement creating DMI.

Plaintiffs mistakenly use the term "core costs" as defined in the April 1994 agreement interchangeably with "administrative expenses" subject to the 5% limitation. The definition of "core costs" includes "the basic cost of salaries and benefits for employees of [DMI] and general administrative costs for the operation of [DMI], and shall also include the costs of planning activities." (Rec. at 1254). The definition of this term, and the definition of "program costs" as excluding "core costs" in the April 1994 agreement, are immaterial for the purposes of calculating administrative expenses.

Substantial evidence supports the JO's conclusion that DMI did not violate the limit on administrative expenses. The JO observed that the figures stated in the 1995 National Board budget and the Board's July 1995 report to Congress disprove plaintiffs' claim. (Rec. at 719; *see also* Rec. at 692-93). Further the record contains evidence that the accounting practices used to calculate the 1995 budget was consistent with that used for previous budgets. (*See* Rec. at 1117-18). Accordingly, defendant's motion is **GRANTED**, and plaintiffs' cross-motion is **DENIED**, as to whether DMI violated 7 C.F.R. § 1150.151.

IV. CONCLUSION

Defendant's motion for summary judgment is **GRANTED** as to all of plaintiffs' claims. Plaintiffs' cross-motion for summary judgment is **DENIED**. The clerk shall enter judgment for defendant.

IT IS SO ORDERED.

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AGRICULTURE MARKETING AGREEMENT ACT

DEPARTMENTAL DECISION

In re: LAMERS DAIRY, INC.
AMA Docket No. M 30-2.
Decision and Order.
Filed August 16, 2001.

Milk – Marketwide pooling – Producer-settlement fund – Unfair trade practices – Premium payments – Price differential – Rulemaking procedures – Equal protection – Fourteenth amendment – Fifth amendment – Statutory construction – Due process – Presumption of regularity.

The Judicial Officer affirmed the decision by Chief Administrative Law Judge James W. Hunt (Chief ALJ) dismissing the Petition instituted under 7 U.S.C. § 608c(15)(A). The Judicial Officer rejected Petitioner's contentions that: (1) marketwide pooling required by Milk Marketing Order No. 30 (7 C.F.R. pt. 1030) constitutes an unfair trade practice in violation of 7 U.S.C. § 608c(7)(A); (2) the failure to exempt Petitioner from the requirements of Milk Marketing Order No. 30 violates Petitioner's constitutional right to equal protection of the laws; and (3) the Class I price differential must be reduced. The Judicial Officer stated that public officials are presumed to have properly discharged their official duties and rejected Petitioner's unsupported contention that the Chief ALJ failed to consider Petitioner's evidence and Petitioner's unsupported contention that the Secretary of Agriculture was incapable of making impartial decisions regarding marketing orders and unfair trade practices. The Judicial Officer further stated that the premium paid by Petitioner to induce producers to sell milk to Petitioner is not regulated by the Agricultural Marketing Agreement Act or Milk Marketing Order No. 30. The Judicial Officer also rejected Petitioner's contention that Milk Marketing Order No. 30 was required to be promulgated in accordance with the procedures in 7 U.S.C. § 608c(17). The Judicial Officer pointed out that Congress waived the hearing requirement in 7 U.S.C. § 608c(17) in 7 U.S.C. § 7253(b)(1) which provides that the Secretary of Agriculture shall use the notice and comment procedures provided in 5 U.S.C. § 553 to reform federal milk marketing orders.

Sharlene A. Deskins, for Respondent.
Richard J. Lamers, for Petitioner.
Initial decision issued by James W. Hunt, Chief Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

Lamers Dairy, Inc. [hereinafter Petitioner], instituted this proceeding by filing a "New Petition for Exemption from Certain Regulations and/or Modification of Certain Provisions of Federal Milk Order 30 (7 CFR Part 1030) Both Chicago and Midwest" [hereinafter the Petition] on March 14, 2000. Petitioner filed the Petition pursuant to the Agricultural Marketing Agreement Act of 1937, as amended [hereinafter the AMAA]; the federal milk marketing order entitled "Milk In The Upper Midwest Marketing Area" (7 C.F.R. pt. 1030) [hereinafter Milk Marketing

Order No. 30]; and the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Marketing Orders (7 C.F.R. §§ 900.50-.71) [hereinafter the Rules of Practice].

Petitioner alleges that Milk Marketing Order No. 30 is not in accordance with law. Petitioner seeks: (1) an exemption from the marketwide pooling of milk required by Milk Marketing Order No. 30; (2) an exemption from the obligation to make payments to the producer-settlement fund established and maintained pursuant to Milk Marketing Order No. 30; and (3) the reduction of the Class I differential to $.30 per hundredweight of milk (Pet. at 5-6).

On May 2, 2000, the Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], filed "Answer of Defendant" [hereinafter Answer]. Respondent denies the material allegations of the Petition and requests the denial of the relief prayed for in the Petition and the dismissal of the Petition (Answer).

Chief Administrative Law Judge James W. Hunt [hereinafter the Chief ALJ] presided at a hearing in Appleton, Wisconsin, on November 1, 2000. Richard J. Lamers, chairman of the board of Lamers Dairy, Inc., represented Petitioner. Sharlene A. Deskins, Office of the General Counsel, United States Department of Agriculture, represented Respondent.

On January 12, 2001, Petitioner filed "Brief in Support of Petition and Hearing Record" [hereinafter Petitioner's Post-Hearing Brief]. On January 18, 2001, Respondent filed "Respondent's Findings of Fact Conclusions of Law and Brief in Support Thereof." On February 14, 2001, Petitioner filed "Petitioners Brief in Response to Respondents Findings" [hereinafter Petitioner's Post-Hearing Response]. On February 14, 2001, Respondent filed "Respondent's Response to the Petitioner's Brief in Support of Petition and Hearing Record."

On May 2, 2001, the Chief ALJ issued a "Decision and Order" [hereinafter Initial Decision and Order] in which the Chief ALJ: (1) found that Petitioner is a handler located in Appleton, Wisconsin; (2) found that Petitioner is a handler subject to Milk Marketing Order No. 30 and handles Class I milk; (3) found that Petitioner is required by Milk Marketing Order No. 30 to pool its milk under marketwide pooling; (4) found that the rulemaking record on which the Secretary of Agriculture promulgated Milk Marketing Order No. 30 supports the Secretary of Agriculture's conclusion that marketwide pooling is appropriate; (5) concluded that the Secretary of Agriculture's determination that marketwide pooling is appropriate under Milk Marketing Order No. 30 is in accordance with law; and (6) ordered the Petition dismissed (Initial Decision and Order at 8-9).

On June 6, 2001, Petitioner appealed to the Judicial Officer. On July 6, 2001, Respondent filed a response to Petitioner's appeal. On July 25, 2001, Petitioner

filed a response to Respondent's July 6, 2001, filing.[1] On July 27, 2001, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I agree with the Chief ALJ's Initial Decision and Order. Therefore, pursuant to section 900.66(a) of the Rules of Practice (7 C.F.R. § 900.66(a)), I adopt, with only minor modifications, the Chief ALJ's Initial Decision and Order as the final Decision and Order. Additional conclusions by the Judicial Officer follow the Chief ALJ's Conclusions of Law, as restated.

Petitioner's exhibits are designated by "PX." Transcript references are designated by "Tr."2

APPLICABLE CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

U.S. Const.

Amendment V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for

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[1]Petitioner entitles its appeal to the Judicial Officer "Petitioners Appeal of the Judicial Officers' Decision and Order Dated May 3, 2001 Received May 7th, 2001". At the time Petitioner filed "Petitioners Appeal of the Judicial Officers' Decision and Order Dated May 3, 2001 Received May 7th, 2001," I had not issued a Decision and Order in this proceeding. Therefore, "Petitioners Appeal of the Judicial Officers' Decision and Order Dated May 3, 2001 Received May 7th, 2001," could not be an appeal of the Judicial Officer's Decision and Order. Based on my review of the record, I infer that "Petitioners Appeal of the Judicial Officers' Decision and Order Dated May 3, 2001 Received May 7th, 2001" is Petitioner's appeal of the Chief ALJ's May 2, 2001, Initial Decision and Order, which Petitioner filed pursuant to section 900.65 of the Rules of Practice (7 C.F.R. § 900.65). Accordingly, hereinafter, I refer to "Petitioners Appeal of the Judicial Officers' Decision and Order Dated May 3, 2001 Received May 7th, 2001" as Petitioner's Appeal Petition. For the same reason, I hereinafter refer to Respondent's July 6, 2001, filing entitled "Respondent's Opposition to 'Petitioner's Appeal of the Judicial Officer's Decision and Order Dated May 3, 2001 Received May 7th, 2001'" as Respondent's Response to Petitioner's Appeal Petition. I also hereinafter refer to Petitioner's July 25, 2001, filing entitled "Petitioner's Response to 'Respondent's Opposition to Petitioner's Appeal of the Judicial Officers' Decision and Order Dated May 3, 2001 Received May 7th, 2001'" as Petitioner's Response to Respondent's Response to Petitioner's Appeal Petition.

the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Amendment XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. V, XIV § 1.

5 U.S.C.:

TITLE 5–GOVERNMENT ORGANIZATION AND EMPLOYEES

PART I–THE AGENCIES GENERALLY

CHAPTER 1–ORGANIZATION

§ 101. Executive departments

The Executive departments are:

. . . .
The Department of Agriculture.
. . . .

CHAPTER 5–ADMINISTRATIVE PROCEDURE

. . . .

SUBCHAPTER II–ADMINISTRATIVE PROCEDURE

§ 551. Definitions

For the purpose of this subchapter–

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include–

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia; or

except as to the requirements of section 552 of this title–

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; subchapter II of chapter 471 of title 49; or sections 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix[.]

5 U.S.C. §§ 101, 551(1).

7 U.S.C.:

TITLE 7—AGRICULTURE

CHAPTER 26—AGRICULTURAL ADJUSTMENT

SUBCHAPTER I—DECLARATION OF CONDITIONS AND POLICY

§ 601. Declaration of conditions

It is declared that the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure and that these conditions affect transactions in agricultural

commodities with a national public interest, and burden and obstruct the normal channels of interstate commerce.

§ 602. Declaration of policy; establishment of price basing period; marketing standards; orderly supply flow; circumstances for continued regulation

It is declared to be the policy of Congress–

(1) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices as defined by section 1301(a)(1) of this title.

(2) To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of this section by gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets, and (b) authorizing no action under this chapter which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section.

(3) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such production research, marketing research, and development projects provided in section 608(c)(6)(I) of this title, such container and pack requirements provided in section 608c(6)(H) of this title such minimum standards of quality and maturity and such grading and inspection requirements for agricultural commodities enumerated in section 608c(2) of this title, other than milk and its products, in interstate commerce as will effectuate such orderly marketing of such agricultural commodities as will be in the public interest.

(4) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for any agricultural commodity enumerated in section 608(c)(2) of this title as will provide, in the interests of producers and consumers, an orderly flow of the supply thereof to market throughout its normal marketing season to avoid unreasonable fluctuations in supplies and prices.

(5) Through the exercise of the power conferred upon the Secretary of

Agriculture under this chapter, to continue for the remainder of any marketing season or marketing year, such regulation pursuant to any order as will tend to avoid a disruption of the orderly marketing of any commodity and be in the public interest, if the regulation of such commodity under such order has been initiated during such marketing season or marketing year on the basis of its need to effectuate the policy of this chapter.

SUBCHAPTER III—COMMODITY BENEFITS

. . . .

§ 608c. Orders regulating the handling of commodity

. . . .

(5) Milk and its products; terms and conditions of orders

In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers. . . .

. . . .

(B) Providing:

(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: *Provided*, That, except in the case of orders covering milk products only, such provision is approved or favored by at least

three-fourths of the producers who, during a representative period determined by the Secretary of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of the volume of such milk produced for market during such period; the approval required hereunder shall be separate and apart from any other approval or disapproval provided for by this section; or

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered;

subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, (d) a further adjustment to encourage seasonal adjustments in the production of milk through equitable apportionment of the total value of the milk purchased by any handler, or by all handlers, among producers on the basis of their marketings of milk during a representative period of time, which need not be limited to one year, (e) a provision providing for the accumulation and disbursement of a fund to encourage seasonal adjustments in the production of milk may be included in an order, and (f) a further adjustment, equitably to apportion the total value of milk purchased by any handler or by all handlers among producers on the basis of the milk components contained in their marketings of milk.

. . . .

(7) Terms common to all orders

In the case of the agricultural commodities and the products thereof specified in subsection (2) of this section orders shall contain one or more of the following terms and conditions:

(A) Prohibiting unfair methods of competition and unfair trade practices in the handling thereof.

. . . .

(9) Orders with or without marketing agreement

Any order pursuant to this section shall become effective in the event that, notwithstanding the refusal or failure of handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof . . . covered by such order which is produced or marketed within the production or marketing area defined in such order to sign a marketing agreement relating to such commodity or product thereof, on which a hearing has been held, the Secretary determines:

. . . .

(B) That the issuance of such order is the only practical means of advancing the interests of the producers of such commodity pursuant to the declared policy, and is approved or favored:

(i) By at least two-thirds of the producers . . . who, during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(ii) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing area specified in such marketing agreement or order.

. . . .

(15) Petition by handler for modification of order or exemption; court review of ruling of Secretary

(A) Any handler subject to an order may file a written petition with the

Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(B) The District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling 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 accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 608a(6) of this title. Any proceedings brought pursuant to section 608a(6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection (15)) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15).

. . . .

(17) Provisions applicable to amendments

The provisions of this section and section 608d of this title applicable to orders shall be applicable to amendments to orders: *Provided*, That notice of a hearing upon a proposed amendment to any order issued pursuant to this section, given not less than three days prior to the date fixed for such hearing, shall be deemed due notice thereof: *Provided further*, That if one-third or more of the producers as defined in a milk order apply in writing for a hearing on a proposed amendment of such order, the Secretary shall call such a hearing if the proposed amendment is one that may legally be made

to such order. Subsection (12) of this section shall not be construed to permit any cooperative to act for its members in an application for a hearing under the foregoing proviso and nothing in such proviso shall be construed to preclude the Secretary from calling an amendment hearing as provided in subsection (3) of this section. The Secretary shall not be required to call a hearing on any proposed amendment to an order in response to an application for a hearing on such proposed amendment if the application requesting the hearing is received by the Secretary within ninety days after the date on which the Secretary has announced the decision on a previously proposed amendment to such order and the two proposed amendments are essentially the same.

CHAPTER 100—AGRICULTURAL MARKET TRANSITION

. . . .

SUBCHAPTER IV—OTHER COMMODITIES

PART A–DAIRY

. . . .

§ 7253. Consolidation and reform of Federal milk marketing orders

(a) Amendment of orders

(1) Required consolidation

The Secretary shall amend Federal milk marketing orders issued under section 608c of this title to limit the number of Federal milk marketing orders to not less than 10 and not more than 14 orders.

. . . .

(b) Expedited process

(1) Use of informal rulemaking

To implement the consolidation of Federal milk marketing orders

and related reforms under subsection (a) of this section, the Secretary shall use the notice and comment procedures provided in section 553 of title 5.

. . . .

USE OF OPTION 1A AS PRICE STRUCTURE FOR CLASS I MILK UNDER CONSOLIDATED FEDERAL MILK MARKETING ORDERS

. . . .

(a) FINAL RULE DEFINED.–In this section, the term "final rule" means the final rule for the consolidation and reform of Federal milk marketing orders that was published in the Federal Register on September 1, 1999 (64 Fed. Reg. 47897-48021)), to comply with section 143 of the Federal Agriculture Improvement and Reform Act of 1996 (7 U.S.C. 7253).

(b) IMPLEMENTATION OF FINAL RULE FOR MILK ORDER REFORM.–Subject to subsection (c), the final rule shall take effect, and be implemented by the Secretary of Agriculture, on the first day of the first month beginning at least 30 days after the date of the enactment of this Act [Nov. 29, 1999].

(c) USE OF OPTION 1A FOR PRICING CLASS I MILK.–In lieu of the Class I price differentials specified in the final rule, the Secretary of Agriculture shall price fluid or Class I milk under the Federal milk marketing orders using the Class I price differentials identified as Option 1A "Location-Specific Differentials Analysis" in the proposed rule published in the Federal Register on January 30, 1998 (63 Fed. Reg. 4802, 4809), except that the Secretary shall include the corrections and modifications to such Class I differentials made by the Secretary through April 2, 1999.

(d) EFFECT OF PRIOR ANNOUNCEMENT OF MINIMUM PRICES.–If the Secretary of Agriculture announces minimum prices for milk under Federal milk marketing orders pursuant to section 1000.50 of title 7, Code of Federal Regulations, before the effective date specified in subsection (b), the minimum prices so announced before that date shall be the only applicable minimum prices under Federal milk marketing orders for the month or months for which the prices have been announced.

(e) IMPLEMENTATION OF REQUIREMENT.–The implementation of the final rule, as modified by subsection (c), shall not be subject to any of the following:

(1) The notice and hearing requirements of section 8c(3) of the

Agricultural Adjustment Act (7 U.S.C. 608c(3)), reenacted with amendments by the Agricultural Marketing Agreement Act of 1937, or the notice and comment provisions of section 553 of title 5, United States Code.

(2) A referendum conducted by the Secretary of Agriculture pursuant to subsections (17) or (19) of section 8c of the Agricultural Adjustment Act (7 U.S.C. 608c), reenacted with amendments by the Agricultural Marketing Agreement Act of 1937.

(3) The Statement of Policy of the Secretary of Agriculture effective July 24, 1971 (36 Fed. Reg. 13804), relating to notices of proposed rulemaking and public participation in rulemaking.

(4) Chapter 35 of title 44, United States Code (commonly known as the Paperwork Reduction Act).

(5) Any decision, restraining order, or injunction issued by a United States court before the date of the enactment of this Act [Nov. 29, 1999].

7 U.S.C. §§ 601, 602, 608c(5)(A)-(B), (7)(A), (9)(B), (15), (17); 7 U.S.C. § 7253(a)(1), (b)(1), note (Supp. V 1999).

7 C.F.R.:

TITLE 7—AGRICULTURE

. . . .

SUBTITLE B—REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

. . . .

CHAPTER X—AGRICULTURAL MARKETING SERVICE (MARKETING AGREEMENTS AND ORDERS; MILK), DEPARTMENT OF AGRICULTURE

. . . .

PART 1000— GENERAL PROVISIONS OF FEDERAL MILK MARKETING ORDERS

Subpart A–Scope and Purpose

1000.1 Scope and purpose of this part 1000.

This part sets forth certain terms, definitions, and provisions which shall be common to and apply to Federal milk marketing order in 7 CFR, chapter X, except as specifically defined otherwise, or modified, or otherwise provided, in an individual order in 7 CFR, chapter X.

Subpart B–Definitions

. . . .

§ 1000.9 Handler.

Handler means:

(a) Any person who operates a pool plant or a nonpool plant.

(b) Any person who receives packaged fluid milk products from a plant for resale and distribution to retail or wholesale outlets, any person who as a broker negotiates a purchase or sale of fluid milk products or fluid cream products from or to any pool or nonpool plant, and any person who by purchase or direction causes milk of producers to be picked up at the farm and/or moved to a plant. Persons who qualify as handlers only under this paragraph under any Federal milk order are not subject to the payment provisions of §§ ____.70, ____.71, ____.72, ____.73, ____.76, and ____.85 of that order.

(c) Any cooperative association with respect to milk that it receives for its account from the farm of a producer and delivers to pool plants or diverts to nonpool plants pursuant to § ____.13 of the order. The operator of a pool plant receiving milk from a cooperative association may be the handler for such milk if both parties notify the market administrator of this agreement prior to the time that the milk is delivered to the pool plant and the plant operator purchases the milk on the basis of farm bulk tank weights and samples.

Subpart F–Classification of Milk

§ 1000.40 Classes of utilization.

Except as provided in § 1000.42, all skim milk and butterfat required to be reported pursuant to § ____.30 of each Federal milk order shall be

classified as follows:

(a) *Class I milk* shall be all skim milk and butterfat:

(1) Disposed of in the form of fluid milk products, except as otherwise provided in this section;

(2) In packaged fluid milk products in inventory at the end of the month; and

(3) In shrinkage assigned pursuant to § 1000.43(b).

(b) *Class II milk* shall be all skim milk and butterfat:

(1) In fluid milk products in containers larger than 1 gallon and fluid cream products disposed of or diverted to a commercial food processing establishment if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(2) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese resembling cottage cheese in form or use;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed in half-gallon containers or larger and intended to be used in soft or semi-solid form;

(iii) Aerated cream, frozen cream, sour cream, sour half-and-half, sour cream mixtures containing nonmilk items, yogurt, and any other semi-solid product resembling a Class II product;

(iv) Custards, puddings, pancake mixes, coatings, batter, and similar products;

(v) Buttermilk biscuit mixes and other buttermilk for baking that contain food starch in excess of 2% of the total solids, provided that the product is labeled to indicate the food starch content;

(vi) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically-sealed containers;

(vii) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products, including sweetened condensed milk, to be used in processing such prepared food products;

(viii) A fluid cream product or any product containing artificial fat or fat substitutes that resembles a fluid cream product, except as otherwise provided in paragraph (c) of this section; and

(ix) Any product not otherwise specified in this section; and

(3) In shrinkage assigned pursuant to § 1000.43(b).

(c) *Class III milk* shall be all skim milk and butterfat:

(1) Used to produce:

(i) Cream cheese and other spreadable cheeses, and hard cheese of types that may be shredded, grated, or crumbled;

(ii) Plastic cream, anhydrous milkfat, and butteroil; and

(iii) Evaporated or sweetened condensed milk in a consumer-type package; and

(2) In shrinkage assigned pursuant to § 1000.43(b).

(d) *Class IV milk* shall be all skim milk and butterfat:

(1) Used to produce:

(i) Butter; and

(ii) Any milk product in dried form;

(2) In inventory at the end of the month of fluid milk products and fluid cream products in bulk form;

(3) In the skim milk equivalent of nonfat milk solids used to modify a fluid milk product that has not been accounted for in Class I; and

(4) In shrinkage assigned pursuant to § 1000.43(b).

(e) *Other uses*. Other uses include skim milk and butterfat used in any product described in this section that is dumped, used for animal feed, destroyed, or lost by a handler in a vehicular accident, flood, fire, or similar occurrence beyond the handler's control. Such uses of skim milk and butterfat shall be assigned to the lowest priced class for the month to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator.

Subpart H–Payments for Milk

§ 1000.70 Producer-settlement fund.

The market administrator shall establish and maintain a separate fund known as the producer-settlement fund into which the market administrator shall deposit all payments made by handlers pursuant to §§ ____.71, ____.76, and ____.77 of each Federal milk order and out of which the market administrator shall make all payments pursuant to §§ ____.72. and ____.77 of each Federal milk order. Payments due any handler shall be off-set by any payments due from that handler.

PART 1030—MILK IN THE UPPER MIDWEST MARKETING AREA

Subpart–Order Regulating Handling

GENERAL PROVISIONS

§ 1030.1 General provisions.

The terms, definitions, and provisions in part 1000 of this chapter apply to this part 1030. In this part 1030, all references to sections in part 1000 refer to part 1000 of this chapter.

DEFINITIONS

§ 1030.2 Upper Midwest marketing area.

The marketing area means all territory within the bounds of the following states and political subdivisions, including all piers, docks, and wharves connected therewith and all craft moored thereat, and all territory occupied by government (municipal, State, or Federal) reservations, installations, institutions, or other similar establishments if any part thereof is within any of the listed states or political subdivisions:

. . . .

WISCONSIN COUNTIES

All counties except Crawford and Grant.

§ 1030.9 Handler.

See § 1000.9.

CLASSIFICATION OF MILK

§ 1030.40 Classes of utilization.

See § 1000.40.

PAYMENTS FOR MILK

§ 1030.70 Producer-settlement fund.

See § 1000.70.

§ 1030.71 Payments to the producer-settlement fund.

Each handler shall make payment to the producer-settlement fund in a manner that provides receipt of the funds by the market administrator no later than the 15th day after the end of the month (except as provided in § 1000.90). Payment shall be the amount, if any, by which the amount specified in paragraph (a) of this section exceeds the amount specified in paragraph (b) of this section:

(a) The total value of milk to the handler for the month as determined pursuant to § 1030.60.

(b) The sum of:

(1) An amount obtained by multiplying the total hundredweight of producer milk as determined pursuant to § 1000.44(c) by the producer price differential as adjusted pursuant to § 1030.75;

(2) An amount obtained by multiplying the total pounds of protein, other solids, and butterfat contained in producer milk by the protein, other solids, and butterfat prices respectively;

(3) The total value of the somatic cell adjustment to producer milk; and

(4) An amount obtained by multiplying the pounds of skim milk and butterfat for which a value was computed pursuant to § 1030.60(i) by the producer price differential as adjusted pursuant to § 1030.75 for the location of the plant from which received.

§ 1030.72 Payments from the producer-settlement fund.

No later than the 16th day after the end of each month (except as provided in § 1000.90), the market administrator shall pay to each handler the amount, if any, by which the amount computed pursuant to § 1030.71(b) exceeds the amount computed pursuant to § 1030.71(a). If, at such time, the balance in the producer-settlement fund is insufficient to make all payments pursuant to this section, the market administrator shall reduce uniformly such payments and shall complete the payments as soon as the funds are available.

7 C.F.R. §§ 1000.1, .9, .40, .70, 1030.1, .2, .9, .40, .70-.72.

CHIEF ALJ'S INITIAL DECISION AND ORDER (AS RESTATED)

Facts

Petitioner, located in Appleton, Wisconsin, has been in existence as a family operated business since 1913. Petitioner's principal business is packaging fluid milk, which is also referred to as Class I milk. Petitioner is a "handler" as defined by Milk Marketing Order No. 30; that is, it receives milk from "producers" and processes it for sale. (Pet. ¶ 1; Tr. 99-100.) As a handler, Petitioner is regulated by Milk Marketing Order No. 30 (7 C.F.R. pt. 1030).

Congress enacted the AMAA in 1937 to establish orderly marketing conditions for agricultural commodities and, in the case of milk, "to raise producer prices and to ensure that the benefits and burdens of the milk market are fairly and proportionately shared by all dairy farmers." *Minnesota Milk Producers Ass'n v. Glickman,* 153 F.3d 632, 637 (8th Cir. 1998).[2] The Secretary of Agriculture promulgates milk marketing orders under the authority of the AMAA. The AMAA "authorizes the Secretary to devise a method whereby uniform prices are paid by milk handlers to producers for all milk received, regardless of the form in which it leaves the plant and its ultimate use. Adjustments are then made among the handlers so that each eventually pays out-of-pocket an amount equal to the actual utilization value of the milk he has bought." *Lehigh Valley Cooperative Farmers, Inc. v. United States,* 370 U.S. 76, 79-80 (1962). Milk used for fluid consumption (Class I milk), the type handled by Petitioner, usually commands the highest price, while milk used for cheese (Class III milk) and butter (Class IV milk) is usually lower priced (Tr. 171-72; 7 C.F.R. § 1000.40(a), (c)-(d)). These prices are averaged or "blended" through a process called "pooling." The AMAA requires that milk marketing orders provide for either marketwide pooling or individual handler pooling.[3] Marketwide pooling, the type in which Petitioner is required to participate, has been described as follows:

Suppose Handler A purchases 100 units of Class I (fluid) milk from

---

[2] See also 7 U.S.C. §§ 601, 602.

[3] See 7 U.S.C. § 608c(5)(A), (B).

> Producer A at the minimum value of $3.00 per unit. Assume further that Handler B purchases 100 units of Class II (soft milk products) milk from Producer B at the minimum value of $2.00 per unit, and that Handler C purchases 100 units of Class III (hard milk products) milk from Producer C at $1.00 per unit. Assuming that this constitutes the entire milk market for a regulatory district, during this period the total price paid for milk is $600.00, making the average price per unit of milk $2.00. Thus, under the regulatory scheme, Producers A, B, and C all receive $200.00 for the milk they supplied, irrespective of the use to which it was put. However, Handler A must, in addition to the $200.00 that it must tender to Producer A, pay $100.00 into the settlement fund because the value of the milk it purchased exceeded the regulatory average price. Along the same vein, Handler C will receive $100.00 from the settlement fund because it will pay Producer C more than the milk it received was worth. The pool achieves equality among producers, and uniformity in price paid by handlers.

Stew Leonard's v. Glickman, 199 F.R.D. 48, 50 (D. Conn. 2001), *appeal docketed*, No. 01-6111 (2d Cir. May 31, 2001).

This example illustrates the crux of Petitioner's complaint. Like Handler A in this example, Petitioner buys milk from producers for use as fluid milk. Petitioner must then pay into the producer-settlement fund the value of this Class I milk in excess of the regulatory milk price. Other handlers who use milk to manufacture dairy products which have a lower value such as cheese are paid money from the producer-settlement fund. (7 C.F.R. §§ 1000.70, 1030.70-.72.)

Petitioner objects to this marketwide pooling because, it asserts, it has to compete with large cheese manufacturing handlers for milk from producers. Petitioner contends that these handlers have an unfair advantage because they use the money that Petitioner has paid into the producer-settlement fund to subsidize their purchase of milk. Petitioner also asserts that there have been occasions when handlers of Class III milk have actually received more for their products than Petitioner has received for its fluid milk and that, when this circumstance has occurred, the handlers of Class III milk have avoided paying money into the producer-settlement fund by "de-pooling." Petitioner further contends that because of the "subsidy" that these handlers of Class III milk receive, Petitioner has had to compete with them by paying producers a premium in order to obtain milk and that Petitioner gets no credit for this premium. Petitioner also alleges that the larger handlers receive kickbacks and, as manufacturers of dairy products, have an unfair advantage over fluid milk handlers by receiving a "make allowance" in the calculation of the Class III milk price. Petitioner makes the additional argument

that the differential for Class I milk is set at an artificially high level in Milk Marketing Order No. 30 so as to further subsidize handlers of manufactured milk products. (Petitioner's Post-Hearing Brief; Petitioner's Post-Hearing Response.)

Petitioner's position is that these conditions, which it says result from marketwide pooling, constitute unfair trade practices within the meaning of section 8c(7)(A) of the AMAA (7 U.S.C. § 608c(7)(A)) and deny Petitioner equal protection of the law. Milk Marketing Order No. 30, therefore, by requiring marketwide pooling, is not in accordance with the purpose of the AMAA to create orderly marketing conditions. To remedy this situation, Petitioner seeks an exemption from marketwide pooling and a reduction in the Class I price differential. (Pet. at 5-6.)

Law

A petitioner in a proceeding instituted under section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)), like the instant proceeding, must establish that an order is not in accordance with law in order to prevail. To establish that an order is not in accordance with law, a petitioner must overcome two obstacles: a petitioner must establish the reasonableness of its proposal *and* it must establish clearly that the record upon which the Secretary of Agriculture based his or her decision cannot sustain the conclusion reached by the Secretary of Agriculture. The petitioner cannot challenge the Secretary of Agriculture's decision on the basis of new evidence offered at the section 8c(15)(A) hearing. *In re Daniel Strebin,* 56 Agric. Dec. 1095, 1133 (1997). Indeed, a petitioner cannot, in the section 8c(15)(A) proceeding, challenge the policy, desirability, or effectiveness of the order or even "introduce evidence relating to the wisdom of the program, or purporting to show that petitioners have been damaged or disadvantaged by activities undertaken in accordance with the provisions of the order."[4] *In re Belridge Packing Corp.,* 48 Agric. Dec. 16, 46 (1989), *aff'd sub nom. Farmers Alliance for Improved Regulation (FAIR) v. Madigan*, No. 89-0959-RCL, 1991 WL 178117 (D.D.C. Aug. 30, 1991).

Discussion

This section 8c(15)(A) proceeding is the second such proceeding instituted by

[4]Notwithstanding this admonition, the Chief ALJ allowed Petitioner to present evidence at the hearing on how it has been affected by Milk Marketing Order No. 30.

Petitioner. In the previous case, *In re Lamers Dairy, Inc.,* 36 Agric. Dec. 265 (1977), Petitioner objected to marketwide pooling and asserted that Class I milk was priced too high. Petitioner's assertion in that case that marketwide pooling constituted a taking without just compensation was rejected. The Secretary of Agriculture's findings relating to pooling and pricing of milk were found to be supported by substantial evidence.

Petitioner argues in the instant proceeding that it is injured by marketwide pooling, Petitioner's competitors are inequitably benefitted by marketwide pooling, and marketwide pooling constitutes an unfair trade practice in violation of section 8c(7)(A) of the AMAA (7 U.S.C. § 608c(7)(A)) which prohibits "unfair methods of competition and unfair trade practices." Assuming that Petitioner is harmed by Milk Marketing Order No. 30 as it alleges, that purported harm is not grounds for exempting Petitioner from marketwide pooling. It must be presumed that Congress did not intend to enact a statute with cross-purposes. Therefore, when Congress provided for marketwide pooling in the same statute in which it prohibited unfair trade practices,[5] I presume that Congress did not intend that marketwide pooling was to be considered an unfair trade practice. Moreover, Congress enacted the AMAA for the economic protection of producers and consumers and not necessarily for handlers.[6] Courts have noted that marketing orders do not have to be completely equitable and that an order may cause some "resultant" damage to a handler without destroying the validity of the marketing order. *United States v. Mills,* 315 F.2d 828, 837-38 (4th Cir. 1963). In short, while Petitioner may be adversely affected by marketwide pooling, this adverse affect does not invalidate marketwide pooling as being unfair within the meaning of the AMAA to those the statute is designed to protect.

Petitioner contends that this inequity violates its constitutional right to the equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States, noting that handlers under other orders are exempt from marketwide pooling and allowed to pool as individual handlers. The equal protection clause of the Fourteenth Amendment to the Constitution of the United States, by its terms, is applicable to the states and is not applicable to the federal government. The United States Department of Agriculture is an executive department of the government of

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[5]See 7 U.S.C. § 608c(5)(B)(ii), (7)(A).

[6]See 7 U.S.C. §§ 601, 602.

the United States;[7] it is not a state. Therefore, as a matter of law, the United States Department of Agriculture could not have violated the equal protection clause of the Fourteenth Amendment to the Constitution of the United States as Petitioner contends. Nevertheless, the Fifth Amendment to the Constitution of the United States, which is applicable to the federal government, contains an equal protection component. Moreover, equal protection claims are treated the same under the Fifth Amendment as under the Fourteenth Amendment.[8]

Equal protection "ensures that all similarly situated persons are treated similarly under the law." *Vermont Assembly of Home Health Agencies, Inc. v. Shalala,* 18 F. Supp.2d 355, 363 (D. Vt. 1998). However, "[i]n areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against an equal protection challenge if there is any reasonably conceivable set of facts that could provide a rational basis for the classification." *FCC v. Beach Communications, Inc.,* 508 U.S. 307, 313 (1993). A regulatory classification "is accorded a strong presumption of validity" with the burden being "on the one attacking the legislative arrangement to negative every conceivable basis which might support it." *Heller v. Doe,* 509 U.S. 312, 319-20 (1993).

Petitioner has not met this burden. Petitioner has not shown that handlers

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[7]See 5 U.S.C. §§ 101, 551(1).

[8]*See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 217 (1995) (holding the equal protection guarantee of the Fifth Amendment is coextensive with that of the Fourteenth Amendment); *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 542 n.21 (1987) (stating the Fourteenth Amendment applies to actions by a state; the Fifth Amendment, however, does apply to the federal government and contains an equal protection component); *United States v. Paradise*, 480 U.S. 149, 166 n.16 (1987) (stating the reach of the equal protection guarantee of the Fifth Amendment is coextensive with that of the Fourteenth Amendment); *Wayte v. United States*, 470 U.S. 598, 608 n.9 (1985) (stating although the Fifth Amendment, unlike the Fourteenth Amendment, does not contain an equal protection clause, it does contain an equal protection component, and the Court's approach to Fifth Amendment equal protection claims has been precisely the same as the Court's approach to equal protection claims under the Fourteenth Amendment); *Washington v. Davis*, 426 U.S. 229, 239 (1976) (holding the due process clause of the Fifth Amendment contains an equal protection component applicable to the federal government); *Buckley v. Valeo*, 424 U.S. 1, 93 (1976) (holding equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975) (stating while the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is so unjustifiable as to be violative of due process; the Court's approach to Fifth Amendment equal protection claims has always been precisely the same as the Court's approach to equal protection claims under the Fourteenth Amendment).

allegedly exempt from marketwide pooling are "similarly situated" or negated "every conceivable" social or economic basis for marketwide pooling. On the other hand, the Secretary of Agriculture, through the Agricultural Marketing Service, stated a rational basis for adopting marketwide pooling pursuant to the AMAA:

> All Federal milk orders today, save one, provide for the marketwide pooling of milk proceeds among all producers supplying the market. The one exception to this form of pooling is found in the Michigan Upper Peninsula market, where individual handler pooling has been used.
>
> Marketwide sharing of the classified use value of milk among all producers in a market is one of the most important features of a Federal milk marketing order. It ensures that all producers supplying handlers in a marketing area receive the same uniform price for their milk, regardless of how their milk is used. This method of pooling is widely supported by the dairy industry and has been universally adopted for the eleven consolidated orders.

64 Fed. Reg. 16,130 (Apr. 2, 1999). See also the court's discussion in *Minnesota Milk Producers Ass'n v. Glickman,* 153 F.3d 632 (8th Cir. 1998).

As the Secretary of Agriculture has set forth a rational basis for marketwide pooling, there has been no violation of Petitioner's right to equal protection of the laws.

Petitioner further contends that Milk Marketing Order No. 30 is invalid because it was promulgated without a hearing as required by section 8c(17) of the AMAA (7 U.S.C. § 608c(17)). Congress, however, waived this hearing requirement in the Federal Agriculture Improvement and Reform Act of 1996 which provides that the Secretary of Agriculture shall use the notice and comment procedures provided in 5 U.S.C. § 553 to reform federal milk marketing orders.[9] The Secretary of Agriculture's notice-and-comment rulemaking proceeding, which reformed federal milk marketing orders, is thus valid even though promulgated without a hearing.

Petitioner's contention that the Class I price differential is artificially high and should be reduced is likewise without merit because it too was adopted pursuant to congressional directive. 7 U.S.C. § 7253 note (Supp. V 1999). Milk pricing differentials are presumed lawful to achieve a statute's goals. *Minnesota Milk Producers Ass'n v. Glickman*, 153 F.3d at 642.

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[9]See 7 U.S.C. § 7253(b)(1); 63 Fed. Reg. 4803 (Jan. 30, 1998).

Finally, while conceding that marketwide pooling has been upheld by the courts starting with the United States Supreme Court's decision in *United States v. Rock Royal Co-Op,* 307 U.S. 533 (1939), Petitioner argues that the Court decided that case in the context of the depression and that times have changed since then:

> . . . the unfair trade practices now occurring under both the old and new Order 30 could not possibly have been perceived or foreseen by the Court in 1939. The Rock Royal case is not applicable to circumstances of the years 1999 and 2000 etc.

Petitioner's Post-Hearing Brief at 10.

The issue of whether *Rock Royal* is still applicable because of changed circumstances is not within the purview of a section 8c(15)(A) proceeding. "[A]ny new, relevant evidence bearing upon the validity of the Order must be presented first to the Secretary in his legislative [i.e., rulemaking], and not in his judicial capacity [i.e., in a section 8c(15)(A) proceeding]." *In re Belridge Packing Corp.*, 48 Agric. Dec. at 38. The reason for this requirement is that the Secretary of Agriculture's milk marketing order, which is presumed lawful, must be judged on the evidence contained in the rulemaking record on which the Secretary of Agriculture based the milk marketing order. "If that evidence is faulty, or if circumstances have changed so that the Order no longer produces equitable results, the remedy is through the amendatory or termination process–not through a § 8c(15)(A) proceeding." *In re Sequoia Orange Co., Inc.*, 41 Agric. Dec. 1511, 1522 (1982), *order transferring case*, No. 82-2510 (D.D.C. June 14, 1983), *aff'd*, No. CV F 83-269 (E.D. Cal. Dec. 21, 1983).

Petitioner has failed to show that the Secretary of Agriculture could not have decided that marketwide pooling is appropriate based on the facts the Secretary of Agriculture considered when adopting Milk Marketing Order No. 30. Accordingly, I find that Milk Marketing Order No. 30 is in accordance with law. The Petition should therefore be dismissed.

Findings of Fact

1. Petitioner, Lamers Dairy, Inc., is a milk handler located in Appleton, Wisconsin.

2. Petitioner is a handler subject to the provisions of Milk Marketing Order No. 30 (7 C.F.R. pt. 1030) and handles Class I milk.

3. Petitioner is required by Milk Marketing Order No. 30 to pool its milk under

marketwide pooling.

4. The rulemaking record on which the Secretary of Agriculture promulgated Milk Marketing Order No. 30 supports the Secretary of Agriculture's conclusion that marketwide pooling is appropriate.

5. Petitioner has failed to show that the Class I price differential in Milk Marketing Order No. 30 is unlawful.

6. Petitioner has failed to show that the requirement that Petitioner pay into the producer-settlement fund, established and maintained pursuant to Milk Marketing Order No. 30, is unlawful.

Conclusions of Law

1. The Secretary of Agriculture's determination that marketwide pooling is appropriate under Milk Marketing Order No. 30 (7 C.F.R. pt. 1030) is in accordance with law.

2. The Class I price differential in Milk Marketing Order No. 30 is in accordance with law.

3. The requirement that Petitioner pay into the producer-settlement fund, established and maintained pursuant to Milk Marketing Order No. 30, is in accordance with law.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Petitioner raises 12 issues in Petitioner's Appeal Petition. First, Petitioner contends the Chief ALJ erroneously states that producers are paid from the producer-settlement fund (Petitioner's Appeal Pet. at 1).

The Chief ALJ states that producers are paid from the producer-settlement fund (Initial Decision and Order at 2). I agree with Petitioner that the Chief ALJ erred. Milk Marketing Order No. 30 provides that the market administrator makes payments from the producer-settlement fund to handlers (7 C.F.R. § 1030.72). Therefore, I do not adopt the Chief ALJ's statement that producers are paid from the producer-settlement fund. However, the Chief ALJ's error is insignificant and not even approaching reversible error.

Second, Petitioner contends the Chief ALJ erroneously failed to state that "it is large Class I plant competitors who are able to extort 'kickbacks' from manufacturing plants for qualifying the manufacturing plant for obtaining money from the pool while the Petitioner is not physically able to do this." (Petitioner's Appeal Pet. at 2.)

The Chief ALJ did not find that large Class I plant competitors extort kickbacks

or that Petitioner is physically unable to extort kickbacks. However, I conclude the Chief ALJ's failure to make these findings is not error. Petitioner's and other handlers' ability or lack of ability to extort kickbacks is not relevant to the sole issue in this proceeding, namely, whether any provision in Milk Marketing Order No. 30 or any obligation imposed in connection with Milk Marketing Order No. 30 is not in accordance with law.

Third, Petitioner contends the Chief ALJ erroneously stated that Petitioner invoked the Fifth Amendment to the Constitution of the United States. Instead, Petitioner contends it invoked the Fourteenth Amendment to the Constitution of the United States. (Petitioner's Appeal Pet. at 2.)

Petitioner raised the issue of a violation of its right to equal protection of the law under the Fourteenth Amendment to the Constitution of the United States, as follows:

> To deny Lamers Dairy and their [sic] farmer patrons exemption would violates [sic] the 14th Amendment of the Constitution in so far as not providing equal protection or application under the law.

Petitioner's Post-Hearing Brief at 10.

The Chief ALJ erroneously states "Petitioner contends that . . . inequity violates its constitutional right to the equal protection of the laws under the Fifth Amendment" (Initial Decision and Order at 6). Therefore, I do not adopt the Chief ALJ's statement that "Petitioner contends that . . . inequity violates its constitutional right to the equal protection of the laws under the Fifth Amendment." However, the Chief ALJ's error is insignificant. The equal protection clause of the Fourteenth Amendment to the Constitution of the United States, by its terms, is applicable to the states and is not applicable to the federal government. The United States Department of Agriculture is an executive department of the government of the United States;[10] it is not a state. Therefore, as a matter of law, the United States Department of Agriculture could not have violated the equal protection clause of the Fourteenth Amendment to the Constitution of the United States as Petitioner contends.

However, the Fifth Amendment to the Constitution of the United States, which is applicable to the federal government, contains an equal protection component. Moreover, as the Chief ALJ correctly noted, equal protection claims are treated the

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[10]See note 7.

same under the Fifth Amendment as under the Fourteenth Amendment (Initial Decision and Order at 6 n.2).[11] Therefore, while the Chief ALJ erroneously stated that Petitioner cited the Fifth Amendment to the Constitution of the United States as the basis for its equal protection challenge, I find that the Chief ALJ correctly addressed the issue of whether the Secretary of Agriculture had violated Petitioner's right to equal protection under the Constitution of the United States.

Fourth, Petitioner contends that pursuant to section 8c(7)(A) of the AMAA (7 U.S.C. § 608c(7)(A)), the Secretary of Agriculture is charged with the responsibility of prohibiting unfair trade practices. Petitioner contends that marketwide pooling required by Milk Marketing Order No. 30 is an unfair trade practice in violation of section 8c(7)(A) of the AMAA (7 U.S.C. § 608c(7)(A)). (Petitioner's Appeal Pet. 2-3.)

I agree with the Chief ALJ's conclusion that marketwide pooling is not an unfair trade practice and his reasons for that conclusion. See Initial Decision and Order at 5-6. Section 8c(7)(A) of the AMAA (7 U.S.C. § 608c(7)(A)) prohibits unfair trade practices in milk marketing orders and section 8c(5)(B)(ii) of the AMAA (7 U.S.C. § 608c(5)(B)(ii)) provides that milk marketing orders may provide for marketwide pooling. I find it highly unlikely that Congress would, in the same statute, prohibit unfair trade practices in milk marketing orders and specifically provide that milk marketing orders may contain a provision which is an unfair trade practice. It is well settled that, whenever possible, a statute's provisions should be read to be consistent with one another rather than contrary to one another.[12] If section 8c(7)(A) of the AMAA (7 U.S.C. § 608c(7)(A)) were interpreted as prohibiting marketwide pooling, section 8c(7)(A) of the AMAA (7 U.S.C. § 608c(7)(A)) would be in conflict with section 8c(5)(B)(ii) of the AMAA (7 U.S.C. § 608c(5)(B)(ii)), which specifically provides that milk marketing orders

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[11] See note 8.

[12] *See Market Co. v. Hoffman*, 101 U.S. 112, 115-16 (1879); *United States v. Moore*, 95 U.S. 760, 763 (1877); *Peck v. Jenness*, 48 U.S. (7 How.) 612, 622 (1849); *United Steelworkers of America v. North Star Steel Co.*, 5 F.3d 39, 43 (3d Cir. 1993), *cert. denied*, 510 U.S. 1114 (1994); *Skidgel v. Maine Dep't of Human Services*, 994 F.2d 930, 940 (1st Cir. 1993); *McGarry v. Secretary of the Treasury*, 853 F.2d 981, 986 (D.C. Cir. 1988); *Citizens to Save Spencer County v. EPA*, 600 F.2d 844, 870 (D.C. Cir. 1979); *Burrow v. Finch*, 431 F.2d 486, 492 (8th Cir. 1970); *Montgomery Charter Service, Inc. v. Washington Metropolitan Area Transit Comm'n*, 325 F.2d 230, 234 (D.C. Cir. 1963); *Brotherhood of Locomotive Firemen & Enginemen v. Northern Pacific Ry.*, 274 F.2d 641, 646 (8th Cir. 1960); *Korte v. United States*, 260 F.2d 633, 636 (9th Cir. 1958), *cert. denied*, 358 U.S. 928 (1959); *HIGA v. Transocean Airlines*, 230 F.2d 780, 784 (9th Cir. 1955), *cert. dismissed*, 352 U.S. 802 (1956); *Fisher v. District of Columbia*, 164 F.2d 707, 708-09 (D.C. Cir. 1947).

may provide for marketwide pooling. Therefore, I reject Petitioner's contention that marketwide pooling authorized by section 8c(5)(B)(ii) of the AMAA (7 U.S.C. § 608c(5)(B)(ii)) and required by Milk Marketing Order No. 30 is an unfair trade practice in violation of section 8c(7)(A) of the AMAA (7 U.S.C. § 608c(7)(A)).

Fifth, Petitioner states "[i]f the Petitioner is not allowed to enter evidence in a (15)(A) proceeding, he [sic] is then being denied due process of law" (Petitioner's Appeal Pet. at 4).

Petitioner fails to identify the evidence that it sought to introduce which the Chief ALJ excluded. Petitioner offered 10 exhibits (PX 1-PX 10). The Chief ALJ admitted eight of Petitioner's exhibits (Tr. 62-64, 77-79, 90-92, 104-05, 113, 115-16, 142-44) and rejected only PX 4 and PX 7 (Tr. 111, 118). The Chief ALJ suggested that Petitioner attach PX 4 to or include PX 4 in Petitioner's Post-Hearing Brief (Tr. 111-12). The record does not indicate that Petitioner objected to the rejection of PX 4. Further, while the record is not clear on this point, it appears that Petitioner followed the Chief ALJ's suggestion and included the substance of PX 4 in Petitioner's Post-Hearing Brief. See Petitioner's Post-Hearing Brief at 3-4.

Petitioner's Exhibit 7 is Richard J. Lamers' affidavit. During Richard J. Lamers' testimony, Mr. Lamers offered his own affidavit in evidence. Responding to an objection by Complainant, the Chief ALJ stated that since Mr. Lamers was at the hearing to testify, his testimony would be better than an affidavit. The Chief ALJ then allowed Richard J. Lamers to read his affidavit into the record or to summarize his affidavit in testimony. Mr. Lamers took advantage of this opportunity. (Tr. 118.) The record does not indicate that Petitioner objected to the rejection of PX 7.

Moreover, the Chief ALJ overruled 22 of Complainant's objections to Petitioner's questions (Tr. 10-11, 18-20, 34-37, 39, 49, 50-52, 56, 72-73, 88-89, 131, 133-35, 137, 181). The Chief ALJ sustained only Complainant's objection on the grounds of relevance to a question posed by Petitioner during its cross-examination of Robert A. Bohse (Tr. 184). The record establishes that Petitioner did not object to the limitation on the scope of its cross-examination of Mr. Bohse (Tr. 184).

I agree with the Chief ALJ's rejection of PX 4 and PX 7 and the Chief ALJ's limitation of the scope of Petitioner's cross-examination of Mr. Bohse. Moreover, as Petitioner did not object to the rejection of PX 4 or PX 7 or to the limitation of the scope of its cross-examination of Mr. Bohse, the Chief ALJ's rejection of PX 4 and PX 7 and limitation of the scope of Petitioner's cross-examination of Mr. Bohse

cannot be appealed by Petitioner.[13] Therefore, I reject Petitioner's contention that it was not allowed to introduce evidence and was thereby denied due process in this proceeding.

Petitioner further contends the Chief ALJ did not consider Petitioner's evidence (Petitioner's Response to Respondent's Response to Petitioner's Appeal Pet. at 7).

Administrative law judges must adequately review the record in a proceeding prior to the issuance of a decision in that proceeding. Petitioner does not cite a basis for its contention that the Chief ALJ did not consider Petitioner's evidence, and I find nothing in the record which supports Petitioner's contention. In the absence of clear evidence to the contrary, public officers are presumed to have properly discharged their official duties.[14] Moreover, the Chief ALJ's Initial

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[13] See 7 C.F.R. § 900.60(d)(2).

[14] *See United States v. Mezzanatto*, 513 U.S. 196, 210 (1995) (stating the fact that there is potential for abuse of prosecutorial bargaining power is an insufficient basis for foreclosing plea negotiation; the great majority of prosecutors are faithful to their duties and absent clear evidence to the contrary, courts presume that public officers properly discharge their duties); *INS v. Miranda,* 459 U.S. 14, 18 (1982) (per curiam) (stating although the length of time to process the application is long, absent evidence to the contrary, the court cannot find that the delay was unwarranted); *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926) (stating a presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume they have properly discharged their official duties); *Sunday Lake Iron Co. v. Wakefield TP,* 247 U.S. 350, 353 (1918) (stating the good faith of taxing officers and the validity of their actions are presumed; when assailed, the burden of proof is on the complaining party); *Chaney v. United States*, 406 F.2d 809, 813 (5th Cir.) (stating the presumption that the local selective service board considered the appellant's request for reopening in accordance with 32 C.F.R. § 1625.2 is a strong presumption that is only overcome by clear and convincing evidence), *cert. denied*, 396 U.S. 867 (1969); *Lawson Milk Co. v. Freeman*, 358 F.2d 647, 649 (6th Cir. 1966) (stating without a showing that the action of the Secretary of Agriculture was arbitrary, his action is presumed to be valid); *Donaldson v. United States*, 264 F.2d 804, 807 (6th Cir. 1959) (stating the presumption of regularity supports official acts of public officers and in the absence of clear evidence to the contrary, courts presume they have properly discharged their duties); *Panno v. United States*, 203 F.2d 504, 509 (9th Cir. 1953) (stating a presumption of regularity attaches to official acts of the Secretary of Agriculture in the exercise of his congressionally delegated duties); *Reines v. Woods*, 192 F.2d 83, 85 (Emer. Ct. App. 1951) (stating the presumption of regularity which attaches to official acts can be overcome only by clear evidence to the contrary); *NLRB v. Bibb Mfg. Co.*, 188 F.2d 825, 827 (5th Cir. 1951) (holding duly appointed police officers are presumed to discharge their duties lawfully and that presumption may only be overcome by clear and convincing evidence); *Woods v. Tate*, 171 F.2d 511, 513 (5th Cir. 1948) (concluding an order of the Acting Rent Director, Office of Price Administration, is presumably valid and genuine in the absence of proof or testimony to the contrary); *Pasadena Research Laboratories, Inc. v. United States*, 169 F.2d 375, 381-82 (9th Cir.) (stating the presumption of regularity applies to methods used by government chemists and analysts and to the care and absence of tampering on the part of postal employees), *cert. denied*,
(continued...)

Decision and Order in which he thoroughly discusses the evidence Petitioner adduced belies Petitioner's contention that the Chief ALJ did not consider Petitioner's evidence. Therefore, I reject Petitioner's unsupported contention that the Chief ALJ did not consider Petitioner's evidence.

Petitioner attached two documents to Petitioner's Appeal Petition. Respondent

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[14](...continued)
335 U.S. 853 (1948); *Laughlin v. Cummings*, 105 F.2d 71, 73 (D.C. Cir. 1939) (stating there is a strong presumption that public officers exercise their duties in accordance with law); *In re Greenville Packing Co.*, 59 Agric. Dec. 194, 220-22 (2000) (stating that, in the absence of evidence to the contrary, Food Safety and Inspection Service inspectors are presumed to have properly issued process deficiency records), *appeal docketed*, No. 00-CV-1054 (N.D.N.Y. July 5, 2000); *In re Dwight L. Lane*, 59 Agric. Dec. 148, 177-78 (2000) (stating that a United States Department of Agriculture hearing officer is presumed to have adequately reviewed the record and no inference is drawn from an erroneous decision that the hearing officer failed to properly discharge his official duty to review the record), *aff'd*, A2-00-84 (D.N.D. July 18, 2001); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 280-82 (1998) (stating that, in the absence of clear evidence to the contrary, United States Department of Agriculture inspectors and investigators are presumed to have properly discharged their duty to document violations of the Animal Welfare Act); *In re Auvil Fruit Co.*, 56 Agric. Dec. 1045, 1079 (1997) (stating without a showing that the official acts of the Secretary of Agriculture are arbitrary, his actions are presumed to be valid); *In re Kim Bennett*, 55 Agric. Dec. 176, 210-11 (1996) (stating that instead of presuming United States Department of Agriculture attorneys and investigators warped the viewpoint of United States Department of Agriculture veterinary medical officers, the court should have presumed that training of United States Department of Agriculture veterinary medical officers was proper because there is a presumption of regularity with respect to official acts of public officers); *In re C.I. Ferrie*, 54 Agric. Dec. 1033, 1053 (1995) (stating use of United States Department of Agriculture employees in connection with a referendum on the continuance of the Dairy Promotion and Research Order does not taint the referendum process, even if petitioners show some United States Department of Agriculture employees would lose their jobs upon defeat of the Dairy Promotion and Research Order, because a presumption of regularity exists with respect to official acts of public officers); *In re Mil-Key Farm, Inc.*, 54 Agric. Dec. 26, 55 (1995) (stating without a showing that the official acts of the Secretary of Agriculture are arbitrary, his actions are presumed to be valid); *In re Hershey Chocolate U.S.A.*, 53 Agric. Dec. 17, 55 (1994) (stating without a showing that the official acts of the Secretary are arbitrary, his actions are presumed to be valid), *aff'd*, No. 1:CV-94-945 (M.D. Pa. Feb. 3, 1995); *In re King Meat Co.*, 40 Agric. Dec. 1468, 1494 (1981) (stating there is a presumption of regularity with respect to the issuance of instructions as to grading methods and procedures by the Chief of the Meat Grading Branch, Food Safety and Quality Service, United States Department of Agriculture), *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); *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1361 (1978) (rejecting respondent's theory that United States Department of Agriculture shell egg graders switched cases of eggs to discredit respondent, in view of the presumption of regularity supporting acts of public officials), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980).

objects to the Judicial Officer's consideration of these two documents because they were not introduced at the hearing (Respondent's Response to Petitioner's Appeal Pet. at 5). Petitioner admits that these two documents were not introduced at the hearing but argues that, as the documents are only extensions and explanations of PX 1 and Mark J. Lamers' and Richard J. Lamers' testimony, the documents "should and must be considered" (Petitioner's Response to Respondent's Response to Petitioner's Appeal Pet. at 7-8).

Section 900.68(a)(1) and (2) of the Rules of Practice provides that an application to reopen the hearing to take further evidence must be filed with the Hearing Clerk, as follows:

> **§ 900.68 Applications for reopening hearings; for rehearings or reargruments of proceedings; or for reconsideration of orders.**
>
> (a) *Petition requisite*–(1) *Filing; service*. An application for reopening the hearing to take further evidence . . . shall be made by petition addressed to the Secretary and filed with the hearing clerk, who immediately shall notify and serve a copy thereof upon the other party to the proceeding. Every such petition shall state the grounds relied upon.
>
> (2) *Petitions to reopen hearings*. A petition to reopen the hearing for the purpose of taking additional evidence may be filed at any time prior to the issuance of the final order. 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. § 900.68(a)(1)-(2).

Petitioner did not file a petition to reopen the hearing to take further evidence. Therefore, I conclude that the two documents attached to Petitioner's Appeal Petition, which were not introduced at the hearing, are not part of the record. I have not considered the two documents which Petitioner attached to Petitioner's Appeal Petition.

Sixth, Petitioner contends the Chief ALJ erroneously failed to address the purpose of the Class I differential (Petitioner's Appeal Pet. at 4-5).

The Chief ALJ stated "Petitioner's contention that the Class I price differential is artificially high and should be reduced is . . . without merit because it . . . was adopted pursuant to Congressional directive. 145 Cong. Rec. No. 163, Part II (November 17, 1999). Milk pricing differentials are presumed lawful to achieve a statute's goals. *Minnesota Milk Producers Ass'n v. Glickman*, [153 F.3d] at 642."

(Initial Decision and Order at 7 (footnote omitted).)

The Class I price differential in Milk Marketing Order No. 30 was adopted pursuant to 7 U.S.C. § 7253 note (Supp. V 1999). Petitioner's challenge to the Class I price differential is a challenge to a congressional directive. In the absence of any claim that the setting of the Class I price differential by Congress is unconstitutional, the Class I price differential must be upheld. Petitioner presents no argument that would provide a basis for concluding the Class I price differential set by Congress is unconstitutional. Further, the purpose of the Class I price differential, which Petitioner contends the Chief ALJ erroneously failed to address, is not relevant to the only issue in this proceeding, namely, whether any provision in Milk Marketing Order No. 30 or any obligation imposed in connection with Milk Marketing Order No. 30 is not in accordance with law. Thus, I reject Petitioner's contention that the Chief ALJ's failure to address the purpose of the Class I differential is error.

Seventh, Petitioner contends the following sentence quoted by the Chief ALJ from *Stew Leonard's v. Glickman*, 199 F.R.D. 48, 50 (2000), is error: "The pool achieves equality among producers, and uniformity in price paid by handlers." Petitioner states that it has to pay more than some other handlers to obtain milk. (Petitioner's Appeal Pet. at 5-7.)

The record does establish that Petitioner paid in excess of the uniform minimum price set by Milk Marketing Order No. 30 in order to induce producers to sell milk to Petitioner. However, the premium paid by Petitioner is not regulated by the AMAA or Milk Marketing Order No. 30. The uniformity in price paid by handlers referenced in *Stew Leonard's v. Glickman*, which the Chief ALJ correctly quoted, relates only to the price regulated under the AMAA. I find no basis upon which to modify the Chief ALJ's correct quotation of *Stew Leonard's v. Glickman*.

Eighth, Petitioner contends the Chief ALJ erroneously failed to address the effect on Petitioner of having to pay premiums in order to obtain milk and the effect on Petitioner of having to make payments to the producer-settlement fund (Petitioner's Appeal Pet. at 8-9).

As an initial matter, Petitioner is not required by either the AMAA or Milk Marketing Order No. 30 to pay premiums to obtain milk. Moreover, much of the Chief ALJ's Initial Decision and Order is devoted to addressing the effect of Milk Marketing Order No. 30 on Petitioner. Therefore, I reject Petitioner's contention that the Chief ALJ failed to address the effect of Petitioner's having to pay into the Milk Marketing Order No. 30 producer-settlement fund.

Ninth, Petitioner contends the Secretary of Agriculture cannot make impartial decisions regarding orders and unfair trade practices because, pursuant to section 8c(9)(B) of the AMAA (7 U.S.C. § 608c(9)(B)), producers can, by vote, terminate

an order (Petitioner's Appeal Pet. at 9-10).

The record contains no evidence which supports Petitioner's contention that the Secretary of Agriculture cannot make impartial decisions regarding marketing orders and unfair trade practices. In the absence of clear evidence to the contrary, public officers are presumed to have properly discharged their official duties.[15] Therefore, I must presume that the Secretary of Agriculture can and does make impartial decisions regarding marketing orders and unfair trade practices. I reject Petitioner's unsupported contention that the Secretary of Agriculture cannot make impartial decisions regarding marketing orders and unfair trade practices because orders must be approved or favored by producers as provided in section 8c(9)(B) of the AMAA (7 U.S.C. § 608c(9)(B)).

Tenth, Petitioner contends *United States v. Mills*, 315 F.2d 828 (4th Cir. 1963), is inapposite because it does not concern the prohibition of unfair trade practices (Petitioner's Appeal Pet. at 10-11).

I agree with Petitioner that *United States v. Mills* does not concern the prohibition of unfair trade practices. However, I disagree with Petitioner's contention that *United States v. Mills* is inapposite. Petitioner contends it is adversely affected by marketwide pooling and marketwide pooling gives cheese manufacturers an unfair advantage over Petitioner. The Chief ALJ cited *United States v. Mills* as authority for his statement that "[c]ourts have noted that marketing orders do not have to be completely equitable and that an order may cause some 'resultant' damage to a handler without destroying the validity of the order." (Initial Decision and Order at 5.) I conclude *United States v. Mills* is pertinent to the purported adverse effect of Milk Marketing Order No. 30 on Petitioner, which Petitioner raised in this proceeding.

Eleventh, Petitioner states that Congress' authorization to promulgate federal milk marketing orders without a hearing defies basic democratic principles (Petitioner's Appeal Pet. at 12).

The promulgation of a milk marketing order under the AMAA is a rulemaking proceeding. Rulemaking is legislative in nature. Once an agency action is characterized as legislative, constitutional procedural due process requirements do not apply.[16] Further, the hearing requirement in section 8c(17) of the AMAA

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[15]See note 14.

[16]*See United States v. Florida East Coast Ry.*, 410 U.S. 224, 245 (1973) (stating there is no across-the-board constitutional right to oral hearings in administrative proceedings for the purpose of promulgating policy-type rules or standards); *Interport Pilots Agency, Inc. v. Sammis*, 14 F.3d 133, 142 (continued...)

(7 U.S.C. § 608c(17)) is not a constitutional requirement, and Congress may amend this statutory hearing requirement or exempt the Secretary of Agriculture from the hearing requirement at any time. Congress waived the hearing requirement in section 8c(17) of the AMAA (7 U.S.C. § 608c(17)) in the Federal Agriculture Improvement and Reform Act of 1996 which provides that the Secretary of Agriculture shall use the notice and comment procedures provided in 5 U.S.C. § 553 to reform federal milk marketing orders.[17] The Secretary of Agriculture's notice-and-comment rulemaking proceeding, which reformed federal milk marketing orders, is thus valid even though the rulemaking proceeding was not conducted in accordance with the procedures in section 8c(17) of the AMAA (7 U.S.C. § 608c(17)).

Twelfth, Petitioner contends that it has a minimal effect on Milk Marketing Order No. 30 and failure to exempt Petitioner while exempting other small handlers violates the Fourteenth Amendment to the Constitution of the United States (Petitioner's Appeal Pet. at 13; Petitioner's Response to Respondent's Response to Petitioner's Appeal Pet. at 10).

The equal protection clause of the Fourteenth Amendment to the Constitution of the United States, by its terms, is applicable to the states and is not applicable to the federal government. The United States Department of Agriculture is an executive department of the government of the United States;[18] it is not a state. Therefore, as a matter of law, the United States Department of Agriculture could not have violated the equal protection clause of the Fourteenth Amendment to the Constitution of the United States as Petitioner contends.

Nevertheless, the Fifth Amendment to the Constitution of the United States, which is applicable to the federal government, contains an equal protection

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[16](...continued)
(2d Cir. 1994) (stating official action that is legislative in nature is not subject to the notice and hearing requirements of the due process clause); *Jackson Court Condominiums v. City of New Orleans*, 874 F.2d 1070, 1074 (5th Cir. 1989) (stating once agency action is characterized as legislative, procedural due process requirements do not apply); *Yassini v. Crosland*, 618 F.2d 1356, 1363 (9th Cir. 1980) (stating where an agency action is not based on individual grounds, but is a matter of general policy, no hearing is constitutionally required); *Pickus v. United States Board of Parole*, 543 F.2d 240, 244 (D.C. Cir. 1976) (stating when not bounded by statutory procedural requirements, the Supreme Court has been consistently willing to assume that due process does not require any hearing or participation in "legislative" decisionmaking).

[17]See note 9.

[18]See note 7.

component. Moreover, equal protection claims are treated the same under the Fifth Amendment as under the Fourteenth Amendment.[19] Equal protection requires that persons similarly situated be treated alike; however, it should be noted that virtually all statutes and regulations classify for one purpose or another, but equal protection does not prohibit legislative classifications.[20] Petitioner fails to identify any handler located within the territory to which Milk Marketing Order No. 30 is applicable[21] who is situated similarly to Petitioner and is exempt from the requirements of Milk Marketing Order No. 30. Instead, Petitioner indicates that some handlers located in Missouri, a state that is not within the territory to which Milk Marketing Order No. 30 is applicable, are exempt from regulation under any federal milk marketing

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[19] See note 8.

[20] *See Romer v. Evans*, 517 U.S. 620, 631 (1996) (stating the Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons); *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (holding the equal protection clause does not forbid classifications; it simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985) (stating the equal protection clause is essentially a direction that all persons similarly situated should be treated alike); *Rinaldi v. Yeager*, 384 U.S. 305, 308-09 (1966) (stating the equal protection clause does not demand that a statute necessarily apply equally to all persons, nor does it require things which are different in fact to be treated in law as though they were the same; hence, legislation may impose special burdens on defined classes in order to achieve permissible ends); *Norvell v. State of Illinois*, 373 U.S. 420, 423 (1963) (holding exact equality is no prerequisite of equal protection of the laws within the meaning of the Fourteenth Amendment); *Tigner v. State of Texas*, 310 U.S. 141, 147 (1940) (holding the Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same); *Stebbins v. Riley*, 268 U.S. 137, 142 (1925) (holding the guaranty of the Fourteenth Amendment of equal protection of the laws is not a guaranty of equality of operation or application of state legislation upon all citizens of a state); *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) (stating the equal protection clause does not preclude states from resorting to classification for purposes of legislation); *Magoun v. Illinois Trust & Savings*, 170 U.S. 283, 294 (1898) (holding a state may distinguish, select, and classify objects of legislation without violating the equal protection clause); *Gulf, Colorado & Santa Fe Ry. v. Ellis*, 165 U.S. 150, 155 (1897) (stating it is not within the scope of the Fourteenth Amendment to withhold from the states the power of classification; yet classification cannot be made arbitrarily, it must always rest upon some difference that bears a reasonable and just relation to the act in respect to which the classification is proposed); *Hayes v. Missouri*, 120 U.S. 68, 71 (1887) (stating the equal protection clause of the Fourteenth Amendment does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate; it requires all persons subject to legislation to be treated alike under like circumstances and conditions).

[21] See 7 C.F.R. § 1030.2.

order (Petitioner's Appeal Pet. at 13; Petitioner's Response to Respondent's Response to Petitioner's Appeal Pet. at 10). Therefore, I reject Petitioner's contention that the failure to exempt Petitioner from the requirements of Milk Marketing Order No. 30 is a violation of Petitioner's right to equal protection of the laws.

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

ORDER

I.

Petitioner's Petition is dismissed.

II.

Petitioner has the right to obtain review of this Order in any district court of the United States in which Petitioner is an inhabitant or has its principal place of business. A bill in equity for the purpose of review of this Order must be filed within 20 days from the date of entry of this Order. Service of process in any such proceeding may be had upon the Secretary of Agriculture by delivering a copy of the bill of complaint to the Secretary of Agriculture. 7 U.S.C. § 608c(15)(B). The date of entry of this Order is August 16, 2001.

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ANIMAL WELFARE ACT

COURT DECISION

REGINALD DWIGHT PARR v. UNITED STATES DEPARTMENT OF AGRICULTURE; UNITED STATES OF AMERICA.
No. 00-60844.
Filed September 5, 2001.

(Cite as: 273 F.3d 1095 (5th Cir.)).

AWA – Willful – Notice.

Petitioner was given sufficient notice to comply with Animal Welfare Act (AWA). Petitioner willfully violated the AWA.

United States Court of Appeals
Fifth Circuit

Before KING, Chief Judge, and JOLLY and BENAVIDES, Circuit Judges.

PER CURIAM:[1]

Substantial evidence in the record supports the decision of the Secretary of Agriculture that petitioner Reginald Dwight Parr wilfully violated the Animal Welfare Act, as amended 7 U.S.C. §§ 2131-2159, and the regulations and standards issued thereunder, 9 C.F.R. §§ 1.1-3.142, eight times between April 9, 1997 and November 18, 1998. Further, we agree with the Secretary that such regulations and standards gave Parr sufficient notice for him to comply with the requirements of the Act. Accordingly, we DENY Parr's petition for review and AFFIRM the decision of the Secretary.

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[1]Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

ANIMAL WELFARE ACT

DEPARTMENTAL DECISIONS

In re: J. WAYNE SHAFFER, AN INDIVIDUAL; MICHAEL LEIGH STANLEY, AN INDIVIDUAL; L'IL ARK EXOTICS, A/K/A L'IL ARK PETS, AND/OR THE L'IL ARK, AN UNINCORPORATED ASSOCIATION OR GENERAL PARTNERSHIP; AND THE ENCHANTED FOREST, A SOLE PROPRIETORSHIP, UNINCORPORATED ASSOCIATION, OR GENERAL PARTNERSHIP.
AWA Docket No. 01-0027.
Decision and Order.
Filed September 26, 2001.

Failure to file answer – Default – Animal welfare – Dealer – License – Ability to pay – Presumed to know law – Constructive notice – Sanction policy – Civil penalty – Cease and desist order.

The Judicial Officer (JO) affirmed the Default Decision issued by Chief Administrative Law Judge James W. Hunt (Chief ALJ) assessing the Respondents, jointly and severally, a $20,150 civil penalty and ordering the Respondents to cease and desist from violating the Animal Welfare Act and the Regulations. The JO deemed Respondents' failure to file a timely answer to the Complaint an admission that Respondents operated as dealers, as defined by the Animal Welfare Act (7 U.S.C. § 2132(f)) and the Regulations (9 C.F.R. § 1.1) without obtaining an Animal Welfare Act license, in willful violation of 7 U.S.C. § 2134 and 9 C.F.R. § 2.1(a)(1). The JO rejected Respondents' arguments that J. Wayne Shaffer was not a dealer because he did not gain monetarily from the sale of any of the animals. The JO stated a person need not have actually profited from the sale of an animal to fall within the definition of the term "dealer" under the Animal Welfare Act and the Regulations; even if a person suffers a loss on the sale of an animal, that person could be a dealer under the Animal Welfare Act and the Regulations, as long as the sale was made for the purpose of compensation or profit. The JO also stated that Michael Leigh Stanley's purported inability to pay the civil penalty was not a basis for setting aside or reducing the civil penalty. The JO held that the advice Michael Leigh Stanley purportedly received from local government offices regarding the need for a license "to farm" animals was not relevant to the proceeding. The JO further held that Michael Leigh Stanley's purported disability and need for income do not constitute defenses to his violations of the Animal Welfare Act and the Regulations or mitigating circumstances to be considered when determining the amount of the civil penalty to be assessed for his violations of the Animal Welfare Act and the Regulations. The JO also held that Michael Leigh Stanley's purported lack of actual knowledge that he was required to obtain an Animal Welfare Act license before operating as a dealer was not a defense to Respondents' violations of the Animal Welfare Act and the Regulations. The JO stated the Animal Welfare Act is published in the United States Statutes at Large and the United States Code, and Michael Leigh Stanley is presumed to know the law. Moreover, the Regulations are published in the Federal Register; thereby constructively notifying Michael Leigh Stanley of the licensing requirements. Finally, the JO held that the assessment of a $20,150 civil penalty and the issuance of a cease and desist order comport with the United States Department of Agriculture's sanction policy.

Colleen A. Carroll, for Complainant.
Respondents, Pro se.

Initial decision issued by James W. Hunt, Chief Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a "Complaint" on March 8, 2001. Complainant instituted the proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-2.133) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges that, during 1998 and 1999, J. Wayne Shaffer, Michael Leigh Stanley, L'il Ark Exotics, and The Enchanted Forest [hereinafter Respondents] operated as dealers as defined in the Animal Welfare Act and the Regulations without being licensed, in willful violation of section 2.4 of the Animal Welfare Act (7 U.S.C. § 2.4)[1] and section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(1)(1))[2] (Compl. ¶¶ 5-55).

The Hearing Clerk served each Respondent with the Complaint, the Rules of Practice, and a service letter on March 14, 2001.[3] Respondents failed to answer the Complaint within 20 days after service, as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). On April 17, 2001, the Hearing Clerk sent a letter to Respondents informing them that their answer to the Complaint had not been

[1]Based on the record, I infer the references in the Complaint to "section 2.4" of the Animal Welfare Act and "7 U.S.C. § 2.4" are typographical errors and Complainant alleges rather that Respondents willfully violated section 4 of the Animal Welfare Act (7 U.S.C. § 2134), which requires dealers to obtain an Animal Welfare Act license from the Secretary of Agriculture.

[2]Based on the record, I infer the references in the Complaint to "9 C.F.R. § 2.1(1)(1)" are typographical errors and Complainant alleges rather that Respondents violated 9 C.F.R. § 2.1(a)(1), which requires each person operating as a dealer to have a valid Animal Welfare Act license.

[3]See United States Postal Service Domestic Return Receipts for Article Number 4579 3830, Article Number 4579 3854, Article Number 4579 3847, and Article Number 4579 3625.

received within the time required in the Rules of Practice.[4]

On May 11, 2001, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a "Motion for Adoption of Proposed Decision and Order" [hereinafter Motion for Default Decision] and a proposed "Decision and Order as to J. Wayne Shaffer, Michael Leigh Stanley, L'il Ark Exotics, and The Enchanted Forest Upon Admission of Facts by Reason of Default" [hereinafter Proposed Default Decision]. The Hearing Clerk served Michael Leigh Stanley, L'il Ark Exotics, and The Enchanted Forest with Complainant's Motion for Default Decision and Complainant's Proposed Default Decision on May 17, 2001.[5] The Hearing Clerk served J. Wayne Shaffer with Complainant's Motion for Default Decision and Complainant's Proposed Default Decision on July 17, 2001.[6] Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139) provides that objections to a proposed decision and a motion for adoption of the proposed decision must be filed within 20 days after service of the motion for the proposed decision and the proposed decision. Respondents failed to file objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision within 20 days after service of Complainant's Motion for Default Decision and Complainant's Proposed Default Decision.

On August 13, 2001, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Chief Administrative Law Judge James W. Hunt [hereinafter the Chief ALJ] issued a "Decision and Order as to J. Wayne Shaffer, Michael Leigh Stanley, L'il Ark Exotics, and The Enchanted Forest Upon Admission of Facts by Reason of Default" [hereinafter Initial Decision and Order]: (1) finding that, at all times material to this proceeding, Respondents were operating as dealers as defined in the Animal Welfare Act and the Regulations; (2) finding that, during 1998 and 1999, Respondents bought, sold, and transported animals in commerce without having obtained an Animal Welfare Act license from the Secretary of Agriculture; (3) concluding that Respondents willfully violated section 2.4 of the Animal Welfare

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[4]Letter dated April 17, 2001, from Joyce A. Dawson, Hearing Clerk, to L'il Ark Exotics, J. Wayne Shaffer, Michael Leigh Stanley, and The Enchanted Forest.

[5]See United States Postal Service Domestic Return Receipts for Article Number 4578 8652, Article Number 4578 8676, and Article Number 4578 8683.

[6]See United States Postal Service Domestic Return Receipt for Article Number 7099 3400 0014 4579 4127.

Act (7 U.S.C. § 2.4)[7] and section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1)); (4) directing Respondents to cease and desist from violating the Animal Welfare Act and the Regulations and Standards;[8] and (5) assessing Respondents, jointly and severally, a $20,150 civil penalty (Initial Decision and Order at 2-17).

On August 27, 2001, J. Wayne Shaffer appealed to the Judicial Officer. On September 4, 2001, Michael Leigh Stanley, L'il Ark Exotics, and The Enchanted Forest appealed to the Judicial Officer. On September 13, 2001, Complainant filed "Complainant's Response to Appeals of Decision and Order Filed by Respondents J. Wayne Shaffer, Michael Leigh Stanley, L'il Ark Exotics, and The Enchanted Forest" [hereinafter Complainant's Response to Appeals]. On September 14, 2001, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record and pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt, with only minor modifications, the Chief ALJ's Initial Decision and Order as the final Decision and Order. Additional conclusions by the Judicial Officer follow the Chief ALJ's Conclusions of Law, as restated.

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 54—TRANSPORTATION, SALE, AND HANDLING OF CERTAIN ANIMALS

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[7]Based on the record, I infer the references in the Initial Decision and Order to "section 2.4" of the Animal Welfare Act and "7 U.S.C. § 2.4" are typographical errors and the Chief ALJ concluded that Respondents willfully violated section 4 of the Animal Welfare Act (7 U.S.C. § 2134), which requires dealers to obtain an Animal Welfare Act license from the Secretary of Agriculture.

[8]The Chief ALJ's reference to "Standards" is a reference to the standards issued under the Animal Welfare Act (9 C.F.R. §§ 3.1-.142) [hereinafter the Standards]. Complainant did not allege that Respondents violated the Standards and the Chief ALJ did not find or conclude that Respondents violated the Standards.

§ 2131. Congressional statement of policy

The Congress finds that animals and activities which are regulated under this chapter are either in interstate or foreign commerce or substantially affect such commerce or the free flow thereof, and that regulation of animals and activities as provided in this chapter is necessary to prevent and eliminate burdens upon such commerce and to effectively regulate such commerce, in order—

(1) to insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment;

(2) to assure the humane treatment of animals during transportation in commerce; and

(3) to protect the owners of animals from the theft of their animals by preventing the sale or use of animals which have been stolen.

The Congress further finds that it is essential to regulate, as provided in this chapter, the transportation, purchase, sale, housing, care, handling, and treatment of animals by carriers or by persons or organizations engaged in using them for research or experimental purposes or for exhibition purposes or holding them for sale as pets or for any such purpose or use.

§ 2132. Definitions

When used in this chapter—

. . . .

(f) 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, except that this term does not include—

(i) a retail pet store except such store which sells any animals to a research facility, an exhibitor, or a dealer; or

(ii) any person who does not sell, or negotiate the purchase or sale of any wild animal, dog, or cat, and who derives no more than $500

gross income from the sale of other animals during any calendar year[.]

§ 2134. Valid license for dealers and exhibitors required

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 animals, 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.

§ 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. No penalty shall be assessed or cease and desist order issued unless such person is given notice and opportunity for a hearing with respect to the alleged violation, and the order of the Secretary assessing a penalty and making a cease and desist order shall be final and conclusive unless the affected person files an appeal from the Secretary's order with the appropriate United States Court of Appeals. 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.

§ 2151. Rules and regulations

The Secretary is authorized to promulgate such rules, regulations, and orders as he may deem necessary in order to effectuate the purposes of this chapter.

7 U.S.C. §§ 2131, 2132(f), 2134, 2149(b), 2151.

28 U.S.C.:

TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE

. . . .

PART VI—PARTICULAR PROCEEDINGS

. . . .

CHAPTER 163—FINES, PENALTIES AND FORFEITURES

§ 2461. Mode of recovery

. . . .

FEDERAL CIVIL PENALTIES INFLATION ADJUSTMENT

SHORT TITLE

SECTION 1. This Act may be cited as the "Federal Civil Penalties Inflation Adjustment Act of 1990"

FINDINGS AND PURPOSE

SEC. 2. (a) FINDINGS.–The Congress finds that–

(1) the power of Federal agencies to impose civil monetary penalties for violations of Federal law and regulations plays an important role in deterring violations and furthering the policy goals embodied in such laws and regulations;

(2) the impact of many civil monetary penalties has been and is

diminished due to the effect of inflation;

(3) by reducing the impact of civil monetary penalties, inflation has weakened the deterrent effect of such penalties; and

(4) the Federal Government does not maintain comprehensive, detailed accounting of the efforts of Federal agencies to assess and collect civil monetary penalties.

(b) PURPOSE–The purpose of this Act is to establish a mechanism that shall–

(1) allow for regular adjustment for inflation of civil monetary penalties;

(2) maintain the deterrent effect of civil monetary penalties and promote compliance with the law; and

(3) improve the collection by the Federal Government of civil monetary penalties.

DEFINITIONS

SEC. 3. For purposes of this Act, the term–

(1) "agency" means an Executive agency as defined under section 105 of title 5, United States Code, and includes the United States Postal Service;

(2) "civil monetary penalty" means any penalty, fine, or other sanction that–

(A)(i) is for a specific monetary amount as provided by Federal law; or

(ii) has a maximum amount provided for by Federal law; and

(B) is assessed or enforced by an agency pursuant to Federal law; and

(C) is assessed or enforced pursuant to an administrative proceeding or a civil action in the Federal courts; and

(3) "Consumer Price Index" means the Consumer Price Index for all-urban consumers published by the Department of Labor.

CIVIL MONETARY PENALTY INFLATION ADJUSTMENT REPORTS

SEC. 4. The head of each agency shall, not later than 180 days after the date of enactment of the Debt Collection Improvement Act of 1996, and at least once every 4 years thereafter–

(1) by regulation adjust each civil monetary penalty provided by law within the jurisdiction of the Federal agency, except for any penalty (including any addition to tax and additional amount) under the Internal Revenue Code of 1986, the Tariff Act of 1930, the Occupational Safety and Health Act of 1970, or the Social Security Act, by the inflation adjustment described under section 5 of this Act; and

(2) publish each such regulation in the Federal Register.

COST-OF-LIVING ADJUSTMENTS OF CIVIL MONETARY PENALTIES

SEC. 5. (a) ADJUSTMENT.–The inflation adjustment under section 4 shall be determined by increasing the maximum civil monetary penalty or the range of minimum and maximum civil monetary penalties, as applicable, for each civil monetary penalty by the cost-of-living adjustment. Any increase determined under this subsection shall be rounded to the nearest–

(1) multiple of $10 in the case of penalties less than or equal to $100;

(2) multiple of $100 in the case of penalties greater than $100 but less than or equal to $1,000;

(3) multiple of $1,000 in the case of penalties greater than $1,000 but less than or equal to $10,000;

(4) multiple of $5,000 in the case of penalties greater than $10,000 but less than or equal to $100,000;

(5) multiple of $10,000 in the case of penalties greater than $100,000 but less than or equal to $200,000; and

(6) multiple of $25,000 in the case of penalties greater than $200,000.

(b) DEFINITION.–For purposes of subsection (a), the term "cost-of-living adjustment" means the percentage (if any) for each civil monetary penalty by which–

(1) the Consumer Price Index for the month of June of the calendar year preceding the adjustment, exceeds

(2) the Consumer Price Index for the month of June of the calendar year in which the amount of such civil monetary penalty was last set or adjusted pursuant to law.

ANNUAL REPORT

SEC. 6. Any increase under this Act in a civil monetary penalty shall apply only to violations which occur after the date the increase takes effect.

LIMITATION ON INITIAL ADJUSTMENT.–The first adjustment of a civil monetary penalty . . . may not exceed 10 percent of such penalty.

28 U.S.C. § 2461 note (Supp. V 1999).

7 C.F.R.:

TITLE 7—AGRICULTURE

SUBTITLE A—OFFICE OF THE SECRETARY OF AGRICULTURE

. . . .

PART 3—DEBT MANAGEMENT

. . . .

Subpart E—Adjusted Civil Monetary Penalties

§ 3.91 Adjusted civil monetary penalties.

(a) *In general.* The Secretary will adjust the civil monetary penalties, listed in paragraph (b), to take account of inflation at least once every 4 years as required by the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. No. 101-410), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. No. 104-134).

(b) *Penalties–*. . . .

. . . .

(2) *Animal and Plant Health Inspection Service*. . . .

. . . .

(v) Civil penalty for a violation of Animal Welfare Act, codified at 7 U.S.C. 2149(b), has a maximum of $2,750[.]

7 C.F.R. § 3.91(a), (b)(2)(v).

9 C.F.R.:

TITLE 9—ANIMALS AND ANIMAL PRODUCTS

CHAPTER I—ANIMAL AND PLANT HEALTH INSPECTION SERVICE, DEPARTMENT OF AGRICULTURE

SUBCHAPTER A—ANIMAL WELFARE

PART 1—DEFINITION OF TERMS

§ 1.1 Definitions.

For the purposes of this subchapter, unless the context otherwise requires, the following terms shall have the meanings assigned to them in this section. The singular form shall also signify the plural and the masculine form shall also signify the feminine. Words undefined in the following paragraphs shall have the meaning attributed to them in general usage as reflected by definitions in a standard dictionary.

. . . .

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: Any dog or other animal whether alive or dead (including unborn animals, organs, limbs, blood, serum, or other parts) for research, teaching, testing, experimentation, exhibition, or for use as a pet; or any dog for hunting, security, or breeding purposes. This term does not include: A retail pet store, as defined in this section, unless such store sells any animals to a research facility, an exhibitor, or a dealer (wholesale); or any person who does not sell, or negotiate the purchase or sale of any wild or exotic animal, dog, or cat and who derives no more than $500 gross income from the sale of animals other than wild or exotic animals, dogs, or cats, during any calendar year.

PART 2—REGULATIONS

SUBPART A—LICENSING

§ 2.1 Requirements and application.

(a)(1) Any person operating or desiring to operate as a dealer, exhibitor,

> or operator of an auction sale, except persons who are exempted from the licensing requirements under paragraph (a)(3) of this section, must have a valid license. A person must be 18 years of age or older to obtain a license. A person seeking a license shall apply on a form which will be furnished by the APHIS, REAC Sector Supervisor in the State in which that person operates or intends to operate. The applicant shall provide the information requested on the application form, including a valid mailing address through which the licensee or applicant can be reached at all times, and a valid premises address where the animals, animal facilities, equipment, and records may be inspected for compliance. The applicant shall file the completed application form with the APHIS, REAC Sector Supervisor.

9 C.F.R. §§ 1.1, 2.1(a)(1) (1998).[9]

CHIEF ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION AND ORDER (AS RESTATED)

Respondents have 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 in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) shall be deemed, for purposes of the proceeding, an admission of the allegations in the complaint. Further, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the failure to file an answer constitutes a waiver of hearing. Accordingly, the material allegations in the Complaint are adopted 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. Respondent L'il Ark Exotics, a/k/a L'il Ark Pets and/or The L'il Ark [hereinafter L'il Ark Exotics], is an unincorporated association or general

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[9]During the period material to this proceeding, section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1) (1998)) was amended by removing the term "APHIS, REAC Sector Supervisor" both times it appears and adding in its place the term "AC Regional Director" (63 Fed. Reg. 62,925-27(Nov. 10, 1998)). This November 10, 1998, amendment of section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1) (1998)) has no bearing on the disposition of this proceeding.

partnership whose business mailing address is 13626 Narrow Passage Road, Eagle Rock, Virginia 24085. Respondents J. Wayne Shaffer and Michael Leigh Stanley are the owners, partners, or principals of L'il Ark Exotics. At all times material to this proceeding, L'il Ark Exotics operated as a dealer, as that term is defined in the Animal Welfare Act and the Regulations.

2. Respondent J. Wayne Shaffer is an individual whose mailing address is 13626 Narrow Passage Road, Eagle Rock, Virginia 24085, and is an owner of or partner in L'il Ark Exotics and an owner of or partner in The Enchanted Forest. At all times material to this proceeding, J. Wayne Shaffer operated as a dealer, as that term is defined in the Animal Welfare Act and the Regulations.

3. Respondent Michael Leigh Stanley is an individual whose mailing address is 13626 Narrow Passage Road, Eagle Rock, Virginia 24085, and is an owner of or partner in L'il Ark Exotics and an owner of or partner in The Enchanted Forest. At all times material to this proceeding, Michael Leigh Stanley operated as a dealer, as that term is defined in the Animal Welfare Act and the Regulations.

4. Respondent The Enchanted Forest is a sole proprietorship, unincorporated association, or general partnership whose business mailing address is 13626 Narrow Passage Road, Eagle Rock, Virginia 24085. J. Wayne Shaffer and Michael Leigh Stanley are the owners, partners, or principals of The Enchanted Forest. At all times material to this proceeding, The Enchanted Forest operated as a dealer, as that term is defined in the Animal Welfare Act and the Regulations.

5. On or about November 24, 1998, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley sold 10 animals (sugar gliders), in commerce, to Southern Exotics, Raleigh, North Carolina, without having obtained an Animal Welfare Act license from the Secretary of Agriculture.

6. On or about November 19, 1998, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley sold 11 animals (sugar gliders), in commerce, to Southern Exotics, Raleigh, North Carolina, without having obtained an Animal Welfare Act license from the Secretary of Agriculture.

7. On or about May 1998, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley bought 20 animals (sugar gliders), in commerce, from Pygmy Pets, Winfield, British Columbia, Canada, without having obtained an Animal Welfare Act license from the Secretary of Agriculture.

8. On or about May 9, 1998, The Enchanted Forest, J. Wayne Shaffer, and Michael Leigh Stanley bought 12 animals (6 sugar gliders and 6 prairie dogs), in commerce, from Animals Exotique, Zebulon, North Carolina, without having obtained an Animal Welfare Act license from the Secretary of Agriculture.

9. On or about January 14, 1999, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley sold three animals (two guinea pigs and one chinchilla), in

commerce, to Pet Forum, Charlottesville, Virginia, without having obtained an Animal Welfare Act license from the Secretary of Agriculture.

10. On or about February 15, 1999, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley sold eight animals (seven cavies and one chinchilla), in commerce, to Pet Forum, Charlottesville, Virginia, without having obtained an Animal Welfare Act license from the Secretary of Agriculture.

11. On or about February 27, 1999, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley sold five animals (sugar gliders), in commerce, to Pet Forum, Charlottesville, Virginia, without having obtained an Animal Welfare Act license from the Secretary of Agriculture.

12. On or about June 29, 1999, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley sold six animals (two sugar gliders and four cavies), in commerce, to Pet Forum, Charlottesville, Virginia, without having obtained an Animal Welfare Act license from the Secretary of Agriculture.

13. On or about August 2, 1999, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley sold four animals (sugar gliders), in commerce, to Pet Forum, Charlottesville, Virginia, without having obtained an Animal Welfare Act license from the Secretary of Agriculture.

14. On or about August 2, 1999, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley transported one animal (a guinea pig), in commerce, to Pet Forum, Charlottesville, Virginia, without having obtained an Animal Welfare Act license from the Secretary of Agriculture.

15. On or about September 12, 1999, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley sold 15 animals (2 sugar gliders, 1 chinchilla, and 12 rabbits), in commerce, to Pet Forum, Charlottesville, Virginia, without having obtained an Animal Welfare Act license from the Secretary of Agriculture.

16. On or about January 14, 1999, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley sold 11 animals (4 sugar gliders, 1 chinchilla, 5 guinea pigs, and 1 rabbit), in commerce, to Outrageous Pets, Inc., Charlottesville, Virginia, without having obtained an Animal Welfare Act license from the Secretary of Agriculture.

17. On or about February 6, 1999, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley sold seven animals (two sugar gliders and five guinea pigs), in commerce, to Outrageous Pets, Inc., Charlottesville, Virginia, without having obtained an Animal Welfare Act license from the Secretary of Agriculture.

18. On or about February 15, 1999, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley sold 11 animals (1 sugar glider and 10 cavies and guinea pigs), in commerce, to Outrageous Pets, Inc., Charlottesville, Virginia, without having obtained an Animal Welfare Act license from the Secretary of Agriculture.

19. On or about February 27, 1999, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley sold five animals (four guinea pigs and one rabbit), in commerce, to Outrageous Pets, Inc., Charlottesville, Virginia, without having obtained an Animal Welfare Act license from the Secretary of Agriculture.

20. On or about June 29, 1999, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley sold three animals (sugar gliders), in commerce, to Outrageous Pets, Inc., Charlottesville, Virginia, without having obtained an Animal Welfare Act license from the Secretary of Agriculture.

21. On or about August 2, 1999, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley sold four animals (sugar gliders), in commerce, to Outrageous Pets, Inc., Charlottesville, Virginia, without having obtained an Animal Welfare Act license from the Secretary of Agriculture.

22. On or about February 5, 1999, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley sold three animals (sugar gliders), in commerce, to Pet City, Roanoke, Virginia, without having obtained an Animal Welfare Act license from the Secretary of Agriculture.

23. On or about November 12, 1998, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley sold eight animals (one sugar glider and seven guinea pigs), in commerce, to Pet City, Roanoke, Virginia, without having obtained an Animal Welfare Act license from the Secretary of Agriculture.

24. On or about August 4, 1998, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley sold six animals (three sugar gliders and three guinea pigs), in commerce, to Pet City, Roanoke, Virginia, without having obtained an Animal Welfare Act license from the Secretary of Agriculture.

25. On or about September 5, 1998, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley sold three animals (sugar gliders), in commerce, to Pet City, Roanoke, Virginia, without having obtained an Animal Welfare Act license from the Secretary of Agriculture.

26. On or about September 21, 1998, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley sold six animals (one sugar glider and five guinea pigs), in commerce, to Pet City, Roanoke, Virginia, without having obtained an Animal Welfare Act license from the Secretary of Agriculture.

27. On or about 1998, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley sold five animals (rabbits), in commerce, to Petland, Inc., Roanoke, Virginia, without having obtained an Animal Welfare Act license from the Secretary of Agriculture.

28. On or about March 25, 1998, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley sold five animals (guinea pigs), in commerce, to Petland, Inc., Roanoke, Virginia, without having obtained an Animal Welfare Act license

from the Secretary of Agriculture.

29. On or about April 22, 1998, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley sold six animals (guinea pigs), in commerce, to Petland, Inc., Roanoke, Virginia, without having obtained an Animal Welfare Act license from the Secretary of Agriculture.

30. On or about May 5, 1998, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley sold 17 animals (5 guinea pigs, 2 gerbils, and 10 hamsters), in commerce, to Petland, Inc., Roanoke, Virginia, without having obtained an Animal Welfare Act license from the Secretary of Agriculture.

31. On or about May 6, 1998, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley sold 29 animals (4 guinea pigs and 25 hamsters), in commerce, to Petland, Inc., Roanoke, Virginia, without having obtained an Animal Welfare Act license from the Secretary of Agriculture.

32. On or about October 23, 1998, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley sold six animals (guinea pigs), in commerce, to Petland, Inc., Roanoke, Virginia, without having obtained an Animal Welfare Act license from the Secretary of Agriculture.

33. On or about February 4, 1999, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley sold 13 animals (guinea pigs), in commerce, to Petland, Inc., Roanoke, Virginia, without having obtained an Animal Welfare Act license from the Secretary of Agriculture.

34. On or about February 15, 1999, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley sold eight animals (cavies and guinea pigs), in commerce, to Petland, Inc., Roanoke, Virginia, without having obtained an Animal Welfare Act license from the Secretary of Agriculture.

35. On or about March 12, 1999, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley sold five animals (cavies), in commerce, to Petland, Inc., Roanoke, Virginia, without having obtained an Animal Welfare Act license from the Secretary of Agriculture.

36. On or about March 16, 1999, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley sold eight animals (cavies), in commerce, to Petland, Inc., Roanoke, Virginia, without having obtained an Animal Welfare Act license from the Secretary of Agriculture.

37. On or about April 1, 1999, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley sold 21 animals (6 cavies and 15 bunnies), in commerce, to Petland, Inc., Roanoke, Virginia, without having obtained an Animal Welfare Act license from the Secretary of Agriculture.

38. On or about April 11, 1999, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley sold 10 animals (cavies), in commerce, to Petland, Inc.,

Roanoke, Virginia, without having obtained an Animal Welfare Act license from the Secretary of Agriculture.

39. On or about May 7, 1999, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley sold 11 animals (4 cavies and 7 rabbits), in commerce, to Petland, Inc., Roanoke, Virginia, without having obtained an Animal Welfare Act license from the Secretary of Agriculture.

40. On or about May 25, 1999, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley sold 17 animals (10 cavies and 7 rabbits), in commerce, to Petland, Inc., Roanoke, Virginia, without having obtained an Animal Welfare Act license from the Secretary of Agriculture.

41. On or about June 22, 1999, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley sold 10 animals (4 cavies, 2 rabbits, 2 chinchillas, and 2 sugar gliders), in commerce, to Petland, Inc., Roanoke, Virginia, without having obtained an Animal Welfare Act license from the Secretary of Agriculture.

42. On or about August 3, 1999, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley sold eight animals (six cavies and two rabbits), in commerce, to Petland, Inc., Roanoke, Virginia, without having obtained an Animal Welfare Act license from the Secretary of Agriculture.

43. On or about August 10, 1999, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley sold one animal (a sugar glider), in commerce, to Petland, Inc., Roanoke, Virginia, without having obtained an Animal Welfare Act license from the Secretary of Agriculture.

44. On or about August 11, 1999, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley sold eight animals (three rabbits and five guinea pigs), in commerce, to Petland, Inc., Roanoke, Virginia, without having obtained an Animal Welfare Act license from the Secretary of Agriculture.

45. On or about August 17, 1999, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley sold two animals (one rabbit and one guinea pig), in commerce, to Petland, Inc., Roanoke, Virginia, without having obtained an Animal Welfare Act license from the Secretary of Agriculture.

46. On or about August 18, 1999, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley sold three animals (two rabbits and one sugar glider), in commerce, to Petland, Inc., Roanoke, Virginia, without having obtained an Animal Welfare Act license from the Secretary of Agriculture.

47. On or about September 3, 1999, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley sold 10 animals (guinea pigs), in commerce, to Petland, Inc., Roanoke, Virginia, without having obtained an Animal Welfare Act license from the Secretary of Agriculture.

48. On or about September 8, 1999, L'il Ark Exotics, J. Wayne Shaffer, and

Michael Leigh Stanley sold seven animals (guinea pigs), in commerce, to Petland, Inc., Roanoke, Virginia, without having obtained an Animal Welfare Act license from the Secretary of Agriculture.

49. On or about September 18, 1999, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley sold six animals (guinea pigs), in commerce, to Petland, Inc., Roanoke, Virginia, without having obtained an Animal Welfare Act license from the Secretary of Agriculture.

50. On or about September 20, 1999, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley sold eight animals (guinea pigs), in commerce, to Petland, Inc., Roanoke, Virginia, without having obtained an Animal Welfare Act license from the Secretary of Agriculture.

51. On or about September 24, 1999, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley sold two animals (sugar gliders), in commerce, to Petland, Inc., Roanoke, Virginia, without having obtained an Animal Welfare Act license from the Secretary of Agriculture.

52. On or about September 29, 1999, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley sold eight animals (guinea pigs), in commerce, to Petland, Inc., Roanoke, Virginia, without having obtained an Animal Welfare Act license from the Secretary of Agriculture.

53. On or about October 7, 1999, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley sold seven animals (guinea pigs), in commerce, to Petland, Inc., Roanoke, Virginia, without having obtained an Animal Welfare Act license from the Secretary of Agriculture.

54. On or about November 11, 1999, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley sold one animal (a rabbit), in commerce, to Petland, Inc., Roanoke, Virginia, without having obtained an Animal Welfare Act license from the Secretary of Agriculture.

55. On or about December 2, 1999, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley sold one animal (a sugar glider), in commerce, to Petland, Inc., Roanoke, Virginia, without having obtained an Animal Welfare Act license from the Secretary of Agriculture.

Conclusions of Law

1. In 10 instances, on or about November 24, 1998, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley willfully violated section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1)).

2. In 11 instances, on or about November 19, 1998, L'il Ark Exotics,

J. Wayne Shaffer, and Michael Leigh Stanley willfully violated section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1)).

3. In 20 instances, on or about May 1998, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley willfully violated section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1)).

4. In 12 instances, on or about May 9, 1998, The Enchanted Forest, J. Wayne Shaffer, and Michael Leigh Stanley willfully violated section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1)).

5. In 3 instances, on or about January 14, 1999, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley willfully violated section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1)).

6. In 8 instances, on or about February 15, 1999, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley willfully violated section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1)).

7. In 5 instances, on or about February 27, 1999, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley willfully violated section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1)).

8. In 6 instances, on or about June 29, 1999, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley willfully violated section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1)).

9. In 4 instances, on or about August 2, 1999, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley willfully violated section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1)).

10. In 1 instance, on or about August 2, 1999, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley willfully violated section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1)).

11. In 15 instances, on or about September 12, 1999, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley willfully violated section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1)).

12. In 11 instances, on or about January 14, 1999, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley willfully violated section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1)).

13. In 7 instances, on or about February 6, 1999, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley willfully violated section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1)).

14. In 11 instances, on or about February 15, 1999, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley willfully violated section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1)).

15. In 5 instances, on or about February 27, 1999, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley willfully violated section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1)).

16. In 3 instances, on or about June 29, 1999, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley willfully violated section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1)).

17. In 4 instances, on or about August 2, 1999, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley willfully violated section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1)).

18. In 3 instances, on or about February 5, 1999, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley willfully violated section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1)).

19. In 8 instances, on or about November 12, 1998, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley willfully violated section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1)).

20. In 6 instances, on or about August 4, 1998, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley willfully violated section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1)).

21. In 3 instances, on or about September 5, 1998, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley willfully violated section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations

(9 C.F.R. § 2.1(a)(1)).

22. In 6 instances, on or about September 21, 1998, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley willfully violated section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1)).

23. In 5 instances, in 1998, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley willfully violated section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1)).

24. In 5 instances, on or about March 25, 1998, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley willfully violated section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1)).

25. In 6 instances, on or about April 22, 1998, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley willfully violated section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1)).

26. In 17 instances, on or about May 5, 1998, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley willfully violated section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1)).

27. In 29 instances, on or about May 6, 1998, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley willfully violated section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1)).

28. In 6 instances, on or about October 23, 1998, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley willfully violated section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1)).

29. In 13 instances, on or about February 4, 1999, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley willfully violated section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1)).

30. In 8 instances, on or about February 15, 1999, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley willfully violated section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1)).

31. In 5 instances, on or about March 12, 1999, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley willfully violated section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations (9 C.F.R.

§ 2.1(a)(1)).

32. In 8 instances, on or about March 16, 1999, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley willfully violated section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1)).

33. In 21 instances, on or about April 1, 1999, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley willfully violated section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1)).

34. In 10 instances, on or about April 11, 1999, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley willfully violated section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1)).

35. In 11 instances, on or about May 7, 1999, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley willfully violated section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1)).

36. In 17 instances, on or about May 25, 1999, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley willfully violated section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1)).

37. In 10 instances, on or about June 22, 1999, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley willfully violated section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1)).

38. In 8 instances, on or about August 3, 1999, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley willfully violated section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1)).

39. In 1 instance, on or about August 10, 1999, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley willfully violated section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1)).

40. In 8 instances, on or about August 11, 1999, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley willfully violated section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1)).

41. In 2 instances, on or about August 17, 1999, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley willfully violated section 4 of the Animal

Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1)).

42. In 3 instances, on or about August 18, 1999, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley willfully violated section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1)).

43. In 10 instances, on or about September 3, 1999, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley willfully violated section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1)).

44. In 7 instances, on or about September 8, 1999, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley willfully violated section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1)).

45. In 6 instances, on or about September 18, 1999, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley willfully violated section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1)).

46. In 8 instances, on or about September 20, 1999, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley willfully violated section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1)).

47. In 2 instances, on or about September 24, 1999, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley willfully violated section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1)).

48. In 8 instances, on or about September 29, 1999, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley willfully violated section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1)).

49. In 7 instances, on or about October 7, 1999, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley willfully violated section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1)).

50. In 1 instance, on or about November 11, 1999, L'il Ark Exotics, J. Wayne Shaffer, and Michael Leigh Stanley willfully violated section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1)).

51. In 1 instance, on or about December 2, 1999, L'il Ark Exotics, J. Wayne

Shaffer, and Michael Leigh Stanley willfully violated section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1)).

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondents raise seven issues in Michael Leigh Stanley's August 17, 2001, letter [hereinafter the Stanley Appeal Petition] and J. Wayne Shaffer's August 22, 2001, letter [hereinafter the Shaffer Appeal Petition]. Before addressing the issues raised by Respondents, I note that the Shaffer Appeal Petition does not clearly indicate that it is an appeal from the Chief ALJ's Initial Decision and Order. In a contradictory description of the purpose of his August 22, 2001, letter, J. Wayne Shaffer indicates: (1) the letter is both an appeal from the Chief ALJ's Initial Decision and Order and a response to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision; and (2) the letter is solely a response to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision, as follows:

> This letter is in response to your letters dated 5/14/01 (which I received on 7/14/01, a full 2 months latter [sic], and then another on 8/14/01. I am responding to the first letter not the second[.]

Shaffer Appeal Pet.

Based on the record, I infer that J. Wayne Shaffer's reference to "your letter[] dated 5/14/01" is a reference to the Hearing Clerk's letter dated May 14, 2001, transmitting Complainant's Motion for Default Decision and Complainant's Proposed Default Decision to Respondents and J. Wayne Shaffer's reference to "your letter[] dated . . . 08/14/01" is a reference to the Hearing Clerk's letter dated August 14, 2001, transmitting the Chief ALJ's Initial Decision and Order to Respondents. The Hearing Clerk served J. Wayne Shaffer with Complainant's Motion for Default Decision and Complainant's Proposed Default Decision on July 17, 2001.[10] Therefore, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), J. Wayne Shaffer's objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision were required to be filed no later than August 6, 2001. If I were to treat J. Wayne Shaffer's letter dated August 22, 2001, as a response to Complainant's Motion for Default Decision

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[10]See note 6.

and Complainant's Proposed Default Decision, I would not consider the letter or remand the proceeding to the Chief ALJ for his consideration because the letter would be a late-filed response to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision. Therefore, to give J. Wayne Shaffer the benefit of my doubt about the purpose of his August 22, 2001, letter, I treat J. Wayne Shaffer's August 22, 2001, letter as a timely-filed appeal from the Chief ALJ's Initial Decision and Order.

I now turn to the issues raised by Respondents in the Stanley Appeal Petition and the Shaffer Appeal Petition. First, J. Wayne Shaffer denies he committed the violations of the Animal Welfare Act and the Regulations found by the Chief ALJ (Shaffer Appeal Pet.) and Michael Leigh Stanley, L'il Ark Exotics, and The Enchanted Forest deny they committed some of the violations found by the Chief ALJ (Stanley Appeal Pet. at first unnumbered page through fourth unnumbered page).

Respondents' denials come too late to be considered. Respondents are deemed, for purposes of this proceeding, to have admitted the allegations in the Complaint because Respondents failed to file an answer within 20 days after the Hearing Clerk served Respondents with the Complaint.

The Hearing Clerk served Respondents with the Complaint, the Rules of Practice, and the Hearing Clerk's March 9, 2001, service letter on March 14, 2001.[11] Sections 1.136(a), 1.136(c), 1.139, and 1.141(a) of the Rules of Practice clearly state the time within which an answer must be filed and the consequences of failing to file a timely answer, as follows:

> **§ 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.

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[11]See note 3.

§ 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.

§ 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. §§ 1.136(a), (c), .139, .141(a).

Moreover, the Complaint clearly informs Respondents of the consequences of failing to file a timely answer, as follows:

The respondents 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.

Compl. at 13.

Similarly, the Hearing Clerk informed Respondents in the March 9, 2001, service letter that a timely answer must be filed pursuant to the Rules of Practice and that failure to file a timely answer to any allegation in the Complaint would constitute an admission of that allegation, as follows:

March 9, 2001

L'il Ark Exotics a.k.a.
L'il Ark Pets and/or The L'il Ark
Mr. J. Wayne Shaffer
Mr. Michael Leigh Stanley
The Enchanted Forest
13626 Narrow Passage Road
Eagle Rock, Virginia 24085

Dear Mr. [sic] Sir/Madam:

Subject: In re: J. Wayne Shaffer, an individual; Michael Leigh Stanley, an individual; L'il Ark Exotics, also known as L'il Ark Pets, and/or The L'il Ark, an unincorporated association or general partnership; and The Enchanted Forest, a sole proprietorship, unincorporated association, or general partnership
Respondents - AWA Docket No. 01-0027

Enclosed is a copy of a Complaint, which has been filed with this office under the Animal Welfare Act, as amended.

Also enclosed is a copy of the Rules of Practice which govern the conduct of these proceedings. You should familiarize yourself with the rules in that the comments which follow are not a substitute for their exact requirements.

The rules specify that you may represent yourself personally or by an attorney of record. Unless an attorney files an appearance in your behalf, it shall be presumed that you have elected to represent yourself personally. Most importantly, you have 20 days from the receipt of this letter to file with the Hearing Clerk an original and four 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.

In the event this proceeding does go to hearing, the hearing shall be formal in nature and will be held and the case decided by an Administrative Law Judge on the basis of exhibits received in evidence and sworn testimony subject to cross-examination.

You must notify us of any future address changes. Failure to do so may result in a judgment being entered against you without your knowledge. We4 [sic] also need your present and future telephone number.

Your answer, as well as any motions or requests that you may hereafter wish to file in this proceeding should be submitted in quadruplicate to the Hearing Clerk, OALJ, Room 1081, South Building, United States Department of Agriculture, Washington, D.C. 20250-9200.

Questions you may have respecting the possible settlement of this case should be directed to the attorney whose name and telephone number appears [sic] on the last page of the complaint.

Sincerely,
/s/
Joyce A. Dawson
Hearing Clerk

On April 17, 2001, the Hearing Clerk sent a letter to Respondents informing them that their answer to the Complaint had not been received within the time required in the Rules of Practice.[12] Respondents did not respond to the Hearing Clerk's April 17, 2001, letter.

On May 11, 2001, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for Default Decision and a Proposed Default Decision based on Respondents' failure to file a timely answer. The Hearing Clerk served Michael Leigh Stanley, L'il Ark Exotics, and The Enchanted Forest with Complainant's Motion for Default Decision and Complainant's Proposed Default Decision on May 17, 2001.[13] The Hearing Clerk served J. Wayne Shaffer with Complainant's Motion for Default Decision and

[12]See note 4.

[13]See note 5.

Complainant's Proposed Default Decision on July 17, 2001.[14] Respondents failed to file objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision within 20 days after service, as provided in 7 C.F.R. § 1.139.

Although, on rare occasions, default decisions have been set aside for good cause shown or where the complainant states that the complainant does not object to setting aside the default decision,[15] generally there is no basis for setting aside a default decision that is based upon a respondent's failure to file a timely answer.[16]

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[14]See note 6.

[15]*See In re H. Schnell & Co.,* 57 Agric. Dec. 1722 (1998) (Remand Order) (setting aside the default decision, which was based upon the respondent's statements during two telephone conference calls with the administrative law judge and the complainant's counsel, because the respondent's statements did not constitute a clear admission of the material allegations in the complaint and concluding that the default decision deprived the respondent of its right to due process under the Fifth Amendment to the Constitution of the United States); *In re Arizona Livestock Auction, Inc.*, 55 Agric. Dec. 1121 (1996) (setting aside the default decision because facts alleged in the complaint and deemed admitted by failure to answer were not sufficient to find a violation of the Packers and Stockyards Act or jurisdiction over the matter by the Secretary of Agriculture); *In re Veg-Pro Distributors*, 42 Agric. Dec. 273 (1983) (Remand Order) (setting aside the default decision because service of the complaint by registered and regular mail was returned as undeliverable, and the respondent's license under the PACA had lapsed before service was attempted), *final decision*, 42 Agric. Dec. 1173 (1983); *In re Vaughn Gallop*, 40 Agric. Dec. 217 (1981) (Order Vacating Default Decision and Remanding Proceeding) (vacating the default decision and remanding the case to the administrative law judge to determine whether just cause exists for permitting late answer), *final decision*, 40 Agric. Dec. 1254 (1981); *In re J. Fleishman & Co.*, 38 Agric. Dec. 789 (1978) (Remand Order) (remanding the proceeding to the administrative law judge for the purpose of receiving evidence because the complainant had no objection to the respondent's motion for remand), *final decision*, 37 Agric. Dec. 1175 (1978); *In re Richard Cain*, 17 Agric. Dec. 985 (1958) (Order Reopening After Default) (setting aside a default decision and accepting a late-filed answer because the complainant did not object to the respondent's motion to reopen after default).

[16]*See generally In re Beth Lutz*, 60 Agric. Dec. 53 (2001) (holding the default decision was properly issued where the respondent filed her answer 23 days after she was served with the complaint and 3 days after the respondent's answer was due and holding the respondent is deemed, by her failure to file a timely answer, to have admitted the violations of the Regulations alleged in the complaint); *In re Curtis G. Foley*, 59 Agric. Dec. 581 (2000) (holding the default decision was properly issued where the respondents filed their answer 6 months and 5 days after they were served with the complaint and 5 months and 16 days after the respondents' answer was due and holding the respondents are deemed, by their failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re Nancy M. Kutz* (Decision as to Nancy M. Kutz), 58 Agric. Dec. 744 (1999) (holding the default decision was properly issued where the respondent's first filing in the proceeding was 28 days after service of the complaint on the respondent

(continued...)

[16](...continued)
and the filing did not respond to the allegations of the complaint and holding the respondent is deemed, by her failure to file a timely answer and by her failure to deny the allegations of the complaint, to have admitted the violations of the Animal Welfare Act and the Regulations alleged in the complaint); *In re Anna Mae Noell*, 58 Agric. Dec. 130 (1999) (holding the default decision was properly issued where the respondents filed an answer 49 days after service of the complaint on the respondents and holding the respondents are deemed, by their failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint), *appeal dismissed sub nom. The Chimp Farm, Inc. v. United States Dep't of Agric.*, No. 00-10608-A (11th Cir. July 20, 2000); *In re Jack D. Stowers*, 57 Agric. Dec. 944 (1998) (holding the default decision was properly issued where the respondent filed his answer 1 year and 12 days after service of the complaint on the respondent and holding the respondent is deemed, by his failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re James J. Everhart*, 56 Agric. Dec. 1400 (1997) (holding the default decision was properly issued where the respondent's first filing was more than 8 months after service of the complaint on the respondent and holding the respondent is deemed, by his failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations alleged in the complaint); *In re John Walker*, 56 Agric. Dec. 350 (1997) (holding the default decision was properly issued where the respondent's first filing was 126 days after service of the complaint on the respondent and holding the respondent is deemed, by his failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re Mary Meyers*, 56 Agric. Dec. 322 (1997) (holding the default decision was properly issued where the respondent's first filing was 117 days after the respondent's answer was due and holding the respondent is deemed, by her failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re Dora Hampton*, 56 Agric. Dec. 301 (1997) (holding the default decision was properly issued where the respondent's first filing was 135 days after the respondent's answer was due and holding the respondent is deemed, by her failure to file a timely answer, to have admitted the violations of the Regulations and Standards alleged in the complaint); *In re City of Orange*, 55 Agric. Dec. 1081 (1996) (holding the default decision was properly issued where the respondent's first filing was 70 days after the respondent's answer was due and holding the respondent is deemed, by its failure to file a timely answer, to have admitted the violations of the Regulations and Standards alleged in the complaint); *In re Ronald DeBruin*, 54 Agric. Dec. 876 (1995) (holding the default decision was properly issued where the respondent failed to file an answer and holding the respondent is deemed, by his failure to file an answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re James Joseph Hickey, Jr.*, 53 Agric. Dec. 1087 (1994) (holding the default decision was properly issued where the respondent failed to file an answer and holding the respondent is deemed, by his failure to file an answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged the complaint); *In re Ron Morrow*, 53 Agric. Dec. 144 (1994) (holding the default decision was properly issued where the respondent was given an extension of time until March 22, 1994, to file an answer, but it was not received until March 25, 1994, and holding the respondent is deemed, by his failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint), *aff'd per curiam*, 65 F.3d 168 (Table), 1995 WL 523336 (6th Cir. 1995); *In re Dean Daul*, 45 Agric. Dec. 556 (1986) (holding the default decision was properly issued where the respondent failed to file a timely
(continued...)

The Rules of Practice provide that an answer must be filed within 20 days after service of the complaint (7 C.F.R. § 1.136(a)). Respondents failed to file a timely answer. Respondents' first filing in this proceeding was August 27, 2001, 5 months and 13 days after the Hearing Clerk served Respondents with the Complaint and 4 months and 24 days after Respondents' answer was due. Respondents' failure to file a timely answer is deemed, for purposes of this proceeding, an admission of the allegations in the Complaint and constitutes a waiver of hearing (7 C.F.R. §§ 1.136(c), .139, .141(a)).

Accordingly, there are no issues of fact on which a meaningful hearing could be held in this proceeding, and the Chief ALJ properly issued the Initial Decision and Order. Application of the default provisions of the Rules of Practice does not deprive Respondents of their rights under the due process clause of the Fifth Amendment to the Constitution of the United States.[17]

Second, J. Wayne Shaffer contends he never "gained monetarily from the sale of any animals" referenced in the Complaint (Shaffer Appeal Pet.).

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[16](...continued)
answer and, in his late answer, did not deny the material allegations of the complaint and holding the respondent is deemed, by his failure to file a timely answer and by his failure to deny the allegations in the complaint in his late answer, to have admitted the violations of the Animal Welfare Act and the Regulations alleged in the complaint); *In re Ronald Jacobson*, 43 Agric. Dec. 780 (1984) (holding the default decision was properly issued where the respondents failed to file a timely answer and holding the respondents are deemed, by their failure to file a timely answer, to have admitted the violations of the Standards alleged in the complaint); *In re Willard Lambert*, 43 Agric. Dec. 46 (1984) (holding the default decision was properly issued where the respondent failed to file an answer and holding the respondent is deemed, by his failure to file an answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re Randy & Mary Berhow*, 42 Agric. Dec. 764 (1983) (holding the default decision was properly issued where the respondents failed to file an answer and holding the respondents are deemed, by their failure to file an answer, to have admitted the violations of the Standards alleged in the complaint).

[17]*See United States v. Hulings*, 484 F. Supp. 562, 567-68 (D. Kan. 1980) (concluding that a hearing was not required under the Fifth Amendment to the United States Constitution where the respondent was notified that failure to deny the allegations of the complaint would constitute an admission of those allegations under the Rules of Practice and the respondent failed to specifically deny the allegations). *See also Father & Sons Lumber and Building Supplies, Inc. v. NLRB*, 931 F.2d 1093, 1096 (6th Cir. 1991) (stating that due process generally does not entitle parties to an evidentiary hearing where the National Labor Relations Board has properly determined that a default summary judgment is appropriate due to a party's failure to file a timely response); *Kirk v. INS*, 927 F.2d 1106, 1108 (9th Cir. 1991) (rejecting the contention that the administrative law judge erred by issuing a default judgment based on a party's failure to file a timely answer).

A person who, in commerce, *for compensation or profit*, sells any animal for research, teaching, testing, experimentation, exhibition, or use as a pet is a dealer (7 U.S.C. § 2132(f); 9 C.F.R. § 1.1). Thus, a person need not have actually profited from the sale of an animal to fall within the definition of the term "dealer" under the Animal Welfare Act and the Regulations, as J. Wayne Shaffer suggests. All that is required to bring a person within the definition of the term "dealer" under the Animal Welfare Act and the Regulations is that the sale of an animal be *for compensation or profit*. Even if a person suffers a loss on the sale of an animal, that person could be a dealer under the Animal Welfare Act and the Regulations, as long as the sale was made for the purpose of compensation or profit. Therefore, even if I were to find that J. Wayne Shaffer did not actually profit from the sale of animals referenced in the Complaint, that finding would not cause me to conclude that J. Wayne Shaffer was not operating as a dealer required by section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1)) to obtain an Animal Welfare Act license.

Moreover, Complainant alleges that, at all times material to the proceeding, J. Wayne Shaffer operated as a dealer, as that term is defined in the Animal Welfare Act and the Regulations (Compl. ¶ 2). Respondents failed to file a timely answer. As previously discussed in this Decision and Order, pursuant to section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)), Respondents' failure to file a timely answer is deemed, for purposes of this proceeding, an admission of the allegations in the Complaint. Thus, J. Wayne Shaffer is deemed, for purposes of this proceeding, to have admitted that he operated as a dealer under the Animal Welfare Act and the Regulations. J. Wayne Shaffer's denial that he operated as a dealer under the Animal Welfare Act and the Regulations comes too late to be considered.

Third, Respondents contend that Michael Leigh Stanley is not able to pay the $20,150 civil penalty assessed by the Chief ALJ (Shaffer Appeal Pet.; Stanley Appeal Pet. at fourth unnumbered page).

Section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) sets forth factors that must be considered when determining the amount of the civil penalty to be assessed against a respondent for violations of the Animal Welfare Act and the Regulations, and a respondent's ability to pay the civil penalty is not one of those factors. Therefore, Michael Leigh Stanley's inability to pay the $20,150 civil penalty assessed by the Chief ALJ is not a basis for setting aside or reducing the

$20,150 civil penalty.[18]

Fourth, Michael Leigh Stanley, L'il Ark Exotics, and The Enchanted Forest contend Michael Leigh Stanley consulted "all local Government offices in Fincastle, Va. and was assured by the commissioner that no licenses were needed to farm these type of animals" (Stanley Appeal Pet. at first unnumbered page).

Complainant does not allege and the Chief ALJ did not find that Respondents failed to obtain a license for farming. Instead, Complainant alleged, and the Chief ALJ found, that J. Wayne Shaffer, Michael Leigh Stanley, and L'il Ark Exotics, operating as dealers under the Animal Welfare Act and the Regulations, bought, sold, and transported animals, in commerce, without having obtained an Animal Welfare Act license and that The Enchanted Forest, operating as a dealer under the Animal Welfare Act and the Regulations, bought animals, in commerce, without

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[18]The Judicial Officer did give consideration to ability to pay when determining the amount of the civil penalty to assess under the Animal Welfare Act in *In re Gus White, III*, 49 Agric. Dec. 123, 152 (1990). The Judicial Officer subsequently held that consideration of ability to pay in *In re Gus White, III*, was inadvertent error and that ability to pay would not be considered in determining the amount of civil penalties assessed under the Animal Welfare Act in the future. *See In re Nancy M. Kutz* (Decision and Order as to Nancy M. Kutz), 58 Agric. Dec. 744, 757 (1999) (stating section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) sets forth factors that must be considered when determining the amount of the civil penalty to be assessed against a respondent for violations of the Animal Welfare Act and the Regulations and Standards, and a respondent's ability to pay the civil penalty is not one of those factors); *In re James E. Stephens*, 58 Agric. Dec. 149, 199 (1999) (stating the respondents' financial state is not relevant to the amount of the civil penalty assessed against the respondents for violations of the Animal Welfare Act and the Regulations and Standards); *In re Judie Hansen*, 57 Agric. Dec. 1072, 1143 (1998) (stating a respondent's ability to pay a civil penalty is not considered in determining the amount of the civil penalty to be assessed), *appeal dismissed*, 221 F.3d 1342 (Table), 2000 WL 1010575 (8th Cir. 2000) (per curiam); *In re David M. Zimmerman*, 57 Agric. Dec. 1038, 1050 n.1 (1998) (stating the Judicial Officer has pointed out that when determining the amount of a civil penalty to be assessed under the Animal Welfare Act, consideration need not be given to a respondent's ability to pay the civil penalty); *In re James J. Everhart*, 56 Agric. Dec. 1401, 1416 (1997) (stating a respondent's inability to pay the civil penalty is not a consideration in determining civil penalties assessed under the Animal Welfare Act); *In re Mr. & Mrs. Stan Kopunec*, 52 Agric. Dec. 1016, 1023 (1993) (stating the ability to pay a civil penalty is not a relevant consideration in Animal Welfare Act cases); *In re Micheal McCall*, 52 Agric. Dec. 986, 1008 (1993) (stating the ability or inability to pay is not a criterion in Animal Welfare Act cases); *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1071 (1992) (stating the Judicial Officer once gave consideration to the ability of respondents to pay a civil penalty, but that the Judicial Officer has removed the ability to pay as a criterion, since the Animal Welfare Act does not require it), *aff'd*, 61 F.3d 907, 1995 WL 309637 (7th Cir. 1995) (not to be cited per 7th Circuit Rule 53(b)(2)); *In re Jerome A. Johnson*, 51 Agric. Dec. 209, 216 (1992) (stating the holding in *In re Gus White, III*, 49 Agric. Dec. 123 (1990), as to consideration of ability to pay, was an inadvertent error; ability to pay is not a factor specified in the Animal Welfare Act and it will not be considered in determining future civil penalties under the Animal Welfare Act).

having obtained an Animal Welfare Act license. I find the advice that Michael Leigh Stanley received from "local Government offices in Fincastle, Va." regarding the need for a license "to farm . . . animals" irrelevant to this proceeding.

Fifth, Michael Leigh Stanley, L'il Ark Exotics, and The Enchanted Forest contend Michael Leigh Stanley is handicapped and needs income to support himself (Stanley Appeal Pet. at first and fourth unnumbered page).

Even if I were to find that Michael Leigh Stanley is disabled and needs income to support himself, Michael Leigh Stanley's disability and need for income would not constitute defenses to his violations of the Animal Welfare Act and the Regulations or mitigating circumstances to be considered when determining the amount of the civil penalty to be assessed for his violations of the Animal Welfare Act and the Regulations. There is no provision in the Animal Welfare Act or in the Regulations exempting disabled persons or persons who need income to support themselves from compliance with the Animal Welfare Act and the Regulations.[19]

Sixth, Michael Leigh Stanley, L'il Ark Exotics, and The Enchanted Forest contend The Enchanted Forest was owned solely by Lillian E. Stanley; The Enchanted Forest was not located in the Eagle Rock, Virginia, area; The Enchanted Forest was closed in December 1995; and J. Wayne Shaffer had nothing to do with The Enchanted Forest (Stanley Appeal Pet. at first unnumbered page).

Complainant alleges that: (1) the business mailing address of The Enchanted Forest is 13626 Narrow Passage Road, Eagle Rock, Virginia 24085; (2) J. Wayne Shaffer is one of the owners, partners, or principals of The Enchanted Forest; (3) at all times mentioned in the Complaint (1998 and 1999), The Enchanted Forest was operating as a dealer, as that term is defined in the Animal Welfare Act and the Regulations; and (4) on or about May 9, 1998, The Enchanted Forest bought 12 animals (6 sugar gliders and 6 prairie dogs), in commerce, from Animals Exotique, Zebulon, North Carolina, without having obtained an Animal Welfare Act license from the Secretary of Agriculture (Compl. ¶¶ 4, 8). Respondents failed to file a timely answer. As previously discussed in this Decision and Order, pursuant to section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)), Respondents' failure to file a timely answer is deemed, for purposes of this proceeding, an admission of the allegations in the Complaint. Thus, Michael Leigh Stanley, L'il Ark Exotics, and The Enchanted Forest are deemed, for purposes of this proceeding, to have

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[19]See *In re James J. Everhart*, 56 Agric. Dec. 1400, 1417 (1997) (stating the respondent's disability is not a mitigating factor and forms no basis for setting aside or modifying the Default Decision in which the respondent was found to have violated the Animal Welfare Act and the Regulations).

admitted the allegations in paragraphs 4 and 8 of the Complaint. Michael Leigh Stanley's, L'il Ark Exotics', and The Enchanted Forest's denial of these allegations come too late to be considered.

Seventh, Michael Leigh Stanley, L'il Ark Exotics, and The Enchanted Forest concede they bought and sold some animals without an Animal Welfare Act license, but state they did so before the United States Department of Agriculture informed Michael Leigh Stanley that an Animal Welfare Act license was required (Stanley Appeal Pet. at first through fourth unnumbered page).

The Animal Welfare Act is published in the United States Statutes at Large and the United States Code, and Michael Leigh Stanley is presumed to know the law.[20] Moreover, the Regulations are published in the Federal Register; thereby constructively notifying Michael Leigh Stanley of the licensing requirements.[21] Therefore, Michael Leigh Stanley's purported lack of actual knowledge of the Animal Welfare Act and the Regulations is not a defense to Respondents' violations of section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1)).

Section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) provides that four factors must be considered when determining the civil penalty to be assessed for violations of the Animal Welfare Act and the Regulations and Standards: (1) the size of the business of the person involved; (2) the gravity of the violations; (3) the person's good faith; and (4) the history of previous violations.

Based on the number of animals Respondents bought, sold, and transported in 1998 and 1999, I find that Respondents have a large business. I also find that the failure to obtain an Animal Welfare Act license before operating as a dealer is a serious violation because enforcement of the Animal Welfare Act and the Regulations and Standards depends upon the identification of persons operating as dealers as defined by the Animal Welfare Act and the Regulations. During a 2-year

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[20] *See Atkins v. Parker*, 472 U.S. 115, 130 (1985); *North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 283 (1925); *Johnston v. Iowa Dep't of Human Services*, 932 F.2d 1247, 1249-50 (8th Cir. 1991).

[21] *See FCIC v. Merrill*, 332 U.S. 380, 385 (1947); *United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 71 (2d Cir. 1994); *United States v. Wilhoit*, 920 F.2d 9, 10 (9th Cir. 1990); *Jordan v. Director, Office of Workers' Comp. Programs*, 892 F.2d 482, 487 (6th Cir. 1989); *Kentucky ex rel. Cabinet for Human Resources v. Brock*, 845 F.2d 117, 122 n.4 (6th Cir. 1988); *Government of Guam v. United States*, 744 F.2d 699, 701 (9th Cir. 1984); *Bennett v. Director, Office of Workers' Comp. Programs*, 717 F.2d 1167, 1169 (7th Cir. 1983); *Diamond Ring Ranch, Inc. v. Morton*, 531 F.2d 1397, 1405 (10th Cir. 1976); *Wolfson v. United States*, 492 F.2d 1386, 1392 (Ct. Cl. 1974) (per curiam); *United States v. Tijerina*, 407 F.2d 349, 354 n.12 (10th Cir.), *cert. denied*, 396 U.S. 867, and *cert. denied*, 396 U.S. 843 (1969); *Ferry v. Udall*, 336 F.2d 706, 710 (9th Cir. 1964), *cert. denied*, 381 U.S. 904 (1965).

period, Respondents operated as dealers, as defined by the Animal Welfare Act and the Regulations, without obtaining the required Animal Welfare Act license. Respondents' failure to obtain the required Animal Welfare Act license thwarted the Secretary of Agriculture's ability to carry out the purposes of the Animal Welfare Act. Respondents' conduct during this 2-year period reveals a consistent disregard for, and unwillingness to abide by, the requirements of the Animal Welfare Act and the Regulations. Thus, I conclude Respondents lacked good faith. Finally, an ongoing pattern of violations establishes a "history of previous violations" for the purposes of section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)). The record establishes that Respondents committed 1,215 violations of the Animal Welfare Act and the Regulations over a 2-year period.

The United States Department of Agriculture'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 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.

The recommendations of administrative officials charged with the responsibility for achieving the congressional purpose of the regulatory statute are highly relevant to any sanction to be imposed and are entitled to great weight in view of the experience gained by administrative officials during their day-to-day supervision of the regulated industry. *In re S.S. Farms Linn County, Inc.*, 50 Agric. Dec. at 497.

Complainant, one of the officials charged with administering the Animal Welfare Act, requests that Respondents be ordered to cease and desist from violating the Animal Welfare Act and the Regulations and Standards and that Respondents be assessed a $20,150 civil penalty (Complainant's Proposed Decision and Order at 17; Complainant's Response to Appeals at 5-6).

Each animal which Respondents bought, sold, and transported without the required Animal Welfare Act license constitutes a separate violation of the Animal Welfare Act and the Regulations. Respondents committed 1,215 willful violations of the Animal Welfare Act and the Regulations. Specifically, J. Wayne Shaffer bought, transported, or sold 405 animals without an Animal Welfare Act license, in willful violation of section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and

section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1)); Michael Leigh Stanley bought, transported, or sold 405 animals without an Animal Welfare Act license, in willful violation of section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1)); L'il Ark Exotics bought, transported, or sold 405 animals without an Animal Welfare Act license, in willful violation of section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1)); and The Enchanted Forest bought 12 animals without an Animal Welfare Act license, in willful violation of section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1)). Respondents could be assessed a maximum $2,750 civil penalty for each of Respondents' 1,215 violations of the Animal Welfare Act and the Regulations.[22] Thus, Respondents could be assessed a maximum civil penalty of $3,341,250 for Respondents' 1,215 violations of the Animal Welfare Act and the Regulations. Complainant recommends and the Chief ALJ assessed Respondents a civil penalty of approximately $16.58 for each of Respondents' 1,215 violations. After examining all the relevant circumstances, in light of the United States Department of Agriculture's sanction policy, and taking into account the factors required to be considered in 7 U.S.C. § 2149(b), the remedial purposes of the Animal Welfare Act, and Complainant's sanction recommendation, I conclude that a cease and desist order[23] and a $20,150 civil penalty are appropriate and necessary to ensure Respondents' compliance with the Animal Welfare Act and the Regulations in the future, to deter others from violating the Animal Welfare Act and the Regulations, and to thereby fulfill the remedial purposes of the Animal Welfare Act.

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[22]Section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) provides that the Secretary of Agriculture may assess a civil penalty of not more than $2,500 for each violation of the Animal Welfare Act and the Regulations and Standards. The Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note (Supp. V 1999)) provides that the head of each agency shall, by regulation, adjust each civil monetary penalty provided by law within the jurisdiction of the Federal agency by increasing the maximum civil penalty for each civil monetary penalty by a cost-of-living adjustment. Effective September 2, 1997, the Secretary of Agriculture, by regulation, adjusted the civil monetary penalty that may be assessed under section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) for each violation of the Animal Welfare Act and the Regulations and Standards by increasing the maximum civil penalty from $2,500 to $2,750 (7 C.F.R. § 3.91(b)(2)(v)).

[23]The Chief ALJ ordered Respondents to cease and desist from violating the Animal Welfare Act and the Regulations and Standards (Initial Decision and Order at 17). As Respondents have been found to have violated the Animal Welfare Act and the Regulations, but not the Standards, I order Respondents to cease and desist from violating the Animal Welfare Act and the Regulations.

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

ORDER

1. Respondents, their agents, employees, successors, and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations. The cease and desist provisions of this Order shall become effective on the day after service of this Order on Respondents.

2. Respondents are jointly and severally assessed a $20,150 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the Treasurer of the United States and sent to:

Colleen A. Carroll
United States Department of Agriculture
Office of the General Counsel
Marketing Division
1400 Independence Avenue, SW
Room 2343-South Building
Washington, DC 20250-1417

Respondents' payment of the $20,150 civil penalty shall be sent to, and received by, Colleen A. Carroll within 60 days after service of this Order on Respondents. Respondents shall state on the certified check or money order that payment is in reference to AWA Docket No. 01-0027.

3. Respondents have the right to seek judicial review of this Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341, 2343-2350. Such court has exclusive jurisdiction to enjoin, to set aside, to suspend (in whole or in part), or to determine the validity of this Order. Respondents must seek judicial review within 60 days after entry of this Order. 7 U.S.C. § 2149(c). The date of entry of this Order is September 26, 2001.

In re: MIKE GOCHNAUER.
AWA Docket No. 01-0008.
Decision and Order.
Filed July 30, 2001.
Amended Order filed September 10, 2001.

AWA - APHIS - General denial - Preponderance of evidence - Veterinary care - Veterinary care, program of - Identification of animals - Housekeeping - Floor space, minimum - Exposure to elements - Emergency care - Harassment, threats - Employees, adequate - Suspension - Penalty.

Respondent held a class "A" license from APHIS for breeding and sale of dogs in La Plata, Missouri. Respondent was cited for 30 separate violations of the Animal Welfare Act (Act). (7 U.S.C. § 2130 *et seq*). Inspections were performed by APHIS inspectors on seven occasions: May 7, 1998; June 18, 1998; September 8, 1998; July 27, 1999; November 9, 1999; June 22, 2000; and August 15, 2000. A Complaint was filed by APHIS on November 4, 2000. There was adverse publicity in local newspaper concerning Respondent. There were alleged threatening phone calls to APHIS officials from persons said to be "associated" with Respondent. There were alleged incidences of emotional unpredictability of Respondent. Respondent appeared at the hearing and generally denied the elements of the Complaint, but did not present direct evidence negating the allegations of the Complaint. The Complainant has the burden of proof and the burden of going forward to make a prima facie case. The Administrative Law Judge (ALJ), found that the Respondent was in violation of the regulations and standards of the Act, to wit; (a) failure to maintain structurally sound enclosures/facilities in good repair; (b) failure to keep the premises free of trash, etc. to protect the animals from injury and to facilitate the required husbandry practices; (c) failure to keep food receptacles clean and sanitized: (d) failure to keep the premises free from storage of non-cleaning materials in kennel area; (e) failure to maintain proper waste and water disposal; (f) failure to provide the animals with proper protection from the elements; (h) failure to provide proper construction with impervious materials; (i) failure to maintain enclosures without injurious projections; (j) failure to provide sufficient living space for the animals; (k) failure to provide proper (kennel area) sanitation; (l) failure to make the facility available for inspection by APHIS inspectors during normal business hours; (m) failure to maintain programs to prevent disease; (n) failure to provide program of disease control and prevention under supervision of a veterinarian; and (o) failure to maintain proper identification of animals. The ALJ found that Respondent did not violate the regulations regarding: failure to provide veterinary care to his animals; did not harass or threaten any APHIS inspectors. The ALJ determined that Respondent's license should be suspended for a period of 12 months and pay a fine of $5,000.

Colleen A. Carroll, for Complainant.
Sheila Gochnauer, for Respondent.
Decision and Order and Amended Order issued by James W. Hunt, Administrative Law Judge.

This disciplinary proceeding was instituted by a complaint filed on October 24, 2000, by the Administrator, Animal and Plant Health Inspection Service ("APHIS"), United States Department of Agriculture. The complaint was amended on December 1, 2000 (references hereafter to the "complaint" include the amendment). The complaint alleges that Respondent was a licensed dealer under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*) ("Act") and that he violated the Act and the regulations and standards promulgated pursuant to the Act (9 C.F.R. § 1.1 *et seq.*).

A hearing was held in La Plata, Missouri, on January 17, 2001. Complainant was represented by Colleen Carroll, Esq. Respondent was represented by his

daughter-in-law, Sheila Gochnauer.[1]

Law

The complaint alleges that Respondent violated the following regulations and standards (9 C.F.R. § 2.100(a)):

§ 2.40 Attending veterinarian and adequate veterinary care (dealers and exhibitors).

(a) Each dealer or exhibitor shall have an attending veterinarian who shall provide adequate veterinary care to its animals in compliance with this section.

(1) Each dealer and exhibitor shall employ an attending veterinarian under formal arrangements. In the case of a part-time attending veterinarian or consultant arrangements, the formal arrangements shall include a written program of veterinary care and regularly scheduled visits to the premises of the dealer or exhibitor; and

(2) Each dealer and exhibitor shall assure that the attending veterinarian has appropriate authority to ensure the provision of adequate veterinary care and to oversee the adequacy of other aspects of animal care and use.

§ 2.50 Time and method of identification.

(a) A class "A" dealer (breeder) shall identify all live dogs and cats on the premises as follows:

(1) All live dogs and cats held on the premises, purchased, or otherwise acquired, sold or otherwise disposed of, or removed from the premises for delivery to a research facility or exhibitor or to another dealer, or for sale, through an auction sale or to any person for use as a pet, shall be identified by an official tag of the type described in § 2.51 affixed to the animal's neck by means of a collar made of material generally considered acceptable to pet owners as a means of identifying their pet dogs or cats, or shall be identified by a distinctive and legible tattoo marking acceptable to and approved by the Administrator.

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[1] The Rules of Practice permit a party to appear in person or by an "attorney of record." (7 C.F.R. §1.141(c)). Although Ms. Gochnauer is not a lawyer, she was permitted to represent her father-in-law as an attorney, since an "attorney," in the broad sense, is "one who is designated to transact business for another." *Black's Law Dictionary*, 1999 edition.

§ 2.126 Access and inspection of records and property.

(a) Each dealer, exhibitor, intermediate handler, or carrier, shall, during business hours, allow APHIS officials:

(1) To enter its place of business;

(2) To examine records required to be kept by the Act and the regulations in this part;

(3) To make copies of the records;

(4) To inspect and photograph the facilities, property and animals, as the APHIS officials consider necessary to enforce the provisions of the Act, the regulations and standards in this subchapter; and

(5) To document, by the taking of photographs and other means, conditions and areas of noncompliance.

Subpart A - Specifications for the Humane Handling, Care, Treatment and Transportation of Dogs and Cats

FACILITIES AND OPERATING STANDARDS

§ 3.1 Housing facilities, general.

(a) *Structure*; construction. Housing facilities for dogs and cats must be designed and constructed so that they are structurally sound. They must be kept in good repair, and they must protect the animals from injury, contain the animals securely, and restrict other animals from entering.

(b) *Condition and site*. Housing facilities and areas used for storing animal food or bedding must be free of any accumulation of trash, waste material, junk, weeds, and other discarded materials. Animal areas inside of housing facilities must be kept neat and free of clutter, including equipment, furniture, and stored material, but may contain materials actually used and necessary for cleaning the area, and fixtures or equipment necessary for proper husbandry practices and research needs. Housing facilities other than those maintained by research facilities and Federal research facilities must be physically separated from any other business. If a housing facility is located on the same premises as another business, it must be physically separated from the other business so that animals the size of dogs, skunks, and raccoons are prevented from entering it.

(c) *Surfaces - (1) General requirements*. The surfaces of housing facilities - including houses, dens, and other furniture-type fixtures and objects within the facility - must be constructed in a manner and made of materials that allow them

to be readily cleaned and sanitized, or removed or replaced when worn or soiled. Interior surfaces and any surfaces that come in contact with dogs or cats must:

(i) Be free of excessive rust that prevents the required cleaning and sanitization, or that affects the structural strength of the surface; and

(ii) Be free of jagged edges or sharp points that might injure the animals.

. . . .

(f) *Drainage and waste disposal.* Housing facility operators must provide for 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. Housing facilities must be equipped with disposal facilities and drainage systems that are constructed and operated so that animal waste and water are rapidly eliminated and animals stay dry. Disposal and drainage systems must minimize vermin and pest infestation, insects, odors, and disease hazards. All drains must be properly constructed, installed, and maintained. If closed drainage systems are used, they must be equipped with traps and prevent the backflow of gases and the backup of sewage onto the floor. If the facility uses sump or settlement ponds, or other similar systems for drainage and animal waste disposal, the system must be located far enough away from the animal area of the housing facility to prevent odors, diseases, pests, and vermin infestation. Standing puddles of water in animal enclosures must be drained or mopped up so that the animals stay dry. Trash containers in housing facilities and in food storage and food preparation areas must be leakproof and must have tightly fitted lids on them at all times. Dead animals, animal parts, and animal waste must not be kept in food storage or food preparation areas, food freezers, food refrigerators, or animal areas.

§ 3.4 Outdoor housing facilities.

. . . .

(b) *Shelter from the elements.* Outdoor facilities for dogs or cats must include one or more shelter structures that are accessible to each animal in each outdoor facility, and that are large enough to allow each animal in the shelter structure to sit, stand, and lie in a normal manner, and to turn about freely. In addition to the shelter structures, one or more separate outside areas of shade must be provided, large enough to contain all the animals at one time and protect them

from the direct rays of the sun. Shelters in outdoor facilities for dogs and cats must contain a roof, four sides, and a floor, and must:

(1) Provide the dogs and cats with adequate protection and shelter from the cold and heat;

(2) Provide the dogs and cats with protection from the direct rays of the sun and the direct effect of wind, rain, or snow;

(3) Be provided with a wind break and rain break at the entrance; and

(4) Contain clean, dry, bedding material if the ambient temperature is below 50°F (10°C). Additional clean, dry bedding is required when the temperature is 35°F (1.7°C) or lower.

(c) *Construction.* Building surfaces in contact with animals in outdoor housing facilities must be impervious to moisture. Metal barrels, cars, refrigerators or freezers, and the like must not be used as shelter structures. The floors of outdoor housing facilities may be of compacted earth, absorbent bedding, sand, gravel, or grass, and must be replaced if there are any prevalent odors, diseases, insects, pests, or vermin. All surfaces must be maintained on a regular basis. Surfaces of outdoor housing facilities - including houses, dens, etc. - that cannot be readily cleaned and sanitized, must be replaced when worn or soiled.

§ 3.6 Primary enclosures.

Primary enclosures for dogs and cats must meet the following minimum requirements:

(a) *General requirements.*

(1) Primary enclosures must be designed and constructed of suitable materials so that they are structurally sound. The primary enclosures must be kept in good repair.

(2) Primary enclosures must be constructed and maintained so that they:

(i) Have no sharp points or edges that could injure the dogs and cats;

(ii) Protect the dogs and cats from injury;

(iii) Contain the dogs and cats securely;

. . . .

(x) Have floors that are constructed in a manner that protects the dogs' and cats' feet and legs from injury, and that, if of mesh or slatted construction, do not allow the dogs' and cats' feet to pass through any openings in the floor.

. . . .

(xii) Primary enclosures constructed on or after February 20, 1998, and floors replaced on or after that date, must comply with the requirements in this paragraph (a)(2). On or after January 21, 2000, all primary enclosures must be in compliance with the requirements in this paragraph (a)(2). If the suspended floor of a primary enclosure is constructed of metal strands, the strands must either be greater than of an inch in diameter (9 gauge) or coated with a material such as plastic or fiberglass. The suspended floor of any primary enclosure must be strong enough so that the floor does not sag or bend between the structural supports.

. . . .

(c) *Additional requirements for dogs*-

(1) *Space*. (i) Each dog housed in a primary enclosure (including weaned puppies) must be provided a minimum amount of floor space, calculated as follows: Find the mathematical square of the sum of the length of the dog in inches (measured from the tip of its nose to the base of its tail) plus 6 inches; then divide the product by 144. The calculation is: (length of dog in inches + 6") x (length of dog in inches + 6") = required floor space in square inches. Required floor space in inches/144 = required floor space in square feet.

. . . .

§ 3.9 Feeding.

. . . .

(b) Food receptacles must be used for dogs and cats, must be readily accessible to all dogs and cats, and must be located so as to minimize contamination by excreta and pests, and be protected from rain and snow. Feeding pans must either be made of a durable material that can be easily cleaned and sanitized or be disposable. If the food receptacles are not disposable, they must be kept clean and must be sanitized in accordance with § 3.11(b)(3) of this subpart. If the food receptacles are disposable, they must be discarded after one use. Self-feeders may be used for the feeding of dry food. If self-feeders are used, they must be kept clean and must be sanitized in accordance with § 3.11(b) of this subpart. Measures must be taken that there is

no molding, deterioration, and caking of feed.

§ 3.11 Cleaning, sanitization, house-keeping, and pest control.

(a) *Cleaning of primary enclosures.* Excreta and food waste must be removed from primary enclosures daily, and from under primary enclosures as often as necessary to prevent an excessive accumulation of feces and food waste, to prevent soiling of the dogs or cats contained in the primary enclosures, and to reduce disease hazards, insects, pests and odors. When steam or water is used to clean the primary enclosure, whether by hosing, flushing, or other methods, dogs and cats must be removed, unless the enclosure is large enough to ensure the animals would not be harmed, upset, or distressed in the process. Standing water must be removed from the primary enclosure and animals in other primary enclosures must be protected from being contaminated with water and other wastes during the cleaning. The pans under primary enclosures with grill-type floors and the ground areas under raised runs with mesh or slatted floors must be cleaned as often as necessary to prevent accumulation of feces and food waste and to reduce disease hazards pests, insects and odors.

. . . .

(2) Used primary enclosures and food and water receptacles for dogs and cats must be sanitized at least once every 2 weeks using one of the methods prescribed in paragraph (b)(3) of this section, and more often if necessary to prevent an accumulation of dirt, debris, food waste, excreta, and other disease hazards.

. . . .

(c) *Housekeeping for premises*. Premises where housing facilities are located, including buildings and surrounding grounds, must be kept clean and in good repair to protect the animals from injury, to facilitate the husbandry practices required in this subpart, and to reduce or eliminate breeding and living areas for rodents and other pests and vermin. Premises must be kept free of accumulations of trash, junk, waste products, and discarded matter. Weeds, grasses, and bushes must be controlled so as to facilitate cleaning of the premises and pest control, and to protect the health and well-being of the animals.

. . . .

§ 3.12 Employees.

Each person subject to the Animal Welfare regulations (9 CFR parts 1, 2, and 3) maintaining dogs and cats must have enough employees to carry out the level of husbandry practices and care required in this subpart. The employees who provide for husbandry and care, or handle animals, must be supervised by an individual who has the knowledge, background, and experience in proper husbandry and care of dogs and cats to supervise others. The employer must be certain that the supervisor and other employees can perform to these standards.

Facts

Respondent, Mike Gochnauer, a dog breeder for sixteen years, has held a class "A" license from APHIS since 1993 to breed and sell dogs. He was licensed before that by the State of Missouri. He testified that he was raised on a farm and has "always had dogs." (Tr. 277.) He lives alone near the breeding facility at 33295 Mesquite Street, La Plata, Missouri 63549. The dogs are kept in cages in a trailer and in hutches. The number of animals at the kennel have ranged from 94 adult dogs and 43 pups in June 1999 to 111 adults and 98 pups in June 2000. He has less animals now.

The record in this case begins with a report of an APHIS inspection on May 7, 1998. (CX 2.) The report indicates that Respondent had been inspected on prior occasions but the reports for those inspections were not made a part of the record. The APHIS inspector, Harold Becker, wrote on the inspection report that he identified the following items as not in compliance with the standards:

> The 1st red hutch housing mixed breed dogs has a dog box in pen that is in need of repair. Top board has been chewed in half. Correct by 8 May 98 . . . Red hutch cage facing west housing beagles has hole in floor of dog box. This needs to be repaired or replaced. Correct by 5 May 98.
>
> . . . .
>
> The area in and around kennel has an excessive amount of wash where manure is washed from under cages into the walking area due to excessive rain. This is creating a very strong odor in the area. Some type of system needs to be set up to eliminate this problem. Correct by: 30 Jun 98.
>
> . . . .

> On back side of trailer under the cages there is a large pool of standing liquid manure and urine which is there due to excessive moisture in this area this winter. Some type of system needs to be set up to drain this sewage away.
>
> . . . .
>
> Hutch type cage facing west is housing 4 beagles, does not allow each animal proper space to lay in a comfortable position. Also pen close to lagoon is housing 8 mixed breed half grown pups this pen is too small for the amount of animals in pen. Correct by: 8 May 98

Becker also stated in his report that broken wire in one pen that had been identified in a previous inspection had not been repaired. However, he also said that five non-compliant items that had been identified at a previous inspection had been corrected. This included replacing fiberglass walls and an entry door, removing animals from pens with inadequate space, improvement in animals with skin problems, and cleaning of cages.

The complaint alleges that the non-compliant items identified by Becker constitute violations of Sections 3.1(a) and (f), 3.6(c)(1), and 3.6(a)(2)(i)(ii) of the standards. Respondent denied generally in his answer to the complaint that he violated the standards but did not present evidence at the hearing specifically denying the non-compliant items identified by Becker. Nevertheless, Complainant has the burden of proving violations by a preponderance of the evidence. Becker's identification of the repairs needed to the hutch, the need for adequate drainage for water and sewage, and the failure to repair broken wire establish violations of Sections 3.1(a) and (f) and 3.6(a)(2)(i)(ii) of the standards. However, Becker did not provide any of the measurements, which are specified in the standards, to support his estimate that the animals lacked adequate space. Complainant therefore did not prove a violation of section 3.6(c)(1).

Becker conducted another inspection on June 18, 1998. (CX 3.) He found that Respondent had repaired the hutches, fixed the broken wire, and provided the animals with more space. However, he found no improvement in the drainage:

> Area in and around kennel has an excessive amount of wash where manure is washed from under cages into the walking due to excessive amount of rain. This is creating a very strong odor in and around kennel area. Correct by: 30 Jun 98
> On back side of trailer under cages large pool of standing liquid manure and

urine which is there due to excessive moisture this winter and summer, some type of system needs to be set up to give proper drainage. Correct by: 30 Jun 98.

The complaint alleges, and I find, that this continuing drainage problem was a violation of section 3.1(f) of the standards.

At Becker's next inspection, and apparently his last, on September 8, 1998, he stated in the report that the drainage problem had been corrected by a trench being "placed around the trailer to prevent water from standing." However, he also found that Respondent had failed to keep the facility clean by storing wood, cleaning materials, and an old picture on top of the cages. (CX 4.) Section 3.1(b) allows cleaning materials to be stored in the animal area, but not other materials. I find that the storage of non-cleaning materials in the kennel constitutes a violation of sections 3.1(b) and 3.11(c) of the housekeeping standard. Becker did not cite Respondent for any other non-compliant items.

Sometime about this time Becker resigned as an inspector. (Tr. 15.) Another APHIS inspector, Jim Gauthier, and an APHIS veterinary medical officer, John Slauter, attempted to conduct an inspection of the kennel on April 15, 1999. (CX 5.) No one was present. Respondent testified that he has never avoided an inspection (Tr. 271.) and in an April 19, 2001 letter he said he is usually the only one at the kennel and that he has to be away at times to deliver dogs or pick up supplies. However, a dealer must have someone available at its facility at all times during business hours to allow unannounced APHIS inspections. *S.S. Farm Linn County, Inc. et al.* 50 Agric. Dec. 476, 492 (1991). Thus, regardless of Respondent's reasons for not being present, his failure to allow APHIS to conduct an inspection is, as alleged in the complaint, a violation of section 2.126 of the regulations.

The next inspection was conducted on July 27, 1999, when Gauthier was accompanied by his supervisor, Daniel Jones, a veterinary medical officer. Dr. Jones testified that he had reviewed the previous inspection reports, presumably those prepared by Becker (since they are the only prior reports in the record), and determined that Respondent "continued to be out of compliance with maintenance and cleaning and structure of the facility." (Tr. 18.) However, the only non-compliance reported at the prior inspection (September 1998) had related to a relatively minor housekeeping matter. In any event Dr. Jones said he discussed the matter with Gauthier, who had replaced Becker, and decided that they "needed to take some kind of action and it is not unusual for the inspector to ask their supervisor to accompany them for a visit, to see if -- to see with the supervisor's own eyes what the problem is, and perhaps even intervene and speak to the licensee,

to see if something -- to stress the importance of being in compliance. And it was decided that this was one of the kennels that Mr. Gauthier wanted myself to accompany him with." (Tr. 35.)

Dr. Jones said the area around the facility was "heavily vegetated." (Tr. 39.) (It was reported on another occasion that the weeds were so high one could not see Respondent's house (Tr. 70)). Jones said that fifteen or more dogs --the inspection report says twenty-- were running loose and did not have any identification. He said that he assumed they were breeding dogs which should have been contained. (CX 6; Tr. 36, 39, 42-43.) Respondent testified that the loose dogs, one of which bit an inspector, were "house" dogs, "hound" dogs, three breeding dogs that he had allowed out of their cages to get exercise, and dogs too old for breeding. He said he never destroys a dog just because it's past its breeding age because it's his pet and has "paid for its retirement." (Tr. 276.)

Dr. Jones said that, though not in the regulations, APHIS assumes that more than six loose dogs are not pets but are breeding dogs that must be contained. (Tr. 42-43, 54, 59.) Respondent was cited for not keeping the breeding dogs confined (section 3.6(a)(2)(iii)) and for not providing them with proper identification (section 2.50). (CX 6.) Respondent's failure to provide proper identification for the three breeding dogs was a violation of section 2.50 of the regulations. However, while the standards regulate enclosures and require accessible outdoor shelters, the standards do not provide that dogs must be confined to their enclosures but only that if they are confined the enclosure must be secure. Respondent therefore did not violate section 3.6(a)(2)(iii) of the standards by allowing the animals out of their enclosures to exercise.

In his report Gauthier made the finding that:

> Mr. Gochnauer stated that his veterinarian had not visited site. Attending vet must visit site at least once per year. All dogs appear to have fleas and skin irritation that must be treated. Outdated drugs were also found. These must be removed. There is no written program of vet care.

Dr. Jones testified that Respondent had not routinely consulted a veterinarian but that he did not see any dogs with medical problems. (Tr. 47-49.) Respondent testified that he has a veterinarian who treats his dogs for afflictions he cannot handle. (Tr. 331.) On another occasion an inspector found that Respondent had a veterinarian but that he had the impression that Respondent believed he could handle his own veterinary care. (Tr. 71-72). However, Respondent did not say whether he had a written program of veterinary care.

The complaint alleges that Respondent failed to maintain a program of

veterinary care and failed to provide veterinary care to animals in need of such care in violation of section 2.40 of the regulations. Respondent's failure to have a program of veterinary care was a violation of section 2.40, but Complainant did not show by a preponderance of the evidence that Respondent did not provide veterinary care for its animals. The report indicates that the flea problem required a veterinarian's attention. However, Dr. Jones said he did not see any dogs with medical problems. (Tr. 47-49.) It is not established that Respondent failed to provide veterinary care to his animals in violation of section 2.40 of the standards.

Another alleged non-compliant item cited in the report related to the housekeeping standards (Section 3.1(b) and 3.11(c)):

> Inside of trailer still has cleaning material that is not stored properly. Also inside of trailer is dirty, with dirt, dust and unrelated items that must be stored properly. Fifty dogs involved.
> Note: This is a notice that you had the same violation(s) documented on the last two inspections. You are being given the opportunity to correct these violations. If similar violations are documented on other inspections, all past and future violations may be used as evidence for legal actions against you.

Respondent, however, had been cited only at one prior inspection for not complying with the housekeeping standard (on September 8, 1998) and it was a relatively minor incident. As for the non-compliance with this standard in July 1999, Dr. Jones testified:

> There was material there that was both on the floor and on top of cages that were trash. There was medical -- medicines and antibiotics bottles that were just strewn out, not kept in its proper place. There was rat poison on top of one of the cages, and there was some cleaning material, such as -- oh, I believe -- I'm not sure what is was, but it would be maybe Clorox or something of this sort, again that was just haphazardly placed here or there. Nothing was in order; things were dirty. And I noticed that the trailer was in need of repair. . . . It was in need and great -- it needed to be cleaned and maintenanced. It was in great -- it needed to be repaired. (Tr. 37-38.)

Although Jones conceded that the rat poison container was empty and as noted before cleaning material (Clorox) may be allowed in the animal area, his testimony was otherwise credible concerning the lack of required housekeeping. This documented lack of compliance constitutes a violation of sections 3.1(b) and 3.11(c).

Gauthier's next inspection was conducted on November 9, 1999. (CX 7.) He

testified that all the non-compliant items had been corrected by Respondent, including the need for better housekeeping, but that Respondent had not provided the minimum floor space for six puppies as required by section 3.6(c)(1) of the standards. (Tr. 219.) This section provides the measurements which are to be used in calculating minimum floor space. Gauthier did not state whether he took the required measurements. (Tr. 220.) There is insufficient evidence to find that Respondent failed to comply with the minimum floor space standard. The report did not cite Respondent for any other non-compliant items.

The next inspection was conducted seven months later on June 22, 2000. (CX 8.) Gauthier said he conducted the inspection after the office had received a complaint but said he did not know the identity of the complaining person. (Tr. 222.) He was accompanied by Phil Ledbetter, an investigator with APHIS' Investigative and Enforcement Service. Ledbetter testified that he accompanied Gauthier because Respondent's facility was categorized as being in "chronic noncompliance" and that two inspectors visit such facilities because "there might be some type of action taken." (Tr. 152.) Respondent, however, had been in compliance at the previous inspection.

Gauthier testified that at the June inspection the facility had gone "downhill" since his last inspection. (Tr. 222.) He indicated that one cause for Respondent's housekeeping problem was that he "collects items and brings them in, and they keep getting closer to the kennel." He advised Respondent to install a perimeter fence to keep the clutter away from the dog enclosures. (Tr. 216.) Ledbetter added that the kennel area was so cluttered with discarded material it made some enclosures "barely accessible" for inspection. (Tr. 162, 188.)

The testimony, report, and the photographs taken by Ledbetter (CX 9-20) documented the violation of sections 3.1(b) and 3.11(c) and the additional following violations: Water and waste under dog runs lacked adequate drainage, and waste in a wheelbarrow had not been disposed of (section 3.1(f)); wood surfaces in dog enclosures were not sealed to make them impervious to moisture (section 3.4(c)); bare metal wire flooring needed to be replaced with coated wire, and sagging flooring needed to be repaired (section 3.6(a)(2)(xii)); holes in walls needed repair (section 3.6(a)(1)); a dog lacked the required six inches of head space (section 3.6(c)(l)); food receptacles and water receptacles were not properly cleaned and sanitized (section 3.9(b), 3.10(b) and 3.11(b)(2)); accumulated fecal material in animal areas had not been cleaned daily (section 3.11(a)); dogs and puppies were not properly identified (section 2.50); dogs with matted hair needed their hair clipped to prevent skin irritation, and a bottle of an expired drug was found in refrigerator (section 2.40) .

The report also stated that the lack of adequate floor space, identified at the

previous inspection, had not been corrected. As noted before this had not been found to be a violation due to Gauthier failing to provide cage measurements. On this inspection, however, the cage was measured (Tr. 207) and the measurements were included in the report. On this occasion, therefore, non-compliance with section 3.6(c)(l) was substantiated.

The report further found that some enclosures failed to comply with section 3.4(b) by not having four "solid walls." This standard, however, requires four "sides," not solid walls, to protect the animals from the elements. Ledbetter said the enclosures had three sides with one open to the weather. He said the enclosures had panels that could be put in place to protect the animals from the weather but that Respondent was not always present to put the panels in place. (Tr. 126-127, 132, 181.) Even though the report is mistaken in stating that the standards require four solid walls, there was still a violation of section 3.4(b) because the animals would be exposed to inclement weather in the event no one was present at the facility during bad weather to put the fourth side panel in place.

The next inspection took place on August 15, 2000. (CX 21.) It was a "team" inspection conducted by Gauthier, Dr. Slauter, and Michael Ray, an investigator who, like Ledbetter, took photographs of the facility during the inspection. (CX 22-32.) Dr. Slauter testified that a licensed veterinarian participates in team inspections of "problem facilities, facilities that have had a long history of problems, in an effort to do everything we can to bring these people into compliance." (Tr. 69.) The report of the inspection indicates that Respondent had corrected the following non-compliant items identified at the inspection in June: accumulated junk had been removed; weeds were cut; drainage for waste and manure had been provided; six-inch head space had been provided for the dogs; and food and water receptacles had been cleaned.

However, the report found that a rusted outside door needed to be repaired or replaced. Dr. Slauter testified that the rust had corroded the metal which would prevent it from being properly cleaned and sanitized. (Tr. 92.) This constituted a violation of section 3.1(c)(1)(i).

The report stated that the following non-compliant items, which were found during the inspection and which the complaint alleges as violations, had also been identified on previous inspections:

> Section 3.4(c). Bare and chewed wood was not impervious to moisture.
> Section 3.4(b). Outdoor enclosures lacked four solid walls.
> Section 3.6(a)(2)(xii). Two enclosures continued to have wire mesh bare wire that was less than 1/8 inch in diameter.
> Section 3.6(a)(2)(i). Dog runs had broken wire and dog boxes had

protruding nails.
Section 3.6(a)(2)(x). Puppies' feet fall through wire mesh.
Section 3.11(a). Fecal waste and hair had accumulated on wire and in dog boxes.
Section 3.6(c)(l). Dogs lacked adequate floor space. The report cited the measurements on which this finding was based.
Section 2.50. Numerous dogs lacked proper identification.

The report stated that dogs were observed to have the following conditions that needed veterinary care: Loose stool that appeared to have blood and mucous; generalized hair loss; hair loss and skin lesions; and a bite wound that appeared to be infected. Respondent testified that he had never "lost" a dog, except for a puppy with a heart condition, and that he has a veterinarian, Dr. John Moore, to treat his dogs. He said that the dog with the wound had been bitten on Saturday and that the veterinarian was not available before the inspection which was conducted on Monday. He said he had the dogs treated by the veterinarian within a day or two after the inspection. (Tr. 330-333.)

The testimony of Drs. Slauter and Gauthier and the photographs taken by Ray substantiate the findings in the report. As alleged in the complaint, the non-compliant items found in the report constitute violations of the cited standards. As for the need for veterinary care, section 2.40 requires that animal dealers provide appropriate "emergency, weekend, and holiday" care for their animals. (Section 2.40(b)(2).) An infected wound would obviously require a veterinarian's attention. Respondent's failure to provide such prompt care even on a weekend is a violation of section 2.40.

Two months later, on October 24, 2000, the instant complaint was filed and on November 4, 2000, APHIS issued a press release reporting that Respondent was charged with thirty separate violations of the Animal Welfare Act. (CX 36.) After the news release about the complaint appeared in a local newspaper, Gauthier was awakened on November 12 by a call from Respondent who complained about the news release. Gauthier said that in the course of the seven or eight minute call Respondent told him that "he wished I was dead and in hell" and told Gauthier to retract the article "or else." He also said that Respondent remarked that if his dogs were taken he would not have anything to live for. A few days later Gauthier received a call from an anonymous caller who referred to him as an obscenity. Gauthier referred the calls to the sheriff who traced the anonymous call and found that the number belonged to a Joseph Gauthier testified that he had heard that Ross was "associated" with Respondent. He did not say in what manner the two were associated. Gauthier said that, over the years, "numerous people have threatened

to have me shot, have me beat and all sorts of things," but that these threats had not bothered him as much as the call from Respondent because he was unpredictable and had been recently fined for shooting at a person name Marshall Smith. Gauthier did not elaborate on what he meant by Respondent's unpredictability. The testimony relating to Respondent's demeanor was that at the last inspection Respondent had been "a little bit cranky, but, you know, that's normal." (Tr. 225.) Dr. Slauter testified Respondent was "very kind to us" at the inspection. (Tr. 70.) Gauthier said that because of the phone call he did not plan to conduct any more inspections of Respondent's facility and that no one had been assigned to conduct inspections. (Tr. 232-248; RX 1.)

An amended complaint was filed on December 1, 2000, alleging that Respondent had "interfered with, threatened, verbally abused, and harassed" Gauthier in the November 12 call. The record does not contain any other incidents where Respondent allegedly harassed or threatened any inspectors.

Respondent, Michael Gochnauer, 66, has had three heart attacks and two strokes. His left arm and leg are partially paralyzed. He walks with difficulty and can use his left arm only to the extent of carrying a light bucket by curving his fingers around the handle. (Tr. 279-280.) Over the past eight years he has had run-ins with what he calls animal rights people coming to his facility. He said he has intentionally let weeds grow tall to prevent prowling people from seeing his house and taking pictures. He has also been the subject of a recent television report. Two or three months after the report was aired he was assaulted one night as he was leaving his home by two men and a woman who beat him into an unconscious "bloody mess." (Tr. 260, 273-275, 291-292.)

As for his phone call to Gauthier, Respondent said he made the call after he read the news release about APHIS' complaint against him in the newspaper. He said that since Gauthier had been the person inspecting his facility he assumed Gauthier was responsible for the article being published. He called Gauthier to try to get him to retract the article. When Gauthier replied that he was not responsible, Respondent testified that he told Gauthier that "I suppose I'll end seeing you in court" but denied making any threat or telling Gauthier that he wished he was dead. (Tr. 268-269.) He testified that he might have said "I wished I was dead," a statement he had also made in his answer to the complaint. In his brief he added that "All I have are my dogs to make ends meet and they are my life." As for Joe Ross, he said he had met Ross only on one occasion when his truck had broken down and Ross offered him a ride home. (Tr. 271.)

The shooting incident occurred at the time the television crew was filming Respondent's facility in the Spring of 1998. Respondent complained to the sheriff's office but got no response. Gochnauer said he took his shotgun into his driveway

and fired it in the air. He said he could not see the television truck because of the weeds when he fired the gun but knew that it was about a quarter mile away. Marshall Smith, who Respondent said was an animal rights' activist from California who was trying to put him out of business, was with the television crew. Smith filed charges claiming that Respondent had shot at him. The sheriff arrived promptly to arrest Respondent who surrendered peacefully. A jury found that he had unlawfully discharged a firearm and fined him $25.00. (Tr. 273-274, 291-295, 299-301.)

There is insufficient evidence to find or infer that Ross' obscene call was due to an association between Ross and Respondent. I do not find that Respondent was responsible for Ross' harassment and verbal abuse.

It is disputed whether Respondent had threatened Gauthier by saying that he wished Gauthier were dead. Respondent said that if there had been such a reference to death it was to himself, a statement he repeated on other occasions in reference to the possible loss of his dogs.

Black's Law Dictionary defines a threat as "a communicated intent to inflict harm or loss on another." *American Jurisprudence* states that "It has been held that implicit in the word threat as it is used in a statute prohibiting threats used to compel action or inaction by another person against his or her will, is the requirement that the expression in its context have a reasonable tendency to create apprehension that its originator will act according to its tenor. The fear which is instilled in the other person must be objectively reasonable." 31A *Am Jur2d,* Extortion, Blackmail and Threats § 54.

Gauthier's apprehension caused by Respondent's alleged threat was undoubtedly exacerbated by Ross' intimidating call. Gauthier said he was also concerned because Respondent was "unpredictable" and had shot at another person. Respondent, however, an older person with significant physical handicaps, was not shown to have been responsible for the call by Ross. The record also does not show that he was dangerously unpredictable, or, apart from being cranky, had a history of violence or threatening behavior. He was not found to have shot at anyone. While Gauthier may have been apprehensive, the objective circumstances do not show that Respondent's phone call would raise the degree of fear to constitute a threat of harm. The allegation in the complaint that Respondent interfered with, threatened, verbally abused, and harassed an inspector is dismissed.

Complainant seeks a fine and revocation of Respondent's license. It contends that Respondent is both unable and unwilling to comply with the requirements of the Animal Welfare Act, the regulations, and the standards for the care of animals. Dr. Robert Gibbens, APHIS Regional Director for the Western Region of Animal Care, who was called by Complainant to support its proposed sanction, testified that

whether Respondent's facility could come into compliance was a factor he considered. (Tr. 253, 257.)

A troubling aspect of Complainant's position is that, though Respondent's violations at the two inspections in 2000 were extensive, it appears that the inspectors decided even earlier to target Respondent for special action. In 1999, Dr. Jones said that, based on prior inspection reports, Respondent "continued to be out of compliance" and that he did not believe that with Respondent's "history" he could come into compliance. (Tr. 49.) However, except for one minor deficiency, the last inspection before Dr. Jones made this determination, Respondent was in compliance. Similarly, in June 2000, Ledbetter said that Respondent was in chronic noncompliance and that action might be taken against him. He expressed the opinion that Respondent was unwilling to comply. (Tr. 121.) However, again, in the last inspection before Ledbetter made this determination, Respondent was in compliance.

These dubious statements, while not affecting the credibility of the findings of the inspectors, does place in question Complainant's objectivity in recommending license revocation.

For his part, Respondent testified that he has been trying to improve his facility and presented photographs showing that, since the inspections, clutter has been removed from the kennel area. (RX 2, 3, 4, 5, 12 and 13.) Other action he has taken has been to install a fence as Gauthier suggested, retain a veterinarian, and reduce the number of dogs at the facility. He says he intends to get down to around 60 adult dogs. (Tr. 260-268, 276-278, 330.) He had a woman assisting him at the kennel for about six months in 1998 and early in 1999 until she left for another job and had a man, Gary Johnson, working for him for part of the summer in 2000. Johnson testified that he and Respondent tried to correct all the deficiencies identified by the inspectors. (Tr 306-310, 311-316.) At the time of the hearing Respondent had no one helping him. (Tr. 280.)

The inspection reports until 2000 showed that Respondent, although having recurring violations, had attempted to correct the non-compliant items identified by the inspectors. At the last inspection in 1999 he was in virtual full compliance. (CX 7.) Respondent's testimony is credible that he has tried to correct the deficiencies identified at the inspections in June and August 2000. Whether he was successful or not is unknown since Gauthier said that he had stopped conducting inspections of the facility. Complainant has also in effect taken the position that it is irrelevant whether he is now in compliance since his license should be revoked based on past inspections.

The record indicates that a major reason for Respondent's non-compliance has not been his unwillingness to comply but, rather, as Dr. Slauter and Dr. Jones

implied, was due to his physical limitations and the lack of help. Dr. Slauter testified that "the level of management [at the kennel] was not adequate to – for this kennel to be in full compliance." (Tr. 86-87.) Dr. Jones, the supervisor of the inspectors, expressed the opinion that "I do not feel that with 100 dogs, that Mr. Gochnauer can care for these animals in the way that the Animal Welfare Act prescribes people to care for animals." (Tr. 49.) It is noted that when Respondent was last in compliance, in November 1999, he had an employee helping him to maintain the facility.

Section 3.12 of the standards specifically provides that an animal dealer such as Respondent "must have enough employees to carry out the level of husbandry practices and care required in this subpart." This was an obvious deficiency in Respondent's case. Dr. Jones pointed out that Respondent had more dogs than he could handle. Yet, despite the evident lack of sufficient help, Respondent was never cited by an inspector for not complying with section 3.12.

Considering all the circumstances, I do not find that Respondent is unwilling to comply with the Animal Welfare Act and the standards. I do find, however, that he is unable, by himself, to properly care for the large number of dogs he has kept at his facility and that his non-compliance was largely due to not having sufficient help to care for all these animals. While Respondent's recurring incidents of non-compliance, regardless of the reason, may be grounds for revoking his license, I do not find revocation appropriate at this time in view of Complainant's seemingly predetermined intention to take such action against him. I shall therefore order that his license be suspended for twelve months and that he pay a penalty of $5,000, which shall be suspended provided he uses the money for the maintenance of his facility. As provided by section 2.11 of the regulations, Respondent must demonstrate before his license is restored that he is in compliance with the standards, including a demonstration that he can provide proper care and husbandry for the number of dogs he keeps at his facility.

In the event his request for restoration of license is denied, Respondent may make application for a hearing as provided by section 2.11(b)[2] of the regulations to

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[2] **§ 2.11 Denial of initial license application**.

(a) A license will not be issued to any applicant who:

. . . .

(3) Has had a license revoked or whose license is suspended, as set forth in § 2.10;

(continued...)

determine why the license should not be denied. Complainant may move at such hearing to have this order modified to provide for license revocation if it shows that Respondent is not in compliance with the standards or this order at the time the application for hearing is made.

Findings of Fact

1. Respondent Mike Gochnauer, an individual, is a dog breeder whose mailing address is 33296 Mesquite, La Plata, Missouri 63549. At all times mentioned in the amended complaint, Respondent was licensed as a dealer under the Animal Welfare Act (AWA License No. 43-A-2364).

2. APHIS conducted inspections of Respondent's premises, animals and records on May 7, June 18, and September 8, 1998, July 27 and November 9, 1999, and on June 22 and August 15, 2000.

3. APHIS attempted to conduct an inspection during business hours on April 15, 1999, but was unsuccessful because of Respondent's absence.

4. On May 7, 1998, Respondent's housing facilities for dogs were not structurally sound and maintained in good repair.

5. On September 8, 1998, Respondent's premises were not kept clean and free of trash, junk, waste, and discarded matter.

6. On July 27, 1999, and June 22, 2000, Respondent's premises were not kept clean and free of trash, junk, waste, and discarded matter.

7. On August 15, 2000, the surfaces of housing facilities at Respondent's facility that come in contact with animals were not free of excessive rust.

8. On May 7 and June 18, 1998, Respondent's housing facilities were not equipped with disposal facilities and drainage systems to rapidly eliminate animal waste and water.

9. On June 22 and August 15, 2000, dogs in Respondent's outdoor housing facilities were not provided with adequate protection from the elements.

10. On June 22 and August 15, 2000, the building surfaces in contact with

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[2](...continued)

. . . .

(b) An applicant whose license application has been denied may request a hearing in accordance with the applicable rules of practice for the purpose of showing why the application for license should not be denied. The license denial shall remain in effect until the final legal decision has been rendered. Should the license denial be upheld, the applicant may again apply for a license 1 year from the date of the final order denying the application.

the animals in Respondent's outdoor housing facilities for dogs were not impervious to moisture.

11. On May 7, 1998, and August 15, 2000, Respondent's primary enclosures for dogs were not constructed and maintained in good repair so that they have no sharp points or edges.

12. On June 22, 2000, Respondent's primary enclosures for dogs were not structurally sound and maintained in good repair.

13. On June 22 and August 15, 2000, Respondent's primary enclosures for dogs had bare metal wire flooring that was less than inch in diameter.

14. On August 15, 2000, Respondent's primary enclosures for dogs were not constructed so that floors protect the animals' feet and legs from injury, and that did not allow their feet to pass through any openings in the floor.

15. On June 22 and August 15, 2000, dogs were not provided sufficient space.

16. On June 22, 2000, food receptacles for dogs were not kept clean and sanitized.

17. On June 22, 2000, water receptacles for dogs were not kept clean and sanitized.

18. On September 8, 1998, July 27, 1999, and June 22, 2000, the premises were not kept clean and free of trash, junk, waste, and discarded matter.

19. On June 22 and August 15, 2000, excreta and food waste were not removed from primary enclosures daily, and from under primary enclosures as often as necessary to prevent an excessive accumulation of feces and food waste.

20. On April 15, 1999, Respondent failed to make his facility available for inspection by Animal and Plant Health Inspection Service employees.

21. On July 27, 1999, and June 22 and August 15, 2000, Respondent 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 on August 15, 2000, failed to provide veterinary care to animals in need of care.

22. On July 27, 1999, and August 15, 2000, Respondent failed to individually identify dogs.

Conclusions of Law

Respondent violated the Animal Welfare Act, 7 U.S.C. § 2131 *et seq*., the regulations, 9 C.F.R. § 2.1 *et seq*., and the standards issued under the Act, 9 C.F.R. § 3.1 *et seq*., as follows:

1. On May 7, 1998, Respondent's housing facilities for dogs were not

structurally sound and maintained in good repair so as to protect the animals from injury. (9 C.F.R. § 3.1(a).)

2. On September 8, 1998, Respondent's premises were not kept clean and free of trash, junk, waste, and discarded matter, in order to protect the animals from injury and facilitate the required husbandry practices. (9 C.F.R. § 3.1(b).)

3. On July 27, 1999, Respondent's premises were not kept clean and free of trash, junk, waste, and discarded matter, in order to protect the animals from injury and facilitate the required husbandry practices. (9 C.F.R. § 3.1(b).)

4. On June 22, 2000, Respondent's premises were not kept clean and free of trash, junk, waste, and discarded matter, in order to protect the animals from injury and facilitate the required husbandry practices. (9 C.F.R. §§ 3.1(b).)

5. On August 15, 2000, the surfaces of housing facilities at Respondent's facility that come in contact with animals were not free of excessive rust that prevents the required cleaning and sanitation. (9 C.F.R. § 3.1(c)(1)(i).)

6. On May 7, 1998, Respondent's housing facilities were not equipped with disposal facilities and drainage systems that are constructed and maintained so that animal waste and water are rapidly eliminated. (9 C.F.R. § 3.1(f).)

7. On June 18, 1998, Respondent's housing facilities were not equipped with disposal facilities and drainage systems that are constructed and maintained so that animal waste and water are rapidly eliminated. (9 C.F.R. § 3.1(f).)

8. On June 18, 1998, Respondent's housing facilities were not equipped with disposal facilities and drainage systems that are constructed and maintained so that animal waste and water are rapidly eliminated. (9 C.F.R. § 3.1(f).)

9. On June 22, 2000, dogs in Respondent's outdoor housing facilities were not provided with adequate protection from the elements. (9 C.F.R. § 3.4(b).)

10. On June 22, 2000, the building surfaces in contact with the animals in Respondent's outdoor housing facilities for dogs were not impervious to moisture. (9 C.F.R. § 3.4(c).)

11. On August 15, 2000, dogs in Respondent's outdoor housing facilities were not provided with adequate protection from the elements. (9 C.F.R. § 3.4(b).)

12. On August 15, 2000, the building surfaces in contact with the animals in Respondent's outdoor housing facilities for dogs were not impervious to moisture. (9 C.F.R. § 3.4(c).)

13. On May 7, 1998, Respondent's primary enclosures for dogs were not constructed and maintained in good repair so that they have no sharp points or edges that could injure the animals. (9 C.F.R. § 3.6(a)(2)(i) and (ii).)

14. On June 22, 2000, Respondent's primary enclosures for dogs were not structurally sound and maintained in good repair. (9 C.F.R. § 3.6(a)(1).)

15. On June 22, 2000, Respondent's primary enclosures for dogs had bare

metal wire flooring that was less than inch in diameter. (9 C.F.R. § 3.6(a)(2)(xii).)

16. On August 15, 2000, Respondent's primary enclosures for dogs were not constructed and maintained in good repair so that they have no sharp points or edges that could injure the animals. (9 C.F.R. § 3.6(a)(2)(i).)

17. On August 15, 2000, Respondent's primary enclosures for dogs were not constructed so that the floors protect the animals' feet and legs from injury, and that do not allow their feet to past through any openings in the floor. (9 C.F.R. § 3.6(a)(2)(x).)

18. On August 15, 2000, Respondent's primary enclosures for dogs had bare metal wire flooring that was less than inch in diameter. (9 C.F.R. § 3.6(a)(2)(xii).)

19. On June 22, 2000, dogs were not provided sufficient space, as required. (9 C.F.R. § 3.6(c)(1).)

20. On August 15, 2000, dogs were not provided sufficient space, as required. (9 C.F.R. § 3.6(c)(1).)

21. On June 22, 2000, food receptacles for dogs were not kept clean and sanitized as required. (9 C.F.R. § 3.9(b).)

22. On June 22, 2000, water receptacles for dogs were not kept clean and sanitized as required. (9 C.F.R. § 3.10(b).)

23. On September 8, 1998, the premises were not kept clean and free of trash, junk, waste, and discarded matter, in order to protect the animals from injury and facilitate the required husbandry practices. (9 C.F.R. § 3.11(c).)

24. On July 27, 1999, the premises were not kept clean and free of trash, junk, waste, and discarded matter, in order to protect the animals from injury and facilitate the required husbandry practices. (9 C.F.R. § 3.11(c).)

25. On June 22, 2000, the premises were not kept clean and free of trash, junk, waste, and discarded matter, in order to protect the animals from injury and facilitate the required husbandry practices. (9 C.F.R. § 3.11 (c).)

26. On June 22, 2000, food and water receptacles for dogs were not kept clean and sanitized as required. (9 C.F.R. § 3.11(b)(2).)

27. On June 22, 2000, excreta and food waste were not removed from primary enclosures daily, and from under primary enclosures as often as necessary to prevent an excessive accumulation of feces and food waste, to prevent soiling of the dogs and to reduce disease hazards, insects, pests and odors. (9 C.F.R. § 3.11(a).)

28. On August 15, 2000, excreta and food waste were not removed from primary enclosures daily, and from under primary enclosures as often as necessary to prevent an excessive accumulation of feces and food waste, to prevent soiling of

the dogs and to reduce disease hazards, insects, pests, and odors. (9 C.F.R. § 3.11(a).)

29. On April 15, 1999, the Respondent failed to make his facility available for inspection by Animal and Plant Health Inspection Service employees in violation of section 2.126 of the regulations. (9 C.F.R. § 2.126.)

30. On June 22, 2000, Respondent failed to maintain programs of disease control and prevention under the supervision and assistance of a doctor of veterinary medicine, in wilful violation of section 2.40 of the regulations. (9 C.F.R. § 2.40).)

31. On August 15, 2000, Respondent 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).)

32. On July 27, 1999, Respondent failed to individually identify dogs, in wilful violation of section 11 of the Act (7 U.S.C. § 2141) and section 2.50 of the regulations. (9 C.F.R. § 2.50).)

33. On August 15, 2000, Respondent failed to individually identify dogs, in wilful violation of section 11 of the Act (7 U.S.C. § 2141) and section 2.50 of the regulations. (9 C.F.R. § 2.50).)

Amended Order

1. The license issued to Respondent under the Animal Welfare Act (No. 43- A- 2364) is hereby revoked.

2. Respondent, his agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the Act and the regulations and standards thereunder.

The parties have waived their right to appeal this Decision and Amended Order under section 1.145 of the Rules of Practice (7 C.F.R. § 1.145), and this Decision and Amended Order shall become final and effective without further proceedings on September 1, 2001.

[This Decision and Order became final and effective September 1, 2001.-Editor]

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EQUAL ACCESS JUSTICE ACT

COURT DECISION

DWIGHT L. LANE AND DARVIN R. LANE v. U.S. DEPARTMENT OF AGRICULTURE; ANN C. VENEMAN, SECRETARY OF THE UNITED STATES DEPARTMENT OF AGRICULTURE; KEITH KELLY, ADMINISTRATOR OF THE FARM SERVICE AGENCY OF THE UNITED STATES DEPARTMENT OF AGRICULTURE; AND WILLIAM G. JENSON, THE JUDICIAL OFFICER OF THE UNITED STATES DEPARTMENT OF AGRICULTURE.
Civil No. A2-00-84.
Filed July 18, 2001.

EAJA – NAD – Attorney fees – Statutory authority to review – Plain meaning of statute – Arbitrary and capricious – Award period.

The Judicial Officer's (JO) decision to reduce the Equal Access to Justice Act award (EAJA) from $213,997 to $55,396 was not arbitrary and capricious. The JO has the statutory authority to review awards by a National Appeals Division (NAD) officer. The District Court determined: (1) The JO had authority to review the NAD award because EAJA awards are made through the Administrative Procedure Act (APA), not NAD. The court cited *Adam Sommerrock Holzbau, GmbH v. U.S.*, 866 F.2d 427, 429 (Fed. Cir. 1989), as precedent for having the JO review issues of attorney fees and expenses; (2) The JO did not abuse his discretion and carefully considered the Appellant's claims and supported his decision; (3) The JO followed the principal of the plain meaning of the statute by determining ". . . attorney or agent fees" to be disjunctive and not additive; (4) The JO properly determined the time period for which fees may be considered, began when the controversy began; and (5) The JO properly considered the hourly rate cap and analyzed the reasonable hours of work for the legal issues.

United States District Court
District of North Dakota
Northeastern Division

MEMORANDUM AND ORDER

Before the Court is defendants' (hereinafter collectively referred to as the United States) Federal Rule of Civil Procedure 12(b)(6) motion to dismiss for failure to state a claim (doc. #3) and the Lanes' Federal Rule of Civil Procedure 56 motion for summary judgment (doc. #17). Oral argument was heard on Friday, June 29, 2001, in Grand Forks, North Dakota. At the close of the hearing, the Court took the matter under advisement. Upon consideration of the submissions of the

parties and in light of the entire file, the Court rules as follows.

A. BACKGROUND

This case involves awarding attorney fees for adverse agency adjudications pursuant to the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504. This is the third time these parties have been before the Court. The background and history of this case is set forth in *Lane v. United States Department of Agriculture*, 929 F. Supp. 1290 (D.N.D. 1996), *aff'd in part, rev'd in part, and remanded by* 120 F.3d 106 (8th Cir. 1997) (*Lane I*); and *Lane v. United States Department of Agriculture*, 187 F.3d 793 (8th Cir. 1999) (*Lane II*), and need not be repeated here in depth.

In short, it is sufficient to note that the Eighth Circuit remanded the case in order for the National Appeals Division (NAD) of the United States Department of Agriculture (USDA) to consider whether the Lanes were entitled to an EAJA fee award. *See Lane I*, 120 F.3d at 110-11. The Lanes had been successful before the NAD in challenging the denial of their delinquent loan servicing applications by the Farmers Home Administration, now known as the Farm Service Agency (FSA). Upon remand, the original NAD hearing officer, Harry Iszler, considered the petitions for fees and expenses. Iszler determined that the Lanes were prevailing parties and found both that the agency's position in the underlying action was not substantially justified and that special circumstances making an award unjust did not exist. *See* 5 U.S.C. § 504(a)(1). Consequently, he awarded Dwight Lane $95,933.45 and Darvin Lane $118,064.26 for attorneys fees, agent fees, and costs.

The FSA sought review of Iszler's determination from the Judicial Officer of the USDA. *See* 5 U.S.C. § 504(a)(3). Upon review, the Judicial Officer reduced Darvin's award to $27,353.30 and Dwight's award to $28,043.30, resulting in a net reduction of $158,601.17.

The Lanes, obviously dissatisfied with the Judicial Officer's drastic reduction, brought this suit. They challenge both the ability of the Judicial Officer to review an NAD EAJA award and his substantive determination.[1] Their amended complaint and motion for summary judgment clarify that they have three main arguments: first, that the USDA Judicial Officer lacks authority to review an NAD hearing officer's EAJA award; second, that this Court should award EAJA fees after a

[1]The Lanes apparently have abandoned their previous argument that any further review of the hearing officer's determination is invalid by failing to address it in their motion for summary judgment. Thus, the Court deems the argument waived.

de novo application of the law to the facts[2]; and last, assuming that the USDA Judicial Officer had the authority to review the EAJA awards, that his decision was arbitrary and capricious.

B. ANALYSIS

The United States has filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). The Court converts this motion to one for summary judgment pursuant to Fed. R. Civ. P. 56. *See* Fed. R. Civ. P. 12(c). Consequently, the Court has cross motions for summary judgment before it. Summary judgment is appropriate when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Both parties agree that the relevant facts are not in dispute. The dispute involves only the legal conclusions to be drawn from those facts.

1. Did the USDA Judicial Officer Have Authority to Review an NAD Hearing Officer's Determination on EAJA fees?

The Lanes challenge the authority of the USDA Judicial Officer to review an NAD decision. The United States admits that Judicial Officer review of an NAD decision is awkward but insists that the appropriate regulations were followed correctly.

The NAD is an independent appeals division of the USDA, separate from all other agencies and offices of the Department, which was created by Congress on October 13, 1994, in the Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994. *See* Title II, Subtitle H, Pub. L. No. 103-354, §§ 271-283, 108 Stat. 3228-3235 (codified at 7 U.S.C. § 6991 et seq.). Congress gave NAD the responsibility for all administrative appeals formerly handled by various agencies and divisions of the USDA,[3] including appeals from

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[2]The Lanes cite no authority for the proposition that the Court has the authority to perform a de novo review and award the fees it determines appropriate. Therefore, this suggestion is summarily denied.

[3]Specifically, the NAD is authorized to hear appeals from the Commodity Credit Corporation, Farm Service Agency, Federal Crop Insurance Corporation, National Resources Conservation Service, Risk Management Agency, Rural-Business Cooperative Service, Rural Development, Rural Housing Service, (continued...)

the former Farmers Home Administration, now the Farm Service Agency. *See* 60 Fed. Reg. 67298, 67299, Dec. 29, 1995; 7 C.F.R. § 11-1. The NAD is headed by a Director who is subject only to the direction and control of the Secretary of Agriculture. 7 U.S.C. § 6992(b), (c). The Secretary is prohibited from delegating NAD authority to anyone other than the Director. *Id.* § 6992(c).

Agency decisions which are subject to the NAD's jurisdiction may be appealed to the NAD for an evidentiary hearing before a hearing officer. *See id.* § 6996(a). The NAD hearing officer's determination is subject to the Director's review. *Id.* § 6998. The Director's decision is considered the final NAD determination. *Id.* § 6998(b) ("the Director shall issue a final determination").

The Judicial officer is a separate official within the USDA who is appointed by the Secretary of Agriculture. The Judicial Officer is not part of the NAD and, therefore, is not under the NAD Director's control and supervision.

Because the NAD is a separate and independent division of the USDA, the Lanes conclude that the Judicial Officer had no authority to review their EAJA awards. The Lanes, therefore, request the Court to set aside the Judicial Officer's decision as invalid and reinstate the hearing officer's decision as final. The United States counters that it was following its extant EAJA regulations in allowing the Judicial Officer to review the EAJA award. *See* 7 C.F.R. §§ 1.201, 1.145. The United States points out that the NAD did not have regulations in place allowing the Director to review an EAJA award[4] since it had taken the position that EAJA did not apply to NAD proceedings. *See Lane I*, 120 F.3d at 109-110 (rejecting NAD position and finding that proceedings before the NAD are under § 554 of the APA). When both this Court and the Eighth Circuit rejected that position, the USDA argues it was faced with a dilemma regarding agency review. It could either allow the NAD Director to review the hearing officer's EAJA award, which would have been logical; or, follow its EAJA regulations which required review by the Judicial Officer. The United States asserts that in keeping with the legal principle that

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[3](...continued)
Rural Utilities Service, and any predecessor or successor agency of those listed. *See* 7 U.S.C. §§ 6991(2), 6993; *see also* 7 C.F.R. § 11.1.

[4]The Court has been informed that this omission has been corrected. On June 14, 1999, the Secretary of Agriculture delegated authority to the NAD Director to review NAD hearing officer determinations, in lieu of the Judicial Officer, in circumstances where EAJA has been held to apply to NAD proceedings. Prior to this delegation, the Judicial Officer reviewed a handful of other similar NAD EAJA awards. The parties have indicated that those awards have not been challenged. Consequently, this case may be the only one of its kind where the issue of the Judicial Officer's authority is questioned.

"agencies must follow their own rules," *see Accardi v. Shaughnessy*, 347 U.S. 260 (1954), the USDA determined that the EAJA award should be appealed to the Judicial Officer for review.

The Court admits that this is a difficult decision. The Lanes' argument is appealing and it appears logical that an NAD hearing officer's decision should only be reviewed by the Director given the independent nature of the NAD. In contrast, it also appears logical for the USDA to follow its generally applicable EAJA regulations when appealing an EAJA award. On balance, the Court determines that the weight of the arguments favors the United States.

EAJA requires agencies to formulate uniform procedures for submitting and considering applications for fees and other expenses. *See* 5 U.S.C. § 504(c)(1). In complying with the statutory mandate, the USDA has promulgated final rules providing the procedures applicable to EAJA applications before the Department. *See* 7 C.F.R. § 1.180 et seq. These regulations are applicable to all adversary adjudications. *See id.* § 1.183(a)(1). Adversary adjudications are adjudications required by statute to be conducted by the Department under 5 U.S.C. § 554 in which the position of the agency is represented by counsel. *See id.* In *Lane I*, it was specifically determined that NAD proceedings fit the definition of adversary adjudications. *See Lane I*, 120 F.3d at 108. Thus, the sine qua non of plaintiffs' victory in *Lane I* is that NAD proceedings are subject to EAJA.

As such, the Lanes' applications necessarily were subject to the Department's generally applicable EAJA regulations. EAJA awards are made only through the APA, not the NAD statute. Thus, in a sense, when this case was remanded to the agency the issue was not uniquely an NAD issue – it was an EAJA issue. And, as noted above, EAJA requires agencies to formulate uniform procedures and rules for handling EAJA applications. The Department's uniform procedures, and the EAJA statute itself, require, where possible, the adjudicative officer "who presided at the adversary adjudication" to consider the applications. *See* 7 C.F.R. § 1.200; 5 U.S.C. § 504(b)(1)(D). In the Lanes' case, this was Harry Iszler, an NAD hearing officer. The fact that the presiding hearing officer was within the NAD does not make the decision on an EAJA application a substantive NAD determination; rather it is simply a by-product of applying the applicable EAJA regulations. Thus, the Court concludes that the Lanes' EAJA applications were subject to the USDA's EAJA regulations.

The Court is emboldened in its decision by the case of *Adam Sommerrock Holzbau, GmbH v. United States*, 866 F.2d 427 (Fed. Cir. 1989). In *Adam Sommerrock*, the court considered whether a time limit for appealing decisions within a provision of the Contract Disputes Act (CDA), 41 U.S.C. § 607, trumped a competing time limit within EAJA § 504(c)(2) as applied to EAJA applications.

Id. at 430. The court rejected the argument that the CDA appeal period applied to EAJA fee decisions. *See id.* In explaining its determination, the court noted that "5 U.S.C. § 504(c)(2) alone applies to fee rulings by contract appeal boards." *Id*. (emphasis in original). In so holding, the court further explained that "the CDA governs appeals to this court of decisions by boards on contract disputes themselves; the EAJA provision at issue governs appeals of disputes of attorney fees and expenses." *Id.* at 429. The principle of *Adam Sommerrock* is equally applicable in this case: the NAD statute governs substantive agency appeals to the Division; however, EAJA governs attorney fees and expense decisions. *See id.*

Consequently, the Court concludes that it was not inappropriate for the USDA to follow its EAJA regulations. Under those regulations, the Judicial Officer was the appropriate reviewing official. *See* 7 C.F.R. §§ 1.201(a), 1.145(a).

2. Was the Judicial Officer's EAJA Decision Supported by Substantial Evidence?

Since it has been determined that the Judicial Officer had the authority to review an NAD EAJA award, the Court faces the question of whether the Judicial Officer's decision was supported by substantial evidence.

The sole basis for an EAJA fee award in administrative proceedings is 5 U.S.C. § 504. *See Melkonvan v. Sullivan*, 501 U.S. 89, 94 (1991) (stating explicitly that § 504 was enacted at the same time as 28 U.S.C. § 2412, and is the only part of the EAJA that allows fees and expenses for administrative proceedings). Section 504(a)(1) provides in part:

> An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust.

5 U.S.C. § 504(a)(1).

In this case, the United States no longer contests that all of the prerequisites for an EAJA fee award have been met: the underlying NAD action was an "adversary adjudication;" the Lanes were prevailing parties; the agency position was not substantially justified; and no other special conditions make an award unjust. Consequently, the only issue is the Lanes' dissatisfaction with the amount of "fees and other expenses" they were awarded.

Under EAJA, dissatisfied parties, such as the Lanes, may appeal the agency determination to the appropriate court for judicial review. *See* 5 U.S.C. § 504(c)(2). The reviewing court's authority is strictly limited. It must base its decision solely on the factual record made before the agency. *Id.* Further, it must give deference to the agency decision such that it "may modify the determination of fees and other expenses only if the court finds that . . . the calculation of the amount of the award, was unsupported by substantial evidence." *Id.*; *Allen v. National Transp. Safety Bd.*, 160 F.3d 431, 432 (8th Cir. 1998) (noting that an agency decision will be affirmed unless it is arbitrary, capricious, an abuse of discretion, or otherwise unsupported by the law).

The substantial evidence test is met if the government's position is "'justified to a degree that could satisfy a reasonable person."' *Smith v. National Transp. Safety Bd.*, 992 F.2d 849, 852 (8th Cir. 1993) (quoting *Pierce v. Underwood*, 487 U.S. 552, 565 (1988)). Put differently, "the government must show that there is a reasonable basis in truth for the facts alleged in the pleadings; that there exists a reasonable basis in law for the theory it propounds, and that the facts alleged will reasonably support the legal theory advanced." *Id.* (quotations omitted).

The Lanes propound that the Judicial Officer committed four errors which viewed separately or taken together demonstrate that his decision was unsupported by substantial evidence. First, they assert that the Judicial Officer legally erred in determining that agent fees may not be awarded in addition to attorneys fees. Second, they argue that the Judicial Officer erred in shortening the time period over which he awarded fees. Third, they assert that the Judicial Officer should not have limited attorneys fees to $75.00 per hour. Last, the Lanes argue that the Judicial Officer erred in reducing the attorneys' hours of work. All of their arguments, however, are unconvincing and fall short of showing that the Judicial Officer abused his discretion.

It must be noted that the Judicial Officer's May 17, 2000, Decision and Order was 70 pages long. It contained a thorough analysis of the Lanes' attorneys' billing records. In fact, the Judicial Officer considered individually the attorneys' monthly statements dating from November 1993 until January 1995. Although he drastically reduced their EAJA award, he did make several favorable concessions to the Lanes. For example, the billing statements contained a notation of "no charge" for certain attorney activities – mostly traveling and telephone time. The Judicial Officer, however, found that there was substantial evidence in the record to conclude that the "no charge" time was actually billed to the clients at a half-time rate. Additionally, he rejected the government's position that the Lanes' billing records were not sufficiently detailed. These examples demonstrate, contrary to the Lanes' suggestion, that the Judicial Officer approached his determination in a fair and

unbiased manner.

a. Elimination of Agent Fees

The NAD hearing officer awarded the Lanes $52,705.00 for the agent services of Mr. Kreklau. The Lanes hired Mr. Kreklau, an agricultural credit counselor, to help them prepare their FSA delinquent loan servicing applications in the underlying agency proceedings. The Judicial Officer determined, as a matter of law, that the Lanes were not entitled to recover both attorneys fees and agents fees under EAJA. Additionally, he also concluded that such services were not reasonable or necessary. He did award, however, the Lanes some expenses for Kreklau by treating him as an expert witness. *See* 28 U.S.C. § 1621. Under that analysis, the Lanes were awarded $120 for his services.

The Lanes argue that both agent fees and attorney fees are recoverable under EAJA. EAJA defines the "fees and expenses" that may be awarded to include the "reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which found by the agency to be necessary for the preparation of the party's case, *and reasonable attorney or agent fees*." 5 U.S.C. § 504(b)(1)(A) (emphasis added). The Lanes read this language to allow for reasonable attorney fees and agent fees. The Judicial Officer specifically rejected the argument that the statute allows for both types of fees.

The question of whether both attorney and agent fees may be awarded under EAJA is one of statutory interpretation. In such a case, the court must "adhere to the general principle that 'when the plain language of a statute is clear in its context, it is controlling."' *United States v. Smith*, 35 F.3d 344, 346 (8th Cir. 1994) (citations omitted). The statute, quoted above, uses the term "or" to separate attorney from agent. In its most common usage the word "or" implies a mutually exclusive choice, in other words, an alternative. *See* Webster's II New Riverside University Dictionary 926 (1984); Black's Law Dictionary 756 (6th ed. 1991). Accordingly, courts generally ascribe a disjunctive rather than conjunctive meaning to the word "or". *See Smith*, 35 F.3d at 346 ("ordinary usage of the word 'or' is disjunctive, indicating an alternative"); *Christl v. Swanson*, 609 N.W.2d 70, 73 (N.D. 2000) (same); *State v. Loge*, 606 N.W.2d 152, 155 (Minn. 2000) (same).

Nevertheless, courts sometimes interpret "or" to mean "and" when a disjunctive meaning would either frustrate a clear statement of legislative intent or render the statute inoperable. *See United States v. Smeathers*, 684 F.2d 363, 364 (8th Cir. 1989) (noting that the rule of construction must yield if it frustrates legislative intent); *Christl*, 609 N.W.2d at 72 ("literal meaning of the terms "and" and "or" should be followed unless it renders that statute inoperable or the meaning becomes

questionable"); *Stanton v. Iowa Dist. Ct. for Polk County*, 2001 WL 98951, *2 (Iowa Ct. App. 2001) (noting that such an interpretation might be needed to comport with the "spirit of the law"); *see also DeSylva v. Ballentine*, 351 U.S. 570, 573 (1956) (explaining that the word "or" is often carelessly used as a substitute for the word "and").

This, however, is not such a case. The primary intent of Congress in creating EAJA was "to diminish the deterrent effect of the expense involved in seeking review of, or defending against, unreasonable government action." *S.E.C. v. Comserv Corp.*, 908 F.2d 1407, 1415 (8th Cir. 1990) (quotations omitted). In other words, Congress intended to relieve average persons of the economic disincentive to challenge unjustified government actions. *See Richard v. Hinson*, 70 F.3d 415, 417 (5th Cir. 1995). In the context of an agency proceeding, private parties may challenge government actions or defend against them through the use of counsel or, if allowed by the agency, by other qualified representatives. *See* 5 U.S.C. § 555(b). Thus, if the specific agency so provides, a private party is not required to retain an attorney for representation; instead, they may hire a qualified non-attorney representative. These non-attorney representatives generally are referred to as agents. *See Cook v. Brown*, 68 F.3d 447, 450-51 (Fed. Cir. 1995) ("Congress understood agents' to be persons who are not trained and authorized to practice law, and who may not represent clients without special permission from a given tribunal.") Courts generally have recognized that agents and attorneys are two mutually exclusive types of representation. *See id*. Thus, it is not surprising that Congress defined "fees and other expenses" to include "attorney or agent fees" within the EAJA provision applicable to *agency proceedings* since an agent could be used as a representative in such proceedings. *See* 5 U.S.C. § 504(b)(1)(A).

In contrast, the EAJA fee-shifting provision applicable to court proceedings allows only for the recovery of "reasonable attorney fees" within its definition of "fees and other expenses." *See* 26 U.S.C. § 2412(d). It does not mention agent fees. *Id. See also Cook*, 68 F.3d at 451 (noting that EAJA authorizes recovery of agent fees only in agency, not court, proceedings). This is perfectly logical since only attorneys, i.e., those admitted to the practice of law, may represent clients in court. From this comparison of otherwise identical definitions of "fees and other expenses," the Court concludes that Congress was aware of the alternative type of representation available in agency proceedings, i.e., agent representation, and Congress intended to reimburse private parties for such *alternative* representation, not both. Interpreting the word "or" in its usual alternative sense does not frustrate that intent or make the provision inoperable. *See Smith*, 35 F.3d at 347 (declining to read "or" to mean "and" when such a construction would defeat the plain language of the statue and would not foster any clearly articulated legislative intent

to the contrary). Therefore, the Court gives "or" its plain meaning and concludes that both attorney fees and agent fees may not be recovered under § 504(b)(10)(A).

Consequently, the Judicial Officer did not err in refusing to award the Lanes agent fees for Kreklau's services.

3. Shortening the Period for Awarding Fees

The NAD hearing officer awarded the Lanes attorneys fees beginning from June 1993. The Judicial Officer, however, held that the adversarial proceeding did not begin until November 1993 and limited attorneys fees from that date forward. The Lanes argue that the Judicial Officer should not have shortened the period for which they recovered fees.

EAJA allows for an award of fees and expenses "in connection with" an adversarial proceeding. 5 U.S.C. § 504(a)(1). This prompts the question: when does an adversarial proceeding begin? EAJA provides that such a proceeding begins when there is an "action or failure to act by the agency" which becomes the basis for the adversary adjudication. *Id.* § 504(b)(1)(E). The Judicial Officer determined that the "action by the agency" which became the basis for the adversary adjudication was the denial of the Lanes' delinquent loan servicing applications. The denials occurred in November 1993.

The Judicial Officer's conclusion is reasonable and logical. Prior to the denial of the applications there was not an adversarial relationship between the parties. The Lanes were merely applying for agency benefits in the form of delinquent loan servicing. It was not until after the applications were denied that the parties' interests were at odds. The adversarial proceedings began when the Lanes appealed FSA's denial of their applications to the NAD. This happened in November 1993. Consequently, the Judicial Officer did not err in limiting the period for awarding fees from that time forward.

4. Applying the Statutory Cap of $75.00 per hour

The Lanes assert that the Judicial Officer erred in applying the statutory cap of $75.00 per hour in awarding attorneys fees. At the time these adversarial proceedings were ongoing, § 504(b)(1)(A)(ii) provided: "Attorney or agent fees shall not be awarded in excess of $75 per hour unless the agency determines by

regulation that an increase in the cost of living . . . justifies a higher fee."[5] 5 U.S.C. § 504 (b)(1)(A)(ii).

This provision clearly and unambiguously applies a $75 rate cap unless the agency regulations provide otherwise. In this case, the agency did not have a regulation increasing the statutory cap above $75 per hour. *See* 7 C.F.R. § 1.187. Therefore, the $75.00 cap applied. The Judicial Officer had no authority to increase or disregard the statutory $75 per hour rate cap. *See Mendenhall v. National Transp. Safety Bd.*, 213 F.3d 464, 468 (9th Cir. 2000) (concluding that allowing an agency to award attorneys' fees at a reasonable market rate contravened the plain statutory text and Supreme Court case law). To do so would have been in contravention of the law.

5. Reducing Reasonable Hours of Work

Finally, the Lanes challenge several categories of time eliminated by the Judicial Officer as unreasonable and unnecessary. The Judicial Officer denied fees for time that both attorneys met with the Lanes, met with Kreklau, and researched certain legal issues. EAJA vests the agency with the authority to determine, in the first instance, what attorney fees are reasonable and necessary. *See* 5 U.S.C. § 504(a)(1) (providing that the *agency* shall award fees and other expenses). This Court must defer to the agency's determination unless it was "unsupported by substantial evidence." *Id.* § 504(c)(2). Thus, it is not the place of this Court to substitute its judgment for that of the agency. The Court finds that the Judicial Officer's decision eliminating duplicative and irrelevant work was supported by substantial evidence. Therefore, the Court does not modify those determinations.

C. CONCLUSION

For the reasons given above, **IT IS ORDERED** that the defendants' motion to dismiss (doc. #3), construed as a motion for summary judgment, is **GRANTED;** contrarily, **IT IS ORDERED** that plaintiffs' motion for summary judgment (doc. #17) is **DENIED.** Plaintiffs' complaint and cause of action is **DISMISSED WITH PREJUDICE.**

IT IS SO ORDERED.

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[5]The March 29, 1996 amendments to EAJA raised the cap to $125.00 per hour. The new cap, however, only applies to adversarial adjudications that began on or after March 29, 1996. Therefore, the $125 cap is not applicable in this case.

COURT DECISIONS

FEDERAL MEAT INSPECTION ACT

GREENVILLE PACKING CO., INC. v. DAN GLICKMAN, SECRETARY OF THE UNITED STATES DEPARTMENT OF AGRICULTURE, AND CATHERINE WOTEKI, UNDER SECRETARY OF AGRICULTURE FOR FOOD SAFETY.

No. 00-CV-1054.
Filed September 5, 2001.

FMIA--PPIA –- APA – Bribery of Federal Official – Arbitrary and Capricious, basis for claim – Due process, timely notice of adverse facts to be asserted – Mitigating circumstances – Inspection services, fitness for, by USDA – Evidence, admissibility generally – Subsequent acts, relevance to penalty imposed – *Per se* bribery offenses, imposition of penalties for – Bifurcated hearings in penalty phase – Indefinite term, denial of inspections services for, not unconstitutional – Penalty expert, use of, not arbitrary – Transfer in lieu of dismissal, improper subject matter jurisdiction, balance of equities.

Appellant, a slaughterhouse, was indefinitely suspended from receiving federal meat inspection services by an Administrative Law Judge (ALJ). At the hearing, evidence of prior conviction of bribery of a federal meat inspector was introduced. Using the *per se* violation rule adopted in *Windy City Meat Co., Inc*., 926 F.2d 672 (7th Cir. 1991), the ALJ made a determination that the Appellant was unfit to receive USDA inspection services and then moved to the penalty phase of the hearing. During the penalty phase of the hearing, the Appellant introduced evidence of mitigating circumstances, whereupon the ALJ received evidence of 78 Process Deficiency Reviews (PDR's). Appellant initially appealed the ALJ's decision before the Judicial Officer (JO). The JO affirmed the ALJ's decision. The court determined that the ALJ had properly considered both mitigating and aggravating factors before setting an indefinite term of suspension of inspection services. Appellant raised due process issues relating to failure to give notice of raising of derogatory evidence. A portion of the case under PPIA was transferred to the U.S. District Court, rather than dismissal, based upon a balance of equities under *Liriano v. United States*, 95 F.3d 119, 121 (2d Cir. 1996).

United States District Court
Northern District of New York

MEMORANDUM DECISION & ORDER

McAvoy, D.J.:

This is an appeal from an administrative proceeding pursuant to the Federal Meat Inspection Act, 21 U.S.C. §§ 601 *et seq.* (FMIA), and the Poultry Products

Inspection Act, 21 U.S.C. §§ 451 *et seq*. (PPIA). A decision dated June 1, 2000, was issued by the Judicial Officer (JO) of the Department of Agriculture, William G. Jenson, affirming the decision of Administrative Law Judge (ALJ) Dorothea A. Baker dated March 13, 2000. Those decisions indefinitely suspended the right of Greenville Packing Co., Inc. (Greenville) to receive federal inspection services as required by the FMIA and the PPIA. Greenville appeals that determination, asserting that the indefinite suspension is an abuse of discretion and that the ALJ made several errors in the admission of evidence that warrant reversal.

I. Background

The facts of this case are not in dispute. Greenville is a slaughtering house. (ALJ Finding of Facts ¶ 2). Greenville has for some time been operating under the direction of Robert Mattick (Mattick). *Id*. ¶ 5. Prior to the events leading to this action, Greenville was the recipient of United States Department of Agriculture (USDA) inspection services. *Id*. ¶ 4. Starting in August 1993, Randall Barber (Barber) was assigned as the permanent inspector to the Greenville plant. *Id*. ¶ 7. Some time in January 1995, the plant was having difficulty getting the necessary veterinary inspections on time. *Id*. ¶ 32. Barber approached Mattick and suggested that he be paid a certain amount to certify the cows ready for slaughter without the required inspections. *Id*. Thereafter, for a two year period from January 1995 to January 1997, Mattick paid bribes to inspector Barber. ¶ 31. In return, Barber allowed Greenville to slaughter animals that had not been properly inspected or not inspected all. ¶ 20, 24, Greenville was permitted to certify these animals as inspected by the USDA, and thus, fit for human consumption, even though no actual inspection had taken place. ¶ 33. In 1997, a surprise inspection by Barber's supervisor revealed what had been happening. ¶ 28-30. Criminal charges were subsequently brought, and Greenville plead guilty to felony bribery of a public official in violation of 18 U.S.C. § 201(c)(1)(A). ¶ 8-9. The USDA subsequently brought an action pursuant to 21 U.S.C. § 671 and 21 U.S.C. § 467(a) to indefinitely withdraw meat and poultry inspection services from Greenville for its felony conviction. ALJ Prelim. Stat. By Decision and Order dated March 13, 2000, the ALJ granted the USDA's petition for withdrawal of services. An appeal to the JO of the USDA affirmed the decision. Plaintiff now brings this action as an appeal of those determinations.

II. Discussion

A. The Request to Transfer the Poultry Claim

As a preliminary matter, this Court does not have subject matter jurisdiction over that portion of Greenville's appeal relating to the Poultry Products Inspection Act (PPIA). Appeals from the determination of a JO regarding PPIA claims are properly before the Circuit Court of Appeals, rather than the District Court. 21 U.S.C. § 467(c). Plaintiff acknowledges this error, and requests this Court to transfer that portion of its claim to the Second Circuit pursuant to 28 U.S.C. § 1631. That statute provides in part:

> Whenever a civil action is filed in a court . . . including a petition for review of administrative action and that court finds that there is a want of jurisdiction, the court shall, if it is in the interests of justice, transfer such action . . . to any other such court in which the action . . . could have been brought at the time it was filed.

When considering whether a transfer is appropriate, the Court should carefully weigh the equities between a transfer and a dismissal. *Liriano v. United States*, 95 F.3d 119, 121 (2d Cir. 1996). Where a new action would be time barred, and the original action was filed in good faith, a transfer is appropriate. *Liriano*, 95 F.3d at 121; *Ranchi v. Manbeck*, 947 F.2d 631, 633 (2d Cir. 1991).

Here, as Plaintiff points out, should the court dismiss this portion of the action, no appeal could be taken because it would now be time barred. Additionally, Plaintiff points to the potential for confusion caused by having decisions under the PPIA appealed to the Circuit Court, but decisions under the FMIA appealed to the District Court. In this case, the equities weigh in favor of a transfer. Plaintiff made a good faith effort to ascertain the court in which the appeal was to be filed. Plaintiff's error was merely inadvertent. Moreover, the prejudice to Plaintiff should this Court decide not to transfer the appeal would be great. Plaintiff would be left with no ability to appeal the adverse administrative determination. Defendants in this action will not be adversely affected by this decision, as they will also have an appropriate forum in which to voice their defense. Thus, the portion of Plaintiff's appeal falling under the PPIA is transferred to the Second Circuit Court of Appeals.

B. Plaintiff's Allegations of Errors in the Admission of Evidence

Plaintiff alleges several errors in the admission of evidence by the ALJ. Review of administrative agency decisions is governed by the arbitrary and capricious standard. Under the Administrative Procedures Act, the Court may only set aside a decision if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). In order to be arbitrary and

capricious, there must be a clear indication that an agency determination "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem [or] 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." *Soler v. G & U, Inc.*, 833 F.2d 1104, 1107 (2d Cir. 1987) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)); *see also Connecticut Department of Public Utility Control v. Federal Trade Commission*, 78 F.3d 842, 849 (2d Cir. 1996) (citations omitted). The Court may not substitute its judgment for that of the agency. *Soler*, 833 F.2d at 1107.

1. Admission of the Process Deficiency Reports (PDR)

Plaintiff first alleges that it was error for the ALJ to have admitted eighty-eight PDRs showing the non-compliance of Greenville subsequent to the conviction. Plaintiff points out that the complaint was brought solely on the grounds of the felony conviction, and thus, the PDRs should not have been introduced. Plaintiff makes two arguments here. First, Plaintiff asserts he was denied due process by the introduction of the reports, and second, that the reports were not relevant to the proceeding.

Plaintiff's Due Process claim

Plaintiff bases his due process claim on Administrative Procedures Act (APA) 5 U.S.C. § 554(b)(3). That section sets out the requirements for the notice to be given when an administrative agency holds a hearing. It provides in part: "Persons entitled to notice of agency hearing shall be timely informed of . . . (3) the matters of fact and law asserted." Plaintiff asserts that he was denied due process because the complaint by the agency only alleged the felony conviction as a basis for withdrawal of inspection services. Thus, Greenville was not adequately apprised of the facts and law of the claims that it would be called to defend. Pltf. Mem. L. 12-13. Defendant responds that the PDRs were admitted only after Plaintiff sought to have mitigating circumstances considered, and that where mitigating circumstances are considered, "relevant aggravating circumstances" may also be considered. Def. Mem. L. 13 (citing *In re William Stewart*, 50 Agric. Dec. 511, 519 (1991), *aff'd* 947 F.2d 937 (3d Cir. 1991)).

The procedures instituted by the Department of Agriculture require that "[a] complaint . . . shall state briefly and clearly . . . the allegations of fact and provisions of law which constitute a basis for the proceeding . . ." 7 C.F.R.

§ 1.135(a). This provision is almost identical to the APA statute. The standard for determining whether adequate notice was given is whether the parties were aware of the issues "actually at stake" in the litigation and whether these issues were fully litigated before the ALJ. *ITT Continental Baking Co., Inc. v. Federal Trade Commission*, 532 F.2d 207, 215 (2d Cir. 1976) (citations omitted). Plaintiff was not deprived of due process here. There was adequate notice that the defendant would seek to introduce the PDRs, as the defendant gave plaintiff that information four months in advance. Def. Mem. L. 13. Further, the record is replete with discussions of the PDRs, Plaintiff's attacks on the PDRs, and the ALJ's understanding as to the issues surrounding the PDRs. Plaintiff had opportunity to demonstrate that a new program was going into effect, and that the non-compliance was in part due to that new program. Admin. Rec. 254-55. Finally, the use of the PDRs did not change the issue or the legal argument in the proceeding before the ALJ. Plaintiff was on notice that its fitness to receive meat packing services was the issue the ALJ would be deciding at the hearing. The PDRs did not in any way change that focus. *Cf. National Labor Relations Board v. Local Union No. 25*, 586 F.2d 959, 960 (2d Cir. 1978) (where there was no opportunity to brief the issue, no evidence on the issue was presented during the proceeding, and legal issue was separate and not disclosed prior to the proceeding, reversal warranted).

Relevance of the PDRs

Plaintiff next argues that the reports should not have been admitted because they are not relevant. The procedural rules for USDA hearings provide: "[e]vidence which is immaterial, irrelevant, or unduly repetitious . . . shall be excluded insofar as practicable." 7 C.F.R. § 1.141(b)(1)(iv). Relevant evidence is defined under the Federal Rules of Evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EV. 401.

The purpose of the act allowing the suspension of inspection services is to protect the public by preventing persons or companies who are unfit from introducing meat into the stream of commerce. *See* ALJ Decision 17 (quoting the Congressional findings in passing the FMIA). Thus, the issue before the ALJ was the fitness of a party to receive meat inspections under the circumstances. Any evidence tending to establish that a party was or was not fit to receive inspection would, therefore, have been relevant.

Plaintiff does not dispute that subsequent *compliance* with the FMIA is a relevant factor in determining the fitness of a party to receive meat packing inspections. *See Wyszynski Provision Co., Inc. v. Secretary of Agriculture*, 538 F.

Supp. 361, 364 (E.D. Penn. 1982). Thus, a *lack* of subsequent compliance is also relevant. It would appear that Plaintiff, in arguing against the admission of the PDRs, would limit the USDA to introducing evidence of the conviction, but would allow the defendant in such a proceeding to introduce any favorable evidence it wanted. Plaintiff cannot have it both ways. Either the conviction alone should be considered in determining whether a defendant is fit to receive inspection, or all of the circumstances and situation surrounding the denial of inspection services should be considered, whether they are favorable or unfavorable. This Court finds that the latter approach is the more logical one. It takes into consideration that sometimes a conviction alone will not be enough to deny services. *See Chernin v. Lyng*, 874 F.2d 501, 504 (8th Cir. 1989). Further, the behavior of the convicted party subsequent to his conviction might be even more relevant in some cases than the conviction itself. This is consistent with other decisions that have considered the subsequent compliance or lack of compliance of a party in determining the fitness of a party to receive inspection. *See In re: William Stewart*, 50 Agric. Dec. 511, 519 (1991) *aff'd* 947 F.2d 937 (3d Cir. 1991); *In re: H. Smith Packing Co. & Louis V. Smith*, 52 Agric. Dec. 1025, 1030 (1993). Thus, the Court cannot find that the ALJ acted in an arbitrary and capricious manner when allowing the PDRs to be introduced.

2. Error in admitting the Federal Register-the *per se* policy

Plaintiff alleges that it was error for the ALJ to have admitted a portion of the Federal Register containing the USDA policy with regard to persons or organizations that bribe an inspector. Pl. Mem. L. 15. Plaintiff alleges that the policy has been ruled illegal by the courts and that its introduction overshadowed the entire proceeding. Pl. Mem. L. 16.

The *per se* policy has been a source of great controversy and tension between the Department of Agriculture and the Federal Courts. *See Utica Packing Co. v. Block*, 781 F.2d 71, 73 (6th Cir. 1985). The Federal Register statement in question details the Department of Agriculture's policy with regard to felony convictions for bribery. It states in part:

> The policy of FSQS[1] in administrative actions brought for the withdrawal or denial of Federal inspection . . . based upon convictions for bribery and

[1]FSQS is the abbreviation for Food Quality and Inspection Service. It has been replaced by a successor organization, the Food Safety and Inspection Service (FSIS). ALJ Dec. 26.

> related offenses, shall be as follows: FSQS shall institute an administrative proceeding seeking the indefinite withdrawal or denial of Federal inspection . . . services when the department's action is based upon a criminal conviction or convictions for bribery or related offenses.

See Administrative Record, Gov. Ex. 11, 44 Fed. Reg. 124 (June 26, 1979). Prior to the unpublished Sixth Circuit decision in *Utica Packing Co*., 705 F.2d 460 (6th Cir. 1982) (Table), this policy was used as the basis for all Department judicial decisions. Thus, a felony conviction meant a *per se* withdrawal of inspection services. In *Utica Packing Co*., the Sixth Circuit found that such a *per se* approach rendered a hearing as required by 21 U.S.C. § 671 meaningless. *See Utica Packing Co. v. Block*, 781 F.2d at 73 (discussing the prior unpublished decision). Since that time, the Department's ALJs and JOs have made alternative holdings, one under the *per se* policy and one considering mitigating circumstances. *See, e.g.*, *Windy City Meat Co., Inc. v. United States Department of Agriculture*, 926 F.2d 672 (7th Cir. 1991) .

That is precisely what has occurred here. The ALJ made a holding under the *per se* rule, then also made a ruling after considering the relevant mitigating circumstances. Plaintiff contends that the mitigating circumstances were not really considered because the ALJ allowed the Federal Register to be introduced into evidence.

First, it is notable that the policy of the FSIS in bringing a petition for indefinite denial of inspection services has never been found to be unconstitutional. What various courts have rejected is the insistence by the Judicial Officers of the USDA that ALJs apply the *per se* policy in their determinations of FSIS petitions. *See, e.g.*, *Windy City Meat, Co.*, 926 F.2d at 673; *Utica Packing Co.*, 781 F.2d at 73. Thus, the FSIS policy, as it applies to notify the meat packing industry of the actions FSIS will take when an establishment or person is convicted of bribery, is not illegal or unconstitutional.

Plaintiff points to the ALJ's comments during the hearing to justify its position that the ALJ "felt duty bound" to follow the *per se* policy. Pl. Mem. L. 16. In particular, Plaintiff criticizes the following statement:

> And in view of the fact that, for instance, there is an indication that this indefinite suspension may last a long, long time in view of the statements made by the parties, one can never know-and I don't say this with any anticipation, but one can never know when there might be a change in policy or a change in approach or a change in personnel where there could be some different view taken of this matter.

Pl. Mem. L. 16 (quoting Admin. Rec. 269). What Plaintiff fails to give this statement is a context. At the time the statement was made, Plaintiff was attempting to have various letters of support written by the community introduced for consideration by the ALJ as mitigating circumstances. Thus, the ALJ's statements were an explanation of why she was allowing the unsworn statements to become a part of the record. Taking the record and decision of the ALJ as a whole, there is no indication that the admission of the *per se* policy overshadowed her decision making.

In fact, it appears that the ALJ was admitting the Federal Register document for the purposes of showing notice of the potential for severe consequences for bribery. When she overruled Plaintiff's initial objection, she did so stating, "it indicates the policy of the Food Safety Inspection Service with respect . . . to whether or not a complaint should be filed . . ." Admin. Rec. 221. Subsequent testimony indicated that the purpose of publishing the policy was to "get into the public domain as to what the agency's position was with regard to filing complaints to either withdraw/deny inspection services from persons, firms or corporations that may have been convicted of a bribery." Admin. Rec. 222. In addition, while Mr. Mattick was being questioned, the ALJ asked him about his education and whether he could read and understand the various regulations. Admin. Rec. 262. Whether Mr. Mattick knew or should of known that he risked withdrawal of inspection services for the bribery was relevant to the ALJ's determination. This is particularly true as Mr. Mattick has maintained throughout that he felt compelled to give the bribe, and did not believe that Inspector Barber's supervisors would have helped him. Admin. Rec. 259-61. Thus, Mr. Mattick's notice of the risk he was taking was relevant in weighing the reasonableness of his decision to continue bribing Inspector Barber rather than report Barber.

Additionally, there is nothing to indicate the ALJ followed a strictly *per se* approach to her determination of fitness. There were numerous findings by the ALJ that could have supported her decision that Greenville was unfit to receive inspection. (ALJ Dec. 19). The ALJ considered the compliance of Plaintiff outside of the bribery (ALJ Finding of Fact ¶ 6; Decision 15-16, 23). She considered the fact that Mr. Mattick was not initially forthcoming about the bribery when Dr. White, the inspection supervisor, visited the plant. Findings ¶ 28. She considered the reasonableness of Plaintiff's claim that it was not possible to report the misconduct of inspectors in light of both the potentially severe consequences for not reporting bribery and the FSIS campaign to make reporting such abuses easier. (ALJ Discussion 14, 25). Even though the ALJ credited Mattick's testimony as to his belief, she went on to find that it was not a reasonable belief to have held. (*Id.* 25). She considered the seriousness of the threat to the public health and safety

posed by Greenville's failure to receive inspection services. (*Id.* 21-23). Finally, she considered the seriousness of the charge of bribery. (*Id.* 18-19).

21 U.S.C. § 671 allows an ALJ to indefinitely suspend meat inspection services even when the sole reason for the suspension is a felony conviction. In this case, the ALJ could have concluded that the mitigating factors did not "overpower the risk to the public" of allowing Greenville to continue operating. *Windy City Meat Co.*, 926 at 678. Particularly in light of the many factors she found to be aggravating circumstances, this decision was not arbitrary. Thus, the decision of the ALJ in admitting the Federal Register policy into evidence was not an abuse of discretion. Further, the decision of the ALJ in finding Greenville unfit was not arbitrary or capricious.

3. Plaintiff's Other Claims of Error

In its complaint, Plaintiff also alleges error by the ALJ in allowing the USDA to introduce evidence that contradicted its own inspector as to whether sick animals had been allowed into the stream of commerce. Compl. ¶ 89. Plaintiff does not elaborate on this allegation in its motion papers. This Court has reviewed the Administrative Record and cannot determine what it is that Plaintiff is alleging to be error. Thus, the Court cannot make a finding that the decision of the ALJ was an abuse of discretion or arbitrary and capricious.

Plaintiff also alleges error in its complaint as to allowing the USDA expert Mr. Van Blargen to testify as to the appropriate sanctions to be given to the Plaintiff. Compl. ¶ 89-90. There is no abuse of discretion here. The ALJ asked for Mr. Van Blargen's opinion of what sanctions he would recommended and why. Admin. Rec. 239. She additionally asked him to specify the circumstances under which the indefinite suspension he was recommending would be lifted. *Id.* 239-40. If the ALJ credited Van Blargen's knowledge of the purposes and history of the FMIA, it would not have been an abuse for her to have asked his opinion as to what sanctions would best serve those purposes. It was then within the discretion of the ALJ to consider the position of the USDA and the purposes behind its policy in fashioning a punishment for Plaintiff. Thus, the ALJ did not act in an arbitrary and capricious manner in considering Van Blargen's testimony when making her decision.

C. Abuse of Discretion to Impose Indefinite Withdrawal

Finally, Plaintiff alleges that the ALJ abused her discretion in issuing a punishment of indefinite withdrawal of inspection services. Plaintiff is correct in

his statement that this was "the harshest possible penalty that can be imposed." Plt. Mem. L. 19. That does not, however, mean that it is an abuse of discretion.

In determining the penalty, the ALJ considered the mitigating circumstances presented by the Plaintiff. She noted the settlement offer by the government in the prior criminal proceeding (ALJ Dec. 28). She also considered the potential impact a decision of indefinite withdrawal would have on the business. *Id.* She then considered the severity of the conduct by Greenville. This Court cannot find that her determination that Greenville "has demonstrated a severe lack of integrity" is arbitrary or capricious. *Id*. at 30. As noted by the ALJ, bribery goes to the heart of the FMIA. It is not impossible to imagine that a plant that has previously engaged in such conduct cannot be relied on to act in the best interest of the public health. Moreover, the ALJ decision was in line with other cases indefinitely denying inspection services when the felony conviction involved bribery or the deception of the public about the inspection of meat. *See, e.g.*, *Windy City Meat Co*., 926 F.2d at 678; *In re: William Stewart*, 50 Agric. Dec. at 518; *In re: Steven's Foods, Inc.*, 40 Agric. Dec. at 1296; *Wyszynski Provision Co., Inc. v. Secretary of Agriculture*, 538 F. Supp. 361, 363-64 (E.D. Penn. 1982); *Toscony Provision Co., Inc. v. Block*, 38 F. Supp. 318, 320 (D.N.J. 1982).

III. Conclusion

For the foregoing reasons, Defendant's motion for summary judgment as to the FMIA claims is GRANTED. Plaintiff's cross-motion to transfer the PPIA claims to the Second Circuit Court of Appeals is also GRANTED.

IT IS SO ORDERED

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HORSE PROTECTION ACT

DEPARTMENTAL DECISIONS

In re: WALLACE BRANDON, JERRY W. GRAVES, AND KATHY GRAVES.
HPA Docket No. 98-0011.
Decision and Order as to Jerry W. Graves and Kathy Graves.
Filed July 19, 2001.

Horse protection – Entry – Exhibit – Allowing entry and exhibition – Admissibility of evidence – Baird test – Burton test – Credibility determinations – Civil penalty – Disqualification.

The Judicial Officer (JO) affirmed the decision by Chief Administrative Law Judge James W. Hunt (Chief ALJ): (1) concluding that Jerry W. Graves allowed the entry and exhibition of a horse at a horse show while the horse was sore, in violation of 15 U.S.C. § 1824(2)(D); (2) concluding that Kathy Graves allowed the entry of and exhibited a horse at a horse show while the horse was sore, in violation of 15 U.S.C. § 1824(2)(A) and (D); (3) assessing Jerry W. Graves and Kathy Graves (Respondents) a civil penalty of $2,000 each; and (4) disqualifying Respondents for 1 year from exhibiting, showing, or entering any horse and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction. The JO rejected Respondents' contention that Complainant's Exhibit 8 (CX 8), an excerpt from the *Walking Horse Report*, was not the sort of evidence upon which responsible persons are accustomed to rely. The JO also rejected Respondents' contention that, under the tests adopted in *Burton v. United States Dep't of Agric.*, 683 F.2d 280 (8th Cir. 1982), and *Baird v. United States Dep't of Agric.*, 39 F.3d 131 (6th Cir. 1994), the Chief ALJ erroneously concluded that they allowed the entry and exhibition of a horse at a horse show while the horse was sore, in violation of 15 U.S.C. § 1824(2)(D). The JO stated that Respondents did not meet the three-pronged test in *Burton* because Respondents' testimony that they directed the trainer not to sore their horse was contradicted by Respondents' affidavits. Further, the JO agreed with the Chief ALJ's conclusion that Respondents' testimony that they instructed the trainer not to sore their horse was not credible. The JO stated that Respondents did not meet the "affirmative steps" test in *Baird* because Respondents' failed to introduce credible evidence that they took an affirmative step to prevent the soring of their horse. Finally, the JO rejected Respondents' contention that the Chief ALJ's credibility determinations were error. The JO stated that, while he is not bound by an administrative law judge's credibility determinations, he gives great weight to the credibility determinations of administrative law judges because they have the opportunity to see and hear the witnesses testify. The JO found that the record supported the Chief ALJ's credibility determinations.

Colleen A. Carroll, for Complainant.
Brenda S. Bramlett, for Respondents.
Initial decision issued by James W. Hunt, Chief Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

The Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on July 9, 1998. Complainant instituted the proceeding under the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) [hereinafter the Horse Protection Act]; the Horse Protection Regulations (9 C.F.R. pt. 11); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes [hereinafter the Rules of Practice].

Complainant alleges that: (1) on August 28, 1997, Wallace Brandon entered for the purpose of showing or exhibiting and exhibited a horse known as "Gold's Red Skipper" as entry number 904 in class number 126 at the Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, while Gold's Red Skipper was sore, in violation of section 5(2)(A) and (B) of the Horse Protection Act (15 U.S.C. § 1824(2)(A), (B)); (2) on August 28, 1997, Wallace Brandon, or his agents or employees, removed Gold's Red Skipper from the inspection area at the Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, before the inspections of Gold's Red Skipper were completed and before Gold's Red Skipper was released from inspection by an Animal and Plant Health Inspection Service representative, thereby impeding the ability of the Animal and Plant Health Inspection Service and show management to inspect Gold's Red Skipper, in violation of section 5(9) of the Horse Protection Act (15 U.S.C. § 1824(9)) and section 11.4(b) of the Horse Protection Regulations (9 C.F.R. § 11.4(b)); (3) on August 28, 1997, Jerry W. Graves entered and allowed the entry and exhibition of Gold's Red Skipper as entry number 904 in class number 126 at the Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, while Gold's Red Skipper was sore, in violation of section 5(2)(A) and (D) of the Horse Protection Act (15 U.S.C. § 1824(2)(A), (D)); and (4) on August 28, 1997, Kathy Graves entered, exhibited, and allowed the entry of Gold's Red Skipper as entry number 904 in class number 126 at the Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, while Gold's Red Skipper was sore, in violation of section 5(2)(A) and (D) of the Horse Protection Act (15 U.S.C. § 1824(2)(A), (D)) (Compl. ¶ II).

On October 23, 1998, Wallace Brandon, Jerry W. Graves, and Kathy Graves [hereinafter Respondents] filed Answer of Respondents [hereinafter Answer] denying the material allegations in the Complaint.

Chief Administrative Law Judge James W. Hunt [hereinafter the Chief ALJ] presided at a hearing in Murfreesboro, Tennessee, on February 23, 2000. Colleen A. Carroll, Office of the General Counsel, United States Department of Agriculture, represented Complainant. Brenda S. Bramlett, Bramlett & Durard, Shelbyville,

Tennessee, represented Respondents.

On August 21, 2000, Complainant filed Complainant's Proposed Findings of Fact and Conclusions of Law; and Memorandum of Points and Authorities in Support Thereof. On October 23, 2000, Respondents filed Respondents' Proposed Findings of Fact and Conclusions of Law; and Memorandum of Points and Authorities in Support Thereof [hereinafter Respondents' Post-Hearing Brief].

On December 11, 2000, the Chief ALJ issued a Decision and Order [hereinafter Initial Decision and Order] in which the Chief ALJ: (1) concluded that on August 28, 1997, Wallace Brandon entered for the purpose of showing or exhibiting and exhibited Gold's Red Skipper as entry number 904 in class number 126 at the Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, while Gold's Red Skipper was sore, in violation of section 5(2)(A) and (B) of the Horse Protection Act (15 U.S.C. § 1824(2)(A), (B)); (2) concluded that on August 28, 1997, Jerry W. Graves allowed the entry and exhibition of Gold's Red Skipper as entry number 904 in class number 126 at the Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, while Gold's Red Skipper was sore, in violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)); (3) concluded that on August 28, 1997, Kathy Graves allowed the entry of and exhibited Gold's Red Skipper as entry number 904 in class number 126 at the Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, while Gold's Red Skipper was sore, in violation of section 5(2)(A) and (D) of the Horse Protection Act (15 U.S.C. § 1824(2)(A), (D)); (4) assessed each Respondent a $2,000 civil penalty; and (5) disqualified each Respondent for 1 year from exhibiting, showing, or entering any horse and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction (Initial Decision and Order at 11-12).

On April 23, 2001, Jerry W. Graves and Kathy Graves appealed to the Judicial Officer. On July 6, 2001, Complainant filed Complainant's Response to Respondents' Appeal Petition. On July 11, 2001, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a decision as to Jerry W. Graves and Kathy Graves.[1]

Based upon a careful consideration of the record, I agree with the Chief ALJ's

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[1] The Hearing Clerk served Wallace Brandon with the Initial Decision and Order on December 18, 2000 (Domestic Return Receipt for Article Number P093175318). Wallace Brandon did not appeal the Initial Decision and Order within 30 days after being served with the Initial Decision and Order. Therefore, in accordance with the Initial Decision and Order and the Rules of Practice, the Initial Decision and Order became final and effective as to Wallace Brandon on January 22, 2001 (Initial Decision and Order at 12; 7 C.F.R. § 1.142(c)(4)).

Initial Decision and Order. Therefore, pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt, with only minor modifications, the Chief ALJ's Initial Decision and Order. Additional conclusions by the Judicial Officer follow the Chief ALJ's Initial Decision and Order as restated.

Complainant's exhibits are designated by "CX." Transcript references are designated by "Tr."

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

15 U.S.C.:

TITLE 15—COMMERCE AND TRADE

. . . .

CHAPTER 44—PROTECTION OF HORSES

§ 1821. Definitions

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.

§ 1822. Congressional statement of findings

The Congress finds and declares that–

(1) the soring of horses is cruel and inhumane;

(2) horses shown or exhibited which are sore, where such soreness improves the performance of such horse, compete unfairly with horses which are not sore;

(3) the movement, showing, exhibition, or sale of sore horses in intrastate commerce adversely affects and burdens interstate and foreign commerce;

(4) all horses which are subject to regulation under this chapter are either in interstate or foreign commerce or substantially affect such commerce; and

(5) regulation under this chapter by the Secretary is appropriate to prevent and eliminate burdens upon commerce and to effectively regulate commerce.

§ 1823. Horse shows and exhibitions

(a) Disqualification of horses

The management of any horse show or horse exhibition shall disqualify any horse from being shown or exhibited (1) which is sore or (2) if the management has been notified by a person appointed in accordance with regulations under subsection (c) of this section or by the Secretary that the horse is sore.

. . . .

(c) Appointment of inspectors; manner of inspections

The Secretary shall prescribe by regulation requirements for the appointment by the management of any horse show, horse exhibition, or horse sale or auction of persons qualified to detect and diagnose a horse which is sore or to otherwise inspect horses for the purposes of enforcing

this chapter. Such requirements shall prohibit the appointment of persons who, after notice and opportunity for a hearing, have been disqualified by the Secretary to make such detection, diagnosis, or inspection. Appointment of a person in accordance with the requirements prescribed under this subsection shall not be construed as authorizing such person to conduct inspections in a manner other than that prescribed for inspections by the Secretary (or the Secretary's representative) under subsection (e) of this section.

§ 1824. Unlawful acts

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.

. . . .

(9) The failure or refusal to permit access to or copying of records, or the failure or refusal to permit entry or inspection, as required by section 1823 of this title.

§ 1825. Violations and penalties

. . . .

(b) Civil penalties; review and enforcement

(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.

(2) Any person against whom a violation is found and a civil penalty assessed under paragraph (1) of this subsection 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 by filing a notice of appeal in such court within 30 days from the date of such order and by simultaneously sending a copy of such notice by certified mail to the Secretary. The Secretary shall promptly file in such court a certified copy of the record upon which such violation was found and such penalty assessed, as provided in section 2112 of title 28. The findings of the Secretary shall be set aside if found to be unsupported by substantial evidence.

. . . .

(c) Disqualification of offenders; orders; civil penalties applicable; enforcement procedures

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. Any person who knowingly fails to obey an order of disqualification shall be subject to a civil penalty of not more than $3,000 for each violation. Any horse show, horse exhibition, or horse sale or auction, or the management thereof, collectively and severally, which knowingly allows any person who is under an order of disqualification to show or exhibit any horse, to enter for the purpose of showing or exhibiting any horse, to take part in managing or judging, or otherwise to participate in any horse show, horse exhibition,

or horse sale or auction in violation of an order shall be subject to a civil penalty of not more than $3,000 for each violation. The provisions of subsection (b) of this section respecting the assessment, review, collection, and compromise, modification, and remission of a civil penalty apply with respect to civil penalties under this subsection.

(d) Production of witnesses and books, papers, and documents; depositions; fees; presumptions; jurisdiction

. . . .

(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.

§ 1828. Rules and regulations

The Secretary is authorized to issue such rules and regulations as he deems necessary to carry out the provisions of this chapter.

15 U.S.C. §§ 1821(3), 1822, 1823(a), (c), 1824(2), (9), 1825(b)(1)-(2), (c), (d)(5), 1828.

9 C.F.R.:

TITLE 9—ANIMALS AND ANIMAL PRODUCTS

CHAPTER I—ANIMAL AND PLANT HEALTH INSPECTION SERVICE, DEPARTMENT OF AGRICULTURE

SUBCHAPTER A—ANIMAL WELFARE

. . . .

PART 11—HORSE PROTECTION REGULATIONS

§ 11.1 Definitions.

For the purpose of this part, unless the context otherwise requires, the following terms shall have the meanings assigned to them in this section. The singular form shall also impart the plural and the masculine form shall also impart the feminine. Words of art undefined in the following paragraphs shall have the meaning attributed to them by trade usage or general usage as reflected in a standard dictionary, such as "Webster's."

. . . .

Designated Qualified Person or *DQP* means a person meeting the requirements specified in § 11.7 of this part who has been licensed as a DQP by a horse industry organization or association having a DQP program certified by the Department and who may be appointed and delegated authority by the management of any horse show, horse exhibition, horse sale or horse auction under section 4 of the Act to detect or diagnose horses which are sore or to otherwise inspect horses and any records pertaining to such horses for the purposes of enforcing the Act.

§ 11.4 Inspection and detention of horses.

For the purpose of effective enforcement of the Act:

. . . .

(b) When any APHIS representative notifies the owner, exhibitor, trainer, or other person having custody of or responsibility for a horse at any horse show, horse exhibition, or horse sale or auction that APHIS desires to inspect such horse, it shall not be moved from the horse show, horse exhibition, or horse sale or auction until such inspection has been completed and the horse has been released by an APHIS representative.

§ 11.7 Certification and licensing of designated qualified persons (DQP's).

(a) *Basic qualifications of DQP appli*cants. DQP's holding a valid, current DQP license issued in accordance with this part may be appointed by the management of any horse show, horse exhibition, horse sale, or horse auction, as qualified persons in accordance with section 4(c) of the Act, to inspect horses to detect or diagnose soring and to otherwise inspect horses, or any records pertaining to any horse for the purpose of enforcing the Act. Individuals who may be licensed as DQP's under this part shall be:

(1) Doctors of Veterinary Medicine who are accredited in any State by

the United States Department of Agriculture under part 161 of chapter I, title 9 of the Code of Federal Regulations, and who are:

(i) Members of the American Association of Equine Practitioners, or

(ii) Large animal practitioners with substantial equine experience, or

(iii) Knowledgeable in the area of equine lameness as related to soring and soring practices (such as Doctors of Veterinary Medicine with a small animal practice who own, train, judge, or show horses, or Doctors of Veterinary Medicine who teach equine related subjects in an accredited college or school of veterinary medicine). Accredited Doctors of Veterinary Medicine who meet these criteria may be licensed as DQP's by a horse industry organization or association whose DQP program has been certified by the Department under this part without undergoing the formal training requirements set forth in this section.

(2) Farriers, horse trainers, and other knowledgeable horsemen whose past experience and training would qualify them for positions as horse industry organization or association stewards or judges (or their equivalent) and who have been formally trained and licensed as DQP's by a horse industry organization or association whose DQP program has been certified by the Department in accordance with this section.

(b) *Certification requirements for DQP programs*. The Department will not license DQP's on an individual basis. Licensing of DQP's will be accomplished only through DQP programs certified by the Department and initiated and maintained by horse industry organizations or associations. Any horse industry organization or association desiring Department certification to train and license DQP's under the Act shall submit to the Administrator a formal request in writing for certification of its DQP program and a detailed outline of such program for Department approval. Such outline shall include the organizational structure of such organization or association and the names of the officers or persons charged with the management of the organization or association. The outline shall also contain at least the following:

(1) The criteria to be used in selecting DQP candidates and the minimum qualifications and knowledge regarding horses each candidate must have in order to be admitted to the program.

(2) A copy of the formal training program, classroom and practical, required to be completed by each DQP candidate before being licensed by such horse industry organization or association, including the minimum number of hours, classroom and practical, and the subject matter of the training program. Such training program must meet the following minimum

standards in order to be certified by the Department under the Act.

(i) Two hours of classroom instruction on the anatomy and physiology of the limbs of a horse. The instructor teaching the course must be specified, and a resume of said instructor's background, experience, and qualifications to teach such course shall be provided to the Administrator.

(ii) Two hours of classroom instruction on the Horse Protection Act and regulations and their interpretation. Instructors for this course must be furnished or recommended by the Department. Requests for instructors to be furnished or recommended must be made to the Administrator in writing at least 30 days prior to such course.

(iii) Four hours of classroom instruction on the history of soring, the physical examination procedures necessary to detect soring, the detection and diagnosis of soring, and related subjects. The instructor teaching the course must be specified and a summary of said instructor's background, experience, and qualifications to teach such course must be provided to the Administrator.

(iv) Four hours of practical instruction in clinics and seminars utilizing live horses with actual application of the knowledge gained in the classroom subjects covered in paragraphs (b)(2)(i), (ii), and (iii) of this section. Methods and procedures required to perform a thorough and uniform examination of a horse shall be included. The names of the instructors and a resume of their background, academic and practical experience, and qualifications to present such instruction shall be provided to the Administrator. Notification of the actual date, time, duration, subject matter, and geographic location of such clinics or seminars must be sent to the Administrator at least 10 days prior to each such clinic or seminar.

(v) One hour of classroom instruction regarding the DQP standards of conduct promulgated by the licensing organization or association pursuant to paragraph (d)(7) of this section.

(vi) One hour of classroom instruction on recordkeeping and reporting requirements and procedures.

(3) A sample of a written examination which must be passed by DQP candidates for successful completion of the program along with sample answers and the scoring thereof, and proposed passing and failing standards.

(4) The criteria to be used to determine the qualifications and performance abilities of DQP candidates selected for the training program and the criteria used to indicate successful completion of the training program, in addition to the written examination required in paragraph (b)(3) of this section.

(5) The criteria and schedule for a continuing education program and the criteria and methods of monitoring and appraising performance for continued licensing of DQP's by such organization or association. A continuing education program for DQP's shall consist of not less than 4 hours of instruction per year.

(6) Procedures for monitoring horses in the unloading, preparation, warmup, and barn areas, or other such areas. Such monitoring may include any horse that is stabled, loaded on a trailer, being prepared for show, exhibition, sale, or auction, or exercised, or that is otherwise on the grounds of, or present at, any horse show, horse exhibition, or horse sale or auction.

(7) The methods to be used to insure uniform interpretation and enforcement of the Horse Protection Act and regulations by DQP's and uniform procedures for inspecting horses for compliance with the Act and regulations;

(8) Standards of conduct for DQP's promulgated by the organization or association in accordance with paragraph (d)(7) of this section; and

(9) A formal request for Department certification of the DQP program.

The horse industry organizations or associations that have formally requested Department certification of their DQP training, enforcement, and maintenance program will receive a formal notice of certification from the Department, or the reasons, in writing, why certification of such program cannot be approved. A current list of certified DQP programs and licensed DQP's will be published in the FEDERAL REGISTER at least once each year, and as may be further required for the purpose of deleting programs and names of DQP's that are no longer certified or licensed, and of adding the names of programs and DQP's that have been certified or licensed subsequent to the publication of the previous list.

(c) *Licensing of DQP's.* Each horse industry organization or association receiving Department certification for the training and licensing of DQP's under the Act shall:

(1) Issue each DQP licensed by such horse industry organization or association a numbered identification card bearing the name and personal signature of the DQP, a picture of the DQP, and the name and address, including the street address or post office box and zip code, of the licensing organization or association;

(2) Submit a list to the Administrator of names and addresses including street address or post office box and zip code, of all DQP's that have successfully completed the certified DQP program and have been licensed

under the Act and regulations by such horse industry organization or association;

(3) Notify the Department of any additions or deletions of names of licensed DQP's from the licensed DQP list submitted to the Department or of any change in the address of any licensed DQP or any warnings and license revocations issued to any DQP licensed by such horse industry organization or association within 10 days of such change;

(4) Not license any person as a DQP if such person has been convicted of any violation of the Act or regulations occurring after July 13, 1976, or paid any fine or civil penalty in settlement of any proceeding regarding a violation of the Act or regulations occurring after July 13, 1976, for a period of at least 2 years following the first such violation, and for a period of at least 5 years following the second such violation and any subsequent violation;

(5) Not license any person as a DQP until such person has attended and worked two recognized or affiliated horse shows, horse exhibitions, horse sales, or horse auctions as an apprentice DQP and has demonstrated the ability, qualifications, knowledge and integrity required to satisfactorily execute the duties and responsibilities of a DQP;

(6) Not license any person as a DQP if such person has been disqualified by the Secretary from making detection, diagnosis, or inspection for the purpose of enforcing the Act, or if such person's DQP license is canceled by another horse industry organization or association.

(d) *Requirements to be met by DQP's and Licensing Organizations or Associations.* (1) Any licensed DQP appointed by the management of any horse show, horse exhibition, horse sale or auction to inspect horses for the purpose of detecting and determining or diagnosing horses which are sore and to otherwise inspect horses for the purpose of enforcing the Act and regulations, shall keep and maintain the following information and records concerning any horse which said DQP recommends be disqualified or excused for any reason at such horse show, horse exhibition, horse sale or auction, from being shown, exhibited, sold or auctioned, in a uniform format required by the horse industry organization or association that has licensed said DQP:

(i) The name and address, including street address or post office box and zip code, of the show and the show manager.

(ii) The name and address, including street address or post office box and zip code, of the horse owner.

(iii) The name and address, including street address or post office box

and zip code, of the horse trainer.

(iv) The name and address, including street address or post office box and zip code, of the horse exhibitor.

(v) The exhibitors number and class number, or the sale or auction tag number of said horse.

(vi) The date and time of the inspection.

(vii) A detailed description of all of the DQP's findings and the nature of the alleged violation, or other reason for disqualifying or excusing the horse, including said DQP's statement regarding the evidence or facts upon which the decision to disqualify or excuse said horse was based.

(viii) The name, age, sex, color, and markings of the horse; and

(ix) The name or names of the show manager or other management representative notified by the DQP that such horse should be excused or disqualified and whether or not such manager or management representative excused or disqualified such horse.

Copies of the above records shall be submitted by the involved DQP to the horse industry organization or association that has licensed said DQP within 72 hours after the horse show, horse exhibition, horse sale, or horse auction is over.

(2) The DQP shall inform the custodian of each horse allegedly found in violation of the Act or its regulations, or disqualified or excused for any other reason, of such action and the specific reasons for such action.

(3) Each horse industry organization or association having a Department certified DQP program shall submit a report to the Department containing the following information, from records required in paragraph (d)(1) of this section and other available sources, to the Department on a monthly basis:

(i) The identity of all horse shows, horse exhibitions, horse sales, or horse auctions that have retained the services of DQP's licensed by said organization or association during the month covered by the report. Information concerning the identity of such horse shows, horse exhibitions, horse sales, or horse auctions shall include:

(A) The name and location of the show, exhibition, sale, or auction.

(B) The name and address of the manager.

(C) The date or dates of the show, exhibition, sale, or auction.

(ii) The identity of all horses at each horse show, horse exhibition, horse sale, or horse auction that the licensed DQP recommended be disqualified or excused for any reason. The information concerning the identity of such horses shall include:

(A) The registered name of each horse.

(B) The name and address of the owner, trainer, exhibitor, or other person having custody of or responsibility for the care of each such horse disqualified or excused.

(4) Each horse industry organization or association having a Department certified DQP program shall provide, by certified mail if personal service is not possible, to the trainer and owner of each horse allegedly found in violation of the Act or its regulations or otherwise disqualified or excused for any reason, the following information;

(i) The name and date of the show, exhibition, sale, or auction.

(ii) The name of the horse and the reason why said horse was excused, disqualified, or alleged to be in violation of the Act or its regulations.

(5) Each horse industry organization or association having a Department certified DQP program shall provide each of its licensed DQP's with a current list of all persons that have been disqualified by order of the Secretary from showing or exhibiting any horse, or judging or managing any horse show, horse exhibition, horse sale, or horse auction. The Department will make such list available, on a current basis, to organizations and associations maintaining a certified DQP program.

(6) Each horse industry organization or association having a Department certified DQP program shall develop and provide a continuing education program for licensed DQP's which provides not less than 4 hours of instruction per year to each licensed DQP.

(7) Each horse industry organization or association having a Department certified DQP program shall promulgate standards of conduct for its DQP's, and shall provide administrative procedures within the organization or association for initiating, maintaining, and enforcing such standards. The procedures shall include the causes for and methods to be utilized for canceling the license of any DQP who fails to properly and adequately carry out his duties. Minimum standards of conduct for DQP's shall include the following;

(i) A DQP shall not exhibit any horse at any horse show or horse exhibition, or sell, auction, or purchase any horse sold at a horse sale or horse auction at which he or she has been appointed to inspect horses;

(ii) A DQP shall not inspect horses at any horse show, horse exhibition, horse sale or horse auction in which a horse or horses owned by a member of the DQP's immediate family or the DQP's employer are competing or are being offered for sale;

(iii) A DQP shall follow the uniform inspection procedures of his certified organization or association when inspecting horses; and

(iv) The DQP shall immediately inform management of each case regarding any horse which, in his opinion, is in violation of the Act or regulations.

(e) *Prohibition of appointment of certain persons to perform duties under the Act.* The management of any horse show, horse exhibition, horse sale, or horse auction shall not appoint any person to detect and diagnose horses which are sore or to otherwise inspect horses for the purpose of enforcing the Act, if that person:

(1) Does not hold a valid, current DQP license issued by a horse industry organization or association having a DQP program certified by the Department.

(2) Has had his DQP license canceled by the licensing organization or association.

(3) Is disqualified by the Secretary from performing diagnosis, detection, and inspection under the Act, after notice and opportunity for a hearing, when the Secretary finds that such person is unfit to perform such diagnosis, detection, or inspection because he has failed to perform his duties in accordance with the Act or regulations, or because he has been convicted of a violation of any provision of the Act or regulations occurring after July 13, 1976, or has paid any fine or civil penalty in settlement of any proceeding regarding a violation of the Act or regulations occurring after July 13, 1976.

(f) *Cancellation of DQP license*. (1) Each horse industry organization or association having a DQP program certified by the Department shall issue a written warning to any DQP whom it has licensed who violates the rules, regulations, by-laws, or standards of conduct promulgated by such horse industry organization or association pursuant to this section, who fails to follow the procedures set forth in § 11.21 of this part, or who otherwise carries out his duties and responsibilities in a less than satisfactory manner, and shall cancel the license of any DQP after a second violation. Upon cancellation of his DQP license, the DQP may, within 30 days thereafter, request a hearing before a review committee of not less than three persons appointed by the licensing horse industry organization or association. If the review committee sustains the cancellation of the license, the DQP may appeal the decision of such committee to the Administrator within 30 days from the date of such decision, and the Administrator shall make a final determination in the matter. If the Administrator finds, after providing the DQP whose license has been canceled with a notice and an opportunity for a hearing, that there is sufficient cause for the committee's determination

regarding license cancellation, he shall issue a decision sustaining such determination. If he does not find that there was sufficient cause to cancel the license, the licensing organization or association shall reinstate the license.

(2) Each horse industry organization or association having a Department certified DQP program shall cancel the license of any DQP licensed under its program who has been convicted of any violation of the Act or regulations or of any DQP who has paid a fine or civil penalty in settlement of any alleged violation of the Act or regulations if such alleged violation occurred after July 13, 1976.

(g) *Revocation of DQP program certification of horse industry organizations or associations.* Any horse industry organization or association having a Department certified DQP program that has not received Department approval of the inspection procedures provided for in paragraph (b)(6) of this section, or that otherwise fails to comply with the requirements contained in this section, may have such certification of its DQP program revoked, unless, upon written notification from the Department of such failure to comply with the requirements in this section, such organization or association takes immediate action to rectify such failure and takes appropriate steps to prevent a recurrence of such noncompliance within the time period specified in the Department notification, or otherwise adequately explains such failure to comply to the satisfaction of the Department. Any horse industry organization or association whose DQP program certification has been revoked may appeal such revocation to the Administrator in writing within 30 days after the date of such revocation and, if requested, shall be afforded an opportunity for a hearing. All DQP licenses issued by a horse industry organization or association whose DQP program certification has been revoked shall expire 30 days after the date of such revocation, or 15 days after the date the revocation becomes final after appeal, unless they are transferred to a horse industry organization or association having a program currently certified by the Department.

9 C.F.R. §§ 11.1, .4(b), .7 (1998) (footnotes omitted).

CHIEF ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION AND ORDER (AS RESTATED)

Statement of the Case

Respondents Jerry W. Graves and Kathy Graves, whose address is 1220 Paul Rescer Road, Moss, Tennessee 38575, own between 35 and 40 Tennessee Walking Horses. They employ professional trainers to train the horses. (Answer ¶ I(B), (C); Tr. 87-88, 142.) In 1994, the Graves acquired a horse known as "Gold's Red Skipper." Gold's Red Skipper was a flatshod horse that was "hard to work with." Based on the recommendation of one of their trainers, Ramsey Bullington, the Graves, in February 1997, asked Wallace Brandon to train Gold's Red Skipper. (Tr. 89, 117-18; CX 12, CX 13.) Wallace Brandon is a horse trainer whose mailing address is 4676 Murfreesboro Road, Franklin, Tennessee 37067 (Answer ¶ I(B); CX 10).

The Graves were unaware that Wallace Brandon, who was paid by the Graves to train Gold's Red Skipper, had been involved in a "prior case" about 12 years ago (Tr. 92, 126-27; CX 10). Jerry W. Graves and Kathy Graves each gave statements on January 21, 1998, to Animal and Plant Health Inspection Service investigator Michael Nottingham that they had not given Wallace Brandon "any instructions on the training of Gold's Red Skipper." (CX 12 at 2, CX 13 at 2.) According to Jerry W. Graves, "if you go start telling [trainers] what to do, they'll tell you to take [the horse] home." (Tr. 149.) However, both Jerry W. Graves and Kathy Graves testified at the hearing that they told Wallace Brandon not to sore Gold's Red Skipper and that they would "move" Gold's Red Skipper if he sored him (Tr. 91-92, 108, 146, 148, 164-65). Gold's Red Skipper was kept at Wallace Brandon's barn where he was periodically seen by veterinarians. Kathy Graves also frequently visited Gold's Red Skipper to ride him. (Tr. 89-90, 109.)

Later, in 1997, Wallace Brandon asked the Graves if they wanted to have Gold's Red Skipper entered in the 59th Annual Tennessee Walking Horse National Celebration in Shelbyville, Tennessee. They agreed. Wallace Brandon entered Gold's Red Skipper as entry number 904 in class number 126, and the owners were listed as "The Jerry Graves Family." The Graves reimbursed Wallace Brandon for the entry fee. Wallace Brandon transported Gold's Red Skipper to the Tennessee Walking Horse National Celebration. (Tr. 110, 151; CX 2, CX 3, CX 4, CX 10, CX 12, CX 13.)

Before his exhibition at the Tennessee Walking Horse National Celebration on August 28, 1997, Gold's Red Skipper was given a pre-show inspection by the

show's Designated Qualified Person.[2] Gold's Red Skipper passed the pre-show inspection, and Kathy Graves rode Gold's Red Skipper during the exhibition. Gold's Red Skipper placed third in his class, and a ribbon and a $500 prize were awarded for his third place finish. (Tr. 97-99, 112; CX 9 at 1, CX 14.)

After Gold's Red Skipper's exhibition, Animal and Plant Health Inspection Service doctor of veterinary medicine, John Michael Guedron, an experienced examiner of walking horses, inspected Gold's Red Skipper. Dr. Guedron observed Gold's Red Skipper's movements and then palpated the horse's forelegs. Dr. Guedron testified that he prepared a report of his examination that day (APHIS FORM 7077) and prepared an affidavit the following day. (Tr. 59-78; CX 5, CX 9.) In his affidavit, Dr. Guedron stated:

> I was assigned to work the 59th Annual Tennessee Walking Horse National Celebration held at the Calsonic Arena in Shelbyville, TN on August 27-30, 1997. Other USDA, APHIS personnel working the show or in attendance were: Dr. Scott Price, VMO-KY; Dr. David Smith, VMO-NY; Dr. Bob Willems, SACS-MD; Mr. Jimmy Odle, I&ES Investigator-TN; and Mr. Mike Nottingham, I&ES Investigator-TN. DQP's from the National Horse Show Commission working at the show included: Charles Thomas; William Edwards; Iry Gladney; Harry Chaffin; Joe Cunningham; and Earl Melton. Also present was Mr. Lonnie Messick, DQP Supervisor for the NHSC.
>
> I first saw Entry #904 in Class #126 a sorrel gelding later identified as "Gold's Red Skipper" as it was presented to me for post-show inspection (it tied 3rd place). This was at approximately 10:00 pm CDT. As the custodian was leading the horse I noted that it was walking slowly with a shortened, choppy gait and its weight shifted to its rear feet. It also had difficulty turning around the cone. I began my physical exam on the left leg and foot and elicited severe, consistent and repeatable pain responses to digital palpation of several spots on the anterior and anterio-lateral aspects of the pastern, approximately 1 - 2 inches above the coronary band. These were evidenced by strong withdrawal of the horse's foot, rearing of its head, and tightening of its abdominal muscles. I continued with the right leg and

[2] A Designated Qualified Person is an individual appointed by the management of a horse show and trained under a United States Department of Agriculture-sponsored program to inspect horses for compliance with the Horse Protection Act (15 U.S.C. § 1823; 9 C.F.R. §§ 11.1, .7).

foot and elicited moderate, consistent and repeatable pain responses, as evidenced by withdrawal of its foot, in a diffuse pattern along the anterior pastern just above the coronary band.

I then asked DQP Earl Melton to examine the horse and noted that the horse appeared to be having even more difficulty in walking and turning around the cone. I observed as the DQP elicited the same consistent and repeatable pain responses as I had, to digital palpation of both front pasterns. He scored the horse as abnormal on locomotion and physical exam for a total score of 7 which disqualified it from showing. As the DQP was writing the ticket, the horse was taken back to its stall on the show grounds. It was at this time that DQP Supervisor Lonnie Messick decided that they needed to have another DQP inspect the horse and agree with the findings of the first. The trainer left to retrieve the horse, but was gone for an unreasonable length of time. Finally, Mr. Messick sent (2) DQP's to bring the horse back and when they returned, they reported witnessing grooms rubbing on the horse's front pasterns. At this time, the horse was moving more freely and even though the 2nd DQP (Charles Thomas) elicited consistent and repeatable pain responses, he could not concur with the decision of the 1st DQP, and only gave it a total score of 6, a one (1) for general appearance, two (2) for locomotion, and three (3) for physical exam, which disqualified the horse, but carries a lesser penalty.

I then conferred with Drs. Price and Willems and we all agreed that since we had lost chain of custody of the horse for such a long time, the 2nd DQP inspection was invalid, as would be any subsequent exam by another VMO. We also agreed that the horse was Sore as defined by the Horse Protection Act and that USDA, APHIS would initiate a Federal case based on my examination alone. I then informed the trainer of our decision. Mr. Jimmy Odle and I filled out the 7077.

CX 9.

Dr. Guedron testified that, based on his examination, Gold's Red Skipper would have experienced pain when he was exhibited (Tr. 78-79). Designated Qualified Person Earl Melton issued a ticket to Wallace Brandon for Gold's Red Skipper's "bilateral sensitivity, locomotion and scurffing." (CX 7 at 3.) The National Horse Show Commission, Inc., notified Wallace Brandon on November 12 and 14, 1997, that, based on the Designated Qualified Person ticket issued on August 28, 1997,

the ribbon and money awarded for Gold's Red Skipper's third place finish had to be returned, that Wallace Brandon was fined $500, and that Wallace Brandon was suspended from showing horses from March 1, 1998, through June 12, 1998 (CX 14).

Neither Jerry W. Graves nor Kathy Graves was present for the pre-show or the post-show inspection of Gold's Red Skipper. In his statement to Michael Nottingham on January 21, 1998, Jerry W. Graves stated that he believed the reason that Gold's Red Skipper was found to be sore at the Tennessee Walking Horse National Celebration was because Gold's Red Skipper was "silly" about his feet and had to stand around for 30 to 45 minutes before being examined (CX 12 at 2). Kathy Graves said in her statement that Wallace Brandon had told her that Gold's Red Skipper had to stand around for 30 to 45 minutes after the exhibition and that Wallace Brandon "told me that he had a little problem with Skipper and had to go before the board. He called me later and said he had worked it out." (CX 13 at 2.) However, at the hearing, Kathy Graves testified that she did not know that Gold's Red Skipper was sore when he was entered and exhibited and that she knew nothing about Gold's Red Skipper being "wrote up" at the Tennessee Walking Horse National Celebration until Animal and Plant Health Inspection Service investigator Michael Nottingham took her statement on January 21, 1998. She said she tried to call Wallace Brandon at that time but was unable to reach him. (Tr. 94.) Jerry W. Graves likewise testified that he was not aware that Gold's Red Skipper was found sore at the Tennessee Walking Horse National Celebration until January 21, 1998 (Tr. 162).

Kathy Graves testified that Gold's Red Skipper was sold in March 1998 (Tr. 121). However, the *Walking Horse Report*, a trade publication, reported in July 1999 that on June 12, 1998, Wallace Brandon entered Gold's Red Skipper at the Crossroads of Dixie Horse Show for the "Jerry Graves Family" (Tr. 170-83; CX 8). Kathy Graves testified that she did not know and did not remember anything about Gold's Red Skipper being exhibited on June 12, 1998 (Tr. 122-24).

Jerry W. Graves and Kathy Graves deny Gold's Red Skipper was sore when he was entered and exhibited on August 28, 1997, and contend the Horse Protection Act is unconstitutional (Answer). Jerry W. Graves and Kathy Graves further contend the evidence does not show that they allowed the entry or exhibition of Gold's Red Skipper under the standard adopted in *Baird v. United States Dep't of Agric.,* 39 F.3d 131 (6th Cir. 1994) (Respondents' Post-Hearing Brief at 4-10).

Discussion

The Horse Protection Act is constitutional. *In re William J. Reinhart*, 59 Agric.

Dec. 721, 735, 763-64 (2000).

Dr. Guedron found, on examining Gold's Red Skipper on August 28, 1997, that the horse demonstrated consistent and repeatable pain responses when both front pasterns were palpated. Dr. Guerdon concluded that Gold's Red Skipper was sore and would have experienced pain when exhibited. (Tr. 66-83; CX 5, CX 9.) Designated Qualified Person Earl Melton elicited similar reactions when he examined Gold's Red Skipper (CX 7, CX 9 at 2). Designated Qualified Person Charles Thomas found a pain response but less than that found by Dr. Guedron and Designated Qualified Person Earl Melton. However, Designated Qualified Person Charles Thomas' inspection took place after Gold's Red Skipper had been returned to his stall and his pasterns had been rubbed. (CX 9 at 2, CX 11.) Thus, substantial evidence shows that Gold's Red Skipper suffered bilateral pain -- abnormal sensitivity -- in both front legs. This circumstance raises the presumption that Gold's Red Skipper was sore. 15 U.S.C. § 1825(d)(5). The only rebuttal was the pre-show Designated Qualified Person examination. Although the Designated Qualified Person who conducted this examination did not disqualify Gold's Red Skipper, a horse may be found sore at one examination and not sore at another. *In re Jackie McConnell,* 44 Agric. Dec. 712, 722 (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). Therefore, the preponderance of the evidence shows that Gold's Red Skipper was sore when exhibited. Gold's Red Skipper was also sore when he was entered in the Tennessee Walking Horse National Celebration since "entering" is a continuing process which includes inspections at the time of the horse's exhibition. *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*, 510 U.S. 867 (1993). I accordingly find Kathy Graves violated section 5(2)(A) of the Horse Protection Act (15 U.S.C. § 1824(2)(A)) by exhibiting Gold's Red Skipper when she rode him at the Tennessee Walking Horse National Celebration.

Jerry W. Graves and Kathy Graves contend that they did not violate the Horse Protection Act when they allowed Wallace Brandon to enter Gold's Red Skipper in the Tennessee Walking Horse National Celebration because they did not know Gold's Red Skipper was sore when he was entered and they had instructed Wallace Brandon not to sore Gold's Red Skipper. They contend their statements that they had not given any instructions to Wallace Brandon were coerced by Animal and Plant Health Inspection Service inspector Michael Nottingham. (Respondents' Post-Hearing Brief at 4-10.)

Michael Nottingham had gone to the Graves' home on January 21, 1998, to obtain their statements. He met with Jerry W. Graves who said he could not read

and he wanted to wait until his wife returned home before giving a statement. Jerry W. Graves said Michael Nottingham told him that if he gave a statement "it would just be over with. I mean, if we didn't, he told me that we was going to have big trouble." (Tr. 147.) But Jerry W. Graves also said that his opinion of Michael Nottingham was that he was "really a nice guy. I mean, he really has a good personality." (Tr. 147.) When Kathy Graves returned home, she gave a statement to Michael Nottingham and read her husband's statement. However, she was reluctant to sign. She said Michael Nottingham told her that the statements were only a formality, but that, if they did not cooperate, it was going to be "rough" and "hard" on them, and that they would be a "whole lot better off" if they signed. Like her husband, she said she thought that Michael Nottingham was "real nice." (Tr. 93-94, 135-37.) Finally, after being encouraged by her husband, Kathy Graves signed the statement (Tr. 95).

It is not likely that a person who allegedly coerces others would be considered "nice" by those he allegedly coerced. Michael Nottingham may have urged Jerry W. Graves and Kathy Graves to sign their statements, but I do not find that they were threatened or coerced by Michael Nottingham into giving false information. The many inconsistencies in the Graves' testimony also affect the credibility of their claim that they had instructed Wallace Brandon not to sore Gold's Red Skipper. The Graves said they did not know until they gave statements in January 1998 that Gold's Red Skipper was found sore when inspected at the Tennessee Walking Horse National Celebration. (Tr. 93-94, 162.) However, the Graves both indicated, when they gave their statements, that they knew that Gold's Red Skipper had been found sore by offering excuses for Gold's Red Skipper's reactions to the inspections at the Tennessee Walking Horse National Celebration, such as that Gold's Red Skipper was a "silly" horse that did not like to stand around (CX 12 at 2, CX 13 at 2). The Graves would also have been alerted to Gold's Red Skipper's "problem" in November 1997 when Wallace Brandon was notified that the ribbon and prize money for Gold's Red Skipper's third place finish, which the Graves presumably received as the owners of the horse, had to be returned because Gold's Red Skipper had been disqualified (CX 14 at 1). Another inconsistency was the statement by Kathy Graves that Gold's Red Skipper was sold in March 1998, yet the Graves exhibited him 3 months later at the Crossroads of Dixie Horse Show (Tr. 121-24; CX 8 at 1). The Graves further claimed they told Wallace Brandon that they would "move" Gold's Red Skipper if he was sored, but they continued to use Wallace Brandon as the trainer until at least June 1998, which was well after the time they said they became aware that Gold's Red Skipper had been found sore (Tr. 93-94, 108, 162, 165; CX 8 at 1). Finally, the Graves failed to call Wallace Brandon or any of their other trainers to corroborate their claim that they had

instructed Wallace Brandon and the other trainers not to sore their horses (Tr. 163-64). In these circumstances, I do not credit the testimony of Jerry W. Graves and Kathy Graves that they had instructed Wallace Brandon not to sore Gold's Red Skipper.

Findings of Fact

1. Respondent Jerry W. Graves is an individual whose mailing address is 1220 Paul Rescer Road, Moss, Tennessee 38575. At all times material to this proceeding, Respondent Jerry W. Graves was an owner of Gold's Red Skipper. On or about August 28, 1997, Respondent Jerry W. Graves allowed the entry and exhibition of Gold's Red Skipper as entry number 904 in class number 126 at the Tennessee Walking Horse National Celebration in Shelbyville, Tennessee.

2. Respondent Kathy Graves is an individual whose mailing address is 1220 Paul Rescer Road, Moss, Tennessee 38575. At all times material to this proceeding, Respondent Kathy Graves was an owner of Gold's Red Skipper. On or about August 28, 1997, Respondent Kathy Graves allowed the entry of Gold's Red Skipper and exhibited Gold's Red Skipper as entry number 904 in class number 126 at the Tennessee Walking Horse National Celebration in Shelbyville, Tennessee.

3. Gold's Red Skipper manifested abnormal sensitivity in both front pasterns when an Animal and Plant Health Inspection Service veterinarian examined him on August 28, 1997.

4. Gold's Red Skipper could reasonably be expected to have suffered pain in the pastern areas of his front feet when he was exhibited as entry number 904 in class number 126 at the Tennessee Walking Horse National Celebration on August 28, 1997.

Conclusions of Law

1. On August 28, 1997, Respondent Jerry W. Graves allowed the entry and exhibition of Gold's Red Skipper as entry number 904 in class number 126 at the Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, while Gold's Red Skipper was sore, in violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)).

2. On August 28, 1997, Respondent Kathy Graves allowed the entry of and exhibited Gold's Red Skipper as entry number 904 in class number 126 at the Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, while Gold's Red Skipper was sore, in violation of section 5(2)(A) and (D) of the Horse

Protection Act (15 U.S.C. § 1824(2)(A), (D)).

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Jerry W. Graves and Kathy Graves raise four issues in Respondents' Appeal of Decision and Order; and Memorandum of Points and Authorities in Support of Respondents' Appeal [hereinafter Appeal Petition].

I. The Chief ALJ Properly Received Complainant's Exhibit 8 in Evidence

Jerry W. Graves and Kathy Graves contend the Chief ALJ erred by admitting CX 8 into evidence. Specifically, Jerry W. Graves and Kathy Graves contend that CX 8, an excerpt from the *Walking Horse Report*, a trade newspaper that reports on horse shows and horse events involving primarily Tennessee Walking Horses, is not the sort of evidence upon which responsible persons are accustomed to rely. (Appeal Pet. at 2-3.)

The Administrative Procedure Act provides for the reception of evidence, as follows:

> **§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision**
>
> . . . .
>
> (d) . . . 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 for the exclusion of evidence, as follows:

> **§ 1.141 Procedure for hearing.**
>
> (h) *Evidence–(1) In general.* . . .
>
> . . . .
>
> (iv) 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).

Trade publications are not inherently unreliable. Courts have frequently received trade publications in evidence.[3] Moreover, at least one court has found the *Walking Horse Report* reliable.[4]

Dr. Robert A. Willems, the horse protection coordinator for the United States Department of Agriculture, testified that he has found the *Walking Horse Report* to be reasonably accurate and that in his official capacity he occasionally relies on the *Walking Horse Report*. Moreover, Dr. Willems authenticated CX 8 as an excerpt from the *Walking Horse Report*. (Tr. 169-71, 180-83.)

Jerry W. Graves and Kathy Graves, citing page 175 lines 23-25 and page 176 line 4 of the transcript, state that on cross-examination Dr. Willems admitted he did not know how accurate the horse show results reported in the *Walking Horse Report* were (Appeal Pet. 2). In response to a question regarding an entry in the *Walking Horse Report*, Dr. Willems testified, "I don't know how accurate it is." (Tr. 176.) However, Dr. Willems' testimony that he did not have personal knowledge of the accuracy of an entry in the *Walking Horse Report* neither negates Dr. Willems' testimony that he has found the *Walking Horse Report* to be reasonably accurate nor requires the exclusion of the excerpt from the *Walking Horse Report*. Therefore, I do not find the Chief ALJ erred by receiving the excerpt of the *Walking Horse*

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[3] *See, e.g.*, *Berner Int'l Corp. v. Mars Sales Co.*, 987 F.2d 975, 983 (3d Cir. 1993) (stating trade journals may be helpful in Lanham Act cases); *Anheuser-Busch Inc. v. Stroh Brewery Co.*, 750 F.2d 631, 634 n.2 (8th Cir. 1984) (stating trade journal articles bolstered other evidence that the plaintiff anticipated consumer connection between the letters "LA" and low, less, or light alcohol); *Dan Robbins & Associates, Inc. v. Questor Corp.*, 599 F.2d 1009, 1014 (C.C.P.A. 1979) (stating listings in trade journals are useful evidence regarding whether the relevant purchasing public views a term as a common description); *First Nat'l Bank of Chicago v. Jefferson Mortgage Co.*, 576 F.2d 479, 495 (3d Cir. 1978) (stating the trial court did not err in receiving in evidence a trade publication for the limited purpose of showing trends in market prices of securities); *Robey v. Sun Record Co.*, 242 F.2d 684, 689 (5th Cir.) (stating the receipt in evidence of trade journals for the limited purpose of showing that the record of "Little Junior" had a degree of public acceptance was proper), *cert. denied*, 355 U.S. 816 (1957); *Wolcher v. United States*, 200 F.2d 493, 498 (9th Cir. 1952) (stating it is generally held that the state of the market in securities or commodities may be proven by reports or quotations in newspapers and trade journals); *Magna Oil & Refining Co. v. White Star Refining Co.*, 280 F. 52, 59 (3d Cir. 1922) (stating that when determining market value, you are not restricted to the evidence of actual sales, but you are at liberty to consider accredited price current lists and market reports published in trade journals which have been admitted into evidence, if you believe from the evidence the trade journal is trustworthy).

[4] *See Roberts v. Carvin*, Civ. A. No. 86-0644, 1986 WL 14184 (E.D. La. Dec. 9, 1986).

Report in evidence merely because Dr. Willems did not have personal knowledge of the accuracy of an entry in the *Walking Horse Report*.

Jerry W. Graves and Kathy Graves also contend the *Walking Horse Report* must be excluded because Dr. Willems did not testify that the *Walking Horse Report* is "of the sort upon which responsible persons are accustomed to rely." (Appeal Pet. at 2-3.)

I agree with Jerry W. Graves and Kathy Graves that Dr. Willems did not testify that the *Walking Horse Report* is the sort of evidence upon which responsible persons are accustomed to rely. However, Dr. Willems testified that he has found the *Walking Horse Report* to be reasonably accurate and that, in his capacity as horse protection coordinator for the United States Department of Agriculture, he occasionally relies on the *Walking Horse Report* (Tr. 169-71). Dr. Willems' testimony regarding his view of the accuracy of the *Walking Horse Report* and his reliance on the *Walking Horse Report* in his official capacity is a sufficient basis for the Chief ALJ's receipt in evidence of CX 8. I do not find that the Chief ALJ erred by receiving CX 8 in evidence without testimony by Dr. Willems that CX 8 is the sort of evidence upon which responsible persons are accustomed to rely. Moreover, had Dr. Willems testified that CX 8 is the sort of evidence upon which responsible persons are accustomed to rely, I would have viewed this testimony as consisting of a legal conclusion interfering with the role of the Chief ALJ who, at that stage of the proceeding, was the sole arbiter of law.

II. The Chief ALJ Properly Concluded The Graves Violated 15 U.S.C. § 1824(2)(D)

Jerry W. Graves and Kathy Graves contend the Chief ALJ's conclusion that they allowed the entry and exhibition of Gold's Red Skipper at the Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, while Gold's Red Skipper was sore, in violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)), is error (Appeal Pet. at 3-8).

A. The Disposition of This Proceeding as to Kathy Graves

As an initial matter, even if I were to conclude that Kathy Graves did not allow the entry or exhibition of Gold's Red Skipper at the Tennessee Walking Horse National Celebration, that conclusion would not change the disposition of this proceeding as to Kathy Graves. I conclude Kathy Graves not only allowed the entry of Gold's Red Skipper at the Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, while Gold's Red Skipper was sore, in violation of section

5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)), but also exhibited Gold's Red Skipper at the Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, while Gold's Red Skipper was sore, in violation of section 5(2)(A) of the Horse Protection Act (15 U.S.C. § 1824(2)(A)). Kathy Graves' violation of 15 U.S.C. § 1824(2)(A) amply supports the $2,000 civil penalty which I assess against her. Moreover, the 1-year disqualification from showing, exhibiting, or entering any horse and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction, which I impose against Kathy Graves, is the minimum period of disqualification permitted by the Horse Protection Act for the first violation of 15 U.S.C. § 1824.

B. The Graves Admit That They Violated 15 U.S.C. § 1824(2)(D)

In the Appeal Petition, Jerry W. Graves and Kathy Graves state they do not contest the finding by the Chief ALJ that Gold's Red Skipper exhibited abnormal sensitivity in both front feet on August 28, 1997, but they contend they did not allow the entry or exhibition of Gold's Red Skipper at the Tennessee Walking Horse National Celebration in Shelbyville, Tennessee (Appeal Pet. at 3). However, in the Answer, Jerry W. Graves and Kathy Graves admit they allowed the entry and exhibition of Gold's Red Skipper at the Tennessee Walking Horse National Celebration in Shelbyville, Tennessee (Answer ¶ I(B), (C)). Further, Kathy Graves testified that she told Wallace Brandon that he could enter Gold's Red Skipper at the Tennessee Walking Horse National Celebration in Shelbyville, Tennessee (Tr. 109-10, 131). Jerry W. Graves' and Kathy Graves' admissions that they allowed Wallace Brandon to enter Gold's Red Skipper at the Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, and their concession in the Appeal Petition that they do not contest the finding that Gold's Red Skipper exhibited abnormal sensitivity in both front feet constitute an admission that they allowed the entry and exhibition of Gold's Red Skipper at the Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, while Gold's Red Skipper was sore, in violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)). Therefore, based on Jerry W. Graves' and Kathy Graves' admissions alone, I reject Jerry W. Graves' and Kathy Graves' contention that the Chief ALJ's conclusions that they violated section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)), are error.

C. The Graves Meet Neither the *Baird* Test Nor the *Burton* Test

Jerry W. Graves and Kathy Graves, relying on *Baird v. United States Dep't of*

Agric., 39 F.3d 131 (6th Cir. 1994), state an owner cannot be held to have allowed a sore horse to be entered or exhibited when the following three factors are shown to exist: (1) there is a finding that the owner had no knowledge that the horse was in a sore condition; (2) there is a finding that a Designated Qualified Person examined and approved the horse before the horse entered the ring; and (3) there is uncontradicted testimony that the owner had directed the trainer not to show a sore horse. Jerry W. Graves and Kathy Graves contend they had no knowledge that Gold's Red Skipper was sore, a Designated Qualified Person examined and approved Gold's Red Skipper before he was exhibited at the Tennessee Walking Horse National Celebration, and they testified unequivocally that they directed Wallace Brandon not to sore Gold's Red Skipper. (Appeal Pet. at 3-8.)

Complainant correctly points out that Jerry W. Graves and Kathy Graves misstate the test adopted in *Baird* to determine whether an owner has allowed the entry of the owner's horse while the horse was sore, in violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)). Instead, Jerry W. Graves and Kathy Graves appear to rely on the test adopted by the United States Court of Appeals for the Eighth Circuit in *Burton v. United States Dep't of Agric.*, 683 F.2d 280 (8th Cir. 1982), in which the Court held, as follows:

> . . . [W]e hold that the owner cannot be held to have "allowed" a "sore" horse to be shown [in violation of 15 U.S.C. § 1824(2)(D)] when the following three factors are shown to exist: (1) there is a finding that the owner had no knowledge that the horse was in a "sore" condition, (2) there is a finding that a Designated Qualified Person examined and approved the horse before entering the ring, and (3) there was uncontradicted testimony that the owner had directed the trainer not to show a "sore" horse. All of these factors taken together are sufficient to excuse an owner from liability.

Burton v. United States Dep't of Agric., 683 F.2d at 283.

The United States Court of Appeals for the Sixth Circuit did not adopt the test in *Burton* but states that *Burton* provides guidance, as follows:

> Although we agree with the conclusion that § 1824(2)(D) does not establish a strict liability standard, we do not read the three-pronged analysis set forth in *Burton* as constituting a hard-and-fast test to determine whether an owner has violated the provision. Instead, *Burton*, in our view, provides guidance for courts reviewing cases like the one at bar, and it does so by enumerating a set of relevant factors to consider, a set that is not necessarily

exhaustive.

Baird v. United States Dep't of Agric., 39 F.3d at 136-37 (footnote omitted).

The *Baird* test to determine whether an owner has allowed the entry of the owner's horse while the horse was sore, in violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)), is set forth, as follows:

> 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 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.

Baird v. United States Dep't of Agric., 39 F.3d at 137 (footnote omitted).

In *Baird*, the affirmative step to prevent the soring that occurred was the owner's direction to his trainers that his horses were not to be sored and his warning that he would take the horses away from trainers he suspected of soring his horses. The Court in *Baird* held that the owner's testimony alone, absent evidence to refute it, was sufficient to show that the owner did not "allow" his trainers to enter and exhibit his horses while sore, in violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)). *Baird v. United States Dep't of Agric.*, 39 F.3d at 138.

The Chief ALJ did not find credible Jerry W. Graves' and Kathy Graves' testimony that they took "affirmative steps" to prevent the soring of Gold's Red Skipper. Specifically, the Chief ALJ did not credit the testimony of Jerry W. Graves and Kathy Graves that they instructed Wallace Brandon not to sore Gold's Red Skipper. Instead, the Chief ALJ credited Complainant's documentary evidence (Jerry W. Graves' and Kathy Graves' affidavits), in which Jerry W. Graves and Kathy Graves state that they gave no instructions to Wallace Brandon regarding the training of Gold's Red Skipper (CX 12 at 2, CX 13 at 2). Jerry W. Graves' and Kathy Graves' affidavits are corroborated by Wallace Brandon's affidavit in which he states, "I prepared [Gold's Red Skipper] for showing and chose all training

devices and methods used during training." (CX 10 at 2.)

In *Baird*, the Sixth Circuit found that "[t]he government did not offer evidence to contradict [the owner's] testimony [footnote omitted] and, accordingly, failed to establish pretext." 39 F.3d at 138. In contrast, the evidence to contradict Jerry W. Graves' and Kathy Graves' testimony is found in the affidavits given by Jerry W. Graves, Kathy Graves, and Wallace Brandon.

The Chief ALJ further found that the many inconsistencies in Jerry W. Graves' and Kathy Graves' testimony also affect the credibility of their claim that they had instructed Wallace Brandon not to sore Gold's Red Skipper. The Chief ALJ fully discussed those inconsistencies in the Initial Decision and Order (Initial Decision and Order at 8-10). I agree with the Chief ALJ's discussion regarding Jerry W. Graves' and Kathy Graves' inconsistencies, and I agree with the Chief ALJ's credibility determinations which are based on those inconsistencies.

Further still, as an additional basis for his credibility determinations, the Chief ALJ cited Jerry W. Graves' and Kathy Graves' failure to call Wallace Brandon or any of their other trainers to corroborate their testimony that they instructed Wallace Brandon and their other trainers not to sore their horses and to refute their affidavits in which they state that they gave Wallace Brandon no instructions regarding Gold's Red Skipper's training (Initial Decision and Order at 9-10). A party's failure to produce a witness, when it would be natural for that party to produce that witness, if the facts known by the witness had been favorable, serves to indicate, as a natural inference, that the party fears to produce the witness. This fear is some evidence that the witness, if produced, would have exposed facts unfavorable to the party. This principle has been followed in many proceedings before the United States Department of Agriculture[5] and in many judicial proceedings.[6] "It is certainly a

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[5] *In re Micheal McCall*, 52 Agric. Dec. 986, 1010 (1993); *In re Terry Horton*, 50 Agric. Dec. 430, 450 (1991); *In re Modesto Mendicoa*, 48 Agric. Dec. 409, 420-22 (1989); *In re Great American Veal, Inc.*, 48 Agric. Dec. 183, 224-25 (1989), *aff'd*, 891 F.2d 281 (3d Cir. 1989) (unpublished); *In re McQueen Bros. Produce Co.*, 47 Agric. Dec. 1611, 1612-13 (1988) (Order Denying Pet. for Recons.); *In re Murfreesboro Livestock Market, Inc.*, 46 Agric. Dec. 1216, 1229-30 (1987); *In re Corn State Meat Co.*, 45 Agric. Dec. 995, 1018-19 (1986); *In re Farmers & Ranchers Livestock Auction, Inc.*, 45 Agric. Dec. 234, 255-56 (1986); *In re James Grady*, 45 Agric. Dec. 66, 108-09 (1986); *In re Haring Meats and Delicatessen, Inc.*, 44 Agric. Dec. 1886, 1909-10 (1985); *In re George W. Saylor, Jr.*, 44 Agric. Dec. 2238, 2487-89 (1985) (Decision on Remand); *In re E. Digby Palmer*, 44 Agric. Dec. 248, 256 n.4 (1985); *In re Dr. Duane O. Petty*, 43 Agric. Dec. 1406, 1425-28 (1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986); *In re Jarosz Produce Farms, Inc.*, 42 Agric. Dec. 1505, 1509-10 (1983); *In re Mattes Livestock Auction Market, Inc.*, 42 Agric. Dec. 81, 101-02, *aff'd*, 721 F.2d 1125 (7th Cir.1983); *In re Eldon Stamper*, 42 Agric. Dec. 20, 32 n.4 (1983), *aff'd*, 722 F.2d 1483 (9th Cir. 1984); *In re De Graaf Dairies, Inc.*, 41 Agric. Dec. 388, 402-03 (1982), *aff'd*, No. 82-1157
(continued...)

maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other to have contradicted." Lord Mansfield in *Blatch v. Archer*, Cowp. 66, quoted with approval in Wigmore, EVIDENCE § 285 (3d ed. 1940).

Jerry W. Graves and Kathy Graves also claimed they visited Gold's Red Skipper in an effort to prevent soring. Although Jerry W. Graves testified that he visited Wallace Brandon's stable three times before the Tennessee Walking Horse

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[5](...continued)
(D.N.J. Jan. 24, 1983), *aff'd mem.*, 725 F.2d 667 (3d Cir. 1983); *In re King Meat Co.*, 40 Agric. Dec. 1468, 1507 (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); *In re Great Western Packing Co.*, 39 Agric. Dec. 1358, 1363-64 (1980), *aff'd*, No. CV 81-0534 (C.D. Cal. Sept. 30, 1981); *In re Dr. John Purvis*, 38 Agric. Dec. 1271, 1276-77 (1979); *In re Zelma Wilcox*, 37 Agric. Dec. 1659, 1666-67 (1978); *In re Central Ark. Auction Sale, Inc.*, 37 Agric. Dec. 570, 586-87 (1977), *aff'd*, 570 F.2d 724 (8th Cir.) (2-1 decision), *cert. denied*, 436 U.S. 957 (1978); *In re Arab Stock Yard, Inc.*, 37 Agric. Dec. 293, 305, *aff'd mem.*, 582 F.2d 39 (5th Cir. 1978); *In re C. D. Burrus*, 36 Agric. Dec. 1668, 1686-87 (1977), *aff'd per curiam*, 575 F.2d 1258 (8th Cir. 1978); *In re DeJong Packing Co.*, 39 Agric. Dec. 607, 637-38 (1977), *aff'd*, 618 F.2d 1329 (9th Cir.) (2-1 decision), *cert. denied*, 449 U.S. 1061 (1980); *In re Eric Loretz*, 36 Agric. Dec. 1087, 1100-01 (1977); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1552, 1558 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *In re Edward Whaley*, 35 Agric. Dec. 1519, 1522 (1976); *In re Ludwig Casca*, 34 Agric. Dec. 1917, 1929-30 (1975); *In re Braxton McLinden Worsley*, 33 Agric. Dec. 1547, 1571-72 (1974); *In re Trenton Livestock, Inc.*, 33 Agric. Dec. 499, 514 (1974), *aff'd per curiam*, 510 F.2d 966 (4th Cir. 1975) (unpublished); *In re J. A. Speight*, 33 Agric. Dec. 280, 300-01 (1974); *In re Sy B. Gaiber & Co.*, 31 Agric. Dec. 474, 499 (1972).

[6]*United States v. Di RE*, 332 U.S. 581, 593 (1948); *Interstate Circuit v. United States*, 306 U.S. 208, 225-27 (1939); *Kirby v. Tallmadge*, 160 U.S. 379, 383 (1896); *Bufco Corp. v. NLRB*, 147 F.3d 964, 971 (D.C. Cir. 1998); *Underwriters Laboratories, Inc. v. NLRB*, 147 F.3d 1048, 1054 (9th Cir. 1998); *Ready Mixed Concrete Co. v. NLRB*, 81 F.3d 1546, 1552 (10th Cir. 1996); *Borror v. Herz*, 666 F.2d 569, 573-74 (C.C.P.A. 1981); *Karavos Compania Naviera S.A. v. Atlantica Export Corp.*, 588 F.2d 1, 9-10 (2d Cir. 1978); *Blow v. Compagnie Maritime Belge (Lloyd Royal) S.A.*, 395 F.2d 74, 79 (4th Cir. 1968); *Milbank Mut. Ins. Co. v. Wentz*, 352 F.2d 592, 597 (8th Cir. 1965); *Cromling v. Pittsburgh & Lake Erie R.R.*, 327 F.2d 142, 148-49 (3d Cir. 1963); *Hoffman v. Commissioner*, 298 F.2d 784, 788 (3d Cir. 1962); *Illinois Central R.R. v. Staples*, 272 F.2d 829, 834-35 (8th Cir. 1959); *Neidhoefer v. Automobile Ins. Co. of Hartford, Conn .*, 182 F.2d 269, 270-71 (7th Cir. 1950); *Pacific-Atlantic S.S. Co. v. United States*, 175 F.2d 632, 636 (4th Cir.), *cert. denied*, 338 U.S. 868 (1949); *Donnelly Garment Co. v. Dubinsky*, 154 F.2d 38, 42-43 (8th Cir. 1946); *Bowles v. Lentin*, 151 F.2d 615, 619 (7th Cir. 1945), *cert. denied*, 327 U.S. 805 (1946); *Longini Shoe Mfg. Co. v. Ratcliff*, 108 F.2d 253, 256-57 (C.C.P.A. 1939).

National Celebration and once after the Tennessee Walking Horse National Celebration, he testified that he never checked Gold's Red Skipper's feet (Tr. 165-67). Kathy Graves testified that the "number one" step she took to see that her horse "was being treated humanely and not being mistreated" was to go to Wallace Brandon's barn 3 or 4 times a month and ride the horse (Tr. 109). Kathy Graves described her pre-show examination of Gold's Red Skipper as designed to ensure that he was not dirty; it was not designed to ensure that Gold's Red Skipper had not been sored (Tr. 116). Further, Kathy Graves' description of Wallace Brandon's and her routine just prior to a show and at a show (Tr. 98-99) indicates a lack of interest in determining whether Gold's Red Skipper had been sored. Nothing in Jerry W. Graves' or Kathy Graves' testimony regarding their claims that they scrutinized Wallace Brandon's training of Gold's Red Skipper indicates that either Jerry W. Graves or Kathy Graves took affirmative steps to prevent the soring of Gold's Red Skipper.

Kathy Graves also testified that she had several veterinarians who would check Gold's Red Skipper from time to time to ensure that Wallace Brandon was not soring him or being mean to him. Kathy Graves testified that the veterinarians would send her statements noting that Gold's Red Skipper "checked fine," had no problems, and was not sore. (Tr. 109, 120-21.) None of these veterinarians testified at the hearing. Further, Jerry W. Graves and Kathy Graves failed to introduce invoices, cancelled checks, or reports from the veterinarians to corroborate Kathy Graves' testimony.

I have carefully considered the entire record, and I agree with the Chief ALJ's credibility determinations. Jerry W. Graves and Kathy Graves failed to introduce credible evidence that they took affirmative steps to prevent the soring of Gold's Red Skipper. Thus, Jerry W. Graves and Kathy Graves did not meet the *Baird* test, which requires credible evidence of an "affirmative step" designed to prevent the soring that occurred. Further, Jerry W. Graves and Kathy Graves failed to meet the third prong of the *Burton* test, viz., uncontroverted testimony that the owner had directed the trainer not to show a sore horse.

III. The Record Supports the Chief ALJ's Credibility Determinations

Jerry W. Graves and Kathy Graves contend the Chief ALJ's finding that they lacked credibility is error (Appeal Pet. at 8-12).

The Chief ALJ found Jerry W. Graves' and Kathy Graves' testimony that their affidavits (CX 12, CX 13) were coerced by Michael K. Nottingham and that they instructed Wallace Brandon not to sore Gold's Red Skipper was not credible (Initial Decision and Order at 8-9).

The Judicial Officer is not bound by an administrative law judge's credibility determinations and may make separate determinations of witnesses' credibility, subject only to court review for substantial evidence. *Mattes v. United States*, 721 F.2d 1125, 1128-29 (7th Cir. 1983).[7] The Administrative Procedure Act provides that, on appeal from an administrative law judge's initial decision, the agency has all the powers it would have in making an initial decision, as follows:

§ 557. Initial decisions; conclusiveness; review by agency; submissions

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[7]*See also In re David M. Zimmerman*, 57 Agric. Dec. 1038, 1053-54 (1998); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 90 (1997) (Order Denying Pet. for Recons.); *In re Garelick Farms, Inc.*, 56 Agric. Dec. 37, 78-79 (1997); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 245 (1997), *aff'd*, 172 F.3d 51 (Table), 1999 WL 16562 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206), *printed in* 58 Agric. Dec. 85 (1999); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 860-61 (1996); *In re Jim Singleton*, 55 Agric. Dec. 848, 852 (1996); *In re William Joseph Vergis*, 55 Agric. Dec. 148, 159 (1996); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1271-72 (1995), *aff'd*, 104 F.3d 139 (8th Cir. 1997), *cert. denied sub nom. Heimann v. Department of Agric.*, 522 U.S. 951 (1997); *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) (stating 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) (stating agencies have authority to make independent credibility determinations without the opportunity to view witnesses firsthand and are not bound by an administrative law judge's credibility findings); *Dupuis v. Secretary of Health and Human Services*, 869 F.2d 622, 623 (1st Cir. 1989) (per curiam) (stating that while considerable deference is owed to credibility findings by an administrative law judge, 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) (stating the Commission is not strictly bound by the credibility determinations of an administrative law judge); *Retail, Wholesale & Dep't Store Union v. NLRB*, 466 F.2d 380, 387 (D.C. Cir. 1972) (stating 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) (stating 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).

by parties; contents of decisions; record

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(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554(d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.

5 U.S.C. § 557(b).

Moreover, the ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT describes the authority of the agency on review of an initial or recommended decision, as follows:

Appeals and review. . . .

In making its decision, whether following an initial or recommended decision, the agency is in no way bound by the decision of its subordinate officer; it retains complete freedom of decision—as though it had heard the evidence itself. This follows from the fact that a recommended decision is advisory in nature. See *National Labor Relations Board v. Elkland Leather Co.*, 114 F.2d 221, 225 (C.C.A. 3, 1940), certiorari denied, 311 U.S. 705.

ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 83 (1947).

However, the consistent practice of the Judicial Officer is to give great weight to the findings by, and particularly the credibility determinations of, administrative

law judges, since they have the opportunity to see and hear witnesses testify.[8] The Chief ALJ explained in great detail his reasons for concluding that Jerry W. Graves' and Kathy Graves' testimony was not credible (Initial Decision and Order at 8-10). The record supports the Chief ALJ's credibility determinations. Therefore, I reject Jerry W. Graves' and Kathy Graves' contention that the Chief ALJ's credibility determinations are error.

IV. The Reference to the Principle of *Respondeat Superior* Is Surplusage

Jerry W. Graves and Kathy Graves contend the Chief ALJ's conclusion that they are liable for the actions of Wallace Brandon "because of the doctrine of respondent [sic] superior" is error. Jerry W. Graves and Kathy Graves state the doctrine is inapplicable because neither Jerry W. Graves nor Kathy Graves had an employer-employee relationship with Wallace Brandon (Appeal Pet. at 12).

The Chief ALJ states "[a]s Brandon was employed by the Graves to enter Skipper in a horse show, they are liable under the principle of *respondent [sic] superior* for Brandon's act in entering Skipper while sore" (Initial Decision and Order at 10 n.1). The Chief ALJ concluded that: (1) Jerry W. Graves allowed the entry and exhibition of Gold's Red Skipper at the Tennessee Walking Horse National Celebration, while Gold's Red Skipper was sore, in violation of 15 U.S.C. § 1824(2)(D); (2) Kathy Graves allowed the entry of Gold's Red Skipper at the Tennessee Walking Horse National Celebration, while Gold's Red Skipper was sore, in violation of 15 U.S.C. § 1824(2)(D); and (3) Kathy Graves exhibited Gold's Red Skipper at the Tennessee Walking Horse National Celebration, while Gold's Red Skipper was sore, in violation of 15 U.S.C. § 1824(2)(A) (Initial Decision and

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[8] *In re Sunland Packing House Co.*, 58 Agric. Dec. 543, 602 (1999); *In re David M. Zimmerman*, 57 Agric. Dec. 1038, 1055-56 (1998); *In re Jerry Goetz*, 56 Agric. Dec. 1470, 1510 (1997), *aff'd*, 99 F. Supp. 2d 1308 (D. Kan. 1998), *aff'd*, No. 00-3173, 2001 WL 401594 (10th Cir. Apr. 20, 2001) (unpublished); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 89 (1997) (Order Denying Pet. for Recons.); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204, 1229 (1996), *aff'd*, 151 F.3d 735 (7th Cir. 1998); *In re Floyd Stanley White*, 47 Agric. Dec. 229, 279 (1988), *aff'd per curiam*, 865 F.2d 262, 1988 WL 133292 (6th Cir. 1988); *In re King Meat Packing Co.*, 40 Agric. Dec. 552, 553 (1981); *In re Mr. & Mrs. Richard L. Thornton*, 38 Agric. Dec. 1425, 1426 (1979) (Remand Order); *In re Steve Beech*, 37 Agric. Dec. 869, 871-72 (1978); *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); *In re Edward Whaley*, 35 Agric. Dec. 1519, 1521 (1976); *In re Dr. Joe Davis*, 35 Agric. Dec. 538, 539 (1976); *In re American Commodity Brokers, Inc.*, 32 Agric. Dec. 1765, 1772 (1973); *In re Cardwell Dishmon*, 31 Agric. Dec. 1002, 1004 (1972); *In re Sy B. Gaiber & Co.*, 31 Agric. Dec. 474, 497-98 (1972); *In re Louis Romoff*, 31 Agric. Dec. 158, 172 (1972).

Order at 11). However, the Chief ALJ did not conclude that Jerry W. Graves or Kathy Graves entered Gold's Red Skipper at the Tennessee Walking Horse National Celebration. Therefore, I find the Chief ALJ's statement that Jerry W. Graves and Kathy Graves are liable, under the doctrine of *respondeat superior*, for Wallace Brandon's act of entering Gold's Red Skipper at the Tennessee Walking Horse National Celebration is surplusage. Accordingly, I do not include the Chief ALJ's statement regarding Jerry W. Graves' and Kathy Graves' liability under the doctrine of *respondeat superior* in this Decision and Order. I do not address whether the Chief ALJ's statement regarding Jerry W. Graves' and Kathy Graves' liability under the doctrine of *respondeat superior* is error.

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

ORDER

Paragraph I

A. Jerry W. Graves is assessed a $2,000 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the "Treasurer of the United States" and sent to:

Colleen A. Carroll
United States Department of Agriculture
Office of the General Counsel
Marketing Division
Room 2343-South Building
Washington, DC 20250-1417

Jerry W. Graves' payment of the civil penalty shall be forwarded to, and received by, Ms. Carroll within 60 days after service of this Order on Jerry W. Graves. Jerry W. Graves shall indicate on the certified check or money order that payment is in reference to HPA Docket No. 98-0011.

B. Jerry W. Graves is disqualified for a period of 1 year from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or device, and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction. "Participating" means engaging in any activity beyond that of a spectator, and includes, without limitation: (a) transporting or arranging for the transportation of horses to or from any horse show, horse exhibition, horse sale, or horse auction; (b) personally giving instructions to exhibitors; (c) being present in the warm-up areas, inspection areas,

or other areas where spectators are not allowed at any horse show, horse exhibition, horse sale, or horse auction; and (d) financing the participation of others in any horse show, horse exhibition, horse sale, or horse auction.

The disqualification of Jerry W. Graves shall become effective on the 60th day after service of this Order on Jerry W. Graves.

C. Jerry W. Graves has the right to obtain review of this Order in the court of appeals of the United States for the circuit in which he resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit. Jerry W. Graves must file a notice of appeal in such court within 30 days from the date of this Order and must simultaneously send a copy of such notice by certified mail to the Secretary of Agriculture. 15 U.S.C. § 1825(b)(2), (c). The date of this Order is July 19, 2001.

Paragraph II

A. Kathy Graves is assessed a $2,000 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the "Treasurer of the United States" and sent to:

Colleen A. Carroll
United States Department of Agriculture
Office of the General Counsel
Marketing Division
Room 2343-South Building
Washington, DC 20250-1417

Kathy Graves' payment of the civil penalty shall be forwarded to, and received by, Ms. Carroll within 60 days after service of this Order on Kathy Graves. Kathy Graves shall indicate on the certified check or money order that payment is in reference to HPA Docket No. 98-0011.

B. Kathy Graves is disqualified for a period of 1 year from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or device, and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction. "Participating" means engaging in any activity beyond that of a spectator, and includes, without limitation: (a) transporting or arranging for the transportation of horses to or from any horse show, horse exhibition, horse sale, or horse auction; (b) personally giving instructions to exhibitors; (c) being present in the warm-up areas, inspection areas, or other areas where spectators are not allowed at any horse show, horse exhibition, horse sale, or

horse auction; and (d) financing the participation of others in any horse show, horse exhibition, horse sale, or horse auction.

The disqualification of Kathy Graves shall become effective on the 60th day after service of this Order on Kathy Graves.

C. Kathy Graves has the right to obtain review of this Order in the court of appeals of the United States for the circuit in which she resides or has her place of business or in the United States Court of Appeals for the District of Columbia Circuit. Kathy Graves must file a notice of appeal in such court within 30 days from the date of this Order and must simultaneously send a copy of such notice by certified mail to the Secretary of Agriculture. 15 U.S.C. § 1825(b)(2), (c). The date of this Order is July 19, 2001.

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In re: WALLACE BRANDON, JERRY W. GRAVES, AND KATHY GRAVES.
HPA Docket No. 98-0011.
Ruling Denying Jerry W. Graves and Kathy Graves' Motion for Stay of Order.
Filed September 18, 2001.

Colleen A. Carroll, for Complainant.
Brenda S. Bramlett, for Respondents.
Ruling issued by William G. Jenson, Judicial Officer.

HPA – Stay order, when appropriate – Balancing factors, application of.

The Judicial Officer (JO) denied Respondents' motion for an Order staying the Order directing sanctions and civil penalties agsinst Resondent. JO applied the four part balancing test set out in *Ohio v. Nuclear Regulatory Comm'n*, 812 F.2d 288, 290 (6th Cir. 1987).

On July 19, 2001, I issued a Decision and Order as to Jerry W. Graves and Kathy Graves: (1) concluding that on August 28, 1997, Jerry W. Graves and Kathy Graves [hereinafter Respondents] violated the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) [hereinafter the Horse Protection Act]; (2) assessing each Respondent a $2,000 civil penalty; and (3) disqualifying each Respondent for 1 year from exhibiting, showing, or entering any horse and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction. *In re Wallace Brandon* (Decision as to Jerry W. Graves and Kathy Graves), 60 Agric. Dec. ___, slip op. at 30, 49-51 (July 19, 2001).

On September 7, 2001, Respondents filed a "Motion for Stay of Order" requesting a stay of the Order in *In re Wallace Brandon* (Decision as to Jerry W. Graves and Kathy Graves), 60 Agric. Dec. ___ (July 19, 2001), pending the outcome of proceedings for judicial review. On September 10, 2001, the Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], filed "Complainant's Response to Respondents' Motion for Stay of Order" opposing Respondents' Motion for Stay of Order. On September 14, 2001, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Respondents' Motion for Stay of Order.

The determination of whether a stay of an agency's order is warranted is based on a balancing of four factors. These factors are: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the party seeking the stay will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if a stay is granted; and (4) the public interest in granting the stay.[1]

First, with respect to the likelihood that Respondents will prevail on the merits of their appeal, Respondents do not address the likelihood that they will prevail on the merits of their appeal. Complainant contends Respondents failed to file a timely notice of appeal and the United States Court of Appeals for the Sixth Circuit lacks jurisdiction to review *In re Wallace Brandon* (Decision as to Jerry W. Graves and Kathy Graves), 60 Agric. Dec. ___ (July 19, 2001) (Complainant's Response to Respondents' Motion for Stay of Order at 2-3).

Respondents state they filed a notice of appeal and a petition for review of *In re Wallace Brandon* (Decision as to Jerry W. Graves and Kathy Graves), 60 Agric. Dec. ___ (July 19, 2001), with the United States Court of Appeals for the Sixth Circuit "on or about the ___ day of September, 2001" (Motion for Stay of Order ¶ 5). Section 6(b)(2) and (c) of the Horse Protection Act limits the time within which a person may seek judicial review of an order of the Secretary of Agriculture, as follows:

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[1]*Ohio v. Nuclear Regulatory Comm'n*, 812 F.2d 288, 290 (6th Cir. 1987); *Cuomo v. Nuclear Regulatory Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985) (per curiam); *Middlewest Motor Freight Bureau v. United States*, 433 F.2d 212, 241-42 (8th Cir. 1970), *cert. denied*, 402 U.S. 999 (1971); *Baggett Transp. Co. v. Hughes Transp., Inc.*, 393 F.2d 710, 716-17 (8th Cir.), *cert. denied*, 393 U.S. 936 (1968); *Associated Securities Corp. v. SEC*, 283 F.2d 773, 774-75 (10th Cir. 1960); *Eastern Air Lines, Inc. v. CAB*, 261 F.2d 830 (2d Cir. 1958) (per curiam); *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958); *In re David R. Hostetter, DVM*, 52 Agric. Dec. 366, 367 (1993) (Order Lifting Stay Order).

§ 1825. Violations and penalties

. . . .

(b) Civil penalties; review and enforcement

. . . .

(2) Any person against whom a violation is found and a civil penalty assessed under paragraph (1) of this subsection 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 by filing a notice of appeal in such court within 30 days from the date of such order and by simultaneously sending a copy of such notice by certified mail to the Secretary. The Secretary shall promptly file in such court a certified copy of the record upon which such violation was found and such penalty assessed, as provided in section 2112 of title 28. The findings of the Secretary shall be set aside if found to be unsupported by substantial evidence.

. . . .

(c) Disqualification of offenders; orders; civil penalties applicable; enforcement procedures

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. Any person who knowingly fails to obey an order of disqualification shall be subject to a civil penalty of not more than $3,000 for each violation. Any horse show, horse exhibition, or horse sale or auction, or the management thereof, collectively and severally, which knowingly allows any person who is under an order of disqualification to show or exhibit any horse, to enter for the purpose of showing or exhibiting any horse, to take part in managing or judging, or otherwise to participate in any horse show, horse exhibition, or horse sale or auction in violation of an order

> shall be subject to a civil penalty of not more than $3,000 for each violation. The provisions of subsection (b) of this section respecting the assessment, review, collection, and compromise, modification, and remission of a civil penalty apply with respect to civil penalties under this subsection.

15 U.S.C. § 1825(b)(2), (c).

The Decision and Order as to Jerry W. Graves and Kathy Graves specifically informs Respondents of the time within which they must file a notice of appeal, as follows:

> **ORDER**
>
> **Paragraph I**
>
> . . . .
>
> C. Jerry W. Graves has the right to obtain review of this Order in the court of appeals of the United States for the circuit in which he resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit. Jerry W. Graves must file a notice of appeal in such court within 30 days from the date of this Order and must simultaneously send a copy of such notice by certified mail to the Secretary of Agriculture. 15 U.S.C. § 1825(b)(2), (c). The date of this Order is July 19, 2001.
>
> **Paragraph II**
>
> . . . .
>
> C. Kathy Graves has the right to obtain review of this Order in the court of appeals of the United States for the circuit in which she resides or has her place of business or in the United States Court of Appeals for the District of Columbia Circuit. Kathy Graves must file a notice of appeal in such court within 30 days from the date of this Order and must simultaneously send a copy of such notice by certified mail to the Secretary of Agriculture. 15 U.S.C. § 1825(b)(2), (c). The date of this Order is July 19, 2001.

In re Wallace Brandon (Decision as to Jerry W. Graves and Kathy Graves), 60 Agric. Dec. ___, slip op. at 50-52 (July 19, 2001).

The date of the Order, which is the subject of Respondents' Motion for Stay of

Order, is July 19, 2001. *In re Wallace Brandon* (Decision as to Jerry W. Graves and Kathy Graves), 60 Agric. Dec. ___ (July 19, 2001). Pursuant to section 6(b)(2) and (c) of the Horse Protection Act (15 U.S.C. § 1825(b)(2) and (c)), the deadline for Respondents' filing their notice of appeal was August 18, 2001. Timeliness of an appeal from an administrative order is a jurisdictional requirement.[2] Therefore, I find that it is highly likely that the United States Court of Appeals for the Sixth Circuit will dismiss Respondents' late-filed appeal for lack of jurisdiction and that Respondents will not obtain review of the merits of their appeal.

Second, with respect to the likelihood that Respondents will be irreparably harmed absent a stay, Respondents state the disqualification provisions of the Order in *In re Wallace Brandon* (Decision as to Jerry W. Graves and Kathy Graves), 60 Agric. Dec. ___ (July 19, 2001), prevent them "from pursing their interest in exhibiting or participating in any horse sale or auction during the pendency of their appeal to the Sixth Circuit Court of Appeals" (Motion for Stay of Order ¶ 6).

Respondent Jerry W. Graves testified that he is a farmer (Transcript at 143). Respondent Kathy Graves testified that she operates a nursing home and indicated that she has no other occupations (Transcript at 88). Therefore, while I find the disqualification provisions of the Order in *In re Wallace Brandon* (Decision as to Jerry W. Graves and Kathy Graves), 60 Agric. Dec. ___ (July 19, 2001), will irreparably harm Respondents, the harm caused by Respondents' 1-year disqualification from engaging in an endeavor that is not related to Respondents= livelihood is not substantial.

Respondents do not contend that the payment of the $2,000 civil penalty which I assessed against each Respondent will result in irreparable harm. Economic loss does not constitute irreparable harm in and of itself.[3] Therefore, I find Respondents' payment of the civil penalties assessed in *In re Wallace Brandon* (Decision as to Jerry W. Graves and Kathy Graves), 60 Agric. Dec. ___ (July 19, 2001), will not irreparably harm Respondents.

Third, with respect to the prospect that others will be harmed if I grant a stay, neither Complainant nor Respondents identify persons who would be harmed if I grant Respondents' Motion for Stay of Order.

The legislative history relevant to the Horse Protection Act Amendments of

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[2] *United States Dept of Agric. v. Kelly*, 38 F.3d 999, 1003 (8th Cir. 1994).

[3] *Ohio v. Nuclear Regulatory Comm'n*, 812 F.2d 288, 290 (6th Cir. 1987); *In re Jerry Goetz*, 60 Agric. Dec. 234, 236 (2001) (Ruling Denying Complainants' Motion to Lift Stay); *In re David R. Hostetter, DVM*, 52 Agric. Dec. 366, 368 (1993) (Order Lifting Stay Order).

1976 reveals the destructive effect of soring on the horse industry.[4] The Order in *In re Wallace Brandon* (Decision as to Jerry W. Graves and Kathy Graves), 60 Agric. Dec. ___ (July 19, 2001), is designed to deter Respondents and other potential violators from future violations of the Horse Protection Act. To the extent that a stay order would diminish the deterrent effect of the Order in *In re Wallace Brandon* (Decision as to Jerry W. Graves and Kathy Graves), 60 Agric. Dec. ___ (July 19, 2001), the stay order would harm persons involved in the Tennessee Walking Horse industry.

Fourth, with respect to the public interest in granting the stay, neither Complainant nor Respondents identify the public interest in granting a stay order and, based on the record before me, I cannot identify any public interest in granting Respondents' Motion for Stay of Order.

I have considered the following factors: (1) the likelihood that Respondents will prevail on the merits of their appeal; (2) the likelihood that Respondents will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if I grant Respondents' Motion for Stay of Order; and (4) the public interest in granting Respondents' Motion for Stay of Order. After considering these four factors, I conclude, based on the record before me, that the July 19, 2001, Order in *In re Wallace Brandon* (Decision as to Jerry W. Graves and Kathy Graves), 60 Agric. Dec. ___ (July 19, 2001), should not be disturbed.

For the foregoing reasons, I deny Respondents' September 7, 2001, Motion for Stay of Order.

In re: DERWOOD STEWART AND RHONDA STEWART, d/b/a STEWART'S NURSERY, a/k/a STEWART'S FARM, STEWART'S FARM & NURSERY, THE DERWOOD STEWART FAMILY, AND STEWART'S NURSERY FARM STABLES.
HPA Docket No. 99-0028.
Decision and Order as to Derwood Stewart.
Filed September 6, 2001.

HPA – Entry – Baird test – Burton test – Statutory construction – Civil penalty – Disqualification – Extensions of time.

The Judicial Officer (JO) reversed the decision by Chief Administrative Law Judge James W. Hunt (Chief ALJ). The JO: (1) concluded that Respondent entered a horse for the purpose of showing or exhibiting the horse in a horse show, while the horse was sore, in violation of 15 U.S.C. § 1824(2)(B);

[4]H.R. Rep. No. 94-1174, at 4-5 (1976), *reprinted in* 1976 U.S.C.C.A.N. 1696, 1698-99.

(2) assessed Respondent a $2,200 civil penalty; and (3) disqualified Respondent for 1 year from exhibiting, showing, or entering any horse and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction. The JO stated that pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note (Supp. V 1999)), the Secretary of Agriculture, by regulation, adjusted the civil monetary penalty that may be assessed for each violation of 15 U.S.C. § 1824 by increasing the maximum civil penalty from $2,000 to $2,200 (7 C.F.R. § 3.91(b)(2)(vii)). The JO held the Chief ALJ erred by assessing Respondent $2,000 rather than the maximum civil penalty. Further, the JO found no extraordinary circumstances that warranted departure from the established Department policy of imposing the minimum disqualification period for the first violation of the Horse Protection Act. The JO found that Respondent personally performed at least one of the steps necessary for the entry of Respondent's horse in a horse show. Thus, Respondent personally violated 15 U.S.C. § 1824(2)(B). Further, the JO found Respondent entered the horse through an employee who performed numerous steps in the entry process. The JO rejected Respondent's contention that he was not liable for the violation of 15 U.S.C. § 1824(2)(B) under *Baird v. United States Dep't of Agric.*, 39 F.3d 131 (6th Cir. 1994), and *Burton v. United States Dep't of Agric.*, 683 F.2d 280 (8th Cir. 1982). The JO stated that *Baird* and *Burton* hold that a horse owner cannot be found to have violated 15 U.S.C. § 1824(2)(D) if certain factors are shown to exist. The JO concluded that *Baird* and *Burton* were not applicable to Respondent who was found to have violated 15 U.S.C. § 1824(2)(B). Finally, the JO rejected Respondent's contention that Complainant's appeal petition was late-filed.

Colleen A. Carroll, for Complainant.
L. Thomas Austin and Jennifer Mitchell, for Respondent.
Initial decision issued by James W. Hunt, Chief Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a "Complaint" on July 1, 1999. Complainant instituted the proceeding under 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 Proceedings Instituted by the Secretary Under Various Statutes [hereinafter the Rules of Practice].

Complainant alleges that: (1) on October 28, 1998, Derwood Stewart [hereinafter Respondent], on behalf of Rhonda Stewart, Stewart's Nursery, also known as Stewart's Farm, Stewart's Farm & Nursery, The Derwood Stewart Family, and Stewart's Nursery Farm Stables entered a horse registered as "JKS `O My Jackie O" and also known as "JFK's O My Jackie O" [hereinafter Jackie O] as entry number 392 in class number 24 at the 30th Anniversary National Walking Horse Trainers Show in Shelbyville, Tennessee, while Jackie O was sore, for the purpose of showing or exhibiting Jackie O in that show, in violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)); and (2) on

October 28, 1998, Rhonda Stewart, Stewart's Nursery, also known as Stewart's Farm, Stewart's Farm & Nursery, The Derwood Stewart Family, and Stewart's Nursery Farm Stables allowed Respondent to enter Jackie O as entry number 392 in class number 24 at the 30th Anniversary National Walking Horse Trainers Show in Shelbyville, Tennessee, while Jackie O was sore, for the purpose of showing or exhibiting Jackie O in that show, in violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)) (Amended Compl. ¶¶ 4-5).

On March 2, 2000, Respondent and Rhonda Stewart filed an "Answer to Amended Complaint" denying the allegations in the Amended Complaint.

Chief Administrative Law Judge James W. Hunt [hereinafter the Chief ALJ] presided at a hearing in Chattanooga, Tennessee, on September 6, 2000. Colleen A. Carroll, Office of the General Counsel, United States Department of Agriculture, represented Complainant. L. Thomas Austin and Jennifer Mitchell, Dunlap, Tennessee, represented Respondent and Rhonda Stewart.

On March 7, 2001, Complainant filed "Complainant's Proposed Findings of Fact and Conclusions of Law; and Memorandum of Points and Authorities in Support Thereof" [hereinafter Complainant's Post-Hearing Brief]. On May 14, 2001, Respondent and Rhonda Stewart filed "Respondents' Proposed Findings of Fact and Conclusions of Law; and Memorandum of Points and Authorities in Support Thereof" [hereinafter Respondents' Post-Hearing Brief].

On May 31, 2001, the Chief ALJ issued a "Decision and Order" [hereinafter Initial Decision and Order] in which the Chief ALJ: (1) concluded that on October 28, 1998, Respondent entered Jackie O in the 30th Anniversary National Walking Horse Trainers Show, while Jackie O was sore, for the purpose of showing or exhibiting Jackie O in that show, in violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)); (2) assessed Respondent a $2,000 civil penalty; and (3) dismissed the complaints[1] as to Rhonda Stewart, Stewart's Nursery, Stewart's Farm, Stewart's Farm & Nursery, The Derwood Stewart Family, and Stewart's Nursery Farm Stables (Initial Decision and Order at 9).

On June 29, 2001, Respondent appealed to the Judicial Officer. On July 23, 2001, Complainant appealed to the Judicial Officer and filed "Complainant's Response to Appeal Petition of Respondent Derwood Stewart." On August 10, 2001, Respondent filed "Respondent Derwood Stewart's Response to Appeal

[1]Based on the record, I infer the Chief ALJ's reference to "complaints" is a reference to the Complaint filed on July 1, 1999, and the Amended Complaint filed October 4, 1999. However, the Complaint is entirely subsumed within the Amended Complaint. I conclude that the operative pleading in this proceeding is the Amended Complaint and that effective February 8, 2000, when the Chief ALJ issued "Order Amending Complaint," the allegations in the Complaint filed July 1, 1999, were no longer at issue in this proceeding.

Petition of Complainant" [hereinafter Respondent's Response] in which Respondent requested oral argument before the Judicial Officer. On August 13, 2001, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a ruling on Respondent's request for oral argument before the Judicial Officer and a decision as to Respondent.[2]

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 Complainant and Respondent have thoroughly addressed the issues and the issues are not complex. Thus, oral argument would appear to serve no useful purpose.

Based upon a careful consideration of the record, I agree with the Chief ALJ's Initial Decision and Order, except with respect to the sanction imposed by the Chief ALJ. Therefore, pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt, except with respect to the sanction and except for minor modifications, the Chief ALJ's Initial Decision and Order. Additional conclusions by the Judicial Officer follow the Chief ALJ's Conclusion of Law, as restated.

Complainant's exhibits are designated by "CX." Transcript references are designated by "Tr."

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

15 U.S.C.:

TITLE 15—COMMERCE AND TRADE

. . . .

CHAPTER 44—PROTECTION OF HORSES

§ 1821. Definitions

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[2]The Hearing Clerk served Rhonda Stewart, Stewart's Nursery, Stewart's Farm, Stewart's Farm & Nursery, The Derwood Stewart Family, and Stewart's Nursery Farm Stables with the Initial Decision and Order on June 4, 2001 (Domestic Return Receipt for Article Number 7099 3400 0014 4579 1225). Complainant did not appeal the Chief ALJ's dismissal of the "complaints" as to Rhonda Stewart, Stewart's Nursery, Stewart's Farm, Stewart's Farm & Nursery, The Derwood Stewart Family, and Stewart's Nursery Farm Stables. Therefore, in accordance with the Initial Decision and Order and the Rules of Practice, the Initial Decision and Order became final and effective as to Rhonda Stewart, Stewart's Nursery, Stewart's Farm, Stewart's Farm & Nursery, The Derwood Stewart Family, and Stewart's Nursery Farm Stables on July 9, 2001 (Initial Decision and Order at 9; 7 C.F.R. § 1.142(c)(4)).

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.

§ 1822. Congressional statement of findings

The Congress finds and declares that–

(1) the soring of horses is cruel and inhumane;

(2) horses shown or exhibited which are sore, where such soreness improves the performance of such horse, compete unfairly with horses which are not sore;

(3) the movement, showing, exhibition, or sale of sore horses in intrastate commerce adversely affects and burdens interstate and foreign commerce;

(4) all horses which are subject to regulation under this chapter are either in interstate or foreign commerce or substantially affect such commerce; and

(5) regulation under this chapter by the Secretary is appropriate to prevent and eliminate burdens upon commerce and to effectively

regulate commerce.

§ 1823. Horse shows and exhibitions

(a) Disqualification of horses

The management of any horse show or horse exhibition shall disqualify any horse from being shown or exhibited (1) which is sore or (2) if the management has been notified by a person appointed in accordance with regulations under subsection (c) of this section or by the Secretary that the horse is sore.

. . . .

(c) Appointment of inspectors; manner of inspections

The Secretary shall prescribe by regulation requirements for the appointment by the management of any horse show, horse exhibition, or horse sale or auction of persons qualified to detect and diagnose a horse which is sore or to otherwise inspect horses for the purposes of enforcing this chapter. Such requirements shall prohibit the appointment of persons who, after notice and opportunity for a hearing, have been disqualified by the Secretary to make such detection, diagnosis, or inspection. Appointment of a person in accordance with the requirements prescribed under this subsection shall not be construed as authorizing such person to conduct inspections in a manner other than that prescribed for inspections by the Secretary (or the Secretary's representative) under subsection (e) of this section.

§ 1824. Unlawful acts

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.

§ 1825. Violations and penalties

. . . .

(b) Civil penalties; review and enforcement

(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.

(2) Any person against whom a violation is found and a civil penalty assessed under paragraph (1) of this subsection 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 by filing a notice of appeal in such court within 30 days from the date of such order and by simultaneously sending a copy of such notice by certified mail to the Secretary. The Secretary shall promptly file in such court a certified copy of the record upon which such violation was found and such penalty assessed, as provided in section 2112 of title 28. The findings of the Secretary shall be set aside if found to be unsupported by substantial evidence.

. . . .

(c) Disqualification of offenders; orders; civil penalties applicable; enforcement procedures

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. Any person who knowingly fails to obey an order of disqualification shall be subject to a civil penalty of not more than $3,000 for each violation. Any horse show, horse exhibition, or horse sale or auction, or the management thereof, collectively and severally, which knowingly allows any person who is under an order of disqualification to show or exhibit any horse, to enter for the purpose of showing or exhibiting any horse, to take part in managing or judging, or otherwise to participate in any horse show, horse exhibition, or horse sale or auction in violation of an order shall be subject to a civil penalty of not more than $3,000 for each violation. The provisions of subsection (b) of this section respecting the assessment, review, collection, and compromise, modification, and remission of a civil penalty apply with respect to civil penalties under this subsection.

(d) Production of witnesses and books, papers, and documents; depositions; fees; presumptions; jurisdiction

. . . .

(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. §§ 1821(3), 1822, 1823(a), (c), 1824(2), 1825(b)(1)-(2), (c), (d)(5).

28 U.S.C.:

TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE

. . . .

PART VI—PARTICULAR PROCEEDINGS

. . . .

CHAPTER 163—FINES, PENALTIES AND FORFEITURES

§ 2461. Mode of recovery

. . . .

FEDERAL CIVIL PENALTIES INFLATION ADJUSTMENT

SHORT TITLE

SECTION 1. This Act may be cited as the "Federal Civil Penalties Inflation Adjustment Act of 1990"

FINDINGS AND PURPOSE

SEC. 2. (a) FINDINGS.–The Congress finds that–

(1) the power of Federal agencies to impose civil monetary penalties for violations of Federal law and regulations plays an important role in deterring violations and furthering the policy goals embodied in such laws and regulations;

(2) the impact of many civil monetary penalties has been and is diminished due to the effect of inflation;

(3) by reducing the impact of civil monetary penalties, inflation has weakened the deterrent effect of such penalties; and

(4) the Federal Government does not maintain comprehensive, detailed accounting of the efforts of Federal agencies to assess and collect civil monetary penalties.

(b) PURPOSE–The purpose of this Act is to establish a mechanism that shall–

(1) allow for regular adjustment for inflation of civil monetary penalties;

(2) maintain the deterrent effect of civil monetary penalties and promote compliance with the law; and

(3) improve the collection by the Federal Government of civil monetary penalties.

DEFINITIONS

SEC. 3. For purposes of this Act, the term–

(1) "agency" means an Executive agency as defined under section 105 of title 5, United States Code, and includes the United States Postal Service;

(2) "civil monetary penalty" means any penalty, fine, or other sanction that–

(A)(i) is for a specific monetary amount as provided by Federal law; or

(ii) has a maximum amount provided for by Federal law; and

(B) is assessed or enforced by an agency pursuant to Federal law; and

(C) is assessed or enforced pursuant to an administrative proceeding or a civil action in the Federal courts; and

(3) "Consumer Price Index" means the Consumer Price Index for all-urban consumers published by the Department of Labor.

CIVIL MONETARY PENALTY INFLATION ADJUSTMENT REPORTS

SEC. 4. The head of each agency shall, not later than 180 days after the date of enactment of the Debt Collection Improvement Act of 1996, and at least once every 4 years thereafter–

(1) by regulation adjust each civil monetary penalty provided by law within the jurisdiction of the Federal agency, except for any penalty (including any addition to tax and additional amount) under the Internal Revenue Code of 1986, the Tariff Act of 1930, the Occupational Safety and Health Act of 1970, or the Social Security Act, by the inflation adjustment described under section 5 of this Act; and

(2) publish each such regulation in the Federal Register.

COST-OF-LIVING ADJUSTMENTS OF CIVIL MONETARY PENALTIES

SEC. 5. (a) ADJUSTMENT.–The inflation adjustment under section 4

shall be determined by increasing the maximum civil monetary penalty or the range of minimum and maximum civil monetary penalties, as applicable, for each civil monetary penalty by the cost-of-living adjustment. Any increase determined under this subsection shall be rounded to the nearest–

(1) multiple of $10 in the case of penalties less than or equal to $100;

(2) multiple of $100 in the case of penalties greater than $100 but less than or equal to $1,000;

(3) multiple of $1,000 in the case of penalties greater than $1,000 but less than or equal to $10,000;

(4) multiple of $5,000 in the case of penalties greater than $10,000 but less than or equal to $100,000;

(5) multiple of $10,000 in the case of penalties greater than $100,000 but less than or equal to $200,000; and

(6) multiple of $25,000 in the case of penalties greater than $200,000.

(b) DEFINITION.–For purposes of subsection (a), the term "cost-of-living adjustment" means the percentage (if any) for each civil monetary penalty by which–

(1) the Consumer Price Index for the month of June of the calendar year preceding the adjustment, exceeds

(2) the Consumer Price Index for the month of June of the calendar year in which the amount of such civil monetary penalty was last set or adjusted pursuant to law.

ANNUAL REPORT

SEC. 6. Any increase under this Act in a civil monetary penalty shall apply only to violations which occur after the date the increase takes effect.

LIMITATION ON INITIAL ADJUSTMENT.–The first adjustment of a civil monetary penalty . . . may not exceed 10 percent of such penalty.

28 U.S.C. § 2461 note (Supp. V 1999).

7 C.F.R.:

TITLE 7—AGRICULTURE

SUBTITLE A—OFFICE OF THE SECRETARY OF AGRICULTURE

. . . .

PART 3—DEBT MANAGEMENT

. . . .

Subpart E—Adjusted Civil Monetary Penalties

§ 3.91 Adjusted civil monetary penalties.

(a) *In general*. The Secretary will adjust the civil monetary penalties, listed in paragraph (b), to take account of inflation at least once every 4 years as required by the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. No. 101-410), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. No. 104-134).

(b) *Penalties–*

. . . .

(2) *Animal and Plant Health Inspection Service*. . . .

. . . .

(vii) Civil penalty for a violation of Horse Protection Act, codified at 15 U.S.C. 1825(b)(1), has a maximum of $2,200[.]

7 C.F.R. § 3.91(a), (b)(2)(vii).

9 C.F.R.:

TITLE 9—ANIMALS AND ANIMAL PRODUCTS

CHAPTER I—ANIMAL AND PLANT HEALTH INSPECTION SERVICE, DEPARTMENT OF AGRICULTURE

SUBCHAPTER A—ANIMAL WELFARE

. . . .

PART 11—HORSE PROTECTION REGULATIONS

§ 11.1 Definitions.

For the purpose of this part, unless the context otherwise requires, the following terms shall have the meanings assigned to them in this section. The singular form shall also impart the plural and the masculine form shall also impart the feminine. Words of art undefined in the following paragraphs shall have the meaning attributed to them by trade usage or general usage as reflected in a standard dictionary, such as "Webster's."

. . . .

Designated Qualified Person or *DQP* means a person meeting the requirements specified in § 11.7 of this part who has been licensed as a DQP by a horse industry organization or association having a DQP program certified by the Department and who may be appointed and delegated authority by the management of any horse show, horse exhibition, horse sale or horse auction under section 4 of the Act to detect or diagnose horses which are sore or to otherwise inspect horses and any records pertaining to such horses for the purposes of enforcing the Act.

§ 11.7 Certification and licensing of designated qualified persons (DQP's).

(a) *Basic qualifications of DQP appli*cants. DQP's holding a valid, current DQP license issued in accordance with this part may be appointed by the management of any horse show, horse exhibition, horse sale, or horse auction, as qualified persons in accordance with section 4(c) of the Act, to inspect horses to detect or diagnose soring and to otherwise inspect horses, or any records pertaining to any horse for the purpose of enforcing the Act. Individuals who may be licensed as DQP's under this part shall be:

(1) Doctors of Veterinary Medicine who are accredited in any State by the United States Department of Agriculture under part 161 of chapter I, title 9 of the Code of Federal Regulations, and who are:

(i) Members of the American Association of Equine Practitioners, or

(ii) Large animal practitioners with substantial equine experience, or

(iii) Knowledgeable in the area of equine lameness as related to soring and soring practices (such as Doctors of Veterinary Medicine with a small animal practice who own, train, judge, or show horses, or Doctors of Veterinary Medicine who teach equine related subjects in an accredited college or school of veterinary medicine). Accredited Doctors of Veterinary Medicine who meet these criteria may be licensed as DQP's by a horse industry organization or association whose DQP program has been certified

by the Department under this part without undergoing the formal training requirements set forth in this section.

(2) Farriers, horse trainers, and other knowledgeable horsemen whose past experience and training would qualify them for positions as horse industry organization or association stewards or judges (or their equivalent) and who have been formally trained and licensed as DQP's by a horse industry organization or association whose DQP program has been certified by the Department in accordance with this section.

(b) *Certification requirements for DQP programs*. The Department will not license DQP's on an individual basis. Licensing of DQP's will be accomplished only through DQP programs certified by the Department and initiated and maintained by horse industry organizations or associations. Any horse industry organization or association desiring Department certification to train and license DQP's under the Act shall submit to the Administrator a formal request in writing for certification of its DQP program and a detailed outline of such program for Department approval. Such outline shall include the organizational structure of such organization or association and the names of the officers or persons charged with the management of the organization or association. The outline shall also contain at least the following:

(1) The criteria to be used in selecting DQP candidates and the minimum qualifications and knowledge regarding horses each candidate must have in order to be admitted to the program.

(2) A copy of the formal training program, classroom and practical, required to be completed by each DQP candidate before being licensed by such horse industry organization or association, including the minimum number of hours, classroom and practical, and the subject matter of the training program. Such training program must meet the following minimum standards in order to be certified by the Department under the Act.

(i) Two hours of classroom instruction on the anatomy and physiology of the limbs of a horse. The instructor teaching the course must be specified, and a resume of said instructor's background, experience, and qualifications to teach such course shall be provided to the Administrator.

(ii) Two hours of classroom instruction on the Horse Protection Act and regulations and their interpretation. Instructors for this course must be furnished or recommended by the Department. Requests for instructors to be furnished or recommended must be made to the Administrator in writing at least 30 days prior to such course.

(iii) Four hours of classroom instruction on the history of soring, the

physical examination procedures necessary to detect soring, the detection and diagnosis of soring, and related subjects. The instructor teaching the course must be specified and a summary of said instructor's background, experience, and qualifications to teach such course must be provided to the Administrator.

(iv) Four hours of practical instruction in clinics and seminars utilizing live horses with actual application of the knowledge gained in the classroom subjects covered in paragraphs (b)(2)(i), (ii), and (iii) of this section. Methods and procedures required to perform a thorough and uniform examination of a horse shall be included. The names of the instructors and a resume of their background, academic and practical experience, and qualifications to present such instruction shall be provided to the Administrator. Notification of the actual date, time, duration, subject matter, and geographic location of such clinics or seminars must be sent to the Administrator at least 10 days prior to each such clinic or seminar.

(v) One hour of classroom instruction regarding the DQP standards of conduct promulgated by the licensing organization or association pursuant to paragraph (d)(7) of this section.

(vi) One hour of classroom instruction on recordkeeping and reporting requirements and procedures.

(3) A sample of a written examination which must be passed by DQP candidates for successful completion of the program along with sample answers and the scoring thereof, and proposed passing and failing standards.

(4) The criteria to be used to determine the qualifications and performance abilities of DQP candidates selected for the training program and the criteria used to indicate successful completion of the training program, in addition to the written examination required in paragraph (b)(3) of this section.

(5) The criteria and schedule for a continuing education program and the criteria and methods of monitoring and appraising performance for continued licensing of DQP's by such organization or association. A continuing education program for DQP's shall consist of not less than 4 hours of instruction per year.

(6) Procedures for monitoring horses in the unloading, preparation, warmup, and barn areas, or other such areas. Such monitoring may include any horse that is stabled, loaded on a trailer, being prepared for show, exhibition, sale, or auction, or exercised, or that is otherwise on the grounds of, or present at, any horse show, horse exhibition, or horse sale or auction.

(7) The methods to be used to insure uniform interpretation and

enforcement of the Horse Protection Act and regulations by DQP's and uniform procedures for inspecting horses for compliance with the Act and regulations;

(8) Standards of conduct for DQP's promulgated by the organization or association in accordance with paragraph (d)(7) of this section; and

(9) A formal request for Department certification of the DQP program.

The horse industry organizations or associations that have formally requested Department certification of their DQP training, enforcement, and maintenance program will receive a formal notice of certification from the Department, or the reasons, in writing, why certification of such program cannot be approved. A current list of certified DQP programs and licensed DQP's will be published in the FEDERAL REGISTER at least once each year, and as may be further required for the purpose of deleting programs and names of DQP's that are no longer certified or licensed, and of adding the names of programs and DQP's that have been certified or licensed subsequent to the publication of the previous list.

(c) *Licensing of DQP's.* Each horse industry organization or association receiving Department certification for the training and licensing of DQP's under the Act shall:

(1) Issue each DQP licensed by such horse industry organization or association a numbered identification card bearing the name and personal signature of the DQP, a picture of the DQP, and the name and address, including the street address or post office box and zip code, of the licensing organization or association;

(2) Submit a list to the Administrator of names and addresses including street address or post office box and zip code, of all DQP's that have successfully completed the certified DQP program and have been licensed under the Act and regulations by such horse industry organization or association;

(3) Notify the Department of any additions or deletions of names of licensed DQP's from the licensed DQP list submitted to the Department or of any change in the address of any licensed DQP or any warnings and license revocations issued to any DQP licensed by such horse industry organization or association within 10 days of such change;

(4) Not license any person as a DQP if such person has been convicted of any violation of the Act or regulations occurring after July 13, 1976, or paid any fine or civil penalty in settlement of any proceeding regarding a violation of the Act or regulations occurring after July 13, 1976, for a period

of at least 2 years following the first such violation, and for a period of at least 5 years following the second such violation and any subsequent violation;

(5) Not license any person as a DQP until such person has attended and worked two recognized or affiliated horse shows, horse exhibitions, horse sales, or horse auctions as an apprentice DQP and has demonstrated the ability, qualifications, knowledge and integrity required to satisfactorily execute the duties and responsibilities of a DQP;

(6) Not license any person as a DQP if such person has been disqualified by the Secretary from making detection, diagnosis, or inspection for the purpose of enforcing the Act, or if such person's DQP license is canceled by another horse industry organization or association.

(d) *Requirements to be met by DQP's and Licensing Organizations or Associations.* (1) Any licensed DQP appointed by the management of any horse show, horse exhibition, horse sale or auction to inspect horses for the purpose of detecting and determining or diagnosing horses which are sore and to otherwise inspect horses for the purpose of enforcing the Act and regulations, shall keep and maintain the following information and records concerning any horse which said DQP recommends be disqualified or excused for any reason at such horse show, horse exhibition, horse sale or auction, from being shown, exhibited, sold or auctioned, in a uniform format required by the horse industry organization or association that has licensed said DQP:

(i) The name and address, including street address or post office box and zip code, of the show and the show manager.

(ii) The name and address, including street address or post office box and zip code, of the horse owner.

(iii) The name and address, including street address or post office box and zip code, of the horse trainer.

(iv) The name and address, including street address or post office box and zip code, of the horse exhibitor.

(v) The exhibitors number and class number, or the sale or auction tag number of said horse.

(vi) The date and time of the inspection.

(vii) A detailed description of all of the DQP's findings and the nature of the alleged violation, or other reason for disqualifying or excusing the horse, including said DQP's statement regarding the evidence or facts upon which the decision to disqualify or excuse said horse was based.

(viii) The name, age, sex, color, and markings of the horse; and

(ix) The name or names of the show manager or other management representative notified by the DQP that such horse should be excused or disqualified and whether or not such manager or management representative excused or disqualified such horse.

Copies of the above records shall be submitted by the involved DQP to the horse industry organization or association that has licensed said DQP within 72 hours after the horse show, horse exhibition, horse sale, or horse auction is over.

(2) The DQP shall inform the custodian of each horse allegedly found in violation of the Act or its regulations, or disqualified or excused for any other reason, of such action and the specific reasons for such action.

(3) Each horse industry organization or association having a Department certified DQP program shall submit a report to the Department containing the following information, from records required in paragraph (d)(1) of this section and other available sources, to the Department on a monthly basis:

(i) The identity of all horse shows, horse exhibitions, horse sales, or horse auctions that have retained the services of DQP's licensed by said organization or association during the month covered by the report. Information concerning the identity of such horse shows, horse exhibitions, horse sales, or horse auctions shall include:

(A) The name and location of the show, exhibition, sale, or auction.

(B) The name and address of the manager.

(C) The date or dates of the show, exhibition, sale, or auction.

(ii) The identity of all horses at each horse show, horse exhibition, horse sale, or horse auction that the licensed DQP recommended be disqualified or excused for any reason. The information concerning the identity of such horses shall include:

(A) The registered name of each horse.

(B) The name and address of the owner, trainer, exhibitor, or other person having custody of or responsibility for the care of each such horse disqualified or excused.

(4) Each horse industry organization or association having a Department certified DQP program shall provide, by certified mail if personal service is not possible, to the trainer and owner of each horse allegedly found in violation of the Act or its regulations or otherwise disqualified or excused for any reason, the following information;

(i) The name and date of the show, exhibition, sale, or auction.

(ii) The name of the horse and the reason why said horse was excused,

disqualified, or alleged to be in violation of the Act or its regulations.

(5) Each horse industry organization or association having a Department certified DQP program shall provide each of its licensed DQP's with a current list of all persons that have been disqualified by order of the Secretary from showing or exhibiting any horse, or judging or managing any horse show, horse exhibition, horse sale, or horse auction. The Department will make such list available, on a current basis, to organizations and associations maintaining a certified DQP program.

(6) Each horse industry organization or association having a Department certified DQP program shall develop and provide a continuing education program for licensed DQP's which provides not less than 4 hours of instruction per year to each licensed DQP.

(7) Each horse industry organization or association having a Department certified DQP program shall promulgate standards of conduct for its DQP's, and shall provide administrative procedures within the organization or association for initiating, maintaining, and enforcing such standards. The procedures shall include the causes for and methods to be utilized for canceling the license of any DQP who fails to properly and adequately carry out his duties. Minimum standards of conduct for DQP's shall include the following;

(i) A DQP shall not exhibit any horse at any horse show or horse exhibition, or sell, auction, or purchase any horse sold at a horse sale or horse auction at which he or she has been appointed to inspect horses;

(ii) A DQP shall not inspect horses at any horse show, horse exhibition, horse sale or horse auction in which a horse or horses owned by a member of the DQP's immediate family or the DQP's employer are competing or are being offered for sale;

(iii) A DQP shall follow the uniform inspection procedures of his certified organization or association when inspecting horses; and

(iv) The DQP shall immediately inform management of each case regarding any horse which, in his opinion, is in violation of the Act or regulations.

(e) *Prohibition of appointment of certain persons to perform duties under the Act.* The management of any horse show, horse exhibition, horse sale, or horse auction shall not appoint any person to detect and diagnose horses which are sore or to otherwise inspect horses for the purpose of enforcing the Act, if that person:

(1) Does not hold a valid, current DQP license issued by a horse industry organization or association having a DQP program certified by the

Department.

(2) Has had his DQP license canceled by the licensing organization or association.

(3) Is disqualified by the Secretary from performing diagnosis, detection, and inspection under the Act, after notice and opportunity for a hearing, when the Secretary finds that such person is unfit to perform such diagnosis, detection, or inspection because he has failed to perform his duties in accordance with the Act or regulations, or because he has been convicted of a violation of any provision of the Act or regulations occurring after July 13, 1976, or has paid any fine or civil penalty in settlement of any proceeding regarding a violation of the Act or regulations occurring after July 13, 1976.

(f) *Cancellation of DQP license.* (1) Each horse industry organization or association having a DQP program certified by the Department shall issue a written warning to any DQP whom it has licensed who violates the rules, regulations, by-laws, or standards of conduct promulgated by such horse industry organization or association pursuant to this section, who fails to follow the procedures set forth in § 11.21 of this part, or who otherwise carries out his duties and responsibilities in a less than satisfactory manner, and shall cancel the license of any DQP after a second violation. Upon cancellation of his DQP license, the DQP may, within 30 days thereafter, request a hearing before a review committee of not less than three persons appointed by the licensing horse industry organization or association. If the review committee sustains the cancellation of the license, the DQP may appeal the decision of such committee to the Administrator within 30 days from the date of such decision, and the Administrator shall make a final determination in the matter. If the Administrator finds, after providing the DQP whose license has been canceled with a notice and an opportunity for a hearing, that there is sufficient cause for the committee's determination regarding license cancellation, he shall issue a decision sustaining such determination. If he does not find that there was sufficient cause to cancel the license, the licensing organization or association shall reinstate the license.

(2) Each horse industry organization or association having a Department certified DQP program shall cancel the license of any DQP licensed under its program who has been convicted of any violation of the Act or regulations or of any DQP who has paid a fine or civil penalty in settlement of any alleged violation of the Act or regulations if such alleged violation occurred after July 13, 1976.

(g) *Revocation of DQP program certification of horse industry organizations or associations.* Any horse industry organization or association having a Department certified DQP program that has not received Department approval of the inspection procedures provided for in paragraph (b)(6) of this section, or that otherwise fails to comply with the requirements contained in this section, may have such certification of its DQP program revoked, unless, upon written notification from the Department of such failure to comply with the requirements in this section, such organization or association takes immediate action to rectify such failure and takes appropriate steps to prevent a recurrence of such noncompliance within the time period specified in the Department notification, or otherwise adequately explains such failure to comply to the satisfaction of the Department. Any horse industry organization or association whose DQP program certification has been revoked may appeal such revocation to the Administrator in writing within 30 days after the date of such revocation and, if requested, shall be afforded an opportunity for a hearing. All DQP licenses issued by a horse industry organization or association whose DQP program certification has been revoked shall expire 30 days after the date of such revocation, or 15 days after the date the revocation becomes final after appeal, unless they are transferred to a horse industry organization or association having a program currently certified by the Department.

9 C.F.R. §§ 11.1, .7 (1998) (footnotes omitted).

CHIEF ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION AND ORDER (AS RESTATED)

Statement of the Case

Respondent's address is 179 Stewart Lane, McMinnville, Tennessee 37110. In 1998, Respondent, who has exhibited Tennessee Walking Horses for about 12 years, owned seven horses, including Jackie O. They were boarded with and trained by Don Milligan. One of Don Milligan's employees was Jessie Smith who had trained some of Respondent's ribbon-winning horses. Sometime in June or July 1998, Respondent moved his horses to his own barn and hired Jessie Smith to train them. (CX 4; Tr. 44, 107-11, 117-18, 132.) Respondent testified that he told Jessie Smith that he "didn't want [his] horses abused in any shape, form or fashion"

(Tr. 111, 116-17). Respondent, who has had no previous violations of the Horse Protection Act, said that he did not see Jessie Smith abuse any of the horses (Tr. 111-13, 137).

Jessie Smith entered Jackie O and two other horses on Respondent's behalf in the 30th Anniversary National Walking Horse Trainers Show as entry number 392 in class 24 (CX 2 at 1; Tr. 111, 113, 119-20). On October 28, 1998, two DQPs[3] and two experienced Animal and Plant Health Inspection Service veterinarians, David C. Smith, DVM, and John Edward Slauter, DVM, examined Jackie O at the 30th Anniversary National Walking Horse Trainers Show before Jackie O's exhibition (CX 3).

Dr. Smith testified that he remembered his examination of Jackie O and that he had prepared an affidavit after his examination (Tr. 12-15). In his affidavit (CX 3 at 2), Dr. Smith stated:

> At approximately 18:13 I observed DQPs Harry Chaffin and Mark Thomas examining entry # 392 in Class # 24, a two year old grey mare known as "JFK O My Jackie O." The horse appeared very uncomfortable during the exam. It was tense, and was leaning over to try to escape the pain elicited by the DQPs' exams. This leaning was to the point that the horse looked as if it might fall over at any time. I could see the horse trying to jerk both fore feet away from the DQPs as they did the palpation portions of their exams. A ticket for bilateral soring was issued by the DQPs.
>
> At 18:20, I examined the horse. The horse's locomotion was stiff and cautious. When I palpated the forefeet, using gentle pressure from the ball of my thumb, I found that both forefeet were painful. The painful areas started in the area just proximal to the medial heel bulb and extended all the way around the medial, dorsal, and lateral aspects of the pastern to area just proximal to the lateral heel bulb. This was consistent in both forefeet. The horse jerked its feet away vigorously as I palpated these areas. This pain response was very easy to reproduce.

Dr. Smith testified that Jackie O was one of the sorest horses that he has seen and that Jackie O would have experienced pain if exhibited (Tr. 13, 20-21).

Dr. Slauter then examined Jackie O. He testified that he did not remember his

[3] A "DQP" (Designated Qualified Person) is a person appointed by the management of a horse show and trained under a United States Department of Agriculture-sponsored program to inspect horses for compliance with the Horse Protection Act (15 U.S.C. § 1823; 9 C.F.R. §§ 11.1, .7).

examination but that he had prepared an affidavit at the time concerning his examination (Tr. 59-60). In his affidavit (CX 3 at 5), Dr. Slauter stated:

> Dr. Smith asked me to examine the horse. The horse led around a stationary cone. It led up unsteady and was very reluctant to move. As I palpated the left pastern I was able to get repeatable pain responses to palpation of numerous areas all around the pastern. I noticed a head jerk and the horse wanted to lean over on me as I found pain responses around the left pastern[.] The horse also had a pronounced left foot withdrawal to the pain responses on palpation.
>
> I then examined the right foot. Once again the horse gave me a pronounced foot withdrawal as I found repeated pain responses to palpation at numerous areas all around the right pastern. Again the horse was in such pain it almost leaned over on me as I palpated the pasterns.
>
> Dr. Smith and I discussed our findings and the horse. In our professional opinions we agreed that the horse was bilaterally sore from either mechanical or chemical means or a combination thereof.

Dr. Smith and Dr. Slauter then completed and signed APHIS form 7077 "Summary of Alleged Violations" (CX 3 at 1). Respondent was not present during the examination of Jackie O. When Respondent learned that Jackie O was found to be sore, he fired Jessie Smith. (Tr. 113-14.)

Complainant alleges that Respondent entered Jackie O in the 30th Anniversary National Walking Horse Trainers Show while sore, in violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) (Amended Compl. ¶ 4). Respondent contends he did not enter Jackie O in the 30th Anniversary National Walking Horse Trainers Show (Respondents' Post-Hearing Brief).

Discussion

The substantial evidence presented by Complainant through the testimony and affidavits[4] of Drs. Slauter and Smith, who were credible witnesses, concerning their findings that Jackie O experienced bilateral pain in its forelimbs when examined, raises the presumption under section 6(d)(5) of the Horse Protection Act (15 U.S.C.

[4]An affidavit prepared while events are fresh in the writer's mind is considered reliable and probative. *In re Cecil Jordan,* 51 Agric. Dec. 1229 (1992) (Remand Order).

§ 1825(d)(5)) that Jackie O was sore.[5] Respondent offered no evidence to rebut this presumption. Accordingly, I find that Jackie O was sore when entered in the 30th Anniversary National Walking Horse Trainers Show on October 28, 1998.

Respondent personally and through his agent, Jessie Smith, entered Jackie O in the 30th Anniversary National Walking Horse Trainers Show, while Jackie O was sore.

Respondent, however, contends that he did not violate the Horse Protection Act because he did not know Jackie O was sore and he had specifically directed the horse's trainer, Jessie Smith, not to sore the horse (Respondents' Post-Hearing Brief at 8-9). However, Respondent's lack of knowledge that Jackie O was sore and Respondent's instructions to his trainer are not defenses to a violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)). An owner of a walking horse, such as Respondent, is an "absolute guarantor" that the horse he enters, either personally or through his agent, will not be entered in a show while sore. A horse owner is therefore liable for a violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) if he or she enters a sore horse in a horse show for the purpose of showing or exhibiting the horse even if the owner is actually unaware that the horse is sore. As an "absolute guarantor," an owner is likewise liable for a violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) even if the owner instructed the trainer not to sore the horse.

Sanction

Section 6(b)(1) of the Horse Protection Act (15 U.S.C. § 1825(b)(1)) authorizes the assessment of a civil penalty of not more than $2,000 for each violation of section 5 of the Horse Protection Act (15 U.S.C. § 1824). However, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note (Supp. V 1999)), the Secretary of Agriculture, by regulation effective September 2, 1997, adjusted the civil monetary penalty that may be assessed under

[5] *In re Jack Stepp*, 57 Agric. Dec. 297, 310 (1998), *aff'd*, 188 F.3d 508 (Table), 1999 WL 646138 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206); *In re Carl Edwards & Sons Stables* (Decision as to Carl Edwards & Sons Stables, Gary R. Edwards, Larry E. Edwards, and Etta Edwards), 56 Agric. Dec. 529, 560 (1997), *aff'd per curiam*, 138 F.3d 958 (11th Cir. 1998) (Table), *printed in* 57 Agric. Dec. 296 (1998); *In re Gary R. Edwards* (Decision as to Gary R. Edwards, Larry E. Edwards, and Carl Edwards & Sons Stables), 55 Agric. Dec. 892, 906 (1996), *dismissed*, No. 96-9472 (11th Cir. Aug. 15, 1997); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 872 (1996); *In re Linda Wagner* (Decision as to Roy E. Wagner and Judith E. Rizio), 52 Agric. Dec. 298, 314 (1993), *aff'd*, 28 F.3d 279 (3d Cir. 1994); *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).

section 6(b)(1) of the Horse Protection Act (15 U.S.C. § 1825(b)(1)) for each violation of section 5 of the Horse Protection Act (15 U.S.C. § 1824) by increasing the maximum civil penalty from $2,000 to $2,200.[6] The Horse Protection Act also authorizes the disqualification of any person assessed a civil penalty, from showing or exhibiting any horse or judging or managing any horse show, horse exhibition, horse sale, or horse auction. The Horse Protection Act provides minimum periods of disqualification of not less than 1 year for a first violation and not less than 5 years for any subsequent violation. 15 U.S.C. § 1825(c).

Congress has recognized the seriousness of soring horses. 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

[6] 62 Fed. Reg. 40,924-28 (July 31, 1997); 7 C.F.R. § 3.91(b)(2)(vii).

> 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. 94-1174, at 4-5 (1976), *reprinted in* 1976 U.S.C.C.A.N. 1696, 1698-99.

The United States Department of Agriculture'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 WL 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 provides that the Secretary of Agriculture shall determine the amount of the civil penalty, as follows:

> 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, 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).

Complainant recommends that I assess Respondent a $2,200 civil penalty (Complainant's Post-Hearing Brief at 34-36). The extent and gravity of Respondent's prohibited conduct are great. Jackie O was one of the sorest horses ever examined by Dr. Smith (Tr. 13, 20-21). Respondent hired a full-time trainer without inquiring as to his record of Horse Protection Act violations and gave him complete control with respect to the method of training Jackie O (CX 4 at 2; Tr. 123-24, 129). Respondent both personally and through his agent entered Jackie O in the 30th Anniversary Walking Horse Trainers Show while Jackie O was sore. Under these circumstances, I find that Respondent has a high degree of culpability for the violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)). Respondent presented no evidence that he is unable to pay a $2,200 civil penalty and presented no evidence that the payment of a $2,200 civil penalty would adversely affect his ability to continue in business.

In most Horse Protection Act cases, the maximum civil penalty per violation has been warranted.[7] Effective September 2, 1997, the Secretary of Agriculture

[7]*See, e.g., In re Jack Stepp*, 57 Agric. Dec. 297 (1998), *aff'd*, 188 F.3d 508 (Table), 1999 WL 646138 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206); *In re Carl Edwards & Sons Stables* (Decision as to Carl Edwards & Sons Stables, Gary R. Edwards, Larry E. Edwards, and Etta Edwards), 56 Agric. Dec. 529 (1997), *aff'd per curiam*, 138 F.3d 958 (11th Cir. 1998) (Table), *printed in* 57 Agric. Dec. 296 (1998); *In re Gary R. Edwards* (Decision as to Gary R. Edwards, Larry E. Edwards, and Carl Edwards & Sons Stables), 55 Agric. Dec. 892 (1996), *dismissed*, No. 96-9472 (11th Cir. Aug. 15, 1997); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853 (1996); *In re Mike Thomas*, 55 Agric. Dec. 800 (1996); *In re C.M. Oppenheimer* (Decision as to C.M. Oppenheimer), 54 Agric. Dec. 221 (1995); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994); *In re Linda*

(continued...)

adjusted the maximum civil penalty for each violation of section 5 of the Horse Protection Act (15 U.S.C. § 1824) by increasing the maximum civil penalty from $2,000 to $2,200.[8] Based on the factors that are required to be considered when determining the amount of the civil penalty to be assessed and the recommendation of administrative officials charged with responsibility for achieving the congressional purpose of the Horse Protection Act, I find no basis for an exception to the United States Department of Agriculture's policy of assessing the maximum civil penalty for each violation of the Horse Protection Act. Therefore, I assess Respondent a $2,200 civil penalty.

Section 6(c) of the Horse Protection Act (15 U.S.C. § 1825(c)) provides that any person 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, horse sale, or horse auction for a period of not less than 1 year for the first violation of the Horse Protection Act and for a period of not less than 5 years for any subsequent violation of 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 of Agriculture'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 have the economic means to pay civil penalties as a cost of doing business. See H.R. Rep. No. 94-1174, at 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 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 of Agriculture consider certain specified factors when determining the amount of the civil penalty to be assessed for a violation of the Horse Protection Act, the Horse Protection Act contains no such requirement with respect to the imposition of a disqualification period.

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[7](...continued)
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); *In re William Dwaine Elliott* (Decision as to William Dwaine Elliott), 51 Agric. Dec. 334 (1992), *aff'd*, 990 F.2d 140 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993); *In re Eldon Stamper*, 42 Agric. Dec. 20 (1983), *aff'd*, 722 F.2d 1483 (9th Cir. 1984), *reprinted in* 51 Agric. Dec. 302 (1992).

[8]See note 6.

While disqualification is discretionary with the Secretary of Agriculture, 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 a respondent is found to have violated the Horse Protection Act for the first time.[9]

Congress has provided the United States Department of Agriculture 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.

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 before me 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.

Findings of Fact

1. Respondent is an individual whose address is 179 Stewart Lane,

[9] *In re Carl Edwards & Sons Stables* (Decision as to Carl Edwards & Sons Stables, Gary R. Edwards, Larry E. Edwards, and Etta Edwards), 56 Agric. Dec. 529, 591 (1997), *aff'd per curiam*, 138 F.3d 958 (11th Cir. 1998) (Table), *printed in*, 57 Agric. Dec. 296 (1998); *In re Gary R. Edwards* (Decision as to Gary R. Edwards, Larry E. Edwards, and Carl Edwards & Sons Stables), 55 Agric. 892, 982 (1996), *dismissed*, No. 96-9472 (11th Cir. Aug. 15, 1997); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 891 (1996); *In re Mike Thomas*, 55 Agric. Dec. 800, 846 (1996); *In re C.M. Oppenheimer* (Decision as to C.M. Oppenheimer), 54 Agric. Dec. 221, 321-22 (1995); *In re Danny Burks* (Decision as to Danny Burks), 53 Agric. Dec. 322, 347 (1994); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261, 318-19 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994); *In re Linda Wagner* (Decision as to Roy E. Wagner and Judith E. Rizio), 52 Agric. Dec. 298, 318 (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, 352 (1992), *aff'd*, 990 F.2d 140 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993).

McMinnville, Tennessee 37710. At all times material to this proceeding, Respondent was the sole owner of Jackie O.

2. Respondent employed Jessie Smith as his employee and agent to train Jackie O for exhibition.

3. Respondent personally and through his agent, Jessie Smith, entered Jackie O in the 30th Anniversary National Walking Horse Trainers Show on October 28, 1998, for the purpose of showing or exhibiting Jackie O.

4. Jackie O manifested abnormal bilateral sensitivity in both of its forelimbs when examined by two experienced veterinarians when Jackie O was entered in the 30th Anniversary National Walking Horse Trainers Show on October 28, 1998, and Jackie O would be expected to experience pain if shown or exhibited.

Conclusion of Law

Respondent violated section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) when he entered Jackie O for the purpose of showing or exhibiting the horse in the 30th Anniversary National Walking Horse Trainers Show on October 28, 1998, while Jackie O was sore.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Complainant's Appeal Petition

Complainant requests in "Complainant's Petition for Appeal of Decision and Order" [hereinafter Complainant's Appeal Petition] that I modify the sanction imposed against Respondent by the Chief ALJ. First, Complainant contends the Chief ALJ erroneously failed "to base his order on the adjusted maximum civil penalty." (Complainant's Appeal Pet. at 2 (emphasis in original).)

The Chief ALJ assessed Respondent a $2,000 civil penalty for his violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) (Initial Decision and Order at 9). As the Chief ALJ correctly noted, customarily a $2,000 civil penalty has been assessed for each violation of the Horse Protection Act[10]

[10] *See, e.g., In re Jack Stepp*, 57 Agric. Dec. 297 (1998), *aff'd*, 188 F.3d 508 (Table), 1999 WL 646138 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206); *In re Carl Edwards & Sons Stables* (Decision as to Carl Edwards & Sons Stables, Gary R. Edwards, Larry E. Edwards, and Etta Edwards), 56 Agric. Dec. 529 (1997), *aff'd per curiam*, 138 F.3d 958 (11th Cir. 1998) (Table), *printed in* 57 Agric. Dec. 296 (1998); *In re Gary R. Edwards* (Decision as to Gary R. Edwards, Larry E. Edwards, and Carl Edwards & Sons Stables), 55 Agric. Dec. 892 (1996), *dismissed*, No. 96-9472 (continued...)

(Initial Decision and Order at 7).

Prior to September 2, 1997, the maximum civil penalty that could be assessed for each violation of section 5 of the Horse Protection Act (15 U.S.C. § 1824) was $2,000.[11] However, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note (Supp. V 1999)), the Secretary of Agriculture, by regulation effective September 2, 1997, adjusted the civil monetary penalty that may be assessed under section 6(b)(1) of the Horse Protection Act (15 U.S.C. § 1825(b)(1)) for each violation of section 5 of the Horse Protection Act (15 U.S.C. § 1824) by increasing the maximum civil penalty from $2,000 to $2,200.[12] The United States Department of Agriculture's policy has been to assess the maximum civil penalty for each violation of the Horse Protection Act unless an examination of the factors that must be considered when determining the amount of the civil penalty reveals facts which warrant the assessment of a civil penalty that is less than the maximum civil penalty. I find no basis on the record before me to assess Respondent less than the maximum civil penalty. Therefore, I conclude the Chief ALJ erred by assessing Respondent a $2,000 civil penalty rather than the maximum $2,200 civil penalty.

Second, Complainant contends the Chief ALJ erred by basing his decision not to disqualify Derwood Stewart from showing, exhibiting, or entering any horse and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction on the statutory factors the Chief ALJ was required to consider when determining the amount of the civil penalty to assess (Complainant's Appeal Pet. at 3-5).

Section 6(b)(1) of the Horse Protection Act (15 U.S.C. § 1825(b)(1)) provides that in determining the amount of the civil penalty, the Secretary of Agriculture shall take into account all factors relevant to such determination, including the

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[10](...continued)
(11th Cir. Aug. 15, 1997); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853 (1996); *In re Mike Thomas*, 55 Agric. Dec. 800 (1996); *In re C.M. Oppenheimer* (Decision as to C.M. Oppenheimer), 54 Agric. Dec. 221 (1995); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994); *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); *In re William Dwaine Elliott* (Decision as to William Dwaine Elliott), 51 Agric. Dec. 334 (1992), *aff'd*, 990 F.2d 140 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993); *In re Eldon Stamper*, 42 Agric. Dec. 20 (1983), *aff'd*, 722 F.2d 1483 (9th Cir. 1984), *reprinted in* 51 Agric. Dec. 302 (1992).

[11]15 U.S.C. § 1825(b)(1).

[12]See note 6.

nature, circumstances, extent, and gravity of the prohibited conduct, and with respect to the person found to have engaged in the prohibited conduct, the degree of culpability, any history of prior offenses, ability to pay, effect on ability to continue business, and such other matters as justice may require. However, the Horse Protection Act contains no such requirement with respect to the imposition of a disqualification period.[13] When a provision is included in one section of a statute and omitted in another section, it should not be implied in the place at which it is omitted.[14] Therefore, I agree with Complainant that the Chief ALJ erred by basing his decision not to disqualify Derwood Stewart on factors required in section 6(b)(1) of the Horse Protection Act (15 U.S.C. § 1825(b)(1)) to be considered when determining the amount of the civil penalty.

Third, Complainant contends the Chief ALJ erred by basing his decision not to disqualify Respondent from showing, exhibiting, or entering any horse and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction on Respondent's having exhibited horses in the past without committing any violation of the Horse Protection Act (Complainant's Appeal Pet. at 6).

I agree with Complainant that the Chief ALJ erred by basing his decision not to disqualify Respondent on Respondent's having exhibited horses in the past without committing any violation of the Horse Protection Act. The Horse Protection Act itself provides for minimum periods of disqualification based upon a respondent's compliance history. Specifically, section 6(c) of the Horse Protection Act (15 U.S.C. § 1825(c)) provides that a respondent may be disqualified for not less than 1 year for the first violation of the Horse Protection Act and not less than 5 years for any subsequent violation of the Horse Protection Act. Moreover, while section 6(c) of the Horse Protection Act (15 U.S.C. § 1825(c)) does not require

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[13] *In re Carl Edwards & Sons Stables* (Decision as to Carl Edwards & Sons Stables, Gary R. Edwards, Larry E. Edwards, and Etta Edwards), 56 Agric. Dec. 529, 591 (1997), *aff'd per curiam*, 138 F.3d 958 (11th Cir. 1998) (Table), *printed in* 57 Agric. Dec. 296 (1998); *In re Gary R. Edwards* (Decision as to Gary R. Edwards, Larry E. Edwards, and Carl Edwards & Sons Stables), 55 Agric. 892, 981 (1996), *dismissed*, No. 96-9472 (11th Cir. Aug. 15, 1997); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 890 (1996); *In re Mike Thomas*, 55 Agric. Dec. 800, 845-46 (1996); *In re Danny Burks* (Decision as to Danny Burks), 53 Agric. Dec. 322, 348 (1994); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261, 319 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994).

[14] *Lang v. Commissioner*, 289 U.S. 109, 112 (1933); *Corn Products Refining Co. v. Benson*, 232 F.2d 554, 562 (2d Cir. 1956); *Hamilton v. NLRB*, 160 F.2d 465, 470 (6th Cir.), *cert. denied sub. nom Kalamzoo Stationery Co. v. NLRB*, 332 U.S. 762 (1947); *Cohen v. Great Guns, Inc.* (*In re Sooner Oil & Gas Corp.*), 24 B.R. 479, 484 (Bankr. W.D. Okla. 1982).

disqualification of persons found to have violated the Horse Protection Act, the Chief ALJ's determination that Respondent should not be disqualified because he had not previously been found to have violated the Horse Protection Act is contrary to section 6(c) of the Horse Protection Act (15 U.S.C. § 1825(c)), which specifically provides for a minimum period of disqualification for the first violation of the Horse Protection Act.

Fourth, Complainant contends the Chief ALJ erred by basing his decision not to disqualify Respondent from showing, exhibiting, or entering any horse and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction on Respondent's lack of knowledge that Jackie O was sore (Complainant's Appeal Pet. at 6-7).

Congress specifically added the disqualification provisions to provide a strong deterrent to violations of the Horse Protection Act by those persons who have the economic means to pay civil penalties as a cost of doing business. See H.R. Rep. No. 94-1174, at 11 (1976), *reprinted in* 1976 U.S.C.C.A.N. 1696, 1706.

In order to eliminate the practice of soring, it would seem necessary to impose at least the minimum period of disqualification on respondents found to have violated section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)). Intent and knowledge are not elements of the violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) and rarely is there any proof of a knowing or intentional violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)). Since there is almost never any proof of knowledge or intent, if that were cause for not imposing a disqualification order, there would almost never be a disqualification order issued. For most respondents found to have violated section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)), the civil penalty for soring would be an acceptable cost of doing business, and the congressional purpose of eliminating the practice of soring would not be achieved. Therefore, it is well-settled that lack of knowledge or intent is not a circumstance mitigating the sanction for violations of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)).[15] Thus, I conclude the Chief ALJ erred by basing his decision not

[15] *In re C.M. Oppenheimer* (Decision as to C.M. Oppenheimer), 54 Agric. Dec. 221, 323 n.40 (1995); *In re Danny Burks* (Decision as to Danny Burks), 53 Agric. Dec. 322, 348 n.21 (1994); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261, 319 n.20 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994); *In re William Earl Bobo*, 53 Agric. Dec. 176, 209 n.7 (1994), *aff'd*, 52 F.3d 1406 (6th Cir. 1995); *In re Jack Kelly*, 52 Agric. Dec. 1278, 1305 n.5 (1993), *appeal dismissed*, 38 F.3d 999 (8th Cir. 1994); *In re Charles Sims*, 52 Agric. Dec. 1243, 1269 n.6 (1993); *In re Paul A. Watlington*, 52 Agric. Dec. 1172, 1203-04 n.6 (1993); *In re Glen O. Crowe*, 52 Agric. Dec. 1132, 1155 n.16 (1993); *In re Billy Gray* 52 Agric. Dec. 1044, 1087 n.6 (1993), *aff'd*, 39 F.3d 670 (6th Cir. 1994); *In re Linda Wagner* (Decision as to Roy E. Wagner and Judith E. Rizio), (continued...)

to disqualify Respondent from showing, exhibiting, or entering any horse and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction on Respondent's lack of knowledge that Jackie O was sore.

Fifth, Complainant contends the Chief ALJ erred by basing his decision not to disqualify Respondent from showing, exhibiting, or entering any horse and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction on Respondent's having instructed the trainer not to sore Jackie O and having fired the trainer after learning that Jackie O was sore (Complainant's Appeal Pet. at 7-8).

The purpose of the Horse Protection Act is to prevent the cruel practice of soring horses. 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. See H.R. Rep. No. 94-1174, at 4-5 (1976), *reprinted in* 1976 U.S.C.C.A.N. 1696, 1698-99. Congress amended the Horse Protection Act in 1976 to enhance the Secretary of Agriculture'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 have the economic means to pay civil penalties as a cost of doing business. See H.R. Rep. No. 94-1174, at 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)) 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, horse sale, or horse auction for a period of not less than 1 year for the first violation of the Horse Protection Act and for a period of not less than 5 years for any subsequent violation of the Horse Protection Act. While, as Respondent correctly points out (Respondent's Response at 4-5), disqualification is discretionary with the Secretary of Agriculture, 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

[15](...continued)
52 Agric. Dec. 298, 318-19 n.5 (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, 296 n.7 (1993); *In re A.P. Holt* (Decision as to Richard Polch and Merrie Polch), 52 Agric. Dec. 233, 251 n.8 (1993), *aff'd per curiam*, 32 F.3d 569, 1994 WL 390510 (6th Cir. 1994) (citation limited under 6th Circuit Rule 24).

appropriate in almost every Horse Protection Act case, including those cases in which a respondent is found to have violated the Horse Protection Act for the first time.[16]

Congress has provided the United States Department of Agriculture 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.

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. Respondent's evidence of his pre-violation instruction to Jackie O's trainer and his post-violation dismissal of Jackie O's trainer do not present the kind of extraordinary circumstances that warrant a departure from the established policy of imposing the minimum disqualification period for the first violation of the Horse Protection Act.

Respondent's Appeal Petition

Respondent raises three issues in "Respondent's Appeal of Decision and Order; and Memorandum of Points and Authorities in Support of Respondent's Appeal" [hereinafter Respondent's Appeal Petition]. First, Respondent contends he did not enter Jackie O in the 30th Anniversary National Walking Horse Trainers Show and only Jessie Smith entered Jackie O in the 30th Anniversary National Walking Horse Trainers Show. Specifically, relying on *Elliott v. Administrator, Animal and Plant Health Inspection Service*, 990 F.2d 140 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993), Respondent contends he did not enter Jackie O in the 30th Anniversary National Walking Horse Trainers Show because he did not complete the entry of Jackie O and Jessie Smith, Jackie O's trainer, performed many of the steps in the process of entering Jackie O. (Respondent's Appeal Pet. at 2-3.)

I find Respondent's reliance on *Elliott* misplaced. The Court in *Elliott* held that "entering" a horse in a horse show is a process and includes all activities required to be completed before a horse can actually be shown or exhibited. *Elliott v. Administrator, Animal and Plant Health Inspection Service*, 990 F.2d at 143, 145. Nothing in *Elliott* requires that all of the steps or any particular step in the process

[16]See note 9.

of entry must be personally completed by the owner of the horse (the principal), rather than by the trainer of the horse (the agent of the principal), in order to conclude that the owner entered the horse.

Moreover, the record establishes that Respondent, both personally and through his employee, Jessie Smith, effected the entry of Jackie O (Tr. 43-44, 119-20). Entry of a horse in a horse show, for purposes of liability under the Horse Protection Act includes paying the entry fee, registering the horse, and presenting the horse for inspection. *Gray v. United States Dep't of Agric.*, 39 F.3d 670, 676 (6th Cir. 1994). Respondent decided to exhibit Jackie O at the 30th Anniversary National Walking Horse Trainers Show (Tr. 120), Respondent paid the entry fee to enter Jackie O in the 30th Anniversary National Walking Horse Trainers Show (Tr. 120), Respondent provided the means to transport Jackie O to and feed and care for Jackie O at the 30th Anniversary National Walking Horse Trainers Show (Tr. 119-20), and Respondent had Jessie Smith present Jackie O for pre-show inspection at the 30th Anniversary National Walking Horse Trainers Show (Tr. 43-44). I agree with the Chief ALJ that Respondent was sufficiently involved in the entry process to have violated section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)).

Second, Respondent contends the Chief ALJ erroneously found Respondent liable for Jessie Smith's entering Jackie O in the 30th Anniversary National Walking Horse Trainers Show under the doctrine of *respondeat superior*. Specifically, Respondent contends that Jessie Smith "stepped out of the course and scope of his employment when he sored" Jackie O and Respondent cannot be held liable for the illegal acts of his employee. (Respondent's Appeal Pet. at 3-4.)

As previously discussed, I find Respondent personally performed at least one of the steps necessary for entry of Jackie O into the 30th Anniversary National Walking Horse Trainers Show. Therefore, even if I were to find the Chief ALJ's conclusion that Respondent entered Jackie O through his employee, error, that finding would not alter my conclusion that Respondent violated section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)).

Respondent states he hired Jessie Smith to train Jackie O in horse shows, he did not give Jessie Smith any verbal or written instructions concerning Jackie O's training, he gave Jessie Smith complete custody of the methods and devices to be used in training Jackie O, and Jessie Smith was responsible for training Jackie O, preparing Jackie O for inspection, and presenting Jackie O for inspection (CX 4 at 2; Respondent's Appeal Pet. at 3). Further, the record establishes that Jessie Smith's entry of Jackie O was with Respondent's knowledge and acquiescence. Specifically, Respondent testified that he discussed the entry of Jackie O in the 30th Anniversary National Walking Horse Trainers Show with Jessie Smith, he provided

the trailer for Jackie O's transportation to the 30th Anniversary National Walking Horse Trainers Show, he provided a helper to accompany Jessie Smith to the 30th Anniversary National Walking Horse Trainers Show, he provided hay and feed for Jackie O's use during the 30th Anniversary National Walking Horse Trainers Show, and he paid the entry fee necessary for Jackie O to enter the 30th Anniversary National Walking Horse Trainers Show (Tr. 119-20). I find Respondent's claim that Jessie Smith was acting outside the scope of his employment when he entered Jackie O at the 30th Anniversary National Walking Horse Trainers Show while Jackie O was sore, is belied by Respondent's admissions regarding the extent of control he gave Jessie Smith over Jackie O and Respondent's knowledge of and acquiescence in Jessie Smith's entering Jackie O in the 30th Anniversary National Walking Horse Trainers Show. Therefore, I reject Respondent's contention that the Chief ALJ erred when he found Respondent entered Jackie O in the 30th Anniversary National Walking Horse Trainers Show through his employee, Jessie Smith. The record clearly establishes that Jessie Smith was Respondent's employee and that Jessie Smith's entry of Jackie O was within the scope of Jessie Smith's employment.

Third, Respondent contends he cannot be liable for violating the Horse Protection Act because he meets the tests set forth in *Baird v. United States Dep't of Agric.*, 39 F.3d 131 (6th Cir. 1994), and *Burton v. United States Dep't of Agric.*, 683 F.2d 280 (8th Cir. 1982) (Respondent's Appeal Pet. at 4).

Section 5(2)(A) of the Horse Protection Act (15 U.S.C. § 1824(2)(A)) prohibits any person from showing or exhibiting, in any horse show or horse exhibition, any horse which is sore; section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) prohibits any person from entering for the purpose of showing or exhibiting, in any horse show or horse exhibition, any horse which is sore; section 5(2)(C) of the Horse Protection Act (15 U.S.C. § 1824(2)(C)) prohibits any person from selling, auctioning, or offering for sale, in any horse sale or auction, any horse which is sore; and section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)) prohibits any horse owner from allowing another person to do one of the acts prohibited in section 5(2)(A), (B), and (C) of the Horse Protection Act (15 U.S.C. § 1824(2)(A), (B), and (C)). *Baird* and *Burton* hold that a horse owner cannot be found to have allowed another person to do one of the acts prohibited in section 5(2)(A), (B), or (C) of the Horse Protection Act (15 U.S.C. § 1824(2)(A), (B), or (C)) in violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)) if certain factors are shown to exist. The Chief ALJ did not conclude and I do not conclude that Respondent violated section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)). Therefore, I find *Baird* and *Burton* inapposite.

Timeliness of Complainant's Appeal Petition

In addition to responding to the issues raised by Complainant in Complainant's Appeal Petition, Respondent contends in Respondent's Response that Complainant's Appeal Petition should be dismissed because it was not timely filed (Respondent's Response at 3-4).

Section 1.145(a) of the Rules of Practice (7 C.F.R. § 1.145(a)) provides that a party may file an appeal within 30 days after receiving service of the administrative law judge's decision. The record contains no evidence of the date on which the Hearing Clerk served Complainant with the Chief ALJ's Initial Decision and Order. Therefore, I cannot conclude that Complainant's Appeal Petition was late-filed.

Moreover, on June 28, 2001, Complainant requested that I extend the time for filing an appeal petition. I granted Complainant's June 28, 2001, request, by extending the time for filing Complainant's appeal petition to July 20, 2001.[17] On July 20, 2001, Complainant made a second request for an extension of time within which to file an appeal petition, and on July 23, 2001, I extended the time within which Complainant could file an appeal petition to July 23, 2001.[18] Therefore, based on the extensions of time granted to Complainant, I conclude that Complainant's Appeal Petition, which Complainant filed on July 23, 2001, was timely filed.

Respondent further contends that Complainant cannot "use an order nunc pro tunc to file its untimely appeal" (Respondent's Response at 4). Complainant made a timely request for an extension of time to file an appeal petition on June 28, 2001. I granted Complainant's request extending the time for filing an appeal petition to July 20, 2001. Complainant's request for a second extension of time was left on the voice mail of the Office of the Judicial Officer on July 20, 2001, before 4:30 p.m., the time the Hearing Clerk's Office closes for the purpose of filing documents in proceedings conducted under the Rules of Practice. Therefore, Complainant's second request for an extension of time was filed before Complainant's appeal petition was due. I was not able to file the Informal Order granting Complainant's July 20, 2001, request for an extension of time until July 23, 2001. As Complainant's Appeal Petition had been due July 20, 2001, I issued the July 23, 2001, Informal Order *nunc pro tunc*. Under these circumstances, I conclude that my granting Complainant's July 20, 2001, request for an extension of time *nunc pro tunc* was not error.

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[17]See Informal Order filed June 28, 2001.

[18]See Informal Order filed July 23, 2001.

Respondent further contends he was denied the opportunity to submit his views on Complainant's June 28, 2001, and July 20, 2001, requests for extensions of time to file an appeal petition (Respondent's Response at 4).

Section 1.147(f) of the Rules of Practice (7 C.F.R. § 1.147(f)) provides that in all instances in which time permits, notice of a request for an extension of time shall be given to the other party with opportunity to submit views concerning the request. The record does not indicate that Respondent was given notice of Complainant's requests for extensions of time within which to file an appeal petition. However, time did not permit my giving Respondent an opportunity to submit views on Complainant's July 20, 2001, request for an extension of time. Moreover, the Judicial Officer has long held that because of the backlog of cases before the Judicial Officer, requests for extensions of time have been routinely granted without burdening the opposing party with the opportunity to submit views concerning the requests and the Judicial Officer put litigants on notice that this practice will continue at least until the backlog in the Office of the Judicial Officer has been eliminated. See *In re Embry Livestock Co.*, 48 Agric. Dec. 1010 (1989) (Order Denying Respondent's Request to Set Aside Extension of Time). The backlog in the Office of the Judicial Officer has been significantly reduced since 1989, when *In re Embry Livestock Co.* was decided, but it has not been eliminated. Since I have not previously given any notice that I would no longer follow *In re Embry Livestock Co.*, I follow *In re Embry Livestock Co.* in this proceeding. However, since the backlog in the Office of the Judicial Officer has been substantially reduced, in future cases, I will no longer follow *In re Embry Livestock Co.*, and instead, I will adhere to section 1.147(f) of the Rules of Practice (7 C.F.R. § 1.147(f)).

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

ORDER

1. Respondent is assessed a $2,200 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the "Treasurer of the United States" and sent to:

Colleen A. Carroll
United States Department of Agriculture
Office of the General Counsel
Marketing Division
Room 2343-South Building
Washington, DC 20250-1417

Respondent's payment of the civil penalty shall be forwarded to, and received by, Ms. Carroll within 60 days after service of this Order on Respondent. Respondent shall indicate on the certified check or money order that payment is in reference to HPA Docket No. 99-0028.

2. Respondent is disqualified for a period of 1 year from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or device, and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction. "Participating" means engaging in any activity beyond that of a spectator, and includes, without limitation: (a) transporting or arranging for the transportation of horses to or from any horse show, horse exhibition, horse sale, or horse auction; (b) personally giving instructions to exhibitors; (c) being present in the warm-up areas, inspection areas, or other areas where spectators are not allowed at any horse show, horse exhibition, horse sale, or horse auction; and (d) financing the participation of others in any horse show, horse exhibition, horse sale, or horse auction.

The disqualification of Respondent shall become effective on the 60th day after service of this Order on Respondent.

3. Respondent has the right to obtain review of this Order in the court of appeals of the United States for the circuit in which he resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit. Respondent must file a notice of appeal in such court within 30 days from the date of this Order and must simultaneously send a copy of such notice by certified mail to the Secretary of Agriculture. 15 U.S.C. § 1825(b)(2), (c). The date of this Order is September 6, 2001.

_____

PLANT QUARANTINE ACT

DEPARTMENTAL DECISIONS

In re: HERMINIA RUIZ CISNEROS.
P.Q. Docket No. 99-0054.
Decision and Order.
Filed July 11, 2001.

PQ – Importation – Mango trees – Soil – Statutes at large constructive notice – Regulations constructive notice – Ability to pay – Civil penalty – Sanction policy.

The Judicial Officer (JO) affirmed the Initial Decision and Order of Administrative Law Judge Dorothea A. Baker assessing the Respondent a $9,600 civil penalty for importing 32 live mango trees without a written PPQ permit as required by 7 C.F.R. § 319.37-3(a), without meeting the postentry quarantine conditions as required by 7 C.F.R. § 319.37-7, without ensuring that the mango trees were free of soil as required by 7 C.F.R. § 319.37-8(a), and at a port that was not a designated port of entry as required by 7 C.F.R. § 319.37-14(a). The JO concluded that the Complainant proved the violations by a preponderance of the evidence and that the $9,600 civil penalty recommended by the Complainant was justified by the facts and circumstances. The JO found that the Respondent had actual knowledge of the regulations prior to her March 17, 1997, violations. Further, the JO stated the Plant Quarantine Act and the Federal Plant Pest Act are published in the United States Statutes at Large and the United States Code and the Respondent is presumed to know the law. The JO also stated that the regulations regarding the importation and offer for entry of prohibited and restricted articles (7 C.F.R. §§ 319.37-.37-14) are published in the *Federal Register*, thereby constructively notifying the Respondent of the requirements for the importation of mango trees. The JO rejected the Respondent's contention that she did not import the mango trees for a commercial purpose. The JO also held that the Respondent failed to prove, by producing documents, that she was not able to pay the $9,600 civil penalty.

James A. Booth, for Complainant.
Respondent, Pro se.
Initial decision issued by Dorothea A. Baker, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on September 3, 1999. Complainant instituted this proceeding under the Act of August 20, 1912, as amended (7 U.S.C. §§ 151-154, 156-164a, 167) [hereinafter the Plant Quarantine Act]; the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj) [hereinafter

the Federal Plant Pest Act]; regulations issued under the Plant Quarantine Act and the Federal Plant Pest Act (7 C.F.R. §§ 319.37-.37-14); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges that: (1) on or about March 17, 1997, Herminia Ruiz Cisneros [hereinafter Respondent] imported approximately 32 mango trees potted in soil into the United States at San Luis, Arizona, from Mexico, in violation of 7 C.F.R. § 319.37-7(a) and (b) in that the mango trees were not imported under postentry quarantine conditions, as required; (2) on or about March 17, 1997, Respondent imported approximately 32 mango trees potted in soil into the United States at San Luis, Arizona, from Mexico, in violation of 7 C.F.R. § 319.37-8(a) in that the mango trees were not imported free of sand, soil, or earth, as required; and (3) on or about March 17, 1997, Respondent imported approximately 32 mango trees potted in soil into the United States at San Luis, Arizona, from Mexico, in violation of 7 C.F.R. § 319.37-14(a) in that the mango trees were not imported at a designated port of entry, as required (Compl. ¶¶ II-IV).

On September 17, 1999, Respondent filed an Answer admitting that she imported 32 mango trees into the United States from Mexico, but claiming that she declared to an official that she was importing the mango trees.

Administrative Law Judge Dorothea A. Baker [hereinafter the ALJ] presided at a hearing in Yuma, Arizona, on December 14, 2000. James A. Booth, Office of the General Counsel, United States Department of Agriculture, represented Complainant. Respondent represented herself. Respondent indicated she did not speak or understand English. At Respondent's request, Complainant provided a translator for the proceeding. Respondent found the translator qualified and impartial and agreed to the use of the translator provided by Complainant. Six witnesses testified on Complainant's behalf. Complainant introduced 16 exhibits. Respondent testified, but introduced no exhibits and had no witnesses testify on her behalf.

On January 23, 2001, Respondent filed a post-hearing statement. On January 29, 2001, Complainant filed Complainant's Proposed Findings of Fact, Conclusions of Law, Order, and Supporting Brief. On February 26, 2001, Respondent filed a second post-hearing statement entitled "Motion to Appeal."

On March 12, 2001, the ALJ issued a Decision and Order [hereinafter Initial Decision and Order]: (1) concluding Respondent's February 26, 2001, filing, entitled "Motion to Appeal," is an untimely supplement to Respondent's January 23, 2001, filing and stating the February 26, 2001, filing should not be considered; (2) finding that on March 17, 1997, Respondent imported 32 live mango trees in soil into the United States at San Luis, Arizona, from Mexico;

(3) concluding Respondent's importation of 32 live mango trees in soil into the United States at San Luis, Arizona, from Mexico, violated 7 C.F.R. §§ 319.37-3, .37-7(a), (b), .37-8(a), and .37-14(a); and (4) assessing Respondent a $9,600 civil penalty (Initial Decision and Order at 2-3, 7-8, 26).

On May 22, 2001, Respondent appealed to, and requested oral argument before, the Judicial Officer. On June 27, 2001, Complainant filed Complainant's Brief in Support of its Response to the Appeal to the Secretary from the Decision of the Administrative Law Judge. On June 29, 2001, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Respondent's motion for oral argument and a 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. Thus, oral argument would appear to serve no useful purpose.

Based upon a careful consideration of the record, I agree with the ALJ's Initial Decision and Order. Therefore, pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt, with minor modifications, the ALJ's Initial Decision and Order as the final Decision and Order. Additional conclusions by the Judicial Officer follow the ALJ's Conclusions of Law as restated.

Complainant's exhibits are designated by "CX." Transcript references are designated by "Tr."

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 7B—PLANT PESTS

§ 150aa. Definitions

As used in this chapter, except where the context otherwise requires:

. . . .

(c) "Plant pest" means any living stage of: Any insects, mites, nematodes, slugs, snails, protozoa, or other invertebrate animals, bacteria, fungi, other parasitic plants or reproductive parts thereof, viruses, or any

organisms similar to or allied with any of the foregoing, or any infectious substances, which can directly or indirectly injure or cause disease or damage in any plants or parts thereof, or any processed, manufactured, or other products of plants.

§ 150ee. Regulations and conditions

The Secretary may promulgate such regulations requiring inspection of products and articles of any character whatsoever and means of conveyance, specified in the regulations, as a condition of their movement into or through the United States, or interstate, and imposing other conditions upon such movement, as he deems necessary to prevent the dissemination into the United States, or interstate, of plant pests, in any situation in which such regulations are not authorized under the Plant Quarantine Act [7 U.S.C. 151 et seq.].

§ 150gg. Violations

. . . .

(b) Civil penalty

Any person who–

(1) violates section 150bb of this title or any regulation promulgated under this chapter[]

. . . .

may be assessed a civil penalty by the Secretary not exceeding $1,000. The Secretary may issue an order assessing such civil penalty only after notice and an opportunity for an agency hearing on the record. Such order shall be treated as a final order reviewable under chapter 158 of title 28. The validity of such order may not be reviewed in an action to collect such civil penalty.

CHAPTER 8—NURSERY STOCK AND OTHER PLANTS AND PLANT PRODUCTS

. . . .

§ 152. "Nursery stock" defined

For the purpose of this chapter the term "nursery stock" shall include all field-grown florists' stock, trees, shrubs, vines, cuttings, grafts, scions, buds, fruit pits, and other seeds of fruit and ornamental trees or shrubs, and other plants and plant products for propagation, except field, vegetable, and flower seeds, bedding plants, and other herbaceous plants, bulbs, and roots.

§ 154. Importation of nursery stock

(a) In general

No person shall–

(1) import or enter into the United States any nursery stock; or

(2) accept delivery of any nursery stock moving from any foreign country into or through the United States;

unless the movement is made in accordance with such regulations as the Secretary of Agriculture may promulgate to prevent dissemination into the United States of plant pests, plant diseases, or insect pests.

(b) Regulations

The regulations promulgated by the Secretary of Agriculture to implement subsection (a) of this section may include regulations requiring that nursery stock moving into or through the United States–

(1) be accompanied by a permit issued by the Secretary of Agriculture prior to the movement of the nursery stock;

(2) be accompanied by a certificate of inspection issued, in a manner and form required by the Secretary of Agriculture, by appropriate officials of the country or State from which the nursery stock is to be moved;

(3) be grown under postentry quarantine conditions by or under the supervision of the Secretary of Agriculture for the purposes of determining whether the nursery stock may be infested with plant pests or insect pests, or infected with plant diseases, not discernible by port-of-entry inspection; and

(4) if the nursery stock is found to be infested with plant pests or insect pests or infected with plant diseases, be subject to remedial

measures the Secretary of Agriculture determines to be necessary to prevent the spread of plant pests, insect pests, or plant diseases.

§ 159. Regulations by Secretary restricting importation of plants, etc., other than "nursery stock"

Whenever the Secretary of Agriculture shall determine that the unrestricted importation of any plants, fruits, vegetables, roots, bulbs, seeds, or other plant products not included by the term "nursery stock" as defined in section 152 of this title may result in the entry into the United States or any of its Territories or Districts of injurious plant diseases or insect pests he shall promulgate his determination, specifying the class of plants and plant products the importation of which shall be restricted and the country and locality where they are grown, and thereafter, and until such promulgation is withdrawn, such plants and plant products imported or offered for import into the United States or any of its Territories or Districts shall be subject to all the provisions of sections 154 and 156 to 158 of this title.

§ 162. Rules and regulations

The Secretary of Agriculture shall make and promulgate such rules and regulations as may be necessary for carrying out the purposes of this chapter.

§ 163. Violations; forgery, alterations, etc., of certificates; punishment; civil penalty

. . . Any person who violates any . . . provision [of this chapter or any] rule[] or regulation [promulgated by the Secretary of Agriculture under this chapter] . . . may be assessed a civil penalty by the Secretary not exceeding $1,000. The Secretary may issue an order assessing such civil penalty only after notice and an opportunity for an agency hearing on the record. Such order shall be treated as a final order reviewable under chapter 158 of title 28. The validity of such order may not be reviewed in an action to collect such civil penalty.

7 U.S.C. §§ 150aa(c), 150ee, 150gg(b), 152, 154, 159, 162, 163.

7 C.F.R.:

TITLE 7—AGRICULTURE

. . . .

SUBTITLE B—REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

. . . .

CHAPTER III—ANIMAL AND PLANT HEALTH INSPECTION SERVICE, DEPARTMENT OF AGRICULTURE

. . . .

PART 319—FOREIGN QUARANTINE NOTICES

SUBPART—NURSERY STOCK, PLANTS, ROOTS, BULBS, SEEDS, AND OTHER PLANT PRODUCTS

§ 319.37 Prohibitions and restrictions on importation; disposal of articles refused importation.

(a) No person shall import or offer for entry into the United States any prohibited article, except as otherwise provided in § 319.37-2(c) of this subpart. No person shall import or offer for entry into the United States any restricted article except in accordance with this subpart.

§ 319.37-1 Definitions.

Terms used in the singular form in this subpart shall be construed as the plural, and vice versa, as the case may demand. The following terms, when used in this subpart, shall be construed respectively to mean:

. . . .

Nursery stock. All field-grown florist's stock, trees, shrubs, vines, cuttings, grafts, scions, buds, fruit pits, and other seeds of fruit and ornamental trees or shrubs, and other plants and plant products for

propagation, except field, vegetable, and flower seeds, bedding plants, and other herbaceous plants, bulbs, and roots.

. . . .

Plant pest. The egg, pupal, and larval stages as well as any other living stage of: Any insects, mites, nematodes, slugs, snails, protozoa, or other invertebrate animals, bacteria, fungi, other parasitic plants or reproductive parts thereof, viruses, or any organisms similar to or allied with any of the foregoing, or any infectious substances, which can directly or indirectly injure or cause disease or damage in any plants or parts thereof, or any processed, manufactured, or other products of plants.

Plant Protection and Quarantine Programs. The organizational unit within the Animal and Plant Health Inspection Service, U.S. Department of Agriculture, delegated responsibility for enforcing provisions of the Plant Quarantine Act, the Federal Plant Pest Act, and related laws, and regulations promulgated thereunder.

Restricted article. Any class of nursery stock or other class of plant, root, bulb, seed, or other plant product, for or capable of propagation, excluding any prohibited articles listed in § 319.37-2(a) or (b) of this subpart, excluding any articles subject to any restricted entry orders in 7 CFR part 321 (i.e., potatoes), and excluding any articles regulated in 7 CFR 319.8 through 319.34 or 319.41 through 319.74-7.

. . . .

Soil. The loose surface material of the earth in which plants, trees, and shrubs grow, in most cases consisting of disintegrated rock with an admixture of organic material and soluble salts.

§ 319.37-3 Permits.

(a) The restricted articles (other than articles for food, analytical, medicinal, or manufacturing purposes) in any part of the following categories may be imported or offered for importation into the United States only after issuance of a written permit by the Plant Protection and Quarantine Programs:

. . . .

(2) Articles subject to the postentry quarantine conditions of § 319.37-7; [and]

. . . .

(5) Lots of 13 or more articles (other than seeds, bulbs, or sterile cultures of orchid plants) from any country or locality except Canada[.]

§ 319.37-7 Post entry quarantine.

(a) The following restricted articles, from the designated countries and localities, and any increase therefrom must be grown under postentry quarantine conditions specified in paragraphs (c) and (d) of this section, and may be imported or offered for importation into the United States only:

(1) If destined for a State that has completed a State post entry quarantine agreement in accordance with paragraph (c) of this section;

(2) If a post entry quarantine growing agreement has been completed and submitted to Plant Protection and Quarantine in accordance with paragraph (d) of this section. The agreement must be signed by the person (the importer) applying for a written permit for importation of the article in accordance with § 319.37-3; and,

(3) If Plant Protection and Quarantine has determined that the completed post entry quarantine growing agreement fulfills the applicable requirements of this section and that services by State inspectors are available to monitor and enforce the post entry quarantine:

Restricted Article (excluding seeds)	Foreign Country(ies) or Locality(ies) from which imported
. . . .	
Fruit and nut articles listed by common name in paragraph (b) of this section.	All except Canada.
. . . .	

(b) *Fruit and nut articles* (common names are listed after scientific names).

. . . .

Mangifera– mango

§ 319.37-8 Growing media.

(a) Any restricted article at the time of importation or offer for importation into the United States shall be free of sand, soil, earth, and other growing media, except as provided in paragraph (b), (c), (d) or (e) of this section.

§ 319.37-14 Ports of entry.

(a) Any restricted article required to be imported under a written permit pursuant to § 319.37-3(a)(1) through (6) of this subpart, shall be imported or offered for importation only at a port of entry designated by an asterisk in paragraph (b) of this section; any other restricted article shall be imported or offered for importation at any port of entry listed in paragraph (b) of this section.

(b) . . . .

LIST OF PORTS OF ENTRY

Ports with special inspection and treatment facilities (plant inspection stations) are indicated by an asterisk (*).

. . . .

ARIZONA

. . . .

San Luis

U.S. Border Station, P.O. Box 37, San Luis, AZ 85349.

7 C.F.R. §§ 319.37(a), .37-1, .37-3(a)(2), (5), .37-7(a), (b), .37-8(a), .37-14(a), (b) (1998) (footnotes omitted).

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION AND ORDER (AS RESTATED)

The evidence presented at the oral hearing and the record as a whole show that Complainant has, by more than a preponderance of the evidence, established that Respondent violated 7 C.F.R. §§ 319.37-3(a), .37-7, .37-8(a), and .37 14(a).[1] Complainant has further shown that the sanction, which Complainant seeks, is

[1]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 proof 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 Plant Quarantine Act and the Federal Plant Pest Act is preponderance of the evidence. *In re Don Tollefson*, 54 Agric. Dec. 426, 434 (1995); *In re Unique Nursery and Garden Center* (Decision as to Valkering U.S.A., Inc.), 53 Agric. Dec. 377, 415-16 (1994), *aff'd*, 48 F.3d 305 (8th Cir. 1995); *In re Christian King*, 52 Agric. Dec. 1333, 1347 (1993); *In re Robert L. Heywood*, 52 Agric. Dec. 1315, 1320 (1993).

justified by the facts and circumstances.

Findings of Fact

1. The Animal and Plant Inspection Service [hereinafter APHIS] is an agency of the United States Department of Agriculture [hereinafter USDA]. APHIS and specifically the Plant Protection and Quarantine [hereinafter PPQ], an organizational unit of APHIS, are responsible for the administration and enforcement of the Plant Quarantine Act, the Federal Plant Pest Act, and the regulations issued under the Plant Quarantine Act and the Federal Plant Pest Act. (7 C.F.R. pts. 2, 371.) One of the fundamental purposes of the Plant Quarantine Act and the Federal Plant Pest Act is to prevent the introduction into the United States from any foreign country of plant pests, plant diseases, and injurious insects new to or not widely prevalent or distributed within and throughout the United States (Tr. 108-09; Plant Quarantine Act; Federal Plant Pest Act).

2. The Secretary of Agriculture has restricted the importation and offer for entry into the United States from Mexico, as well as from many other foreign countries, of nursery stock, plants, roots, bulbs, seeds, and other plant products and plants and trees in sand, soil, or earth (7 C.F.R. §§ 319.37-.37-14).

3. Plant pests, plant diseases, and injurious insects from foreign countries, including Mexico, pose a substantial economic threat to the trees, plants, fruits, flowers, and agricultural industries of the United States. The Mediterranean fruit fly, the Mexican fruit fly, the melon fly, the oriental fruit fly, the citrus black fly, and the mango weevil are all new to or not widely prevalent or distributed within and throughout the United States. They are examples of plant pests that pose a substantial threat to United States agriculture and the United States economy. The introduction into the United States of plant pests, plant diseases, or injurious insects new to or not widely prevalent or distributed within and throughout the United States could be quite devastating for several reasons. Not only could the introduced pest, disease, or insect destroy the affected crops, fruits, trees, or plants, but also, the introduced pest, disease, or insect could require an expensive treatment or eradication program, the quarantine of areas or entire states where the affected crops, fruits, trees, or plants are grown, and compensation to farmers and others for the financial losses incurred. The export of the affected crops, fruits, trees, or plants could also be restricted or prohibited causing significant financial losses to producers and exporters of the affected agricultural products. Past introductions of the Mediterranean fruit fly in California have cost billions of dollars in crop and revenue losses. An outbreak of Karnal bunt forced a quarantine of the State of Arizona and parts of the State of New Mexico and the State of Texas. The

marketability and value of wheat from fields infected with Karnal bunt were significantly affected. (Tr. 108-16.)

4. APHIS administers USDA efforts to prevent the introduction of plant pests, plant diseases, and injurious insects from foreign countries. APHIS relies heavily upon PPQ personnel at United States ports of entry to prevent plant pests, plant diseases, and injurious insects from entering the United States and causing significant agricultural and economic damage within the United States. (Tr. 108-11.)

5. USDA's efforts to prevent the introduction of plant pests, plant diseases, and injurious insects into the United States costs hundreds of millions of dollars a year in federal funds and also significant amounts in state funds. In 1999, the majority of PPQ's annual budget of approximately $450 million was dedicated to preventing plant pests, plant diseases, and injurious insects from entering the United States. In 1999, PPQ intercepted approximately 500,000 fruits, plants, and other products which are not allowed to be imported into the United States from foreign countries. At the port of San Luis, Arizona, alone, in 1999, there were approximately 3,600 interceptions of fruits, plants, and other products which are not allowed to be imported into the United States from Mexico. (Tr. 108-11.)

6. Respondent is an individual whose mailing address is P.O. Box 2312, San Luis, Arizona 85349 (Appeal Pet. ¶ 1).

7. Before March 17, 1997, Respondent was aware of the requirements for the importation into the United States from Mexico of live plants in soil at designated ports and the applicable postentry quarantine requirements for such importations. On February 11, 1997, Respondent was stopped at the port of San Luis, Arizona, and 24 live trees in soil were found hidden under a blanket in the back of her automobile. Respondent did not have a permit to import the trees. On February 11, 1997, at the port of San Luis, Arizona, the trees in soil hidden in Respondent's vehicle were seized and a PPQ inspector gave Respondent an APHIS Notice of Alleged Violation form, which she signed. The February 11, 1997, Notice of Alleged Violation form lists "7 C.F.R. 319.37, 319.56, 330, 320" as the regulations Respondent violated by the illegal importation into the United States from Mexico of the 24 trees in soil on February 11, 1997. A United States Customs inspector, who is fluent in Spanish, read and explained the February 11, 1997, Notice of Alleged Violation form to Respondent. The PPQ inspector who executed the February 11, 1997, Notice of Alleged Violation form also explained to Respondent, through a United States Customs inspector who is fluent in Spanish, the regulations listed on the Notice of Alleged Violation form and explained to Respondent the types of plants that could be imported into the United States from Mexico and all the procedures, conditions, and requirements necessary for such

importations. The February 11, 1997, Notice of Alleged Violation form states that Respondent agreed to pay a $100 civil penalty in settlement for violating the regulations listed on the February 11, 1997, Notice of Alleged Violation form. Respondent acknowledged by her signature on the February 11, 1997, Notice of Alleged Violation form that she was paying the $100 civil penalty in settlement for violating the regulations listed on the February 11, 1997, Notice of Alleged Violation form. (Tr. 18-22, 42-70; CX 1 at 1, CX 11 at 1, CX 13-CX 17.)

8. The 24 live trees in soil seized from Respondent on February 11, 1997, far exceeded the average number of plants typically seized by PPQ officials at the port of San Luis, Arizona. Up to that time, the seizure of the 24 trees was the largest quantity of plants in soil ever confiscated by PPQ at the port of San Luis, Arizona. Twenty of the 24 live trees were potted in 5-gallon containers of soil and four of the trees were potted in 1-gallon containers. The total amount of all the soil imported weighed approximately 200 to 300 pounds. (Tr. 30, 52-53, 67-70, 117; CX 13, CX 14.)

9. On March 17, 1997, Respondent imported into the United States at the port of San Luis, Arizona, from Mexico, 32 live mango trees potted in soil. Respondent did not obtain a written PPQ permit to import the mango trees and did not import the mango trees in accordance with the required postentry quarantine conditions. Respondent did not import the mango trees at a designated PPQ port of entry since the port of San Luis, Arizona, is not a designated PPQ port of entry. (Tr. 22-28, 34-36, 71-84; CX 1, CX 2, CX 4-CX 11.)

10. PPQ officers at the port of San Luis, Arizona, on April 2, 1997, destroyed the 32 mango trees in soil in accordance with USDA regulations (Tr. 82).

11. PPQ's seizure of the 32 live mango trees in soil far exceeded the average number or amount of articles typically seized by PPQ officials at the port of San Luis, Arizona. The seizure of the 32 mango trees is the largest quantity of plants in soil ever seized from an individual by PPQ officials at the port of San Luis, Arizona. Usually, only one or two plants in soil are ever intercepted by PPQ at San Luis, Arizona. The 32 live mango trees were potted in 5-gallon containers of soil and the total amount of all the soil imported weighed approximately 300 to 350 pounds. Usually, only one or two plants potted in soil with the total amount of the soil weighing a few pounds are ever intercepted by PPQ at San Luis, Arizona. (Tr. 76-77, 83, 86, 117.)

12. The 32 live mango trees seized from Respondent on March 17, 1997, were grafted trees, which means that there was a significant amount of labor involved in preparing and grafting the mango saplings into the older 12-inch root stock parts of the mango tree. Grafting is used in the commercial production of fruit trees. (Tr. 74-76.)

13. The 32 live mango trees seized from Respondent on March 17, 1997, at the port of San Luis, Arizona, could harbor many different types of plant pests (Tr. 108-17).

14. The risk of the introduction of plant pests, plant diseases, and injurious insects posed by the importation of soil is higher than the risk posed by the importation of other agricultural products. The soil imported by Respondent could have contained a variety of harmful plant pests or insects or their eggs, pupae, or larvae; noxious weeds; nematodes; or fungal and bacterial pathogens. Often a component in the process or life cycle of a particular plant pest, plant disease, or insect exists in soil. (Tr. 114-16.)

15. Respondent's importation from Mexico of 32 live mango trees and approximately 300 pounds of soil on March 17, 1997, presented a significant risk of introducing plant pests, plant diseases, and injurious insects into the United States. Such a large number of live trees and large quantity of soil thereby considerably undermined APHIS' efforts to safeguard the United States from plant pests, plant diseases, and injurious insects. (Tr. 108-20.)

Statement of the Applicable Law

Pursuant to sections 1 and 5 of the Plant Quarantine Act (7 U.S.C. §§ 154, 159) and section 106 of the Federal Plant Pest Act (7 U.S.C. § 150ee), the Secretary of Agriculture has determined that, in order to prevent the introduction into the United States of certain plant pests, plant diseases, and insects, it is necessary to restrict the importation into the United States of certain articles from foreign countries and localities.

The regulations issued under the Plant Quarantine Act and the Federal Plant Pest Act provide that no person shall import or offer for entry into the United States any restricted article except in accordance with all applicable restrictions in 7 C.F.R. §§ 319.37-.37-14 (7 C.F.R. § 319.37(a)). A "restricted article" is defined as any class of nursery stock or other class of plant for, or capable of, propagation, excluding articles not relevant to this proceeding (7 C.F.R. § 319.37-1). Mango trees are listed as restricted articles in 7 C.F.R. § 319.37-7. Since mango trees are listed as restricted articles in 7 C.F.R. § 319.37-7, they are subject to the postentry quarantine conditions of 7 C.F.R. § 319.37-7.

The regulations issued under the Plant Quarantine Act and the Federal Plant Pest Act list categories of restricted articles that may be imported or offered for importation into the United States only after PPQ issues a written permit (7 C.F.R. § 319.37-3(a)). One of these categories is all articles subject to the postentry quarantine conditions in 7 C.F.R. § 319.37-7 (7 C.F.R. § 319.37-3(a)(2)). Mango

trees are restricted articles subject to the postentry conditions of 7 C.F.R. § 319.37-7. Thus, mango trees may be imported or offered for importation into the United States from Mexico only after PPQ issues a written permit pursuant to 7 C.F.R. § 319.37-3. Another category of restricted articles that may be imported or offered for importation into the United States only after PPQ issues a written permit is lots of 13 or more articles (7 C.F.R. § 319.37-3(a)(5)). Respondent imported 32 articles.

Moreover, restricted articles, at the time of importation or offer for importation into the United States, must be free of sand, soil, earth, and other growing media except under circumstances not relevant to this proceeding (7 C.F.R. § 319.37-8(a)). Finally, 7 C.F.R. § 319.37-14(a) requires that restricted articles required to be imported under a written PPQ permit pursuant to 7 C.F.R. § 319.37-3(a)(1)-(6) must be imported or offered for importation into the United States only at a port of entry designated by an asterisk in 7 C.F.R. § 319.37-14(b). The port of San Luis, Arizona, listed in 7 C.F.R. § 319.37-14(b), is not designated with an asterisk and is therefore not a designated port of entry for restricted articles required to be imported under a written PPQ permit pursuant to 7 C.F.R. § 319.37-3(a)(1)-(6).

Discussion

The 32 live mango trees in soil imported by Respondent into the United States at the port of San Luis, Arizona, from Mexico, on March 17, 1997, resulted in a number of violations. Respondent imported the mango trees without a written PPQ permit in violation of 7 C.F.R. § 319.37-3(a). Respondent imported the mango trees without meeting the postentry quarantine requirements in violation of 7 C.F.R. § 319.37-7. Respondent did not import the mango trees free of sand, soil, earth, and other growing media in violation of 7 C.F.R. § 319.37-8(a). Respondent did not import the mango trees at a designated port of entry in violation of 7 C.F.R. § 319.37-14(a). Thus, the importation of each mango tree in soil violated 7 C.F.R. §§ 319.37-3(a), .37-7, .37-8(a), and .37-14(a).

Respondent never disputed the fact that on March 17, 1997, she imported 32 live mango trees potted in soil into the United States from Mexico without a permit, without meeting the postentry quarantine requirements, and at a port which is not a designated port of entry. At no time did Respondent ever assert or present any evidence that she had a permit to import the mango trees. At no time did Respondent ever assert or present any evidence that her importation of the mango trees met the postentry quarantine requirements. At no time did Respondent ever assert or present any evidence that she imported the mango trees free of soil. At no time did Respondent ever assert or present any evidence that she imported the

mango trees at a designated port of entry or that San Luis, Arizona, was a designated port of entry.

Respondent admitted in her Answer that she imported the mango trees. In addition, Respondent admitted in an affidavit which she executed on May 7, 1998, that she imported the mango trees and did not declare the mango trees, as follows:

> On March 17, 1997, I entered the United States from Mexico in my Ford Escort with Arizona Plate KPK561. I was hauling 32 mango trees that I got them in Mexico, San Luis, Colorado, Mexico. I was going to plant some and give the rest as gifts. I did not declared [sic] these trees to the U.S. Officials. The trees were also in dirt from Mexico.

CX 11 at 1.

A Spanish-speaking PPQ officer read and explained the contents of Respondent's affidavit to Respondent before she signed it (Tr. 100-05; CX 11 at 2, CX 12).

Respondent claimed in her Answer that she had declared to an official that she was importing mango trees from Mexico. Respondent made the same claim in her testimony at the hearing and additionally denied that she hid the mango trees and claimed that she was uncertain as to whether she could bring the mango trees into the United States, as follows:

DIRECT TESTIMONY

> THE WITNESS: What I wanted to say that at no time did I not declare what I had. And also this thing about that I was hiding the things, that's not true either.
>
> Yes, I did have a blanket in the car but it was -- the blanket was with the purpose that my carpet in the car would not get dirty. And like I told you, my car has a trunk and then there's a window where you can see into the trunk. And that's why I couldn't really have hidden them.
>
> And this man that went to my house, what they said, everything that they say is fine, except for the part where they said I didn't declare the trees. Because whenever I cross the border, I always declare what I have because sometimes I don't know what's forbidden or not. And that's why when they always ask you what do you have, and so you have to tell them what you

have. And that's all that I wanted to say that at no time did I hide the trees or did I not tell them that I had them.

The second officer that gave his statement, that officer is very -- is a very good, nice officer with me and with everybody else that crosses. What happens, he probably does not remember because it's been such a long time, he does not remember what I told him.

And the other one; well he is a little bit more -- how can I tell you, he's like bad character. Most of the time he's angry.

And that's all that I wanted to say.

Tr. 123-24.

Complainant presented both testimony and physical evidence which establishes that on March 17, 1997, Respondent imported 32 live mango trees potted in soil from Mexico into the United States without a permit, without meeting the postentry quarantine requirements, and at a port which is not a designated PPQ port of entry. Respondent actually does not contest the violations of 7 C.F.R. §§ 319.37-3(a), .37-7, .37.8(a), and .37.14(a), except to claim that upon arrival at San Luis, Arizona, she declared that she was importing the mango trees into the United States. In addition to Respondent's admission in her affidavit (CX 11) that she did not declare the 32 live mango trees, the record contains overwhelming testimony that Respondent did not declare that she was importing the mango trees.

Respondent was thoroughly informed of the applicable regulations for the importation of plants and trees from Mexico on February 11, 1997. The 24 trees in soil that Respondent imported on February 11, 1997, were confiscated from her and she paid a $100 civil penalty for importing the 24 trees in soil (Tr. 47-48; CX 13). Moreover, on February 11, 1997, Respondent signed a Notice of Alleged Violation form, which lists all the regulations that Respondent had violated by importing the 24 live trees in soil, and PPQ inspector Jeffery Robert Alling explained to Respondent the requirements for the importation of plants and trees from Mexico (Tr. 49-50, 58-62; CX 13). Thus, on February 11, 1997, Respondent had actual notice of the applicable regulations for the importation of trees in soil.

United States Customs inspector Fernando Carlo Castillo was personally involved in Respondent's February 11, 1997, and March 17, 1997, importations of live trees in soil at the port of San Luis, Arizona. Inspector Castillo personally prepared a United States Customs Service Incident/Witness Statement which

describes Respondent's two importations. (Tr. 16-17; CX 1.)

Inspector Castillo states in his Incident/Witness Statement that he was at the primary inspection station at the port of San Luis, Arizona, on February 11, 1997, when Respondent came to the inspection station. Inspector Castillo states he asked Respondent for both a customs and an agricultural declaration and she responded that she had nothing from Mexico. Inspector Castillo noticed Respondent's hand shaking and asked her to open the trunk of her car. He noticed a blanket covering plants and soil. (CX 1.)

Additionally, inspector Castillo testified that he asks a person (usually the driver of the vehicle) entering primary inspection: "[d]o you have anything to declare such as plants, fruits, medicines, any alcoholic beverages, monetary instruments more than $10,000." (Tr. 19-20.) Inspector Castillo testified that he asked Respondent for a customs and an agricultural declaration and that "Respondent answered that she had nothing to declare" (Tr. 19).[2]

United States Immigration and Naturalization Service [hereinafter INS] inspector Luis Lemus testified that he was at the primary inspection station at the port of San Luis, Arizona, on March 17, 1997, when Respondent came to the primary inspection station. INS inspector Lemus testified that he asked Respondent if she was bringing anything from Mexico. (Tr. 34.) INS inspector Lemus testified that Respondent "said she was not bringing anything from Mexico" (Tr. 34-35). INS inspector Lemus further testified that he normally asks people twice for a declaration, but he asks a second time in a different way (Tr. 35). So, INS inspector Lemus again asked Respondent if she had anything in the trunk of her car and "she said no the second time" (Tr. 35).

Despite the two negative declarations by Respondent, INS inspector Lemus asked Respondent to open the trunk of her car and discovered the mango trees in the trunk (Tr. 35-36). Respondent cross-examined INS inspector Lemus about his recollection of her two negative declarations on March 17, 1997, and he confirmed that Respondent made two negative declarations (Tr. 37-38).

At approximately 11:30 p.m., on March 17, 1997, United States Customs inspector Castillo was called over to INS inspector Lemus' primary inspection station and was informed that there was a violation (Tr. 23-26). Since there are no USDA inspectors on duty at the port of San Luis, Arizona, at that time of night, United States Customs inspector Castillo took Respondent to secondary inspection (Tr. 23-25, 62-64). At secondary inspection, inspector Castillo completed a United States Customs Notice of Abandonment and Assent to Forfeiture of Prohibited or

[2]Spanish is inspector Castillo's native language and he is fluent in Spanish (Tr. 15). At primary inspection on February 11, 1997, inspector Castillo spoke to Respondent in Spanish (Tr. 20).

Seized Merchandise and Certificate of Destruction form (Tr. 25-26; CX 2). This United States Customs form lists the 32 mango trees as the articles abandoned by Respondent. Respondent signed the form acknowledging that she was abandoning all claim to the 32 mango trees (Tr. 25-26; CX 2). Since PPQ inspectors were not on duty, United States Customs inspector Castillo was instructed by his supervisor to fill out the United States Customs Notice of Abandonment and Assent to Forfeiture of Prohibited or Seized Merchandise and Certificate of Destruction form and present it to PPQ the next morning (Tr. 22-25). On March 18, 1997, PPQ inspector Alling found the 32 mango trees in soil at secondary inspection along with the United States Customs Notice of Abandonment and Assent to Forfeiture of Prohibited or Seized Merchandise and Certificate of Destruction form (Tr. 73-74). PPQ inspector Alling met with United States Customs inspector Castillo on March 18, 1997, to obtain information about Respondent's violations and to request inspector Castillo to prepare a United States Customs Service Incident/Witness Statement (Tr. 17, 90-91; CX 1). PPQ inspector Alling took photographs of these 32 mango trees in soil (Tr. 79-83; CX 4-CX 10).

INS inspector Lemus testified that on March 17, 1997, at the primary inspection station, Respondent twice declared that she was not importing anything from Mexico. Inspector Lemus' testimony that Respondent twice declared she was not importing anything from Mexico is credible considering that it was not coincidental that Respondent imported the 32 live mango trees on March 17, 1997, at approximately 11:30 p.m. (Tr. 25-26). Respondent is and has been a resident of San Luis, Arizona (CX 11, CX 13). It is the common knowledge of the residents of San Luis, Arizona, and the surrounding area that USDA inspectors are never on duty at the port of San Luis, Arizona, after approximately 8:00 p.m.[3] (Tr. 29, 62-63, 117-19). William T. Hyde, the PPQ director of the port of San Luis, Arizona, testified that this policy of not having PPQ personnel at the port after approximately 8:00 p.m. has been in effect for the entire 25 years he has been the San Luis, Arizona, port director (Tr. 107, 118). Respondent had been thoroughly informed on February 11, 1997, that she could not import plants or trees at the port of San Luis, Arizona, even if she did have a permit. Nevertheless, just 5 weeks later, on March 17, 1997, Respondent not only imported 32 mango trees in soil at the port of San Luis, Arizona, but she did so at approximately 11:30 p.m., when it is commonly known that no PPQ inspectors are on duty (Tr. 25-26).

Respondent was fully informed on February 11, 1997, of all applicable

[3]PPQ does not have the personnel to staff the port at San Luis, Arizona, after 8:00 p.m. Moreover, since San Luis, Arizona, is not a PPQ designated port of entry, PPQ personnel are normally not expected to or needed to process importations that require a permit. (Tr. 62-64, 118-20.)

regulations for the importation of plants and trees from Mexico. Moreover, regulations for the importation of plants and trees from Mexico are published in the *Federal Register*, thereby constructively notifying Respondent of the regulations. In order to achieve the congressional purposes of the Plant Quarantine Act and the Federal Plant Pest Act, violators are held responsible for their violations irrespective of their lack of evil motive or intent to violate the Plant Quarantine Act, the Federal Plant Pest Act, or the regulations issued under the Plant Quarantine Act and the Federal Plant Pest Act.[4]

USDA regulations regarding the importation of plants and trees in soil were fully explained to Respondent on February 11, 1997. PPQ inspector Alling personally completed the APHIS Notice of Alleged Violation form dated February 11, 1997 (Tr. 42; CX 13, CX 14). PPQ inspector Alling testified that he informed Respondent through a United States Customs inspector, who is fluent in Spanish, of all the USDA regulations that Respondent had violated on February 11, 1997. PPQ inspector Alling informed Respondent in detail through the same Spanish-speaking United States Customs inspector of the types of plants and trees that could be imported from Mexico and the procedures, conditions, and requirements necessary for such importations. (Tr. 44-45, 58-62, 64-66, 85-86; CX 13, CX 14.)

Thus, PPQ inspector Alling explained to Respondent, among other requirements and conditions for the importation of plants and trees, that plants and trees could not be imported with soil; that is, the plants and trees would have to be bare-rooted. PPQ inspector Alling also explained to Respondent that bare-rooted plants and trees would have to be imported under a written permit and would have to meet postentry quarantine requirements. Moreover, PPQ inspector Alling explained to Respondent that the bare-rooted plants and trees would have to be imported at a designated PPQ port of entry and that the port of San Luis, Arizona, was not a designated PPQ port of entry. PPQ inspector Alling further explained to Respondent that the designated PPQ ports of entry closest to San Luis, Arizona, were Nogales, Arizona, and San Ysidro, California. Nevertheless, Respondent totally ignored all of the USDA regulations that had been fully explained to her on February 11, 1997, and imported 32 live mango trees in soil into the United States at San Luis, Arizona, on March 17, 1997.

Section 108(b) of the Federal Plant Pest Act authorizes the Secretary of Agriculture to assess a civil penalty of not more than $1,000 for each violation of

[4] *In re Rafael Dominquez*, 60 Agric. Dec. 199, 207 (2001); *In re Cynthia Twum Boafo*, 60 Agric. Dec. 191, 195 (2001); *In re Mercedes Capistrano*, 45 Agric. Dec. 2196, 2198 (1986); *In re Rene Vallalta*, 45 Agric. Dec. 1421, 1423 (1986).

the Federal Plant Pest Act and the regulations issued under the Federal Plant Pest Act (7 U.S.C. § 150gg(b)). Section 10 of the Plant Quarantine Act authorizes the Secretary of Agriculture to assess a civil penalty of not more than $1,000 for each violation of the Plant Quarantine Act and the regulations issued under the Plant Quarantine Act (7 U.S.C. § 163).

The regulations, 7 C.F.R. §§ 319.37-.37-14, were, during all times relevant to this proceeding, and are, an integral and significant part of the federal effort to prevent the introduction into the United States from any foreign country of plant pests, plant diseases, and injurious insects new to or not widely prevalent or distributed within and throughout the United States. APHIS and PPQ administer programs designed to prevent the introduction into the United States of plant pests, plant diseases, and injurious insects. APHIS and PPQ rely heavily upon PPQ personnel at United States ports of entry as one of several means of preventing the dissemination of plant pests, plant diseases, and injurious insects into the United States. (Tr. 106-20.) At the port of San Luis, Arizona, alone, in 1999, there were approximately 3,600 interceptions of articles imported into the United States in violation of the plant quarantine laws and the regulations issued under those laws. PPQ nationwide, in 1999, made approximately 500,000 interceptions of articles imported into the United States in violation of the plant quarantine laws and the regulations issued under those laws. Most of PPQ's 1999 budget of $454 million was spent on preventing the dissemination of plant pests, plant diseases, and injurious insects into the United States. PPQ's interception programs have been very effective in preventing the introduction and spread of plant pests, plant diseases, and injurious insects from Mexico and other foreign countries into the United States. Very serious and damaging, if not devastating, agricultural and economic effects would result if PPQ was not successful in preventing the introduction of plant pests, plant diseases, and injurious insects into the United States. Only one plant pest from the 32 live mango trees or the approximately 300 pounds of soil imported by Respondent into the United States from Mexico could have caused millions or even billions of dollars of damage to the United States. (Tr. 108-20.)

The success of PPQ's programs to protect United States agriculture by preventing the dissemination of plant pests, plant diseases, and injurious insects into the United States is greatly dependent upon compliance of individuals, such as Respondent, with the Plant Quarantine Act, the Federal Plant Pest Act, and the regulations issued under the Plant Quarantine Act and the Federal Plant Pest Act. Without strict adherence to USDA regulations by individuals like Respondent, there is a significant risk of the introduction into the United States of plant pests, plant diseases, and injurious insects. Thus, the imposition of a significant sanction in a

case such as this one is necessary to deter Respondent and other potential violators from future violations of the Plant Quarantine Act, the Federal Plant Pest Act, and the regulations issued under the Plant Quarantine Act and the Federal Plant Pest Act. *In re Shulamis Kaplinsky,* 47 Agric. Dec. 613, 629 (1988).

USDA'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 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3):

> [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.

In light of this sanction policy, the sanction recommendations of administrative officials charged with the responsibility for achieving the congressional purposes of the Plant Quarantine Act and the Federal Plant Pest Act are highly relevant to any sanction to be imposed and are entitled to great weight in view of the experience gained by administrative officials during their day-to-day supervision of programs designed to prevent the introduction of plant pests, plant diseases, and injurious insects into the United States.

Respondent's importation into the United States from Mexico of 32 live mango trees in soil presented a significant risk of introducing plant pests, plant diseases, and injurious insects into the United States. Respondent's violations thereby undermined APHIS' efforts to safeguard the United States from plant pests, plant diseases, and injurious insects. The harmful effects of plant pests, plant diseases, and injurious insects to the United States and United States agricultural exports could be very significant and costly. (Tr. 106-20.)

Sanctions are essential to discourage and prevent violations like the ones in this case. Respondent was fully aware of the regulations applicable to the importation into the United States from Mexico of plants, trees, and plants and trees in soil on February 11, 1997 (Tr. 58-62, 64-66, 85-86; CX 13, CX 14). On February 11, 1997, Respondent paid a $100 civil penalty for importing into the United States 24 live trees in soil (Tr. 47-48; CX 13). Yet, just 5 weeks later, on March 17, 1997, Respondent imported 32 live trees in soil. These 32 live mango trees imported on March 17, 1997, far exceeded the average number of articles typically confiscated by PPQ at the port of San Luis, Arizona. PPQ typically intercepts only fresh fruit or a few plants or trees in soil. (Tr. 30, 83, 86, 89, 110, 117.) Respondent's

importation of 32 live mango trees, along with approximately 300 pounds of soil, was not a typical importation. Respondent's importation was a commercial importation. (Tr. 74-78.) Thus, Respondent's unusually large importation of 32 live mango trees in soil was significantly more risky than the typical number and amount of prohibited or restricted products intercepted by PPQ. Respondent's importation seriously undermined USDA's efforts to enforce the Plant Quarantine Act, the Federal Plant Pest Act, and the regulations issued under the Plant Quarantine Act and the Federal Plant Pest Act. Accordingly, at the oral hearing, Complainant's attorney, on behalf of Complainant, requested a civil penalty of $300 for each live mango tree in soil that Respondent imported into the United States at the port of San Luis, Arizona, from Mexico, on March 17, 1997. Since Respondent imported 32 live mango trees in soil, the total civil penalty would be $9,600. (Tr. 144-45.)

The imposition of the requested $9,600 sanction is justified and necessary in this case to deter Respondent and other potential violators from future violations of the Plant Quarantine Act, the Federal Plant Pest Act, and the regulations issued under the Plant Quarantine Act and the Federal Plant Pest Act. Had it not been for Complainant's recommendation, I would have imposed a far greater civil penalty.

I find Respondent's protestation that she declared the 32 live mango trees to United States officials when she entered the United States lacks credibility. INS inspector Lemus testified that on March 17, 1997, at the primary inspection station, he twice asked Respondent if she had anything to declare from Mexico (Tr. 34-35). INS inspector Lemus testified that Respondent "said she was not bringing anything from Mexico" (Tr. 34-35). On cross-examination, INS inspector Lemus confirmed that Respondent made two negative declarations (Tr. 38). Moreover, Respondent herself, in her sworn affidavit, regarding the importation on March 17, 1997, admitted that she "did not declared [sic] these trees to the U.S. Officials" (CX 11 at 1).

Even if I found that Respondent had declared the 32 live mango trees on March 17, 1997, immediately upon entry into United States (which I do not so find), Respondent's declaration would not be a defense to her violations of 7 C.F.R. §§ 319.37-3(a), .37-7, .37-8(a), and .37-14(a). It is well settled that a voluntary declaration of a prohibited or restricted article before a search of a respondent's possessions has begun is a mitigating circumstance, but the declaration does not operate as a defense to a violation of the regulations issued under the Plant

Quarantine Act and the Federal Plant Pest Act.[5]

For all the reasons discussed in this Decision and Order, Complainant's request for the imposition of a $9,600 civil penalty to deter Respondent and other potential violators from future violations of the Plant Quarantine Act, the Federal Plant Pest Act, and the regulations issued under the Plant Quarantine Act and the Federal Plant Pest Act is fully justified and warranted by the circumstances of this proceeding.

Conclusions of Law

Based on the record and by reason of the Findings of Fact, the evidence establishes that Respondent imported 32 live mango trees in soil into the United States at San Luis, Arizona, from Mexico, on March 17, 1997. The importation of each mango tree in soil violated the Plant Quarantine Act, the Federal Plant Pest Act, and 7 C.F.R. §§ 319.37-3(a), .37-7, .37-8(a), and .37-14(a).

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent raises four issues in Respondent's Motion to Appeal (Oral Argument) [hereinafter Appeal Petition]. First, Respondent contends she did not know that the importation into the United States at San Luis, Arizona, from Mexico, of 32 mango trees on March 17, 1997, violated 7 C.F.R. §§ 319.37-3, .37-7(a), (b), .37-8(a), and .37-14(a) (Appeal Pet. ¶¶ 2-5).

The Plant Quarantine Act and the Federal Plant Pest Act are published in the United States Statutes at Large and the United States Code, and Respondent is presumed to know the law.[6] Moreover, the regulations concerning the importation into the United States of mango trees in soil are published in the *Federal Register*, thereby constructively notifying Respondent of the requirements for importation.[7]

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[5]*In re Mr. Francisco Escobar, Jr.*, 54 Agric. Dec. 392, 416-17 (1995), *aff'd per curiam*, 68 F.3d 466 (5th Cir. 1995) (Table); *In re Shulamis Kaplinsky*, 47 Agric. Dec. 613, 630-31, 638 (1988); *In re Lawrence Craig*, 47 Agric. Dec. 606, 607 (1988); *In re Richard Duran Lopez*, 44 Agric. Dec. 2201, 2207-08 (1985); *In re Francisco Ramos*, 44 Agric. Dec. 1447 (1985) (Ruling on Recons.).

[6]*See Atkins v. Parker*, 472 U.S. 115, 130 (1985); *North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 283 (1925); *Johnston v. Iowa Dep't of Human Servs.*, 932 F.2d 1247, 1249-50 (8th Cir. 1991).

[7]*See FCIC v. Merrill*, 332 U.S. 380, 385 (1947); *United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 71 (2d Cir. 1994); *United States v. Wilhoit*, 920 F.2d 9, 10 (9th Cir. 1990); *Jordan v. Director, Office of Workers' Compensation Programs*, 892 F.2d 482, 487 (6th Cir. 1989); *Kentucky ex rel. Cabinet for Human Resources v. Brock*, 845 F.2d 117, 122 n.4 (6th Cir. 1988); *Government of Guam v. United*
(continued...)

Therefore, Respondent's purported lack of actual knowledge of the Plant Quarantine Act, the Federal Plant Pest Act, and the regulations issued under the Plant Quarantine Act and the Federal Plant Pest Act is not a defense to Respondent's violations of the Plant Quarantine Act, the Federal Plant Pest Act, and 7 C.F.R. §§ 319.37-3(a), .37-7, .37-8(a), and .37-14(a). Moreover, as the ALJ fully discussed in the Initial Decision and Order, the evidence establishes that, as of February 11, 1997, Respondent had actual knowledge of the regulations concerning the importation of plants and trees in soil into the United States from Mexico.

Second, Respondent contends she imported the 32 mango trees as gifts to family members and friends and she did not import the mango trees for commercial purposes (Appeal Pet. ¶ 6).

The purpose for which Respondent imported the 32 mango trees is not a defense to Respondent's violations of 7 C.F.R. §§ 319.37-3(a), .37-7, .37-8(a), and .37-14(a). Further, as the ALJ fully discussed in the Initial Decision and Order, the evidence establishes that Respondent imported the 32 mango trees into the United States for commercial purposes (Tr. 74-78).

Third, Respondent contends she is not a criminal and states "I feel that the system see's [sic] me as a hard case criminal" (Appeal Pet. ¶ 6).

This proceeding is not a criminal prosecution. Instead, this proceeding is a civil disciplinary administrative proceeding in which the Secretary of Agriculture is authorized to assess a civil penalty for violations of the Plant Quarantine Act, the Federal Plant Pest Act, and the regulations issued under the Plant Quarantine Act and the Federal Plant Pest Act. My conclusion that Respondent violated the Plant Quarantine Act, the Federal Plant Pest Act, and 7 C.F.R. §§ 319.37-3(a), .37-7, .37-8(a), and .37-14(a) does not constitute a conclusion that Respondent has committed a criminal offense.

Fourth, Respondent contends she cannot afford to pay a $9,600 civil penalty (Appeal Pet. ¶ 6).

A violator's inability to pay a civil penalty is a mitigating circumstance to be considered for the purpose of determining the amount of the civil penalty to be

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[7](...continued)
States, 744 F.2d 699, 701 (9th Cir. 1984); *Bennett v. Director, Office of Workers' Compensation Programs*, 717 F.2d 1167, 1169 (7th Cir. 1983); *Diamond Ring Ranch, Inc. v. Morton*, 531 F.2d 1397, 1405 (10th Cir. 1976); *Wolfson v. United States*, 492 F.2d 1386, 1392 (Ct. Cl. 1974) (per curiam); *United States v. Tijerina*, 407 F.2d 349, 354 n.12 (10th Cir.), *cert. denied*, 396 U.S. 867, and *cert. denied*, 396 U.S. 843 (1969); *Ferry v. Udall*, 336 F.2d 706, 710 (9th Cir. 1964), *cert. denied*, 381 U.S. 904 (1965).

assessed in animal quarantine cases and plant quarantine cases.[8] However, the burden is on the respondents in animal quarantine cases and plant quarantine cases to prove, by producing documentation, the lack of ability to pay the civil penalty.[9] Respondent has failed to produce any documentation supporting her assertion that she lacks the ability to pay a $9,600 civil penalty, and Respondent's undocumented assertion that she lacks the ability to pay the civil penalty falls far short of the proof necessary to establish an inability to pay the civil penalty.[10]

Respondent has not raised the issue of the amount of the civil penalty in her Appeal Petition, except in the context of her purported inability to pay the civil penalty. However, I note *sua sponte* that Complainant's sanction recommendation and the ALJ's assessment of a civil penalty are based on the number of trees Respondent imported into the United States rather than on the number of provisions of the regulations Respondent violated (Tr. 144-45; Complainant's Proposed Findings of Fact, Conclusions of Law, Order, and Supporting Brief at 22; Initial Decision and Order at 23-26). I agree with the ALJ's assessment of a civil penalty

[8]*In re Rafael Dominguez*, 60 Agric. Dec. 199, 208-09 (2001); *In re Cynthia Twum Boafo*, 60 Agric. Dec. 191, 197 (2001); *In re Jerry Lynn Stokes*, 57 Agric. Dec. 914, 919 (1998); *In re Garland E. Samuel*, 57 Agric. Dec. 905, 912-13 (1998); *In re Barry Glick*, 55 Agric. Dec. 275, 283 (1996); *In re Robert L. Heywood*, 52 Agric. Dec. 1323, 1324-25 (1993); *In re Robert L. Heywood*, 52 Agric. Dec. 1315, 1321-22 (1993) (Decision and Order and Remand Order).

[9]*In re Rafael Dominguez*, 60 Agric. Dec. 199, 209 (2001); *In re Cynthia Twum Boafo*, 60 Agric. Dec. 191,197-98 (2001); *In re Jerry Lynn Stokes*, 57 Agric. Dec. 914, 919 (1998); *In re Garland E. Samuel*, 57 Agric. Dec. 905, 913 (1998); *In re Barry Glick*, 55 Agric. Dec. 275, 283 (1996); *In re Robert L. Heywood*, 52 Agric. Dec. 1323, 1324-25 (1993); *In re Robert L. Heywood*, 52 Agric. Dec. 1315, 1321-22 (1993) (Decision and Order and Remand Order).

[10]*See In re Rafael Dominguez*, 60 Agric. Dec. 199, 209 (2001) (holding the undocumented assertion by the respondent that he was unable to pay the civil penalty falls far short of the proof necessary to establish inability to pay); *In re Cynthia Twum Boafo*, 60 Agric. Dec. 191, 198 (2001) (holding undocumented assertions by the respondent that she was unable to pay the civil penalty falls far short of the proof necessary to establish inability to pay); *In re Jerry Lynn Stokes*, 57 Agric. Dec. 914, 919-20 (1998) (holding undocumented assertions by the respondent that he was unable to pay the civil penalty falls far short of the proof necessary to establish inability to pay); *In re Garland E. Samuel*, 57 Agric. Dec. 905, 913 (1998) (holding undocumented assertions by the respondent that he was unable to pay the civil penalty falls far short of the proof necessary to establish inability to pay); *In re Barry Glick*, 55 Agric. Dec. 275, 283 (1996) (holding undocumented assertions by the respondent that he lacked the assets to pay the civil penalty are not sufficient to prove inability to pay the civil penalty); *In re Don Tollefson*, 54 Agric. Dec. 437, 439 (1995) (assessing the full civil penalty despite the respondent's submission of some documentation of financial problems) (Order Denying Pet. for Recons.); *In re Robert L. Heywood*, 52 Agric. Dec. 1323, 1325 (1993) (assessing the full civil penalty because the respondent did not produce documentation establishing his inability to pay the civil penalty).

based on the number of trees Respondent imported. This approach to the assessment of civil penalties for violations of the Plant Quarantine Act and the regulations issued under the Plant Quarantine Act is authorized by section 10 of the Plant Quarantine Act (7 U.S.C. § 163). Further, this approach to the assessment of civil penalties for violations of the Federal Plant Pest Act and the regulations issued under the Federal Plant Pest Act is authorized by section 108(b) of the Federal Plant Pest Act (7 U.S.C. § 150gg(b)). Moreover, this per-tree approach to the assessment of civil penalties is similar to the per-box approach I have taken in cases involving the interstate movement of boxes of Mexican Hass avocados in violation of regulations issued under the Plant Quarantine Act and the Federal Plant Pest Act.[11] Finally, I find the approach to the assessment of civil penalties taken by the ALJ reflects the gravity of Respondent's violations. While the importation or offer for entry of a single tree in violation of regulations issued under the Plant Quarantine Act and the Federal Plant Pest Act could cause the introduction into the United States of plant pests, plant diseases, and injurious insects, the risk of the introduction into the United States of plant pests, plant diseases, and injurious insects increases with each additional prohibited or restricted article that is imported or offered for entry into the United States in violation of the regulations issued under the Plant Quarantine Act and the Federal Plant Pest Act.

Section 108(b) of the Federal Plant Pest Act (7 U.S.C. § 150gg(b)) provides that any person violating the Federal Plant Pest Act or any regulation promulgated under the Federal Plant Pest Act may be assessed by the Secretary of Agriculture a civil penalty not exceeding $1,000. Section 10 of the Plant Quarantine Act (7 U.S.C. § 163) provides that any person violating the Plant Quarantine Act or any regulation promulgated under the Plant Quarantine Act may be assessed by the Secretary of Agriculture a civil penalty not exceeding $1,000. Respondent committed 128 violations of the regulations issued under the Plant Quarantine Act and the Federal Plant Pest Act: viz., 32 violations of 7 C.F.R. § 319.37-3(a), 32 violations of 7 C.F.R. § 319.37-7, 32 violations of 7 C.F.R. § 319.37-8(a), and 32 violations of 7 C.F.R. § 319.37-14(a). Thus, Respondent could be assessed a maximum civil penalty of $128,000.

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

ORDER

Respondent is assessed a $9,600 civil penalty. The civil penalty shall be paid

[11] *In re Rafael Dominguez*, 60 Agric. Dec. 210 (2001); *In re Calzado Leon*, 59 Agric. Dec. 770 (2000); *In re La Fortuna Tienda*, 58 Agric. Dec. 833 (1999).

by a certified check or money order, made payable to the "Treasurer of the United States," and sent to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

The certified check or money order shall be sent to, and received by, the United States Department of Agriculture, APHIS Field Servicing Office, Accounting Section, within 60 days after service of this Order on Respondent. Respondent shall state on the certified check or money order that payment is in reference to P.Q. Docket No. 99-0054.

In re: GERONIMO'S AND LA MICHOACANA.
P.Q. Docket No. 99-0055.
Decision and Order.
Filed August 6, 2001.

PQ - Moving, offer for re-shipment - Knowledge of intended destination - Sanctions, purpose of, to deter others.

Respondent filed a timely request for hearing. The Administrative Law Judge (ALJ) found that Respondent knew or should have known by prior business transactions, invoices, sales tax numbers and permit numbers that the re-sale/re-shipment of imported produce (Mexican Hass Avocados) to a recipient in another state (where importation was restricted) was prohibited by Federal Regulations. The consequences of wrongful movement (re-shipment/transportation) of imported produce to a non-permitted state/agriculture region could result in serious financial damages to U.S. agriculture interests due to importation of non-native pests and disease. Sanctions may be assessed as more than nominal or actual damages in order to deter others.

James D. Holt, for Complainant.
Gabriel Villanuva, for Respondent Geronimo's.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

This proceeding was instituted under the Plant Quarantine Act of August 20, 1912, as amended (7 U.S.C. §§ 151-167), and the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj) ("Acts") by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service ("APHIS") on

September 9, 1999.[1] The complaint alleges that Respondent Geronimo's Mexican Produce ("Geronimo's") violated the Acts and regulations promulgated under the Acts (7 C.F.R. §§ 301.11(b) and 319.56-2ff) on or about March 3, 1999, by moving four boxes of Mexican Hass avocados from Chicago, Illinois, to Marshalltown, Iowa. Respondent filed a timely answer on September 24, 1999. A hearing was held on April 4, 2001, in Chicago, Illinois. James D. Holt, Esq., Office of the General Counsel, U.S. Department of Agriculture ("USDA"), appeared on behalf of the Complainant. Mr. Gabriel Villanuva appeared on behalf of Respondent Geronimo's.

Law

The Plant Quarantine Act, which was in force at the time of the alleged violation in 1999, provides that the Secretary of Agriculture ("Secretary") may promulgate regulations restricting the importation of fruit into the United States to prevent the introduction of injurious insects and diseases. The Secretary may assess a civil penalty not exceeding $1,000 for each violation (7 U.S.C. §§ 160, 163). On June 20, 2000, the Plant Protection Act (7 U.S.C. § 7701) was enacted repealing the 1912 Plant Quarantine Act and the Federal Plant Pest Act. However, section 7758(c) of the Plant Protection Act provides that "Regulations issued under the authority of a provision of law repealed by [the Plant Protection Act] shall remain in effect until such time as the Secretary issues a regulation under section 7754 [of the Plant Protection Act] that supersedes the earlier regulation." The following regulations promulgated by the Secretary under the Plant Quarantine Act have not been superseded and are therefore applicable to this proceeding:

Title 7--Code of Federal Regulations, Part 301--Imported Plants and Plant Parts § 301.10 (Definitions)

> *Move (moved, movement).* Shipped, offered to a common carrier for shipment, received for transportation or transported by a common carrier, or carried, transported, moved, or allowed to be moved.

§ 301.11 (Notice of quarantine; prohibitions on the interstate movement of certain imported plants and plant parts)

[1]The proceeding as to Respondent La Michoacana was terminated by the entry of a Consent Decision on March 31, 2000.

(a) In accordance with part 319 of this chapter, some plants and plant parts may only be imported into the United States subject to certain destination restrictions. That is, under part 319, some plants and plant parts may be imported into some States or areas of the United States but are prohibited from being imported into, entered into, or distributed within other States or areas, as an additional safeguard against the introduction and establishment of foreign plant pests and diseases.

(b) Under this quarantine notice, whenever any imported plant or plant part is subject to destination restrictions under part 319:

(1) The State(s) or area(s) into which the plant or plant part is allowed to be imported is quarantined with respect to that plant or plant part; and

(2) No person shall move any plant or plant part from any such quarantined State or area into or through any State or area not quarantined with respect to that plant or plant part.

Title 7--Code of Federal Regulations, Part 319--Foreign Quarantine Notices, Sub-part--Fruit and Vegetables (Quarantine)

§ 319.56 (Notice of quarantine)

(a) The fact has been determined by the Secretary of Agriculture, and notice is hereby given:

(1) That there exist in Europe, Asia, Africa, Mexico, Central America, and South America, and other foreign countries and localities, certain injurious insects, including fruit and melon flies (*Tephritidae)*, new to and not heretofore widely distributed within and throughout the United States, which affect and may be carried by fruits and vegetables commercially imported into the United States or brought to the ports of the United States as ships' stores or casually by passengers or others, and

(2) That the unrestricted importation of fruits and vegetables from the countries and localities enumerated may result in the entry into the United States of injurious insects, including fruit and melon flies (*Tephritidae*).

(b) The Secretary of Agriculture, under authority conferred by the act of

Congress approved August 20, 1912 (37 Stat. 315; 7 U.S.C. 151-167), does hereby declare that it is necessary, in order to prevent the introduction into the United States of certain injurious insects, including fruit and melon flies (*Tephritidae*), to forbid, except as provided in the rules and regulations supplemental hereto, the importation into the United States of fruits and vegetables from the foreign countries and localities named and from any other foreign country or locality, and of plants or portions of plants used as packing material in connection with shipments of such fruits and vegetables.

(c) On and after November 1, 1923, and until further notice, the importation from all foreign countries and localities into the United States of fruits and vegetables, and of plants or portions of plants used as packing material in connection with shipments of such fruits and vegetables, except as provided in the rules and regulations supplemental hereto, is prohibited:

§ 319.56-2ff (Administrative instructions governing movement of Hass avocados from Mexico to the Northeastern United States)

Fresh Hass variety avocados (*Persea americana*) may be imported from Mexico into the United States for distribution in the northeastern United States only under a permit. . .and only under the following conditions:

. . . .

(a) *Shipping restrictions*.

. . . .

(3) The avocados may be distributed only in the following northeastern States: Connecticut, Delaware, the District of Columbia, Illinois, Indiana, Kentucky, Maine, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Vermont, Virginia, West Virginia, and Wisconsin.

Findings of Fact

1. The mailing address of Respondent Geronimo's Mexican Produce is 96 South Water Market, Chicago, Illinois 60608.
2. On March 3, 1999, Respondent Geronimo's moved four boxes of Mexican

Hass avocados from Chicago, Illinois to Marshalltown, Iowa.

Discussion

Geronimo Sevilla is the owner of Respondent Geronimo's Mexican Produce, 96 South Water Market, Chicago, Illinois. On February 24, 1999, Respondent legally purchased Mexican Hass avocados, an imported regulated product under 7 C.F.R. § 319.56-2ff, from Blue Island Wholesale Produce, Chicago, Illinois. On March 3, 1999, it sold four boxes of Mexican Hass avocados to La Michoacana, which is located in Marshalltown, Iowa. The avocados were then moved from Illinois to Iowa on March 3. Geronimo Sevilla stated in June 2001 that he did not know when he sold the avocados to La Michoacana, that it was located in Iowa. However, La Michoacana's owner, Angel Banuelos-Sorvia, made the statement that: "The market in Chicago knows I am from Iowa because they have my sales tax # and permit # on file. I have been doing business with Geronimo's for about 10 months." (CX 8, 9, 11, 12, 13.)

On March 20, 1999, Mike Booth, an APHIS Investigator, observed boxes of Mexican Hass avocados from Geronimo's in Alden, Iowa. (Tr. 12.) The boxes containing the avocados were clearly labeled as Mexican produce and carried the following warning: "Distribution or sale is prohibited outside of and limited to the following states: CT, DC, IL, IN, KY, MA, MD, ME, MI, NH, NJ, NY, OH, PA, RI, VA, VT, WV, and WI." (Tr. 14; CX 2.) On March 22, 1999, APHIS representatives seized the Mexican Hass avocados at La Michoacana. (Tr. 13, 16, 22; CX 3, 5.)

Gabriel Villanuva, Respondent's representative at the hearing, stated, "What has been spoken is true and we know that we're supposed to go their way. They're correct, the boxes are marked. All the boxes are marked and the states they're not supposed to go." (Tr. 43.)

While Respondent did not itself move the avocados from Illinois to Iowa, it allowed them to be moved within the meaning of 7 C.F.R. § 301.10. In *Robert W. Watts, Jr., et al.*, 53 Agric. Dec. 1419, 1427 (1994), it was held that when a person, such as Respondent, sells a regulated product that is later moved, the seller has engaged in the first step in the movement of the product and is thus considered to have moved the regulated product. Respondent therefore violated the Act and sections 7 C.F.R. §§ 301.11(b) and 319.56-2ff of the regulations when Mexican Hass avocados were moved from Chicago, Illinois, to Marshalltown, Iowa, on March 3, 1999.

On February 5, 1997, APHIS amended the regulations governing the importation of fruits and vegetables to allow Hass avocado fruit grown in approved

orchards in municipalities in Michoacana, Mexico, to be imported into certain areas of the United States, subject to certain conditions. The conditions required for the importation of Hass avocado fruit included inspection and shipping procedures, restrictions on the time of year when shipments can be imported into the United States, and restrictions on the states in which avocados can be distributed. (Tr. 36; 62 FR 5293, February 5, 1997.) Using a systems approach, APHIS established a series of measures to prevent the introduction of such destructive pests as weevils, seed moths, and fruit flies that can infest avocados and other fruits and vegetables. (Tr. 36; 60 FR 34834, July 3, 1995.) One measure limited the importation of Mexican Hass avocados into the United States from November through February. Under this measure the avocados could be distributed only in Connecticut, Delaware, the District of Columbia, Illinois, Indiana, Kentucky, Maine, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Vermont, Virginia, West Virginia, and Wisconsin. Iowa was not one of the states in which the avocados could be distributed. APHIS believed that the cold climate and a lack of suitable host material during the winter months would prevent pests from becoming established. (7 C.F.R. § 319.56-2ff(a)(2).)

In the United States, Hass avocados are raised in California, Florida, and Texas. (Tr. 38.) A 1995 risk assessment estimated that if weevils were introduced and became established in only California through the importation of infested Mexican Hass avocados it would cause damage of $123 million. (Tr. 38.) In addition to the weevil threat to the avocado crop, fruit flies can spread from avocados to citrus, with the potential damage of $1.4 billion to just citrus crops in Florida, Georgia, Louisiana, Texas, and California. (Tr. 38.)

Sanction

"[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." *S.S. Farms Linn County, Inc.*, 50 Agric. Dec. 476 (1991).

The success of programs to protect America's agriculture by the prevention, control and eradication of plant pests is dependent upon the compliance of individuals such as the Respondent. Without their adherence to federal regulations concerned with the prevention of the spread of plant pests, the risk of the undetected spread of destructive plant pests is greatly increased. The imposition of sanctions

in cases such as this are important to prevent spread of such pests by insuring that not only a particular respondent will not again violate Federal Regulations, but also that the sanction will deter others in similar situations.

Complainant states that the United States citrus industry is annually valued at over 2 billion dollars. Past eradication of fruit fly infestations in Florida in 1956, in Texas in the 1950's, and in California in 1975, cost more than 30 million dollars. In 1983, a Medfly pest eradication program conducted in California cost over 100 million dollars. These costs do not take into account increased consumer prices, lost exports, and other indirect costs which could total more than 10 times the direct costs. *In re Lopez*, 44 Agric. Dec. 2201 (1985). It is conceivable that just one infested Mexican Hass avocado could devastate domestic avocados and other fruits and vegetables.

Complainant believes that compliance and deterrence can be achieved only with the imposition of a civil penalty of four thousand dollars. Complainant's recommendation "as to the appropriate sanction is entitled to great weight, in view of the experience gained by the [Complainant] during [his] day-to-day supervision of the regulated industry." *In re S.S. Farms Linn County, Inc., et al.,* 50 Agric. Dec. 476 (1991). It is found that a civil penalty of four thousand dollars ($4,000.00) is an appropriate sanction in this case.

Conclusion of Law

Respondent Geronimo's Mexican Produce violated the Plant Quarantine Act (7 U.S.C. § 151), the Federal Plant Pest Act (7 U.S.C. § 150aa) and the regulations promulgated thereunder by moving Mexican Hass avocados to a state where they are prohibited.

Order

Respondent Geronimo's is assessed a civil penalty of four thousand dollars ($4,000.00). Respondent shall send a certified check or money order for four thousand dollars ($4,000.00), payable to "Treasurer of the United States," to USDA, APHIS Field Servicing Office, Accounting Section, P.O. Box 3334, Minneapolis, Minnesota 55403, within 30 days from the effective date of this Order. The certified check or money order should include the docket number of this proceeding.

This Decision and Order will become final and effective 35 days after service hereof, unless there is an appeal to the Judicial Officer within 30 days after service 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 and effective September 18, 2001.-Editor]

MISCELLANEOUS ORDERS

In re: BOGHOSIAN RAISIN PACKING CO. AND LION RAISINS, INC.
2001 AMA Docket No. F&V 989-1.
Order Dismissing Petition.
Filed July 25, 2001.

Show cause.

Gregory Cooper, for Respondent.
Howard A. Sagaser, for Petitioner.
Brian C. Leighton, for Petitioner.
Order issued James W. Hunt, Chief Administrative Law Judge.

Petitioners were directed on June 13, 2001, to file a response to an order to show cause by June 25, 2001. Section 900-69 of the Rules of Practice (7 C.F.R. § 900.69) require that all documents be filed by the parties with the Hearing Clerk. A response to the order to show cause was not filed with the Hearing Clerk. Accordingly, as a timely response to the order was not filed, the petition and amended petition filed herein are dismissed.

In re: DUNAJSKI DAIRY, INC.
2000 AMA Docket No. M-1-1.
Order Dismissing Case.
Filed August 15, 2001.

Motion to Dismiss.

Sharlene A. Deskins, for Respondent.
John A. McNiff, for Petitioner
Order issued by Jill S. Clifton, Administrative Law Judge.

The parties have jointly moved to dismiss the Petition in this case with prejudice. John A. McNiff, Esq., apparently executed the Joint Motion on or about May 8, 2001, prior to his death on May 27, 2001.

Accordingly, this case is dismissed.

Copies hereof, and of the parties' Joint Motion received August 14, 2001, shall be served by the Hearing Clerk upon each of the parties. Petitioner's copies shall be served at the following addresses:

Oliver T. Cook, Esq., for
John A. McNiff, Esq.
Pearl, McNiff, Crean,
Cook & Sheehan
Attorneys at Law
30 Main Street
Peabody, MA 01960-5597
and
Dunajski Dairy, Inc.
Attn: Theodore B. Dunajski, Jr.
28 Buxton Lane
Peabody, MA

The Hearing Clerk is requested to show the addresses to which the copies were mailed, and the mailing dates.

In re: SCOTT A. DURIS.
A.Q. Docket No. 01-0009.
Order of Dismissal.
Filed September 5, 2001.

Motion to Dismiss.

James D. Holt, for Complainant.
Respondent, Pro se.
Order issued by James W. Hunt, Administrative Law Judge.

Complainant's motion to dismiss the complaint is granted. The complaint as to Respondent, Scott A. Duris, is dismissed.

In re: MARY E. TORRES DEMUNOZ.
A.Q. Docket No. 01-0003.
Order Dismissing Complaint.
Filed September 10, 2001.

Motion to Dismiss.

James Booth, for Complainant.
Respondent, Pro se.
Order issued by James W. Hunt, Administrative Law Judge.

Complainant's motions to Withdraw Proposed Default Decision and Order and to Dismiss Complaint are granted. Accordingly, the Complaint filed on February 22, 2001, is dismissed.

In re: KARL MITCHELL, AN INDIVIDUAL; AND ALL ACTING ANIMALS, A SOLE PROPRIETORSHIP OR UNINCORPORATED ASSOCIATION.
AWA Docket No. 01-0016.
Order Granting Complainant's Petition for Reconsideration.
Filed August 8, 2001.

Petition for reconsideration – Animal welfare – Inflation adjustment – Dog defined – Cat defined – Present defined – Presumption of regularity – Civil penalty – Cease and desist order – License revocation.

The Judicial Officer granted Complainant's petition for reconsideration and increased the civil penalty assessed against Respondents in *In re Karl Mitchell*, 60 Agric. 91 (2001). The Judicial Officer concluded that, when he assessed Respondents a $15,250 civil penalty, he erroneously failed to take into account the regulations issued under the Federal Civil Penalties Inflation Adjustment Act, as amended (28 U.S.C. § 2461 note (Supp. V 1999)) (7 C.F.R. § 3.91). Pursuant to the regulations, the Secretary of Agriculture increased the maximum civil penalty that may be assessed under section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) for each violation of the Animal Welfare Act and the regulations and standards issued under the Animal Welfare Act by 10 percent from $2,500 to $2,750 (7 C.F.R. § 3.91(b)(2)(v)). Accordingly, the Judicial Officer increased the civil penalty which he assessed against Respondents by 10 percent from $15,250 to $16,775.

Colleen A. Carroll, for Complainant.
J. Oscar Shaw, for Respondents.
Initial decision issued by Dorothea A. Baker, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on December 6, 2000.

Complainant instituted the proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations and Standards]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges that, during the period April 11, 2000, through December 4, 2000, Karl Mitchell and All Acting Animals [hereinafter Respondents] willfully violated the Animal Welfare Act and the Regulations and Standards (Compl. ¶¶ 3-12).

On January 5, 2001, the Hearing Clerk served each Respondent with the Complaint, the Rules of Practice, and a service letter dated December 7, 2000.[2] Respondents failed to answer the Complaint within 20 days after service as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). On February 13, 2001, the Hearing Clerk sent a letter to Respondents informing them that Respondents' answer to the Complaint had not been received within the time required by the Rules of Practice.[3]

On February 14, 2001, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for Adoption of Proposed Decision and Order [hereinafter Motion for Default Decision] and a proposed Decision and Order By Reason of Admission of Facts [hereinafter Proposed Default Decision]. The Hearing Clerk served Respondents with Complainant's Motion for Default Decision and Complainant's Proposed Default Decision on March 8, 2001.[4]

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[2]The Hearing Clerk sent each Respondent the Complaint, the Rules of Practice, and the December 7, 2000, service letter by certified mail (See Domestic Return Receipt for Article Number 4579 5131 and Domestic Return Receipt for Article Number 4579 5155). The United States Postal Service marked each envelope containing the Complaint, the Rules of Practice, and the December 7, 2000, service letter "unclaimed" and returned the mailings to the Hearing Clerk. On January 5, 2001, in accordance with section 1.147(c)(1) of the Rules of Practice (7 C.F.R. § 1.147(c)(1)), the Hearing Clerk remailed the Complaint, the Rules of Practice, and the December 7, 2000, service letter to each Respondent by ordinary mail (See two memoranda dated January 5, 2001, from "TMFisher").

[3]See letter dated February 13, 2001, from Lawuan Waring, Acting Hearing Clerk, to Karl Mitchell and All Acting Animals.

[4]See Domestic Return Receipt for Article Number 4579 3922 signed by Respondent Karl Mitchell. The Hearing Clerk sent Respondent All Acting Animals Complainant's Motion for Default Decision and Complainant's Proposed Default Decision by certified mail (See Certified Mail Receipt 4579 3915). However, the record does not establish that anyone signed the Domestic Return Receipt for Article Number 4579 3915. Respondent Karl Mitchell is an owner or sole proprietor of Respondent All

(continued...)

Respondents failed to file objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision within 20 days after service as required by section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). On April 11, 2001, Respondents filed a Motion for Leave to File Late Answer to Complaint, an Answer to Complaint and Affirmative Defenses, and a Response to Motion for Adoption of Proposed Decision and Order.

On April 25, 2001, Administrative Law Judge Dorothea A. Baker [hereinafter the ALJ] filed an Order Granting Complainant's Motion for Adoption of Proposed Decision and Order filed February 14, 2001, and a Decision and Order by Reason of Admission of Facts [hereinafter Initial Decision and Order]. The ALJ: (1) concluded that Respondent Karl Mitchell is an owner or sole proprietor of Respondent All Acting Animals; (2) concluded that, at all times material to this proceeding, Respondents operated as exhibitors as defined in the Animal Welfare Act under Animal Welfare Act license number 88-C-0076; (3) concluded that Respondents violated the Animal Welfare Act and the Regulations and Standards as alleged in the Complaint; (4) directed Respondents to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; (5) assessed Respondents jointly and severally a $27,500 civil penalty; and (6) revoked Respondents' Animal Welfare Act license (Initial Decision and Order at 8-15).

On May 15, 2001, Respondents appealed to the Judicial Officer. On May 21, 2001, Complainant filed a response to Respondents' appeal petition. On May 23, 2001, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for decision.

On June 13, 2001, I issued a Decision and Order: (1) concluding that Respondents committed 45 willful violations of the Animal Welfare Act and the Regulations and Standards; (2) ordering Respondents to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; (3) assessing Respondents, jointly and severally, a $15,250 civil penalty; and (4) revoking Respondents' Animal Welfare Act license. *In re Karl Mitchell*, 60 Agric. Dec. 91, 106-14, 132-32 (2001).

On July 3, 2001, Complainant filed Complainant's Petition for Reconsideration of Decision of the Judicial Officer [hereinafter Petition for Reconsideration]. On

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[4](...continued)
Acting Animals. Respondent Karl Mitchell and Respondent All Acting Animals have the same mailing address. Respondent Karl Mitchell and Respondent All Acting Animals operate as Animal Welfare Act exhibitors under the same Animal Welfare Act license (Animal Welfare Act license number 88-C-0076). Under these circumstances, I concluded that service of Complainant's Motion for Default Decision and Complainant's Proposed Default Decision on Respondent Karl Mitchell also constitutes service on Respondent All Acting Animals. *In re Karl Mitchell*, 60 Agric. Dec. 91, 93 n.3, 106 (2001).

July 23, 2001, Respondents filed Respondents Response to Complainant's Petition for Reconsideration of Decision of the Judicial Officer [hereinafter Response to Petition for Reconsideration]. On July 25, 2001, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for reconsideration of the June 13, 2001, Decision and Order.

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 54—TRANSPORTATION, SALE, AND HANDLING OF CERTAIN ANIMALS

§ 2131. Congressional statement of policy

The Congress finds that animals and activities which are regulated under this chapter are either in interstate or foreign commerce or substantially affect such commerce or the free flow thereof, and that regulation of animals and activities as provided in this chapter is necessary to prevent and eliminate burdens upon such commerce and to effectively regulate such commerce, in order—

(1) to insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment;

(2) to assure the humane treatment of animals during transportation in commerce; and

(3) to protect the owners of animals from the theft of their animals by preventing the sale or use of animals which have been stolen.

The Congress further finds that it is essential to regulate, as provided in this chapter, the transportation, purchase, sale, housing, care, handling, and treatment of animals by carriers or by persons or organizations engaged in using them for research or experimental purposes or for exhibition purposes or holding them for sale as pets or for any such purpose or use.

§ 2132. Definitions

When used in this chapter–

. . . .

(h) the term "exhibitor" means any person (public or private) exhibiting any animals, which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary, and such term includes carnivals, circuses, and zoos exhibiting such animals whether operated for profit or not; but such term excludes retail pet stores, organizations sponsoring and all persons participating in State and country fairs, livestock shows, rodeos, purebred dog and cat shows, and any other fairs or exhibitions intended to advance agricultural arts and sciences, as may be determined by the Secretary[.]

§ 2140. Recordkeeping by dealers, exhibitors, research facilities, intermediate handlers, and carriers

Dealers and exhibitors shall make and retain for such reasonable period of time as the Secretary may prescribe, such records with respect to the purchase, sale, transportation, identification, and previous ownership of animals as the Secretary may prescribe. . . . Such records shall be made available at all reasonable times for inspection and copying by the Secretary.

§ 2146. Administration and enforcement by Secretary

(a) Investigations and inspections

The Secretary shall make such investigations or inspections as he deems necessary to determine whether any dealer, exhibitor, intermediate handler, carrier, research facility, or operator of an auction sale subject to section 2142 of this title, has violated or is violating any provision of this chapter or any regulation or standard issued thereunder, and for such purposes, the Secretary shall, at all reasonable times, have access to the places of business and the facilities, animals, and those records required to be kept pursuant to section 2140 of this title of any such dealer, exhibitor, intermediate handler, carrier, research facility, or operator of an auction sale.

§ 2149. Violations by licensees

(a) Temporary license suspension; notice and hearing; revocation

If the Secretary has reason to believe that any person licensed as a dealer, exhibitor, or operator of an auction sale subject to section 2142 of this title, has violated or is violating any provision of this chapter, or any of the rules or regulations or standards promulgated by the Secretary hereunder, he may suspend such person's license temporarily, but not to exceed 21 days, and after notice and opportunity for hearing, may suspend for such additional period as he may specify, or revoke such license, if such violation is determined to have occurred.

(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. No penalty shall be assessed or cease and desist order issued unless such person is given notice and opportunity for a hearing with respect to the alleged violation, and the order of the Secretary assessing a penalty and making a cease and desist order shall be final and conclusive unless the affected person files an appeal from the Secretary's order with the appropriate United States Court of Appeals. 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.

(c) Appeal of final order by aggrieved person; limitations; exclusive jurisdiction of United States Courts of Appeals

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, aggrieved by a final order of the Secretary issued pursuant to this section may, within 60 days after entry of such an order, seek review of such order in the appropriate United States Court of Appeals in accordance with the provisions of sections 2341, 2343 through 2350 of title 28, and such court shall have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of the Secretary's order.

§ 2151. Rules and regulations

The Secretary is authorized to promulgate such rules, regulations, and orders as he may deem necessary in order to effectuate the purposes of this chapter.

7 U.S.C. §§ 2131, 2132(h), 2140, 2146(a), 2149(a)-(c), 2151.

28 U.S.C.:

TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE

. . . .

PART VI—PARTICULAR PROCEEDINGS

. . . .

CHAPTER 163—FINES, PENALTIES AND FORFEITURES

§ 2461. Mode of recovery

. . . .

FEDERAL CIVIL PENALTIES INFLATION ADJUSTMENT

SHORT TITLE

SECTION 1. This Act may be cited as the "Federal Civil Penalties Inflation Adjustment Act of 1990"

FINDINGS AND PURPOSE

SEC. 2. (a) FINDINGS.–The Congress finds that–

(1) the power of Federal agencies to impose civil monetary penalties for violations of Federal law and regulations plays an important role in deterring violations and furthering the policy goals embodied in such laws and regulations;

(2) the impact of many civil monetary penalties has been and is diminished due to the effect of inflation;

(3) by reducing the impact of civil monetary penalties, inflation has weakened the deterrent effect of such penalties; and

(4) the Federal Government does not maintain comprehensive, detailed accounting of the efforts of Federal agencies to assess and collect civil monetary penalties.

(b) PURPOSE–The purpose of this Act is to establish a mechanism that shall–

(1) allow for regular adjustment for inflation of civil monetary penalties;

(2) maintain the deterrent effect of civil monetary penalties and promote compliance with the law; and

(3) improve the collection by the Federal Government of civil monetary penalties.

DEFINITIONS

SEC. 3. For purposes of this Act, the term–

(1) "agency" means an Executive agency as defined under section 105 of title 5, United States Code, and includes the United States Postal Service;

(2) "civil monetary penalty" means any penalty, fine, or other sanction that–

(A)(i) is for a specific monetary amount as provided by Federal law; or

(ii) has a maximum amount provided for by Federal law; and

(B) is assessed or enforced by an agency pursuant to Federal law; and

(C) is assessed or enforced pursuant to an administrative proceeding or a civil action in the Federal courts; and

(3) "Consumer Price Index" means the Consumer Price Index for

all-urban consumers published by the Department of Labor.

CIVIL MONETARY PENALTY INFLATION ADJUSTMENT REPORTS

SEC. 4. The head of each agency shall, not later than 180 days after the date of enactment of the Debt Collection Improvement Act of 1996, and at least once every 4 years thereafter–

(1) by regulation adjust each civil monetary penalty provided by law within the jurisdiction of the Federal agency, except for any penalty (including any addition to tax and additional amount) under the Internal Revenue Code of 1986, the Tariff Act of 1930, the Occupational Safety and Health Act of 1970, or the Social Security Act, by the inflation adjustment described under section 5 of this Act; and

(2) publish each such regulation in the Federal Register.

COST-OF-LIVING ADJUSTMENTS OF CIVIL MONETARY PENALTIES

SEC. 5. (a) ADJUSTMENT.–The inflation adjustment under section 4 shall be determined by increasing the maximum civil monetary penalty or the range of minimum and maximum civil monetary penalties, as applicable, for each civil monetary penalty by the cost-of-living adjustment. Any increase determined under this subsection shall be rounded to the nearest–

(1) multiple of $10 in the case of penalties less than or equal to $100;

(2) multiple of $100 in the case of penalties greater than $100 but less than or equal to $1,000;

(3) multiple of $1,000 in the case of penalties greater than $1,000 but less than or equal to $10,000;

(4) multiple of $5,000 in the case of penalties greater than $10,000 but less than or equal to $100,000;

(5) multiple of $10,000 in the case of penalties greater than $100,000 but less than or equal to $200,000; and

(6) multiple of $25,000 in the case of penalties greater than $200,000.

(b) DEFINITION.–For purposes of subsection (a), the term "cost-of-living adjustment" means the percentage (if any) for each civil monetary penalty by which–

(1) the Consumer Price Index for the month of June of the calendar year preceding the adjustment, exceeds

(2) the Consumer Price Index for the month of June of the calendar year in which the amount of such civil monetary penalty was last set or adjusted pursuant to law.

ANNUAL REPORT

SEC. 6. Any increase under this Act in a civil monetary penalty shall apply only to violations which occur after the date the increase takes effect.

LIMITATION ON INITIAL ADJUSTMENT.–The first adjustment of a civil monetary penalty . . . may not exceed 10 percent of such penalty.

28 U.S.C. § 2461 note (Supp. V 1999).

7 C.F.R.:

TITLE 7—AGRICULTURE

SUBTITLE A—OFFICE OF THE SECRETARY OF AGRICULTURE

. . . .

PART 3—DEBT MANAGEMENT

. . . .

Subpart E—Adjusted Civil Monetary Penalties

§ 3.91 Adjusted civil monetary penalties.

(a) *In general.* The Secretary will adjust the civil monetary penalties, listed in paragraph (b), to take account of inflation at least once every 4 years as required by the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. No. 101-410), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. No. 104-134).

(b) *Penalties–*

. . . .

(2) *Animal and Plant Health Inspection Service.* . . .

. . . .

(v) Civil penalty for a violation of Animal Welfare Act, codified at 7 U.S.C. 2149(b), has a maximum of $2,750[.]

7 C.F.R. § 3.91(a), (b)(2)(v).

9 C.F.R.:

TITLE 9—ANIMALS AND ANIMAL PRODUCTS

CHAPTER I—ANIMAL AND PLANT HEALTH INSPECTION SERVICE, DEPARTMENT OF AGRICULTURE

SUBCHAPTER A—ANIMAL WELFARE

PART 1—DEFINITION OF TERMS

§ 1.1 Definitions.

For the purposes of this subchapter, unless the context otherwise requires, the following terms shall have the meanings assigned to them in this section. The singular form shall also signify the plural and the masculine form shall also signify the feminine. Words undefined in the following paragraphs shall have the meaning attributed to them in general usage as reflected by definitions in a standard dictionary.

. . . .

Animal means any live or dead dog, cat, nonhuman primate, guinea pig, hamster, rabbit, or any other warmblooded animal, which is being used, or intended for use for research, teaching, testing, experimentation, or exhibition purposes, or as a pet. . . . With respect to a dog, the term means all dogs, including those used for hunting, security, or breeding purposes.

. . . .

Cat means any live or dead cat (Felis catus) or any cat-hybrid cross.

. . . .

Exhibitor means any person (public or private) exhibiting any animals, which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary. This term includes carnivals, circuses,

animal acts, zoos, and educational exhibits, exhibiting such animals whether operated for profit or not. This term excludes retail pet stores, horse and dog races, organizations sponsoring and all persons participating in State and county fairs, livestock shows, rodeos, field trials, coursing events, purebred dog and cat shows and any other fairs or exhibitions intended to advance agricultural arts and sciences as may be determined by the Secretary.

PART 2—REGULATIONS

SUBPART A—LICENSING

. . . .

§ 2.4 Non-interference with APHIS officials.

A licensee or applicant for an initial license shall not interfere with, threaten, abuse (including verbally abuse), or harass any APHIS official in the course of carrying out his or her duties.

SUBPART G–RECORDS

§ 2.75 Records: Dealers and exhibitors.

(a)(1) . . . [E]ach exhibitor shall make, keep, and maintain records or forms which fully and correctly disclose the following information concerning each dog or cat purchased or otherwise acquired, owned, held, or otherwise in his or her possession or under his or her control, or which is transported, euthanized, sold, or otherwise disposed of by that . . . exhibitor. The records shall include any offspring born of any animal while in his or her possession or under his or her control.

(i) The name and address of the person from whom a dog or cat was purchased or otherwise acquired whether or not the person is required to be licensed or registered under the Act;

(ii) The USDA license or registration number of the person if he or she is licensed or registered under the Act;

(iii) The vehicle license number and state, and the driver's license number and state of the person, if he or she is not licensed or registered under the Act;

(iv) The name and address of the person to whom a dog or cat was sold or given and that person's license or registration number if he or she is licensed or registered under the Act;

(v) The date a dog or cat was acquired or disposed of, including by euthanasia;

(vi) The official USDA tag number or tattoo assigned to a dog or cat under §§ 2.50 and 2.54;

(vii) A description of each dog or cat which shall include:

(A) The species and breed or type;

(B) The sex;

(C) The date of birth or approximate age; and

(D) The color and any distinctive markings;

(viii) The method of transportation including the name of the initial carrier or intermediate handler or, if a privately owned vehicle is used to transport a dog or cat, the name of the owner of the privately owned vehicle;

(ix) The date and method of disposition of a dog or cat, e.g., sale, death, euthanasia, or donation.

9 C.F.R. §§ 1.1, 2.4, .75(a)(1).

CONCLUSIONS BY THE JUDICIAL OFFICER ON RECONSIDERATION

Complainant raises one issue in Complainant's Petition for Reconsideration. Complainant seeks reconsideration of the $15,250 civil penalty that I assessed Respondents in *In re Karl Mitchell*, 60 Agric. Dec. 91 (2001), for Respondents' 45 violations of the Animal Welfare Act and the Regulations and Standards. Specifically, Complainant requests that I increase the $15,250 civil penalty assessed against Respondents by 10 percent to $16,775. (Pet. for Recons. at 1-2.) Respondents request that I deny Complainant's Petition for Reconsideration and that I decrease the $15,250 civil penalty that I assessed against Respondents in *In re Karl Mitchell*, 60 Agric. Dec. 91(2001) (Response to Pet. for Recons. at 2, 6). I grant Complainant's request that I increase the civil penalty assessed against Respondents from $15,250 to $16,775; I reject Respondents' requests that I deny Complainant's Petition for Reconsideration and that I decrease the civil penalty assessed against Respondents.

Complainant's Petition for Reconsideration

I agree that the $15,250 civil penalty that I assessed against Respondents in *In re Karl Mitchell*, 60 Agric. Dec. 91___ (June 13, 2001), should be increased by 10 percent to $16,775. Part of the basis for my assessment of a $15,250 civil penalty against Respondents was my erroneous conclusion that the maximum civil penalty that the Secretary of Agriculture could assess Respondents was $2,500 for each of Respondents' 45 violations of the Animal Welfare Act and the Regulations and Standards. Specifically, I concluded that section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) provides that the Secretary of Agriculture may assess a civil penalty of not more than $2,500 for each violation of the Animal Welfare Act and the Regulations and Standards. *In re Karl Mitchell*, 60 Agric. Dec. 91, 131 n.26 (2001). Using the $2,500 per-violation maximum, I stated, as follows:

> I assess: (1) a $2,500 civil penalty for Respondent Karl Mitchell's interference with, threats, abuse, and harassment of Animal and Plant Health Inspection Service officials in willful violation of section 2.4 of the Regulations (9 C.F.R. § 2.4); (2) a $1,250 civil penalty for Respondents' failure on June 29, 2000, to allow Animal and Plant Health Inspection Service officials access to Respondents' facilities, animals, and records in willful violation of section 16(a) of the Animal Welfare Act (7 U.S.C. § 2146(a)) and section 2.4 of the Regulations (9 C.F.R. § 2.4); (3) a $1,000 civil penalty for Respondents' failure on May 16, 2000, to allow Animal and Plant Health Inspection Service officials access to Respondents' records in willful violation of section 16(a) of the Animal Welfare Act (7 U.S.C. § 2146(a)) and section 2.4 of the Regulations (9 C.F.R. § 2.4); and (4) a $10,500 civil penalty for the remaining 42 willful violations of the Animal Welfare Act and the Regulations and Standards.

In re Karl Mitchell, 60 Agric. Dec. 91, 131 n.27 (2001).

While section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) provides that the Secretary of Agriculture may assess a civil penalty of not more than $2,500 for each violation of the Animal Welfare Act and the Regulations and Standards, as I stated in *In re Karl Mitchell*, 60 Agric. Dec. 91, 131 n.26 (2001), I erroneously failed to take into account the regulations issued by the Secretary of Agriculture under the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note (Supp. V 1999)) [hereinafter the Federal Civil Penalties Inflation Adjustment Act] (7 C.F.R. § 3.91).

Sections 4 and 5(a) of the Federal Civil Penalties Inflation Adjustment Act provide that head of each agency shall, by regulation, adjust each civil monetary

penalty provided by law within the jurisdiction of the Federal agency, by increasing the maximum civil monetary penalty for each civil monetary penalty by the "cost-of-living adjustment."[5] Effective September 2, 1997, the Secretary of Agriculture, by regulation, adjusted the civil monetary penalty that may be assessed under section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) for each violation of the Animal Welfare Act and the Regulations and Standards by increasing the maximum civil penalty from $2,500 to $2,750 (62 Fed. Reg. 40,924-28 (July 31, 1997); 7 C.F.R. § 3.91(b)(2)(v)).

Based on this increase in the maximum civil penalty which the Secretary of Agriculture may assess under section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)), I find that Respondents could be assessed a maximum civil penalty of $123,750 for Respondents' 45 violations of the Animal Welfare Act and the Regulations and Standards, which I found in *In re Karl Mitchell*, 60 Agric. Dec. 91 (2001). After examining all the relevant circumstances, in light of the United States Department of Agriculture's sanction policy, and taking into account the factors required to be considered in 7 U.S.C. § 2149(b), the remedial purposes of the Animal Welfare Act, and Complainant's sanction recommendation, all of which are discussed in *In re Karl Mitchell*, 60 Agric. Dec. 91 (2001), I conclude that a cease and desist order, the revocation of Respondents' Animal Welfare Act license, and a $16,775 civil penalty[6] are appropriate and necessary to ensure Respondents' compliance with the Animal Welfare Act and the Regulations and Standards in the future, to deter others from violating the Animal Welfare Act and the Regulations and Standards, and to thereby fulfill the remedial purposes of the Animal Welfare Act.

Respondents' Response to Complainant's Petition for Reconsideration

[5]The term "cost-of-living adjustment" as used in the Federal Civil Penalties Inflation Adjustment Act is defined in section 5(b) of the Federal Civil Penalties Inflation Adjustment Act.

[6]I assess: (1) a $2,750 civil penalty for Respondent Karl Mitchell's interference with, threats, abuse, and harassment of Animal and Plant Health Inspection Service officials in willful violation of section 2.4 of the Regulations (9 C.F.R. § 2.4); (2) a $1,375 civil penalty for Respondents' failure on June 29, 2000, to allow Animal and Plant Health Inspection Service officials access to Respondents' facilities, animals, and records in willful violation of section 16(a) of the Animal Welfare Act (7 U.S.C. § 2146(a)) and section 2.4 of the Regulations (9 C.F.R. § 2.4); (3) a $1,100 civil penalty for Respondents' failure on May 16, 2000, to allow Animal and Plant Health Inspection Service officials access to Respondents' records in willful violation of section 16(a) of the Animal Welfare Act (7 U.S.C. § 2146(a)) and section 2.4 of the Regulations (9 C.F.R. § 2.4); and (4) an $11,550 civil penalty for the remaining 42 willful violations of the Animal Welfare Act and the Regulations and Standards.

Respondents identify six bases for their requests that I deny Complainant's Petition for Reconsideration and that I decrease the $15,250 civil penalty that I assessed against Respondents in *In re Karl Mitchell*, 60 Agric. Dec. 91 (2001). First, Respondents contend that, as a matter of law, they could not have violated section 2.75(a) of the Regulations (9 C.F.R. § 2.75(a)) as alleged in paragraphs 6(c) and 6(d) of the Complaint (Response to Pet. for Recons. at 2).[7]

Complainant alleges in paragraphs 6(c) and 6(d) of the Complaint that on July 24, 2000, Respondents' records of acquisition of animals from Betty Thomas did not contain Ms. Thomas' address and did not contain Ms. Thomas' United States Department of Agriculture license number in willful violation of section 2.75(a) of the Regulations (9 C.F.R. § 2.75(a)). Respondents 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). Thus, Respondents are deemed to have admitted that their records of acquisition of animals from Betty Thomas did not contain Ms. Thomas' address and did not contain Ms. Thomas' United States Department of Agriculture license number in willful violation of section 2.75(a) of the Regulations (9 C.F.R. § 2.75(a)). Respondents correctly state that section 2.75(a) of the Regulations (9 C.F.R. § 2.75(a)) applies only to dogs and cats. Respondents assert that, as a matter of law, their admission that their records pertaining to the acquisition of "animals" did not contain required information cannot be held to be an admission that they violated a regulation that only applies to records concerning dogs and cats. (Response to Pet. for Recons. at 2.)

I disagree with Respondents' contention that their admission that their records pertaining to the acquisition of animals did not contain required information, cannot, as a matter of law, constitute an admission that they violated 9 C.F.R. § 2.75(a). Dogs and cats are animals.[8] Thus, Respondents' admission that their records pertaining to the acquisition of animals did not contain required

[7] In the June 13, 2001, Decision and Order, I found that, as a matter of law, Respondents could not have committed the violations alleged in paragraphs 6(b), 6(d), and 8(i) of the Complaint. *In re Karl Mitchell*, 60 Agric. Dec. 91, 130 n.25 (2001). Respondents correctly point out that my reference to paragraph 6(d) of the Complaint is error and that I should have referenced paragraph 6(e) of the Complaint in *In re Karl Mitchell*, 60 Agric. Dec. 91, 130 n.25 (June 13, 2001) (Response to Pet. for Recons. at 2 n.1).

[8] See the definition of the term "animal" in section 1.1 of the Regulations (9 C.F.R. § 1.1).

information, can, as a matter of law, constitute an admission that they violated the recordkeeping requirements relating to dogs and cats in 9 C.F.R. § 2.75(a). Therefore, I reject Respondents' contention that, as a matter of law, they cannot be deemed to have admitted that they violated section 2.75(a) of the Regulations (9 C.F.R. § 2.75(a)) as alleged in paragraphs 6(c) and 6(d) of the Complaint.

Second, Respondents contend that, as a matter of law, they could not have violated section 2.75(a) of the Regulations (9 C.F.R. § 2.75(a)) as alleged in paragraph 6(a) of the Complaint (Response to Pet. for Recons. at 2-3).

Complainant alleges in paragraph 6(a) of the Complaint that on July 24, 2000, Respondents' records of the purchase of two cats did not contain the purchaser's address in willful violation of section 2.75(a) of the Regulations (9 C.F.R. § 2.75(a)). Respondents correctly state that section 2.75(a) of the Regulations (9 C.F.R. § 2.75(a)) applies only to dogs and cats. Moreover, Respondents correctly state that the only type of cat covered by section 2.75(a) of the Regulations (9 C.F.R. § 2.75(a)) is Felis catus (the domestic house cat).[9] Respondents now contend that they "did not have any domestic cats or dogs, but only exotic animals, lions, tigers and liger 'cats.'" (Response to Pet. for Recons. at 3.) Respondents 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). Respondents' denial that they had domestic house cats, and, assertion that they, therefore, could not have violated 9 C.F.R. § 2.75(a) as alleged in paragraph 6(a) of the Complaint are too late to be considered.

Third, Respondents contend that I erroneously inferred that the word "present" in paragraph 3 of the Complaint refers to the date Complainant issued the Complaint, December 4, 2000. Respondents assert that there are no facts to substantiate how Complainant was aware of any violation after July 24, 2000. Therefore, there is no evidence to support a conclusion that the word "present" in paragraph 3 of the Complaint refers to December 4, 2000 (Response to Pet. for Recons. at 4-5).

Complainant alleges in paragraph 3 of the Complaint that "[o]n several occasions between April 11, 2000, and the present, [R]espondent Karl Mitchell has

[9]See the definition of the term "cat" in section 1.1 of the Regulations (9 C.F.R. § 1.1). See also *State v. Belk*, 150 S.E.2d 481, 484-85 (N.C. 1996); *P.B. v. C.C.*, 647 N.Y.S.2d 732, 735 (N.Y. App. Div. 1996) (Kupferman, J., dissenting); *In re Karl Mitchell*, 60 Agric. Dec. 91, 130 n.25 (2001).

interfered with, threatened, abused and harassed [Animal and Plant Health Inspection Service] officials in the performance of their duties, in willful violation of section 2.4 of the Regulations (9 C.F.R. § 2.4)." I inferred that the word "present" as used in paragraph 3 of the Complaint refers to the date Complainant issued the Complaint, December 4, 2000. *In re Karl Mitchell*, 60 Agric. Dec. 91, 128 n.22 (2001).

I agree with Respondents that there is no "evidence" to support a conclusion that the word "present" in paragraph 3 of the Complaint refers to December 4, 2000. Moreover, I find Complainant's use of the word "present" in paragraph 3 of the Complaint troubling because of its inexactitude.[10] However, generally, when the drafter of a document uses the word "present" in the context in which it is used in paragraph 3 of the Complaint, the drafter is referring to the time the document is issued. Based on the limited record before me, I find no basis on which to infer that Complainant intended the word "present" in paragraph 3 of the Complaint to refer to July 24, 2000, as Respondents suggest, or to refer to any date other than the date Complainant issued the Complaint. Therefore, I reject Respondents' contention that I erroneously inferred that the word "present" in paragraph 3 of the Complaint refers to the date Complainant issued the Complaint.

Moreover, even if I were to infer that the word "present" in paragraph 3 of the Complaint refers to July 24, 2000, as Respondents suggest, that inference would not cause me to decrease the amount of the civil penalty which I assess against Respondents. Having failed to file a timely answer, Respondents are deemed to have admitted that on several occasions Respondent Karl Mitchell interfered with, threatened, abused, and harassed Animal and Plant Health Inspection Service officials in the performance of their duties, in willful violation of section 2.4 of the Regulations (9 C.F.R. § 2.4). Respondents' multiple violations of 9 C.F.R. § 2.4 fully warrant the civil penalty which I assess against Respondents, whether the violations occurred between April 11, 2000, and July 24, 2000, or between April 11, 2000, and December 4, 2000.

Fourth, Respondents contend that on May 16, 2000, "Respondent Karl Mitchell was not present on the premises"; therefore, Respondents could not have violated section 16(a) of the Animal Welfare Act (7 U.S.C. § 2146(a)) and section 2.4 of the Regulations (9 C.F.R. § 2.4) as alleged in paragraph 5 of the Complaint (Response to Pet. for Recons. at 4).

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[10]Notwithstanding Complainant's troubling use of the word "present" in paragraph 3 of the Complaint, as discussed in *In re Karl Mitchell*, 60 Agric. Dec. 91, 114-16 (2001), I find the Complaint provides Respondents with adequate notice of the facts and provisions of law that constitute the basis for the proceeding and the issues in controversy.

Complainant alleges in paragraph 5 of the Complaint that on May 16, 2000, Respondents failed to allow Animal and Plant Health Inspection Service officials to examine the records that Respondents are required to maintain under the Animal Welfare Act and the Regulations, in willful violation of section 16(a) of the Animal Welfare Act (7 U.S.C. § 2146(a)) and section 2.4 of the Regulations (9 C.F.R. § 2.4). Respondents 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). Thus, Respondents are deemed to have admitted that on May 16, 2000, Respondents failed to allow Animal and Plant Health Inspection Service officials to examine the records that Respondents are required to maintain under the Animal Welfare Act and the Regulations, in willful violation of section 16(a) of the Animal Welfare Act (7 U.S.C. § 2146(a)) and section 2.4 of the Regulations (9 C.F.R. § 2.4). Respondents' assertion that Respondent Karl Mitchell was not on the premises on May 16, 2000, is too late to be considered.

Fifth, Respondents contend that, based on the limited record, I cannot assess the gravity of Respondents' violations, Respondents' good faith or lack of good faith, or the willfulness of Respondents' violations (Response to Pet. for Recons. at 5-6).

As discussed in the June 13, 2001, Decision and Order, the gravity of Respondents' violations and Respondents' lack of good faith are revealed by the number and type of Respondents' violations. *In re Karl Mitchell*, 60 Agric. Dec. 91, 128-32 (2001). Moreover, Complainant alleges that each of Respondents' violations was willful (Compl. ¶¶ 3-12). Respondents 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. Therefore, Respondents are deemed to have admitted that each of their violations was a willful violation. Respondents' denial that their violations were willful is too late to be considered.

Sixth, Respondents assert that the nature of the Animal and Plant Health Inspection Service inspections would cause one to question the motives of the Animal and Plant Health Inspection Service inspectors (Response to Pet. for Recons. at 5-6).

The record contains no evidence regarding the motivation of the Animal and Plant Health Inspection Service inspectors who inspected or attempted to inspect

Respondents' facilities, animals, and records. In the absence of clear evidence to the contrary, public officers are presumed to have properly discharged their official duties.[11] Therefore, I presume that these Animal and Plant Health Inspection

[11] *See United States v. Mezzanatto*, 513 U.S. 196, 210 (1995) (stating the fact that there is potential for abuse of prosecutorial bargaining power is an insufficient basis for foreclosing plea negotiation; the great majority of prosecutors are faithful to their duties and absent clear evidence to the contrary, courts presume that public officers properly discharge their duties); *INS v. Miranda,* 459 U.S. 14, 18 (1982) (per curiam) (stating although the length of time to process the application is long, absent evidence to the contrary, the court cannot find that the delay was unwarranted); *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926) (stating a presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume they have properly discharged their official duties); *Sunday Lake Iron Co. v. Wakefield TP,* 247 U.S. 350, 353 (1918) (stating the good faith of taxing officers and the validity of their actions are presumed; when assailed, the burden of proof is on the complaining party); *Chaney v. United States*, 406 F.2d 809, 813 (5th Cir.) (stating the presumption that the local selective service board considered the appellant's request for reopening in accordance with 32 C.F.R. § 1625.2 is a strong presumption that is only overcome by clear and convincing evidence), *cert. denied*, 396 U.S. 867 (1969); *Lawson Milk Co. v. Freeman*, 358 F.2d 647, 649 (6th Cir. 1966) (stating without a showing that the action of the Secretary of Agriculture was arbitrary, his action is presumed to be valid); *Donaldson v. United States*, 264 F.2d 804, 807 (6th Cir. 1959) (stating the presumption of regularity supports official acts of public officers and in the absence of clear evidence to the contrary, courts presume they have properly discharged their duties); *Panno v. United States*, 203 F.2d 504, 509 (9th Cir. 1953) (stating a presumption of regularity attaches to official acts of the Secretary of Agriculture in the exercise of his congressionally delegated duties); *Reines v. Woods*, 192 F.2d 83, 85 (Emer. Ct. App. 1951) (stating the presumption of regularity which attaches to official acts can be overcome only by clear evidence to the contrary); *NLRB v. Bibb Mfg. Co.*, 188 F.2d 825, 827 (5th Cir. 1951) (holding duly appointed police officers are presumed to discharge their duties lawfully and that presumption may only be overcome by clear and convincing evidence); *Woods v. Tate*, 171 F.2d 511, 513 (5th Cir. 1948) (concluding an order of the Acting Rent Director, Office of Price Administration, is presumably valid and genuine in the absence of proof or testimony to the contrary); *Pasadena Research Laboratories, Inc. v. United States*, 169 F.2d 375, 381-82 (9th Cir.) (stating the presumption of regularity applies to methods used by government chemists and analysts and to the care and absence of tampering on the part of postal employees), *cert. denied*, 335 U.S. 853 (1948); *Laughlin v. Cummings*, 105 F.2d 71, 73 (D.C. Cir. 1939) (stating there is a strong presumption that public officers exercise their duties in accordance with law); *In re Greenville Packing Co.*, 59 Agric. Dec. 194, 220-22 (2000) (stating that, in the absence of evidence to the contrary, Food Safety and Inspection Service inspectors are presumed to have properly issued process deficiency records), *appeal docketed*, No. 00-CV-1054 (N.D.N.Y. July 5, 2000); *In re Dwight L. Lane*, 59 Agric. Dec. 148, 177-78 (2000) (stating that a United States Department of Agriculture hearing officer is presumed to have adequately reviewed the record and no inference is drawn from an erroneous decision that the hearing officer failed to properly discharge his official duty to review the record), *aff'd*, A2-00-84 (D.N.D. July 18, 2001); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 280-82 (1998) (stating that, in the absence of clear evidence to the contrary, United States Department of Agriculture inspectors and investigators are presumed to have properly discharged their duty to document violations of the Animal Welfare Act); *In re Auvil Fruit Co.*, 56 Agric. Dec. 1045, 1079 (1997) (stating without a showing that the official acts of the Secretary of Agriculture are arbitrary, his actions are presumed

(continued...)

Service inspectors were only motivated by the desire to properly discharge their official duties, and I reject Respondents' suggestion that these Animal and Plant Health Inspection Service inspectors had other motivations.

For the foregoing reasons, Complainant's Petition for Reconsideration is granted.

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.[12]

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[11](...continued)
to be valid); *In re Kim Bennett*, 55 Agric. Dec. 176, 210-11 (1996) (stating that instead of presuming United States Department of Agriculture attorneys and investigators warped the viewpoint of United States Department of Agriculture veterinary medical officers, the court should have presumed that training of United States Department of Agriculture veterinary medical officers was proper because there is a presumption of regularity with respect to official acts of public officers); *In re C.I. Ferrie*, 54 Agric. Dec. 1033, 1053 (1995) (stating use of United States Department of Agriculture employees in connection with a referendum on the continuance of the Dairy Promotion and Research Order does not taint the referendum process, even if petitioners show some United States Department of Agriculture employees would lose their jobs upon defeat of the Dairy Promotion and Research Order, because a presumption of regularity exists with respect to official acts of public officers); *In re Mil-Key Farm, Inc.*, 54 Agric. Dec. 26, 55 (1995) (stating without a showing that the official acts of the Secretary of Agriculture are arbitrary, his actions are presumed to be valid); *In re Hershey Chocolate U.S.A.*, 53 Agric. Dec. 17, 55 (1994) (stating without a showing that the official acts of the Secretary are arbitrary, his actions are presumed to be valid), *aff'd*, No. 1:CV-94-945 (M.D. Pa. Feb. 3, 1995); *In re King Meat Co.*, 40 Agric. Dec. 1468, 1494 (1981) (stating there is a presumption of regularity with respect to the issuance of instructions as to grading methods and procedures by the Chief of the Meat Grading Branch, Food Safety and Quality Service, United States Department of Agriculture), *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); *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1361 (1978) (rejecting respondent's theory that United States Department of Agriculture shell egg graders switched cases of eggs to discredit respondent, in view of the presumption of regularity supporting acts of public officials), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980).

[12]*In re Rafael Dominguez*, 60 Agric. Dec. 210, 217 (2001) (Order Denying Pet. for Recons.); *In re William J. Reinhart*, 60 Agric. Dec. 241, 263 (2001) (Order Denying William J. Reinhart's Pet. for Recons.); *In re Reginald Dwight Parr*, 59 Agric. Dec. 629, 647 (2000) (Order Denying Respondent's Pet. for Recons.); *In re Mangos Plus, Inc.*, 59 Agric. Dec. 883, 890 (2000) (Order Denying Pet. for Recons.); *In re Kirby Produce Co.*, 58 Agric. Dec. 1032, 1040 (1999) (Order Denying Pet. for Recons.); *In re James E. Stephens*, 58 Agric. Dec. 201, 209 (1999) (Order Denying Pet. for Recons.); *In re Michael Norinsberg*, 58 Agric. Dec. 619, 625 (1999) (Order Denying Pet. for Recons. on Remand); *In re Sweck's, Inc.*, 58 Agric. Dec. 222, 227 (1999) (Order Denying Pet. for Recons.); *In re Produce Distributors, Inc.*, 58 Agric. Dec. 535, 540-41 (1999) (Order Denying Pet. for Recons. as to Irene T. (continued...)

Complainant's Petition for Reconsideration was timely filed and automatically stayed the June 13, 2001, Decision and Order. Since Complainant's Petition for Reconsideration is granted, the Order in the Decision and Order issued June 13, 2001, is not reinstated.

For the foregoing reasons and the reasons in *In re Karl Mitchell*, 60 Agric. Dec. 91 (2001), the following Order should be issued.

ORDER

1. Respondents, their agents, employees, successors, and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards. The cease and desist provisions of this Order shall become effective on the day after service of this Order on Respondents.

2. Respondents are jointly and severally assessed a $16,775 civil penalty. The civil penalty shall be paid by certified check or money order, made payable to the Treasurer of the United States. Respondents shall send the certified check or money order to:

Colleen A. Carroll
United States Department of Agriculture

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[12](...continued)
Russo, d/b/a Jay Brokers); *In re Judie Hansen*, 58 Agric. Dec. 369, 387 (1999) (Order Denying Pet. for Recons.); *In re Daniel E. Murray*, 58 Agric. Dec. 77, 83 (1999) (Order Denying Pet. for Recons.); *In re David M. Zimmerman*, 58 Agric. Dec. 336, 338-39 (1999) (Order Denying Pet. for Recons.); *In re C.C. Baird*, 57 Agric. Dec. 1284, 1299 (1998) (Order Denying in Part and Granting in Part Pet. for Recons.); *In re JSG Trading Corp.*, 57 Agric. Dec. 710, 729 (1998) (Order Denying Pet. for Recons. as to JSG Trading Corp.); *In re Peter A. Lang*, 57 Agric. Dec. 91, 110 (1998) (Order Denying Pet. for Recons.); *In re Jerry Goetz*, 57 Agric. Dec. 426, 444 (1998) (Order Denying Respondent's Pet. for Recons. and Denying in Part and Granting in Part Complainant's Pet. for Recons.); *In re Allred's Produce*, 57 Agric. Dec. 799, 801-02 (1998) (Order Denying Pet. for Recons.); *In re Michael Norinsberg*, 57 Agric. Dec. 791, 797 (1998) (Order Denying Pet. for Recons.); *In re Tolar Farms*, 57 Agric. Dec. 775, 789 (1998) (Order Denying Pet. for Recons.); *In re Samuel Zimmerman*, 56 Agric. Dec. 1458, 1467 (1997) (Order Denying Pet. for Recons.); *In re Kanowitz Fruit & Produce Co.*, 56 Agric. Dec. 942, 957 (1997) (Order Denying Pet. for Recons.); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 269, 275 (1997) (Order Denying Pet. for Recons.); *In re City of Orange*, 56 Agric. Dec. 370, 371 (1997) (Order Granting Request to Withdraw Pet. for Recons.); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 898, 901 (1997) (Order Denying Pet. for Recons.); *In re Havana Potatoes of New York Corp.*, 56 Agric. Dec. 1017, 1028 (1997) (Order Denying Pet. for Recons.); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 101 (1997) (Order Denying Pet. for Recons.); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1234 (1996) (Order Denying Pet. for Recons.).

Office of the General Counsel
Marketing Division
1400 Independence Avenue, SW
Room 2343-South Building
Washington, DC 20250-1417

The certified check or money order shall be sent to, and received by, Ms. Carroll within 60 days after service of this Order on Respondents. Respondents shall state on the certified check or money order that payment is in reference to AWA Docket No. 01-0016.

3. Respondents' Animal Welfare Act license (Animal Welfare Act license number 88-C-0076) is revoked. The Animal Welfare Act license revocation provisions of this Order shall become effective on the 60th day after service of this Order on Respondents.

4. Respondents have the right to seek judicial review of this Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341, 2343-2350. Such court has exclusive jurisdiction to enjoin, to set aside, to suspend (in whole or in part), or to determine the validity of this Order. Respondents must seek judicial review within 60 days after entry of this Order. 7 U.S.C. § 2149(c). The date of entry of this Order is August 8, 2001.

In re: DIANA DALTON.
AWA Docket No. 00-0010.
Dismissal Order.
Filed November 8, 2001.

Motion to Dismiss

Robert A. Ertman, for Complainant
Respondent, Pro se.
Order issued by Dorothea A. Baker, Administrative Law Judge.

Upon motion of the Complainant and for good cause shown, the complaints in the matter are dismissed, without prejudice.

In re: VILLAGE WHOLESALE, INC. , AND FRANCIS ENGLERT, JR.
AWA DOCKET NO. 00-0012.
Dismissal Order
Filed November 8, 2001.

Motion to Dismiss

Robert A. Ertman, for Complainant
Respondent, Pro se
Order issued by Dorothea A. Baker, Administrative Law Judge.

Upon motion of the Complainant and for good cause shown, the complaints in the matter are dismissed, without prejudice.

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In re: DALE GOODALE.
AWA Docket No. 01-0006.
Remand Order.
Filed December 11, 2001.

Animal welfare – Dealer – Remand.

The Judicial Officer vacated Chief Administrative Law Judge James W. Hunt's (Chief ALJ) default decision and remanded the proceeding to the Chief ALJ to give Respondent a hearing.

Brian Thomas Hill, for Complainant.
Respondent, Pro se.
Initial decision issued by James W. Hunt, Chief Administrative Law Judge.
Remand Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a "Complaint" on October 23, 2000. Complainant instituted the proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-2.133) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges that: (1) on or about September 6, 1997, and continuing through July 25, 1999, Dale Goodale [hereinafter Respondent] operated as a dealer as defined in the Animal Welfare Act and the Regulations without being licensed, in willful violation of section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1)); (2) Respondent sold, in commerce, at least 194 dogs for resale for use as pets; and (3) the sale of each animal constitutes a violation (Compl. ¶ IIC).

The Hearing Clerk served Respondent with the Complaint, the Rules of Practice, and a service letter on October 28, 2000.[1] Respondent failed to answer the Complaint within 20 days after service as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)).[2] On November 22, 2000, the Hearing Clerk sent a letter to Respondent informing him that his answer to the Complaint had not been received within the time required in the Rules of Practice.[3]

On March 14, 2001, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a "Motion for Adoption of Proposed Decision and Order" [hereinafter Motion for Default Decision] and a "Proposed Decision and Order Upon Admission of Facts by Reason of Default" [hereinafter Proposed Default Decision]. Complainant's Proposed Default Decision includes a proposed finding that Respondent, "at all times material herein, was licensed and operating as a dealer as defined in the Act and the regulations" and an apparently inconsistent proposed finding that "[o]n or about September 6, 1997, and continuing through July 25, 1999, respondent operated as a dealer as defined in the Act and the regulations, without being licensed, in willful violation of section 2.1(a)(1) of the regulations (9 C.F.R. § 2.1(a)(1))" (Proposed Default Decision at third unnumbered page). Complainant does not explain these apparently inconsistent proposed findings in any filing in this proceeding. Moreover, Complainant's Proposed Default Decision includes a perplexing proposed order which states "Respondent is disqualified from obtaining a license is suspended for a period of one year" (Proposed Default Decision at fourth unnumbered page).

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[1]United States Postal Service Domestic Return Receipt for Article Number P368327607.

[2]Respondent contends he filed a timely answer to the Complaint. The record contains a copy of a letter, dated November 14, 2000, from Respondent, which Respondent contends is his timely-filed answer. (Respondent's Objection to the Proposed Decision and Order; Respondent's letter filed October 15, 2001 [hereinafter Appeal Petition].) Section 1.147(g) of the Rules of Practice (7 C.F.R. § 1.147(g)) provides that the effective date of filing an answer is the date the answer reaches the Hearing Clerk. The record contains nothing which indicates Respondent's November 14, 2000, letter reached the Hearing Clerk within 20 days after the Hearing Clerk served Respondent with the Complaint. Therefore, I find Respondent's answer was not timely filed.

[3]Letter dated November 22, 2000, from Joyce A. Dawson, Hearing Clerk, to Dale Goodale.

On April 9, 2001, Darrell J. Isaacson of Mason City, Iowa, entered an appearance on behalf of Respondent and filed "Respondent's Objection to the Proposed Decision and Order" and a copy of a letter dated November 14, 2000, which Respondent contends is his timely-filed answer to the Complaint.

On August 24, 2001, Chief Administrative Law Judge James W. Hunt [hereinafter the Chief ALJ] issued an "Order to Show Cause" directing the parties to show cause, by September 24, 2001, why Respondent's November 14, 2000, letter should not be considered timely filed and, if not timely filed, whether there was good cause for Respondent's answer not being timely filed. On September 14, 2001, Complainant filed "Memorandum to Show Cause" stating that Complainant's Proposed Default Decision should be adopted and Respondent's Objection to the Proposed Decision and Order should be denied. Respondent did not file any response to the Chief ALJ's Order to Show Cause, and on September 26, 2001, the Chief ALJ issued an "Order Denying Respondent's Objections to Complainant's Proposed Decision and Order."

On September 26, 2001, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the Chief ALJ issued a "Decision and Order Upon Admission of Facts By Reason of Default" [hereinafter Initial Decision and Order]: (1) finding that "[t]he respondent, at all times material herein, was licensed and operating as a dealer as defined in the Act and the regulations[;]" (2) finding that "[o]n or about September 6, 1997, and continuing through July 25, 1999, respondent operated as a dealer as defined in the Act and the regulations, without being licensed, in willful violation of section 2.1(a)(1) of the regulations (9 C.F.R. § 2.1(a)(1))[;]" (3) finding that Respondent sold, in commerce, at least 194 dogs for resale for use as pets and that the sale of each animal constitutes a separate violation; (4) directing Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards;[4] (5) assessing Respondent a $67,500 civil penalty; and (6) stating that "Respondent is disqualified from obtaining a license is suspended for a period of one year" (Initial Decision and Order at second and third unnumbered pages). The Chief ALJ does not explain the apparently inconsistent findings that Respondent had an Animal Welfare Act license at all times material to this proceeding and that on or about September 6, 1997, and continuing through July 25, 1999, Respondent operated as a dealer as defined in the Animal Welfare Act and the Regulations, without being licensed, in willful violation of section

[4]The Chief ALJ's reference to the "Standards" is a reference to the standards issued under the Animal Welfare Act (9 C.F.R. §§ 3.1-.142) [hereinafter the Standards]. Complainant did not allege that Respondent violated the Standards and the Chief ALJ did not conclude that Respondent violated the Standards.

2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1)). Moreover, the Chief ALJ does not explain what I find to be a perplexing statement in his Order: "Respondent is disqualified from obtaining a license is suspended for a period of one year[.]"

On October 15, 2001, Respondent appealed to, and requested oral argument before, the Judicial Officer.[5] Complainant failed to file a timely response to Respondent's Appeal Petition, and on December 7, 2001, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a ruling on Respondent's request for oral argument and a decision.

Respondent's request for oral argument before the Judicial Officer, which the Judicial Officer may grant, refuse, or limit,[6] is refused because I vacate the Chief ALJ's Initial Decision and Order and remand this proceeding to the Chief ALJ for further proceedings. Therefore, oral argument before the Judicial Officer at this point in the proceeding would be premature and would appear to serve no useful purpose.

BASIS FOR REMAND ORDER

Based upon a careful consideration of the record, the Chief ALJ's Initial Decision and Order is vacated and the proceeding is remanded to the Chief ALJ to issue a decision and order on remand. Generally, there is no basis for setting aside a default decision based on a respondent's failure to file a timely answer.[7]

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[5]Respondent states that Darrell J. Isaacson no longer represents him and that he is proceeding pro se (Appeal Pet. at 1).

[6]7 C.F.R. § 1.145(d).

[7]*See generally In re Beth Lutz*, 60 Agric. Dec. 53 (2001) (holding the default decision was properly issued where the respondent filed her answer 23 days after she was served with the complaint and 3 days after the respondent's answer was due and holding the respondent is deemed, by her failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations alleged in the complaint); *In re Curtis G. Foley*, 59 Agric. Dec. 581 (2000) (holding the default decision was properly issued where the respondents filed their answer 6 months and 5 days after they were served with the complaint and 5 months and 16 days after the respondents' answer was due and holding the respondents are deemed, by their failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re Nancy M. Kutz* (Decision as to Nancy M. Kutz), 58 Agric. Dec. 744 (1999) (holding the default decision was properly issued where the respondent's first filing in the proceeding was 28 days after service of the complaint on the respondent and the filing did not respond to the allegations of the complaint and holding the respondent is deemed, by her failure to file a timely answer and by her failure to deny the allegations of the complaint, to have admitted the violations of the Animal Welfare Act and the Regulations alleged
(continued...)

[7](...continued)
in the complaint); *In re Anna Mae Noell*, 58 Agric. Dec. 130 (1999) (holding the default decision was properly issued where the respondents filed an answer 49 days after service of the complaint on the respondents and holding the respondents are deemed, by their failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint), *appeal dismissed sub nom. The Chimp Farm, Inc. v. United States Dep't of Agric.*, No. 00-10608-A (11th Cir. July 20, 2000); *In re Jack D. Stowers*, 57 Agric. Dec. 944 (1998) (holding the default decision was properly issued where the respondent filed his answer 1 year and 12 days after service of the complaint on the respondent and holding the respondent is deemed, by his failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re James J. Everhart*, 56 Agric. Dec. 1400 (1997) (holding the default decision was properly issued where the respondent's first filing was more than 8 months after service of the complaint on the respondent and holding the respondent is deemed, by his failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations alleged in the complaint); *In re John Walker*, 56 Agric. Dec. 350 (1997) (holding the default decision was properly issued where the respondent's first filing was 126 days after service of the complaint on the respondent and holding the respondent is deemed, by his failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re Mary Meyers*, 56 Agric. Dec. 322 (1997) (holding the default decision was properly issued where the respondent's first filing was 117 days after the respondent's answer was due and holding the respondent is deemed, by her failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re Dora Hampton*, 56 Agric. Dec. 301 (1997) (holding the default decision was properly issued where the respondent's first filing was 135 days after the respondent's answer was due and holding the respondent is deemed, by her failure to file a timely answer, to have admitted the violations of the Regulations and Standards alleged in the complaint); *In re City of Orange*, 55 Agric. Dec. 1081 (1996) (holding the default decision was properly issued where the respondent's first filing was 70 days after the respondent's answer was due and holding the respondent is deemed, by its failure to file a timely answer, to have admitted the violations of the Regulations and Standards alleged in the complaint); *In re Ronald DeBruin*, 54 Agric. Dec. 876 (1995) (holding the default decision was properly issued where the respondent failed to file an answer and holding the respondent is deemed, by his failure to file an answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re James Joseph Hickey, Jr.*, 53 Agric. Dec. 1087 (1994) (holding the default decision was properly issued where the respondent failed to file an answer and holding the respondent is deemed, by his failure to file an answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged the complaint); *In re Ron Morrow*, 53 Agric. Dec. 144 (1994) (holding the default decision was properly issued where the respondent was given an extension of time until March 22, 1994, to file an answer, but it was not received until March 25, 1994, and holding the respondent is deemed, by his failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint), *aff'd per curiam*, 65 F.3d 168 (Table), 1995 WL 523336 (6th Cir. 1995); *In re Dean Daul*, 45 Agric. Dec. 556 (1986) (holding the default decision was properly issued where the respondent failed to file a timely answer and, in his late answer, did not deny the material allegations of the complaint and holding the respondent is deemed, by his failure to file a timely answer and by his failure to deny the allegations in the complaint in his late answer, to have admitted the violations of the Animal Welfare Act and the Regulations alleged in the complaint); *In re Ronald Jacobson*, 43 Agric. Dec. 780 (1984) (holding the
(continued...)

However, on rare occasions, default decisions are set aside.[8] I set aside the Chief ALJ's Initial Decision and Order and remand this proceeding to the Chief ALJ for two reasons.

First, Complainant proposed and the Chief ALJ adopted apparently inconsistent findings of a dispositive fact. Complainant takes the apparently inconsistent position and the Chief ALJ made the apparently inconsistent findings that Respondent had an Animal Welfare Act license and did not have an Animal Welfare Act license at all times material to this proceeding. Based on the limited record before me, it appears that, if Respondent had an Animal Welfare Act licence at all times material to this proceeding, the Complaint should be dismissed. On the other hand, again based on the limited record before me, it appears that, if

[7](...continued)
default decision was properly issued where the respondents failed to file a timely answer and holding the respondents are deemed, by their failure to file a timely answer, to have admitted the violations of the Standards alleged in the complaint); *In re Willard Lambert*, 43 Agric. Dec. 46 (1984) (holding the default decision was properly issued where the respondent failed to file an answer and holding the respondent is deemed, by his failure to file an answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re Randy & Mary Berhow*, 42 Agric. Dec. 764 (1983) (holding the default decision was properly issued where the respondents failed to file an answer and holding the respondents are deemed, by their failure to file an answer, to have admitted the violations of the Standards alleged in the complaint).

[8]*See In re Deora Sewnanan*, 60 Agric. Dec. ___ (Nov. 9, 2001) (setting aside the default decision because the respondent was not served with the complaint); *In re H. Schnell & Co.*, 57 Agric. Dec. 1722 (1998) (Remand Order) (setting aside the default decision, which was based upon the respondent's statements during two telephone conference calls with the administrative law judge and the complainant's counsel, because the respondent's statements did not constitute a clear admission of the material allegations in the complaint and concluding that the default decision deprived the respondent of its right to due process under the Fifth Amendment to the Constitution of the United States); *In re Arizona Livestock Auction, Inc.*, 55 Agric. Dec. 1121 (1996) (setting aside the default decision because facts alleged in the complaint and deemed admitted by failure to answer were not sufficient to find a violation of the Packers and Stockyards Act or jurisdiction over the matter by the Secretary of Agriculture); *In re Veg-Pro Distributors*, 42 Agric. Dec. 273 (1983) (Remand Order) (setting aside the default decision because service of the complaint by registered and regular mail was returned as undeliverable, and the respondent's license under the PACA had lapsed before service was attempted), *final decision*, 42 Agric. Dec. 1173 (1983); *In re Vaughn Gallop*, 40 Agric. Dec. 217 (1981) (Order Vacating Default Decision and Remanding Proceeding) (vacating the default decision and remanding the case to the administrative law judge to determine whether just cause exists for permitting late answer), *final decision*, 40 Agric. Dec. 1254 (1981); *In re J. Fleishman & Co.*, 38 Agric. Dec. 789 (1978) (Remand Order) (remanding the proceeding to the administrative law judge for the purpose of receiving evidence because the complainant had no objection to the respondent's motion for remand), *final decision*, 37 Agric. Dec. 1175 (1978); *In re Richard Cain*, 17 Agric. Dec. 985 (1958) (Order Reopening After Default) (setting aside a default decision and accepting a late-filed answer because the complainant did not object to the respondent's motion to reopen after default).

Respondent did not have an Animal Welfare Act license at all times material to this proceeding, Respondent has violated section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1)) as alleged in the Complaint. Based on the limited record before me, I am unable to reconcile Complainant's apparently inconsistent proposed findings of fact, which the Chief ALJ adopted. Under these circumstances, I find good cause to provide Respondent with a hearing as he has requested (Respondent's Objection to the Proposed Decision and Order at second unnumbered page). A hearing would provide the opportunity to develop a complete record which should clarify the apparently inconsistent dispositive findings proposed by Complainant and adopted by the Chief ALJ.

Second, I set aside the Chief ALJ's Initial Decision and Order because Complainant's proposed order, which the Chief ALJ's adopted, is not clear to me. Specifically, neither Complainant nor the Chief ALJ explains what I find to be a perplexing statement in Complainant's proposed order and the Chief ALJ's Order: "Respondent is disqualified from obtaining a license is suspended for a period of one year" (Proposed Default Decision at fourth unnumbered page; Initial Decision and Order at third unnumbered page).

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

ORDER

The Chief ALJ's Initial Decision and Order is vacated and the proceeding is remanded to the Chief ALJ for further proceedings in accordance with the Rules of Practice.

Respondent may appeal any decision on remand issued by the Chief ALJ by filing an appeal petition in accordance with section 1.145(a) of the Rules of Practice (7 C.F.R. § 1.145(a)).

In re: PAUL EUGENIO, d/b/a REPXOTICS, INC.
AWA Docket No. 00-0027.
Order Denying Late Appeal.
Filed December 21, 2001.

Late appeal – Jurisdiction.

The Judicial Officer denied Respondent's late-filed appeal. The Judicial Officer stated that he has no jurisdiction to consider Respondent's appeal filed after Administrative Law Judge Dorothea A. Baker's Decision and Order Upon Admission of Facts By Reason of Default became final.

Brian T. Hill, for Complainant.
Respondent, Pro se.
Initial decision issued by Dorothea A. Baker, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

Bobby R. Acord, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a "Complaint" on April 12, 2000. Complainant instituted the proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-2.133) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges that: (1) from August 14, 1998, through July 26, 1999, Paul Eugenio, d/b/a Repxotics, Inc. [hereinafter Respondent], operated as a dealer as defined in the Animal Welfare Act and the Regulations without being licensed, in willful violation of section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and subsection 2.1 of the Regulations (9 C.F.R. § 2.1);[1] (2) Respondent sold, in commerce, $61,822.30 worth of small mammals on at least 861 occasions; and (3) the Animal and Plant Health Inspection Service inspected Respondent's premises and found that from August 14, 1998, through July 26, 1999, Respondent 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) (Compl. ¶¶ II, III).

The Hearing Clerk served Respondent with the Complaint, the Rules of Practice, and a service letter. Respondent failed to answer the Complaint within 20 days after service, as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)).

On October 5, 2000, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a "Motion for Adoption of Proposed Decision and Order" [hereinafter Motion for Default Decision] and a "Proposed Decision and Order Upon Admission of Facts By Reason of Default" [hereinafter Proposed Default Decision]. On November 29, 2000, Respondent filed objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision.

[1]Complainant erroneously refers to section 2.1 of the Regulations as "subsection" 2.1 of the Regulations (Compl. ¶ II). I find this incorrect reference harmless error.

On August 2, 2001, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Administrative Law Judge Dorothea A. Baker [hereinafter the ALJ] issued a "Decision and Order Upon Admission of Facts By Reason of Default" [hereinafter Initial Decision and Order]: (1) finding that from August 14, 1998, through July 26, 1999, the Animal and Plant Health Inspection Service found that Respondent had operated as a dealer when he sold, in commerce, $61,822.30 worth of small mammals, which covered at least 861 occasions, in willful violation of section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and subsection 2.1 of the Regulations (9 C.F.R. § 2.1);[2] (2) finding that from August 14, 1998, through July 26, 1999, the Animal and Plant Health Inspection Service found 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 willful violation of section 2.40 of the Regulations (9 C.F.R. § 2.40); (3) directing Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and "standards issued thereunder";[3] (4) assessing Respondent a $50,000 civil penalty; and (5) prohibiting Respondent from obtaining an Animal Welfare Act license for 2 years.

On October 11, 2001, Respondent appealed to the Judicial Officer. On December 18, 2001, Complainant filed "Objections to Respondent's Appeal." On December 19, 2001, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

The record establishes that the Hearing Clerk served Respondent with the Initial Decision and Order on August 17, 2001.[4] Section 1.145(a) of the Rules of Practice provides the time for appealing an administrative law judge's decision, as follows:

§ 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

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[2] The ALJ erroneously refers to section 2.1 of the Regulations as "subsection" 2.1 of the Regulations (Initial Decision and Order at second unnumbered page). I find this incorrect reference harmless error.

[3] The ALJ's reference to "standards issued thereunder" is a reference to the standards issued under the Animal Welfare Act (9 C.F.R. §§ 3.1-.142). Complainant did not allege and the ALJ did not find that Respondent violated the standards issued under the Animal Welfare Act.

[4] Domestic Return Receipt for Article Number 7099 3400 0014 4579 4035.

Judicial Officer by filing an appeal petition with the Hearing Clerk.

7 C.F.R. § 1.145(a).

Therefore, Respondent's appeal petition was required to be filed with the Hearing Clerk no later than September 17, 2001.[5] However, Respondent timely requested an extension of time in which to file an appeal petition.[6] On September 18, 2001, I granted Respondent's request for an extension of time by extending the time for filing Respondent's appeal petition to October 9, 2001.[7] On October 11, 2001, Respondent filed with the Hearing Clerk an appeal petition dated October 11, 2001. Respondent acknowledges in the appeal petition that the appeal petition is 2 days late, but states that he filed the appeal petition late because he "did not know what to do."

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 an initial

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[5]Thirty days after August 17, 2001, was September 16, 2001. However, September 16, 2001, was a Sunday, and section 1.147(h) of the Rules of Practice provides that when the time for filing expires on a Sunday, the time for filing shall be extended to the next business day, as follows:

> **§ 1.147 Filing; service; extensions of time; and computation of time.**
>
> . . . .
>
> (h) *Computation of time.* Saturdays, Sundays and Federal holidays shall be included in computing the time allowed for the filing of any document or paper: *Provided*, That, when such time expires on a Saturday, Sunday, or Federal holiday, such period shall be extened [sic] to include the next following business day.

7 C.F.R. § 1.147(h).

The next business day after Sunday, September 16, 2001, was Monday, September 17, 2001. Therefore, prior to my granting Respondent's September 17, 2001, request for an extension of time, Respondent was required to file his appeal petition no later than September 17, 2001.

[6]Letter dated September 13, 2001, from Respondent to "To Whom it May Concern" filed with the Hearing Clerk on September 17, 2001.

[7]Informal Order dated September 18, 2001.

decision and order becomes final.[8] The ALJ's Initial Decision and Order became

[8] *See In re Harold P. Kafka*, 58 Agric. Dec. 357 (1999) (dismissing the respondent's appeal petition filed 15 days after the initial decision and order became final), *aff'd per curiam*, 259 F.3d 716 (3d Cir. 2001) (Table); *In re Kevin Ackerman*, 58 Agric. Dec. 340 (1999) (dismissing Kevin Ackerman's appeal petition filed 1 day after the initial decision and order became final); *In re Severin Peterson*, 57 Agric. Dec. 1304 (1998) (dismissing the applicants' appeal petition filed 23 days after the initial decision and order became final); *In re Queen City Farms, Inc.*, 57 Agric. Dec. 813 (1998) (dismissing the respondent's appeal petition filed 58 days after the initial decision and order became final); *In re Gail Davis*, 56 Agric. Dec. 373 (1997) (dismissing the respondent's appeal petition filed 41 days after the initial decision and order became final); *In re Field Market Produce, Inc.*, 55 Agric. Dec. 1418 (1996) (dismissing the respondent's appeal petition filed 8 days after the initial decision and order became effective); *In re Ow Duk Kwon*, 55 Agric. Dec. 78 (1996) (dismissing the respondent's appeal petition filed 35 days after the initial decision and order became effective); *In re New York Primate Center, Inc.*, 53 Agric. Dec. 529 (1994) (dismissing the respondents' appeal petition filed 2 days after the initial decision and order became final); *In re K. Lester*, 52 Agric. Dec. 332 (1993) (dismissing the respondent's appeal petition filed 14 days after the initial decision and order became final and effective); *In re Amril L. Carrington*, 52 Agric. Dec. 331 (1993) (dismissing the respondent's appeal petition filed 7 days after the initial decision and order became final and effective); *In re Teofilo Benicta*, 52 Agric. Dec. 321 (1993) (dismissing the respondent's appeal petition filed 6 days after the initial decision and order became final and effective); *In re Newark Produce Distributors, Inc.*, 51 Agric. Dec. 955 (1992) (dismissing the respondent's appeal petition filed after the initial decision and order became final and effective); *In re Laura May Kurjan*, 51 Agric. Dec. 438 (1992) (dismissing the respondent's appeal petition filed after the initial decision and order became final); *In re Kermit Breed*, 50 Agric. Dec. 675 (1991) (dismissing the respondent's late-filed appeal petition); *In re Bihari Lall*, 49 Agric. Dec. 896 (1990) (stating the respondent's appeal petition, filed after the initial decision became final, must be dismissed because it was not timely filed); *In re Dale Haley*, 48 Agric. Dec. 1072 (1989) (stating the respondents' appeal petition, filed after the initial decision became final and effective, must be dismissed because it was not timely filed); *In re Mary Fran Hamilton*, 45 Agric. Dec. 2395 (1986) (dismissing the respondent's appeal petition filed with the Hearing Clerk on the day the initial decision and order had become final and effective); *In re Bushelle Cattle Co.*, 45 Agric. Dec. 1131 (1986) (dismissing the respondent's appeal petition filed 2 days after the initial decision and order became final and effective); *In re William T. Powell*, 44 Agric. Dec. 1220 (1985) (stating 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 Toscony Provision Co., Inc.*, 43 Agric. Dec. 1106 (1984) (stating the Judicial Officer has no jurisdiction to hear an appeal that is filed after the initial decision becomes final), *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); *In re Dock Case Brokerage Co.*, 42 Agric. Dec. 1950 (1983) (dismissing the respondents' appeal petition filed 5 days after the initial decision and order became final); *In re Veg-Pro Distributors*, 42 Agric. Dec. 1173 (1983) (denying the respondent's appeal petition filed 1 day after the default decision and order became final); *In re Samuel Simon Petro*, 42 Agric. Dec. 921 (1983) (stating the 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.* , 42 Agric. Dec. 427 (1983) (dismissing the respondent's appeal petition filed on the day the initial decision became effective); *In re Charles Brink*, 41 Agric. Dec. 2146 (1982) (stating the Judicial Officer has no jurisdiction to consider the respondent's appeal dated before the initial decision and order became final, but not filed until 4 days after the initial

(continued...)

final on October 10, 2001.

The United States Department of Agriculture'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)(A) of the Federal Rules of Appellate Procedure provides, as follows:

Rule 4. Appeal as of Right—When Taken

(a) Appeal in a Civil Case.

(1) Time for Filing a Notice of Appeal.

(A) In a civil case . . . the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

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.[9]

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[8](...continued)
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) (stating since the 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 administrative law judge nor the Judicial Officer has jurisdiction to consider the respondent's petition); *In re Animal Research Center of Massachusetts, Inc.*, 38 Agric. Dec. 379 (1978) (stating failure to file an appeal petition before the effective date of the initial decision is jurisdictional); *In re Willie Cook*, 39 Agric. Dec. 116 (1978) (stating it is the consistent policy of the United States Department of Agriculture not to consider appeals filed more than 35 days after service of the initial decision).

[9] *Accord Budinich 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. of Illinois*, 434 U.S. 257, 264 (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), *rehearing denied*, 434 U.S. 1089 (1978); *Martinez v. Hoke* , 38 F.3d
(continued...)

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 an 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 to file a notice of appeal upon a motion filed no later than 30 days after the expiration of the time otherwise provided in the rules for the filing of a notice of appeal (Fed. R. App. P. 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 an initial decision and order has become final. Therefore, under the Rules of Practice, even if I were to find Respondent's statement that he failed to file a timely appeal petition because he "did not know what to do" constitutes a showing of excusable neglect or good cause, I could not extend the time for Respondent's filing an appeal petition after the ALJ's Initial Decision and Order became final.

Moreover, the jurisdictional bar under the Rules of Practice, which precludes the Judicial Officer from hearing an appeal that is filed after an initial decision and order 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.

[9](...continued)
655, 656 (2d Cir. 1994) (per curiam) (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) (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), *cert. denied*, 493 U.S. 1060 (1990); *Jerningham v. Humphreys*, 868 F.2d 846 (6th Cir. 1989) (Order) (the failure of an appellant to timely file a notice of appeal deprives an appellate court of jurisdiction; compliance with Rule 4(a) of the Federal Rules of Appellate Procedure is a mandatory and jurisdictional prerequisite which this court can neither waive nor extend).

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.[10]

Accordingly, Respondent's appeal petition must be denied, since it is too late for the matter to be further considered. Moreover, the matter should not be considered by a reviewing court since, under the Rules of Practice, "no decision shall be final for purposes of judicial review except a final decision of the Judicial Officer upon appeal" (7 C.F.R. § 1.142(c)(4)).

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

ORDER

Respondent's appeal petition filed October 11, 2001, is denied. The Decision and Order Upon Admission of Facts By Reason of Default filed by Administrative Law Judge Dorothea A. Baker on August 2, 2001, is the final decision and order in this proceeding.

In re: JAMES MEADOR d/b/a M&M FARMS.
FCIA Docket No. 00-0005.
Order Dismissing Case.
Filed July 3, 2001.

Motion to Dismiss.

Donald McAmis, for Complainant.
Respondent, Pro se.
Order issued by Jill S. Clifton, Administrative Law Judge.

Complainant, Federal Crop Insurance Corporation moved to dismiss the complaint in this case without prejudice. There has been no objection or other response from Respondent. I have decided to grant Complainant's motion, subject to the following limitations.

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[10] *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) (the time limit in 28 U.S.C. § 2344 is jurisdictional), *cert. denied sub nom. Tuolumne Park & Recreation Dist. v. ICC*, 493 U.S. 1093 (1990).

Either party may request that the case be restored to the active docket, so long as such request is filed within one year from the date of this dismissal. If no such request is filed, without further action or notice the dismissal will become final and with prejudice. Accordingly, this case is dismissed.

Copies of this Order shall be served by the Hearing Clerk upon each of the parties. The Hearing Clerk is requested to show the addresses to which the copies were mailed, and the mailing dates.

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In re: STATE OF CALIFORNIA, HEALTH AND HUMAN SERVICES AGENCY.
FSP Docket No. 01-0002.
Order Dismissing Case.
Filed September 13, 2001.

Motion to Dismiss – Settlement.

John B. Koch, for Complainant.
J. William Lewis, for Appellant.
Order issued by Jill S. Clifton, Administrative Law Judge.

By letter dated September 4, 2001, the State of California withdrew its request for review. The State of California has chosen to enter into a settlement agreement instead of pursuing an appeal of the within claim.

Accordingly, this case is hereby dismissed.

Copies of this Order shall be served by the Hearing Clerk upon each of the parties. The Hearing Clerk is requested to show the addresses to which the copies were mailed, and the mailing dates.

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In re: STATE OF MICHIGAN FAMILY INDEPENDENCE AGENCY.
FSP Docket No. 01-0001.
Order Dismissing Case.
Filed November 8, 2001.

Motion to Dismiss – Settlement.

Angela M. Kline, for Complainant.
Charles A. Jones, Appellant.
Order issued by Jill S. Clifton, Administrative Law Judge.

By letter dated October 22, 2001, the Michigan State agency withdrew its appeal, due to a settlement agreement.

Accordingly, this case is hereby dismissed.

Copies of this Order shall be served by Hearing Clerk upon each of the parties. The Hearing Clerk is requested to show the addresses to which the copies were mailed, and the mailing dates.

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In re: KYRUS CAMP, KYRUS CAMP LOGGING.
DNS-FS Docket No. 01-0002.
Order Dismissing Appeal.
Filed October 29, 2001.

Motion to Dismiss.

Lori Jones, for Complainant.
Respondent, Pro se.
Order issued by James W. Hunt, Administrative Law Judge.

On September 10, 2001, Respondents, Kyrus Camp, Kyrus Camp Logging, filed an appeal of the Debarring and Suspending Official's decision to debar Respondents.

On October 1, 2001, the Debarring and Suspending Official filed a motion to dismiss the appeal on the ground that it had withdrawn its decision to debar Respondents. As Respondents' debarment has been withdrawn, their appeal is moot. Respondents' appeal is therefore ordered dismissed.

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In re: DENNIS AND VICKI CARROLL, JOE CLIFT, AND YOLANDA ROBIN DILWORTH.
HPA Docket No. 01-0026.
Dismissal Order.
Filed October 1, 2001.

Dismissal with Prejudice.

Frank Martin, Jr., for Complainant.
Respondent, Pro se.
Order issued by James W. Hunt, Administrative Law Judge.

Upon the motion of the Complainant and for good cause shown, the complaint in HPA Docket No. 01-0026 is dismissed with prejudice as to respondent Vicki Carroll.

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In re: RAE MARTIN, AN INDIVIDUAL d/b/a RAE MARTIN STABLES, A SOLE PROPRIETORSHIP OR UNINCORPORATED ASSOCIATION; AND RAYMOND COUGHMAN, AN INDIVIDUAL.
HPA Docket No. 00-0005.
Order Dismissing Complaint Without Prejudice.
Filed October 5, 2001.

Dismissal without Prejudice.

Sharlene A. Deskins, for Complainant.
Brenda S. Bramlett, for Respondents.
Order issued by James W. Hunt, Administrative Law Judge.

Wherefore, for good cause shown the complaint against the Respondents is dismissed without prejudice.

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In re: BRUCE J. SIEDLECKI, JEFFREY L. GREEN, AND CHARLES R. GREEN d/b/a CHARLIE GREEN STABLES.
HPA Docket No. 00-0004.
Dismissal Order.
Filed October 25, 2001.
Dismissal with Prejudice.

Frank Martin, Jr., for Complainant.
Brenda S. Bramlett, for Respondent.
Order issued by Jill S. Clifton, Administrative Law Judge.

Upon the joint motion of the Complainant and Respondent, and for good cause shown, the complaint in HPA Docket No. 00-0004 is dismissed with prejudice as to Respondent Charles R. Green, d/b/a Charlie Green Stables.

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In re: RONNY DAVIDSON, AN INDIVIDUAL; RONNY DAVIDSON STABLES, AN UNINCORPORATED ASSOCIATION; RODNEY C. HUDDLESTON, AN INDIVIDUAL; AND STEPHANIE HUDDLESTON, AN INDIVIDUAL.
HPA Docket No. 01-0006.
Order Dismissing Complaint as to Respondent Stephanie Huddleston, also known as Stefanie Huddleston.
Filed December 6, 2001.

Dismissal.

Robert A. Ertman, for Complainant.
Respondent, Pro se.
Order issued by Jill S. Clifton.

The Animal and Plant Health Inspection Service (APHIS), Complainant, represented by Robert A. Ertman, Esq., moved to dismiss the Complaint against Stephanie Huddleston.

Accordingly, the Complaint against Respondent Stephanie Huddleston, also known as Stefanie Huddleston, is hereby dismissed.

Copies of this Order shall be served by the Hearing Clerk upon each of the parties. The Hearing Clerk is requested to show the addresses to which the copies were mailed, and the mailing dates.

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In re: ROBERT NELSON HUGH, AN INDIVIDUAL; HUGH STABLES, AN UNINCORPORATED ASSOCIATION; BUDDY HUGH, AN INDIVIDUAL; AND RODNEY L. BROWN, AN INDIVIDUAL.
HPA Docket No. 99-0023.
Dismissal Order.
Filed December 13, 2001.

Dismissal with Prejudice.

Frank Martin, Jr., for Complainant.
Brenda S. Bramlett, for Respondents.

Order issued by Jill S. Clifton, Administrative Law Judge.

Upon the joint motion of the Complainant and Respondents, and for good cause shown, the complaint in HPA Docket No. 99-0023 is dismissed with prejudice as to Respondents Buddy Hugh and Rodney L. Brown.

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In re: MARIE ST. PAULIN.
P.Q. Docket No. 01-0016.
Order Dismissing Case.
Filed October 9, 2001.

Withdrawal of Complaint.

Margaret Burns, for Complainant.
Respondent, Pro se.
Order issued by Jill S. Clifton, Administrative Law Judge.

By Motion received October 5, 2001, the Animal and Plant Health Inspection Service withdrew the within Complaint.

Accordingly, this case is hereby dismissed.

Copies of this Order shall be served by the Hearing Clerk upon each of the parties. The Hearing Clerk is requested to show the addresses to which the copies were mailed, and the mailing dates.

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In re: DEORA SEWNANAN.
P.Q. Docket No. 00-0018.
Order Vacating Decision.
Filed November 9, 2001.

P.Q. – Default – Service – Proof of service.

The Judicial Officer (JO) vacated Administrative Law Judge Dorothea A. Baker's (ALJ) Default Decision and Order. The JO found the ALJ's Default Decision and Order was based on the ALJ's finding that Respondent failed to file an answer within 20 days after Respondent had been served with the Complaint, as required by 7 C.F.R. § 1.136(a). The JO found the record contained no proof that Respondent had been served with the Complaint.

Rick D. Herndon, for Complainant.

Respondent, Pro se.
Initial decision issued by Dorothea A. Baker, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a "Complaint" on September 14, 2000. Complainant instituted this proceeding under the Act of August 20, 1912, as amended (7 U.S.C. §§ 151-167) [hereinafter the Plant Quarantine Act]; the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj) [hereinafter the Federal Plant Pest Act]; the Act of February 2, 1903, as amended (21 U.S.C. § 111) [hereinafter the Act of February 2, 1903]; regulations issued under the Plant Quarantine Act, the Federal Plant Pest Act, and the Act of February 2, 1903 (7 C.F.R. §§ 319.56-.56-8); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice] (Compl. at 1-2).

Complainant alleges that on or about November 5, 1999, Deora Sewnanan [hereinafter Respondent] violated 7 C.F.R. § 319.56(c) by importing four mangoes from Guyana into the United States, importation of which was prohibited (Compl. ¶ II).

The Hearing Clerk sent Respondent the Complaint, the Rules of Practice, and a service letter dated September 14, 2000, by certified mail. The United States Postal Service marked the envelope containing the Complaint, the Rules of Practice, and the September 14, 2000, service letter "unclaimed" and returned the mailing to the Hearing Clerk. On November 20, 2000, the Hearing Clerk remailed the Complaint and Rules of Practice to Respondent by certified mail.[1]

On August 1, 2001, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a "Motion for Adoption of Proposed Default Decision and Order" [hereinafter Motion for Adoption of Proposed Decision and Order], and a "Proposed Default Decision and Order" [hereinafter Proposed Decision and Order]. On or before August 17, 2001, the Hearing Clerk served Respondent with Complainant's Motion for Adoption of Proposed Decision and Order, Complainant's Proposed Decision and Order, and a service letter dated

[1]See memorandum dated November 20, 2000, from "TMFisher."

August 1, 2001.[2] Respondent failed to file objections to Complainant's Motion for Adoption of Proposed Decision and Order and Complainant's Proposed Decision and Order within 20 days after service, as required by section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

On September 18, 2001, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Administrative Law Judge Dorothea A. Baker [hereinafter the ALJ] issued a "Default Decision and Order" [hereinafter Initial Decision and Order]: (1) finding that on or about November 5, 1999, Respondent imported four mangoes from Guyana into the United States in violation of 7 C.F.R. § 319.56; and (2) assessing Respondent a $500 civil penalty (Initial Decision and Order at second unnumbered page).

On September 26, 2001, Respondent appealed to the Judicial Officer. On November 1, 2001, Complainant filed "Complainant's Response to Respondent's Appeal Letter." On November 2, 2001, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I disagree with the ALJ's Initial Decision and Order and I vacate the Initial Decision and Order.

CONCLUSIONS BY THE JUDICIAL OFFICER

Sections 1.136(a), 1.136(c), and 1.139 of the Rules of Practice state the time within which an answer must be filed and the consequences of failing to file a timely answer, as follows:

> **§ 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

[2]See Domestic Return Receipt for Article Number 7099 3400 0014 4579 0150. Domestic Return Receipt for Article Number 7099 3400 0014 4579 0150 does not indicate the date of delivery of Complainant's Motion for Adoption of Proposed Decision and Order, Complainant's Proposed Decision and Order, and the August 1, 2001, service letter. However, the latest date the mailing could have been served on Respondent is August 17, 2001, the date the Hearing Clerk received the returned Domestic Return Receipt for Article Number 7099 3400 0014 4579 0150.

§ 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.

§ 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. . . .

7 C.F.R. §§ 1.136(a), (c), .139.

The ALJ found Respondent failed to file an answer within 20 days after the Hearing Clerk served Respondent with the Complaint. Pursuant to sections 1.136(c) and 1.139 of the Rules of Practice (7 C.F.R. §§ 1.136(c), .139), the ALJ found Respondent's failure to file a timely answer an admission of the allegations in the Complaint and a waiver of hearing. Accordingly, the ALJ issued the Initial Decision and Order in which she adopted the material allegations in the Complaint and assessed Respondent a civil penalty. (Initial Decision and Order at first and second unnumbered pages.)

I vacate the ALJ's Initial Decision and Order because the record does not contain proof of service of the Complaint on Respondent, and I conclude the 20-day period for filing Respondent's answer has not yet begun to run.

The record reveals the Hearing Clerk sent Respondent the Complaint, the Rules of Practice, and a service letter dated September 14, 2000, by certified mail. The United States Postal Service marked the envelope containing the Complaint, the Rules of Practice, and the September 14, 2000, service letter "unclaimed" and returned the mailing to the Hearing Clerk. Section 1.147(c)(1) of the Rules of Practice provides for service of a complaint by ordinary mail after certified mail is returned marked "unclaimed" or "refused" by the United States Postal Service, as follows:

§ 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 . . . 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 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).

However, instead of remailing the Complaint, the Rules of Practice, and the September 14, 2000, service letter to Respondent by ordinary mail as provided in section 1.147(c)(1) of the Rules of Practice (7 C.F.R. § 1.147(c)(1)), the Hearing Clerk remailed the Complaint and Rules of Practice to Respondent by certified mail on November 20, 2000. The Office of the Hearing Clerk placed a memorandum in the record which memorializes the November 20, 2000, certified mailing, as follows:

> Complaint and Rules of practice was [sic] remailed by *certified* mail as follow [sic]:
>
> PQ Docket No. 00-0018
>
> Ms. Deora Sewananan [sic]
> 32 17 54th Street
> Woodside, New York 11377
>
> TMFisher: 11/20/00

Memorandum of November 20, 2000, from "TMFisher" (emphasis added).

Section 1.147(e) of the Rules of Practice provides various means by which service may be proved, as follows:

> **§ 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 for such a 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).

While the record establishes that the Hearing Clerk mailed the Complaint by certified mail on November 20, 2000, the record contains no certified mail receipt returned by the United States Postal Service or other proof establishing that the Hearing Clerk served Respondent with the November 20, 2000, certified mailing.

Complainant asserts the Hearing Clerk served the Complaint by regular mail on November 20, 2000, and Respondent's answer was due December 10, 2000, 20 days after service (Complainant's Mot. for Default Decision at first unnumbered page). However, Complainant does not cite any document in the record to support Complainant's assertion that the Hearing Clerk mailed the Complaint by regular mail, and I can find nothing in the record that supports Complainant's assertion. Moreover, the November 20, 2000, memorandum of "TMFisher" belies Complainant's assertion.

I conclude Respondent was not served with the Complaint and the time for filing Respondent's answer has not yet begun to run. Therefore, I vacate the ALJ's Initial Decision and Order which is based upon the ALJ's finding that Respondent failed to file an answer within 20 days after Respondent had been served with the

Complaint.

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

ORDER

The Initial Decision and Order issued September 18, 2001, is vacated.

In re: RUFINA ACEVEDO PEREZ.
P.Q. Docket No. 01-0017.
Order Affirming Decision.
Filed November 28, 2001.

P.Q. – Default – Failure to file timely answer – Importation of, Mangoes – Cherries – Limes – Civil penalty – Installment payments.

The Judicial Officer (JO) affirmed the Default Decision issued by Administrative Law Judge Dorothea A. Baker (ALJ): (1) concluding that Respondent imported approximately 36 fresh mangoes from Mexico into the United States in violation of 7 C.F.R. §§ 319.56(c), .56-2i, .56-2x, and .56-3; (2) concluding that Respondent imported approximately 2 pounds of cherries from Mexico into the United States in violation of 7 C.F.R. §§ 319.56(c) and .56-3; (3) concluding that Respondent imported one fresh sweet lime from Mexico into the United States in violation of 7 C.F.R. § 319.56(c); and (4) assessing Respondent a $500 civil penalty. At Respondent's request, the JO provided for the payment of the civil penalty in installments of $50 per month.

James A. Booth, for Complainant.
Respondent, Pro se.
Initial decision issued by Dorothea A. Baker, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a "Complaint" on May 23, 2001. Complainant instituted this proceeding under the Act of August 20, 1912, as amended (7 U.S.C. §§ 151-154, 156-164a, 167) [hereinafter the Plant Quarantine Act]; the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj) [hereinafter the Federal Plant Pest Act]; regulations issued under the Plant Quarantine Act and the Federal Plant Pest Act (7 C.F.R. §§ 319.56-.56-8); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges that: (1) on or about May 20, 2000, Rufina Acevedo Perez [hereinafter Respondent] imported approximately 36 fresh mangoes from Mexico into the United States at Dallas, Texas, in violation of 7 C.F.R. §§ 319.56(c), .56-2i, .56-2x, and .56-3 because the mangoes were not imported under permit and treated, as required; (2) on or about May 20, 2000, Respondent imported approximately 2 pounds of fresh cherries from Mexico into the United States at Dallas, Texas, in violation of 7 C.F.R. §§ 319.56(c), .56-2x, and .56-3 because the cherries were not imported under permit and treated, as required; and (3) on or about May 20, 2000, Respondent imported one fresh sweet lime from Mexico into the United States at Dallas, Texas, in violation of 7 C.F.R. § 319.56(c) because the importation of fresh sweet lime from Mexico is prohibited (Compl. ¶¶ II-VI).

The Hearing Clerk served Respondent with the Complaint, the Rules of Practice, and a service letter on May 29, 2001.[1] Respondent failed to file an answer to the Complaint within 20 days after service of the Complaint, as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). On June 21, 2001, the Hearing Clerk sent Respondent a letter informing Respondent that Respondent's answer to the Complaint had not been received within the allotted time.[2]

On July 25, 2001, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a "Motion for Adoption of Proposed Default Decision and Order" [hereinafter Motion for Adoption of Proposed Decision and Order] and a "Proposed Default Decision and Order" [hereinafter Proposed Decision and Order]. The Hearing Clerk served Respondent with Complainant's Motion for Adoption of Proposed Decision and Order, Complainant's Proposed Decision and Order, and a service letter on July 30, 2001.[3] Respondent failed to file objections to Complainant's Motion for Adoption of Proposed Decision and Order and Complainant's Proposed Decision and Order within 20 days after service, as required by section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). The Hearing Clerk sent Respondent a letter dated August 22, 2001, stating that objections to Complainant's Motion for Adoption of Proposed Decision and Order had not been filed within the allotted time and that the record was being referred to an administrative law judge for consideration and decision.[4]

On August 27, 2001, pursuant to section 1.139 of the Rules of Practice (7 C.F.R.

[1]See Domestic Return Receipt for Article Number 70993400001445790235.

[2]See letter dated June 21, 2001, from Joyce A. Dawson, Hearing Clerk, to Rufina Acevedo Perez.

[3]See Domestic Return Receipt for Article Number 7099 3400 0014 4579 0211.

[4]See letter dated August 22, 2001, from Joyce A. Dawson, Hearing Clerk, to Rufina Acevedo Perez.

§ 1.139), Administrative Law Judge Dorothea A. Baker [hereinafter the ALJ] issued a Default Decision and Order [hereinafter Initial Decision and Order]: (1) finding that on or about May 20, 2000, Respondent imported approximately 36 fresh mangoes from Mexico into the United States at Dallas, Texas, in violation of 7 C.F.R. §§ 319.56(c), .56-2i, .56-2x, and .56-3; (2) finding that on or about May 20, 2000, Respondent imported approximately 2 pounds of fresh cherries from Mexico into the United States at Dallas, Texas, in violation of 7 C.F.R. §§ 319.56(c) and .56-3; (3) finding that on or about May 20, 2000, Respondent imported one fresh sweet lime from Mexico into the United States at Dallas, Texas, in violation of 7 C.F.R. § 319.56(c); (4) concluding that Respondent violated the Plant Quarantine Act, the Federal Plant Pest Act, and 7 C.F.R. § 319.56 *et seq*.; and (5) assessing Respondent a $500 civil penalty (Initial Decision and Order at 2).

On September 24, 2001, Respondent appealed to the Judicial Officer. On November 20, 2001, Complainant filed "Complainant's Response to Respondent's Appeal." On November 27, 2001, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I agree with the ALJ's Initial Decision and Order, except that I issue an Order that provides for Respondent's payment of the civil penalty in installments. Therefore, pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt the Initial Decision and Order as the final Decision and Order, with minor modifications. Additional conclusions by the Judicial Officer follow the ALJ's conclusion of law, as restated.

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 7B—PLANT PESTS

. . . .

§ 150gg. Violations

. . . .

(b) Civil penalty

Any person who–

(1) violates section 150bb of this title or any regulation promulgated under this chapter[]

. . . .

may be assessed a civil penalty by the Secretary not exceeding $1,000. The Secretary may issue an order assessing such civil penalty only after notice and an opportunity for an agency hearing on the record. Such order shall be treated as a final order reviewable under chapter 158 of title 28. The validity of such order may not be reviewed in an action to collect such civil penalty.

. . . .

CHAPTER 8—NURSERY STOCK AND OTHER PLANTS AND PLANT PRODUCTS

. . . .

§ 163. Violations; forgery, alterations, etc., of certificates; punishment; civil penalty

. . . Any person who violates any . . . rule[] or regulation [promulgated by the Secretary of Agriculture under this chapter] . . . may be assessed a civil penalty by the Secretary not exceeding $1,000. The Secretary may issue an order assessing such civil penalty only after notice and an opportunity for an agency hearing on the record. Such order shall be treated as a final order reviewable under chapter 158 of title 28. The validity of such order may not be reviewed in an action to collect such civil penalty.

7 U.S.C. §§ 150gg(b), 163.

7 C.F.R.:

TITLE 7—AGRICULTURE

. . . .

SUBTITLE B—REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

. . . .

CHAPTER III—ANIMAL AND PLANT HEALTH INSPECTION SERVICE, DEPARTMENT OF AGRICULTURE

. . . .

PART 319—FOREIGN QUARANTINE NOTICES

. . . .

SUBPART—FRUITS AND VEGETABLES

QUARANTINE

§ 319.56 Notice of quarantine.

. . . .

(c) On and after November 1, 1923, and until further notice, the importation from all foreign countries and localities into the United States of fruits and vegetables, and of plants or portions of plants used as packing material in connection with shipments of such fruits and vegetables, except as provided in the rules and regulations supplemental hereto, is prohibited: *Provided*, That whenever the Deputy Administrator for the Plant Protection and Quarantine Programs shall find that existing conditions as to pest risk involved in the importation of the articles to which the regulations supplemental hereto apply, make it safe to modify, by making less stringent, the restrictions contained in any of such regulations, he shall publish such findings in administrative instructions, specifying the manner in which the regulations shall be made less stringent, whereupon such modification shall become effective; or he may, when the public interests will permit, with respect to the importation of such articles into Guam, upon request in specific cases, authorize such importation under conditions, specified in the permit to carry out the purposes of this subpart, that are less stringent than those contained in the regulations.

. . . .

§ 319.56-2i Administrative instructions prescribing treatments for mangoes from Central America, South America, and the West Indies.

(a) *Authorized treatments*. Treatment with an authorized treatment listed in the Plant Protection and Quarantine Treatment Manual will meet the treatment requirements imposed under § 319.56-2 as a condition for the importation into the United States of mangoes from Central America, South America, and the West Indies. The Plant Protection and Quarantine Treatment Manual is incorporated by reference. For the full identification of this standard, see § 300.1 of this chapter, "Materials incorporated by reference."

(b) *Department not responsible for damage*. The treatments for mangoes prescribed in the Plant Protection and Quarantine Treatment Manual are judged from experimental tests to be safe. However, the Department assumes no responsibility for any damage sustained through or in the course of such treatment.

. . . .

§ 319.56-2x Administrative instructions; conditions governing the entry of certain fruits and vegetables for which treatment is required.

(a) The following fruits and vegetables may be imported into the United States only if they have been treated in accordance with the Plant Protection and Quarantine Treatment Manual, which is incorporated by reference at § 300.1 of this chapter:

Country/locality	*Common name*	*Botanical name*	*Plant part(s)*
. . . .			
Mexico	Cherry	*Prunus avium*	fruit.
	. . . .		
	Mango	*Mangerifa indica*	fruit.
. . . .			

§ 319.56-3 Applications for permits for importation of fruits and vegetables.

(a) Persons contemplating the importation of fruits or vegetables the entry of which is authorized in the regulations in this subpart shall first make application to the Plant Protection and Quarantine Programs for a permit, stating in the application the country or locality of origin of the fruits or

vegetables, the port of first arrival, and the name and address of the importer in the United States to whom the permit should be sent.

(b) Applications for permits should be made in advance of the proposed shipments; but if, through no fault of the importer, a shipment should arrive before a permit is received, the importation will be held in customs custody at the port of first arrival, at the risk and expense of the importer, for a period not exceeding 20 days pending the receipt of the permit.

(c) Application may be made by telegraph, in which case the information required above must be given.

(d) A separate permit must be secured for shipments from each country and for each port of first arrival in the United States.

7 C.F.R. §§ 319.56(c), .56-2i, .56-2x, .56-3.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION AND ORDER (AS RESTATED)

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 in the Complaint are adopted as Findings of Fact, and 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. Respondent is an individual whose mailing address is 485 Otis Drive, Brownsville, Tennessee 38012.

2 On or about May 20, 2000, Respondent imported approximately 36 fresh mangoes from Mexico into the United States at Dallas, Texas, without a permit and without having the fresh mangoes treated.

3. On or about May 20, 2000, Respondent imported approximately 2 pounds of fresh cherries from Mexico into the United States at Dallas, Texas, without a permit and without having the fresh cherries treated.

4. On or about May 20, 2000, Respondent imported one fresh sweet lime from Mexico into the United States at Dallas, Texas.

Conclusion of Law

By reason of the Findings of Facts, Respondent violated the Plant Quarantine Act, the Federal Plant Pest Act, and 7 C.F.R. §§ 319.56(c), .56-2i, .56-2x, and .56-3.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent raises two issues in her letter dated September 18, 2001 [hereinafter Appeal Petition]. First, Respondent asserts she previously paid $50 in relation to this proceeding (Appeal Pet. at first unnumbered page). Complainant responds that the Animal and Plant Health Inspection Service has received $50 from Respondent and that Respondent's $50 payment should be credited against the $500 civil penalty assessed against Respondent by the ALJ (Complainant's Response to Respondent's Appeal at 2; Attachment to Complainant's Response to Respondent's Appeal).

Based on Respondent's assertion that she previously paid $50 in relation to this proceeding and Complainant's agreement with Respondent's assertion, I reflect Respondent's previous payment of $50 in the Order.

Second, Respondent requests that she be allowed to pay the civil penalty assessed against her in installments. Respondent does not indicate either a number of installments or a time between each installment. (Appeal Pet. at first unnumbered page.) Complainant has no objection to Respondent's paying the civil penalty in installments of $50 per month (Complainant's Response to Respondent's Appeal at 2).

Pursuant to Respondent's request that she be allowed to pay the civil penalty in installments and Complainant's lack of objection to Respondent's paying the civil penalty in installments of $50 per month, I issue an Order requiring Respondent to pay the civil penalty in installments of $50 per month.

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

ORDER

Respondent is assessed a $500 civil penalty. The civil penalty shall be paid by certified checks or money orders, made payable to the Treasurer of the United States, and sent to:

United States Department of Agriculture
APHIS Field Servicing Office

Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondent has paid $50 of the $500 civil penalty which I assess against her. Respondent shall pay the unpaid portion of the $500 civil penalty in installments of $50 each month for 9 consecutive months. Respondent's next payment shall be sent to, and received by, the United States Department of Agriculture, APHIS Field Servicing Office, Accounting Section, within 60 days after service of this Order on Respondent. If Respondent is late in making any payment or misses any payment, then all remaining payments become immediately due and payable in full. Respondent shall state on each certified check or money order that payment is in reference to P.Q. Docket No. 01-0017.

_____

DEFAULT DECISIONS

ANIMAL QUARANTINE ACT

In re: TAMMY DUONG.
A.Q. Docket No. 00-0002.
Decision and Order.
Filed September 7, 2001.

A.Q. – Default.

James A. Booth, 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 animal products (9 C.F.R. § 94 *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 Act of August 30, 1890, as amended (21 U.S.C. §§102-105), the Act of February 2, 1903, as amended (21 U.S.C. §111), and the Act of July 2, 1962 (21 U.S.C. §134a-134f)(Acts), and the regulations promulgated thereunder (9 C.F.R. §94 *et seq*.) (regulations), by a complaint filed on July 11, 2000, by the 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. Tammy Duong, herein referred to as the respondent, is an individual whose mailing address is 11966 Cedarvale Street, Norwalk, California 90650.

2. On or about January 18, 1999, the respondent imported twenty pounds of pork floss into the United States from Vietnam at Los Angeles, California, in

violation of 9 C.F.R. §94.1 because the importation of pork from Vietnam into the United States 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. Therefore, the following Order is issued.

Order

The respondent is hereby assessed a civil penalty of five hundred 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 A.Q. Docket No. 00-0002.

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 28, 2001.-Editor]

———————

ANIMAL WELFARE ACT

In re: LISA CHRISTIANSON HUTCHERSON.
AWA Docket No. 00-0005.
Decision and Order.
Filed August 25, 2000.

AWA – Default – Admission.

Frank Martin, Jr., 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, 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 Lisa Christianson Hutcherson by personal service on February 22, 2000. 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 Lisa Christianson Hutcherson 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.

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. Lisa Christian Hutcherson, hereinafter referred to as respondent, is an individual whose address is 8681 N. 299th Ave., Buckeye, Arizona 85326.

2. The respondent, at all times material herein, was operating as a dealer as defined in the Act and the regulations.

3. On or about September 10 and 11, 1996, and October 1, 1997, 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.

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 $4,000 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 period of one year 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 and Order became final November 18, 2001 – Editor.]

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In re: SAMUEL K. ANGEL; AND THOMBRA INTERNATIONAL, INC., d/b/a LIONSTIGERS.COM AND LIONS, TIGERS, AND TEDDY BEARS - OH MY!
AWA Docket No. 01-0025.
Decision and Order.

Filed September 26, 2001.

AWA – Default – Admission of Facts.

Brian T. Hill, 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, United States Department of Agriculture, alleging that the respondents willfully violated the Act and the regulations and standards issued pursuant to the Act (9 C.F.R. § 1.1 et seq.).

Copies of the complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130-1.151, were served via certified mail by the Hearing Clerk on Respondent ThomBra International, inc., d/b/a LionsTigers.com and Lions, Tigers, and Teddy Bears - Oh My!, (hereinafter referred to as "Respondent ThomBra International, Inc.," or "Respondent"), on March 14, 2001. The 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 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 respondents' 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

I

A. Respondent is a Texas corporation whose address is P.O. Box 130, Roanoke, Texas 76262.

B. Respondent at all times material herein, was licensed and operating as an exhibitor as defined in the Act and the regulations.

C. When respondent became licensed and annually thereafter, it received a copy of the Act and the regulations and standards issued thereunder and agreed in

writing to comply with them.

II

On March 4, 2000, Samuel K. Angel, a representative of Respondent ThomBra International, Inc., failed to provide sufficient distance or barrier between animals and the general viewing public resulting in the injury of Ms. Samantha Iverson (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

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 and standards issued thereunder.
2. The respondent is assessed a civil penalty of $2,750.00, which shall be paid by a certified check or money order made payable to the Treasurer of United States.

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 and Order became final December 14, 2001 – Editor.]

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In re: SAMUEL K. ANGEL; AND THOMBRA INTERNATIONAL, INC., d/b/a LIONSTIGERS.COM AND LIONS, TIGERS, AND TEDDY BEARS - OH MY!
AWA Docket No. 01-0025.
Decision and Order.
Filed September 26, 2001.

AWA – Default – Admission of Facts.

Brian T. Hill, 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, United States Department of Agriculture, alleging that the respondents willfully violated the Act and the regulations and standards issued pursuant to the Act (9 C.F.R. § 1.1 et seq.).

Copies of the complaint and the Rules of Practice governing proceedings under the Act, 7
C.F.R. §§ 1.130-1.151, were sent via certified mail by the Hearing Clerk to Respondent Samuel K. Angel, (hereinafter referred to as "Respondent" or "Respondent Angel"), and returned to the Hearing Clerk on April 6, 2001 marked "unclaimed". Pursuant to the Act, 7 C.F.R. § 1.147(c)(1), copies of the Complaint and the Rules of Practice were sent by ordinary mail to the respondent on April 17, 2001. The 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 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 respondents' 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

I

A. Respondent is an individual, whose address is P.O. Box 130, Roanoke, Texas 76262.

B. Respondent at all times material herein, was licensed and operating as an exhibitor as defined in the Act and the regulations.

C. When respondent became licensed and annually thereafter, he received a copy of the Act and the regulations and standards issued thereunder and agreed in writing to comply with them.

II

On or about December 18, 1998, APHIS found that Respondent Angel 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).

III

On or about December 19, 1999, Respondent Angel failed to notify the APHIS, REAC Sector Supervisor of his change of address within 10 days of the change (9 C.F.R. § 2.8).

IV

On March 4, 2000, during public exhibition Respondent Angel failed to maintain a sufficient distance or barrier between animals and the general viewing public (9 C.F.R. § 2.131(b)(1)).

V

On March 4, 2000, Samuel K. Angel, a representative of Respondent ThomBra International, Inc., failed to provide sufficient distance or barrier between animals and the general viewing public resulting in the injury of Ms. Samantha Iverson (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

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 and standards issued thereunder.
2. The respondent is assessed a civil penalty of $8,250.00, which shall be paid

by a certified check or money order made payable to the Treasurer of United States.

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 and Order became final December 14, 2001 – Editor.]

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FEDERAL CROP INSURANCE ACT

In re: GARY HASTINGS.
FCIA Docket No. 00-0010.
Decision and Order.
Filed June 22, 2001.

FCIA – Untimely answer – Admission.

Donald McAmis, for Complainant.
Respondent, Pro se.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

Decision

In response to a complaint filed by Federal Crop Insurance Corporation (FCIC), a document on behalf of respondent has been filed which in the penultimate paragraphs admits the allegations is in paragraphs II and III of the complaint. To the extent the document is an answer to the complaint, and is responsive to the allegations in the complaint, it constitutes an admission of the allegations. Respondent never denies any allegations in the complaint. To the extent the document is not an answer to the complaint, then no answer has been timely filed and the allegations in the complaint are deemed admitted.

Pursuant to sections 1.136(c) and 1.139 of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary, respondent, Gary Hastings, has admitted in his answer the allegations contained in the complaint. Those allegations included a conviction for, on April 8, 1999, unlawfully, willingly, and knowingly making false statements or reports for the purpose of influencing the actions of the FCIC.. Therefore, since the allegations in paragraphs II and III of the Complaint are deemed admitted, and respondent has pleaded guilty to unlawfully, willingly and knowingly making false statement or reports for the purpose of influencing the action of FCIC and was convicted, it is found that the respondent has willfully and 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 Federal Crop Insurance Act. (7 U.S.C. § 1506 (n), the Act).

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 for a period of one year and from receiving any other benefit under the Act for a period of 5 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 the 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 and Order became final August 2, 2001.-Editor]

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In re: JOE DELANY SCHENCK.
FCIA Docket No. 00-0008.
Decision and Order.
Filed June 22, 2001.

FCIA – Untimely answer – Admission.

Donald McAmis, for Complainant.
Respondent, Pro se.
Decision and Order issued by James W. Hunt, 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 respondent, Joe Delany Schenck, 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 willfully and 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 Federal Crop Insurance Act. (7 U.S.C. § 1506 (n), the Act).

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 for a period of one year, from receiving any other benefit under the Act for a period of 5 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 the 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 and Order became final August 3, 2001.-Editor.]

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PLANT QUARANTINE ACT

In re: JEUMENE T. SAINT-FLEUR.
P.Q. Docket No. 01-0014.
Decision and Order.
Filed September 7, 2001.

P.Q. – Untimely answer – Admission.

James Booth, for Complainant.
Respondent, Pro se.
Decision and Order issued by Jill S. Clifton, Administrative Law Judge.

Decision

This is an administrative proceeding for the assessment of a civil penalty for violations of the regulations governing the importation of fruit from Mexico into the United States (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 Plant Quarantine Act of August 20, 1912, as amended (7 U.S.C. §§ 151-167), the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj) (Acts) and the regulations promulgated thereunder, by a complaint filed on March 29, 2001, by the 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 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. Jeumene T. Saint-Fleur, respondent, is an individual whose mailing address is 64 Prospect Avenue, 2MF1, Irvington, New Jersey 07111.

2. On or about July 4, 1999, the respondent imported approximately 12 fresh

mangoes from Haiti into the United States at Jamaica, New York, in violation of 7 C.F.R. §§ 319.56(c), 319.56-2i, and 319.56-3, and on or about July 4, 1999, the respondent also imported approximately 10 pounds of sugar cane from Haiti into the United States at Jamaica, New York, in violation of 7 C.F.R. § 319.56(c).

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Acts and the regulations issued under the Act (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 dollars ($500.00). This civil 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. 01-0014.

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 22, 2001.-Editor]

In re: MARIE MICHELLE DIEUJUSTE.
P.Q. Docket No. 01-0005.
Decision and Order.
Filed October 18, 2001.

P.Q. – Untimely answer – Admission.

James Booth, for Complainant.
Respondent, Pro se.
Decision and Order issued by Jill S. Clifton, Administrative Law Judge.

Decision

This is an administrative proceeding for the assessment of a civil penalty for violations of the regulations governing the importation of fruit from Haiti into the United States (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 Plant Quarantine Act of August 20, 1912, as amended (7 U.S.C. §§ 151-167), the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj) (Acts) and the regulations promulgated thereunder, by a complaint filed on December 21, 2000, by the 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 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. Marie Michelle Dieujuste, respondent, is an individual whose mailing address is 250 Clarkson Avenue, Apartment 501, Brooklyn, New York 11226.

2. On or about March 9, 2000, the respondent imported four (4) *Mangifera indica* (mangoes) into the United States at Jamaica, New York, from Haiti, in violation of 7 C.F.R. § 319.56(c).

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Acts and the regulations issued under the Act (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 dollars ($500.00). This civil 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. 01-0005.

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 3, 2001.-Editor]

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In re: SAMRA PRODUCE AND FARMS, INC.
P.Q. Docket No. 01-0019.
Decision and Order.
Filed November 14, 2001.

P.Q. – Untimely answer – Admission.

James D. Holt, for Complainant.
Respondent, Pro se.
Decision and Order issued by Jill S. Clifton, Administrative Law Judge.

The Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture [herein the complainant], instituted this administrative proceeding under the Plant Quarantine Act of August 20, 1912, as amended (7 U.S.C. §§ 151-167), and the Federal Plant Pest Act, as amended (7

U.S.C. §§ 150aa-150jj) [herein the Acts][5], the regulations promulgated thereunder (7 C.F.R. §319.56-5), and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statues (7 C.F.R. §§ 1.130-1.151) [herein the Rules of Practice], by filing a complaint on June 22, 2001.

The complaint alleges that on April, 3, 2000, the respondent imported approximately twenty-five (25) cases of Hyacinth beans from the Dominican Republic into the United States at Jamaica, New York, in violation of 7 C.F.R. § 319.56-5, because the respondent did not provide notice of the importation of each case of Hyacinth beans, as required.

The Hearing Clerk, Office of Administrative Law Judges, [herein Hearing Clerk] mailed the complaint to the respondent by certified mail on June 25, 2001. Respondent has not filed an answer to date. The failure to file an answer constitutes a waiver of hearing. 7 C.F.R. § 1.139.

On September 13, 2001, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), complainant filed a proposed decision, along with a motion for the adoption thereof, both which were served upon the respondent by the Hearing Clerk. There having been no meritorious objections filed, 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 1.139 of the Rules of Practice applicable to this proceeding. 7 C.F.R. § 1.139.

Finding of Fact

1. The mailing address of Samra Produce and Farms, Inc. is 706 Market Court, Los Angeles, California 90021.

2. On April, 3, 2000, respondent, at Jamaica, New York, imported twenty-five (25) cases of Hyacinth beans from the Dominican Republic into the United States without providing notice of the importation.

Conclusion

It is a well established policy that "the sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the

[5]I note that while section 438(a) of the Plant Protection Act, enacted on June 20, 2000, repealed the Act of August 20, 1912 (commonly known as the "Plant Quarantine Act:(7 U.S.C. 151-164a, 167) and the Federal Plant Pest Act (7 U.S.C. 150aa *et seq*., 7 U.S.C. 147a note), section 438(c) of that Act states that "Regulations issued under the authority of a provision of law repealed by subsection (a) shall remain in effect until such time as the Secretary issues a regulation under section 434 [Regulations and Orders] that supersedes the earlier regulation."

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." *S.S. Farms Linn County, Inc*., 50 Agric. Dec. 476 (1991).

The success or failure of the programs designed to protect America's agriculture by the prevention, control and eradication of animal diseases and plant pests is dependent upon the compliance of individuals such as the respondent. Without the adherence of these individuals to Federal regulations concerned with the prevention of the spread of animal diseases and plant pests, the risk of the undetected introduction and spread of animal diseases and plant pests is greatly increased. The sanctions must be substantial enough to be meaningful. This is important not only to insure that a particular respondent will not again violate the regulations, but that the sanction will also deter others in similar situations. These proceedings address three violations of the Acts. A single violation of the Acts could cause losses of billions of dollars and eradication expenses of tens of millions of dollars. This suggests the need for a severe sanction to serve as an effective deterrent to violations.

Complainant believes that compliance and deterrence can now be achieved only with the imposition of the one thousand dollar ($1,000.00) civil penalty requested. Complainant's recommendation "as to the appropriate sanction is entitled to great weight, in view of the experience gained by the [Complainant] during [his] day-to-day supervision of the regulated industry." *In re: S.S. Farms Linn County, Inc. et al.*, 50 Agric. Dec. 476 (1991).

Complainant also seeks as a primary goal the deterrence of other persons similarly situated to the respondent. *In re: Indiana Slaughtering Co.*, 35 Agric. Dec. 1822, 1831 (1976). "The civil penalties imposed by the Secretary for violations of his quarantine regulations should be sufficiently large to serve as an effective deterrent not only to the respondent but also to other potential violators." *In re Kaplinsky*, 47 Agric. Dec. 629 (1988). Furthermore, "if the person cannot pay the penalty imposed, arrangements can be made to pay the civil penalty over a period of time." *Id.* at 633.

Under USDA's sanction policy "great weight is given to the recommendation of the officials charged with the responsibility for administering the regulatory program." *In re Spencer Livestock Commission Co.*, 46 Agric. Dec. 268, 447, *aff'd*, 841 F.2d 1451 (9th Cir. 1988). "In order to achieve the congressional purpose and to prevent the importation into the United States of items that could be disastrous to the United States agricultural community, it is necessary to take a hard-nosed approach and hold violators responsible for any violation irrespective of lack of evil motive or intent to violate the quarantine laws." *In re Capistrano*, 45 Agric. Dec.

2196, 2198 (1986). *Accord, In re Vallata*, 45 Agric. Dec. 1421 (1986).

Therefore, by reason of the facts contained in the Findings of Fact above, I find that the respondent has violated the Acts and the regulation promulgated pursuant to those regulations (7 C.F.R. § 319.56-5).

Therefore, the following Order is issued.

Order

Samra Produce and Farms, Inc. is hereby assessed a civil penalty of one thousand hundred dollars ($1,000.00). 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
Accounts Receivable
P.O. Box 3334
Minneapolis, Minnesota 55403

within thirty (30) days from the effective date of this Order. The certified check or money order should include the docket number of this proceeding.

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 Decision and Order upon the 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 26, 2001.-Editor]

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CONSENT DECISIONS

(Not published herein - Editor)

AGRICULTURAL MARKETING AGREEMENT ACT

Abe Kazarian. AMAA Docket No. 00-0004. 8/3/01.

Abe Kazarian. AMAA Docket No. 00-0004. 8/14/01.

Collins Fruit Co. AMAA Docket No. 00-0003. 9/6/01.

ANIMAL WELFARE ACT

D&H Pet Farms, Inc. AWA Docket No. 00-0035. 7/19/01.

Frank Strout. AWA Docket No. 99-0039. 7/30/01.

Frank Strout. AWA Docket No. 00-0039. 7/30/01.

Michael Jurich and Prairie Wind Animal Refuge, a Colorado corporation. AWA Docket No. 01-0029. 8/3/02.

Richard and Tim Hullinger, d/b/a Badlands Truck Stop, Inc. AWA 01-0034. 8/20/01.

Michael Lankin. AWA Docket No. 00-0036. 8/20/01.

Ronald Armitage and Arbuckle & Ozarks Development Company, d/b/a Exotics Animal Paradise. AWA Docket No. 01-0040. 8/29/01.

Sherry and Kenneth Roche. AWA Docket No. 99-0011. 8/31/01.

Continental Airlines, Inc. AWA Docket No. 01-0026. 9/12/01.

Bill Nielsen and Amy Nielsen, d/b/a Nielsen Farms Kennels. AWA Docket No. 00-0020. 9/14/01.

Bill Nielsen and Amy Nielsen, d/b/a Nielsen Farms Kennels. AWA Docket No. 01-0002. 9/14/01.

Danny Schachtele and Mildred Schachtele, d/b/a Middle Fork Kennels. AWA Docket No. 01-0030. 9/18/01.

Wildlife Rescue, Inc. and Bert Allen Wahl, Jr. AWA Docket No. 00-0008. 9/20/01.

Wildlife Rescue, Inc. and Bert Allen Wahl, Jr. AWA Docket No. 00-0040. 9/20/01.

Mark Allan McKee, Sr. d/b/a Critters. AWA Docket No. 01-0033. 10/9/01.

Do-Bo-Tri Kennel Ltd., James C. Hughes, and Sharon Sue Hughes. AWA Docket No. 01-0020. 10/25/01.

Douglas Alan Hughes. AWA Docket No. 01-0020. 10/25/01.

Bobby G. Johnston, Sr. and V. Lorene Johnston d/b/a Johnston's Kennel. AWA Docket No. 00-0034. 11/9/01.

Springfield Dickerson Zoo. AWA Docket No. 01-0048. 11/19/01.

Jack R. Boyd, Jr. AWA Docket No. 01-0045. 11/30/01.

ANIMAL QUARANTINE ACT

Schmidt Livestock, Inc. A.Q. Docket No. 01-0014. 12/18/01.

FEDERAL MEAT INSPECTION ACT

Jacob Fleishman Cold Storage, Inc. FMIA Docket No. 00-0004. 11/5/01.

Vanguard Culinary Group, LTD. d/b/a Cross Creek Foods, Inc. James G. Stancil, and Robert C. Stackhouse. FMIA Docket No. 99-0008. 12/12/01.

HORSE PROTECTION ACT

Dennis Carroll. HPA Docket No. 01-0026. 10/1/01.

Joe Clift. HPA Docket No. 01-0026. 10/1/01.

Jeffrey L. Green. HPA Docket No. 00-0004. 10/25/01.

Rodney C. Huddleston. HPA Docket No. 01-0006. 12/6/01.

Robert Nelson Hugh HPA Docket No. 99-0023. 12/6/01.

Hugh Stables. HPA Docket No. 99-0023. 12/6/01.

Yolanda Robin Dilworth. HPA Docket 01-0026. 12/21/01.

PLANT QUARANTINE ACT

Edie Dalou. P.Q. Docket No. 01-0024. 10/5/01.

Tortilleria La Unica, Mercedes Peguero, and Jose A. Hernandez. P.Q. Docket No. 01-0015. 11/29/01.

Adam's Supermercado. P.Q. Docket No. 99-0024. 12/12/01.

POULTRY PRODUCTS INSPECTION ACT

Jacob Fleishman Cold Storage, Inc. PPIA Docket No. 00-0003. 11/5/01.

Vanguard Culinary Group, LTD. d/b/a Cross Creek Foods, Inc. James G. Stancil, and Robert C. Stackhouse. PPIA Docket No. 99-0006. 12/12/01.

AGRICULTURE DECISIONS

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UNITED STATES DEPARTMENT OF AGRICULTURE

AGRICULTURE DECISIONS

AGRICULTURE DECISIONS is an official publication by the Secretary of Agriculture consisting of decisions and orders issued in adjudicatory administrative proceedings conducted for the Department under various statutes and regulations. 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 number, e.g., AWA Docket No. 99-0022, 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 consent decisions is included. Consent decisions are on file and may be inspected upon request made to the Hearing Clerk, Office of Administrative Law Judges.

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Volume 60

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UNITED STATES DEPARTMENT OF AGRICULTURE

AGRICULTURE DECISIONS

AGRICULTURE DECISIONS is an official publication by the Secretary of Agriculture consisting of decisions and orders issued in adjudicatory administrative proceedings conducted for the Department under various statutes and regulations. 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.

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PERISHABLE AGRICULTURAL COMMODITIES ACT

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PERISHABLE AGRICULTURAL COMMODITIES ACT

COURT DECISIONS

KIRBY PRODUCE COMPANY, INC. v. UNITED STATES DEPARTMENT OF AGRICULTURE AND UNITED STATES OF AMERICA.
No. 99-1505.
Decided August 3, 2001.

(Cite as: 256 F.3d 830 (D.C. Cir.)).

PACA – Deference to decisions of USDA – Arbitrary and Capricious – No-Pay/Slow Pay – Material facts, lack of dispute – Implicit or equivocal facts, decision based upon, insufficient evidence to determine – Impossibility of performance not synonymous with predication of risk of nonperformance.

Appellant, a merchant of perishable agricultural commodities, petitioned for review of the Judicial Officer's (JO) decision which had upheld the Administrative Law Judge (ALJ). The Court of Appeals held JO's decision to be arbitrary and capricious when Petitioner requested, but was not granted, a hearing on the underlying infraction. The JO had determined that there were no material issues of factwhich were joined by the pleadings. The JO determined that an admission on the record in a prior case, that "full, prompt payment for perishable goods was not made"coupled with Petitioner's request for an indefinite adjournment in this case, constituted an admission that full payment would not be made prior to the time scheduled for hearing (as required to convert a no-pay case into a slow-pay case). The JO concluded that the revocation of the merchant's license was proper. The Court of Appeals determined that the "implicit or equivocal admission" in Petitioner's prior case was insufficient to remove a fact from a material dispute, citing *H. Schnell & Co.*, 57 Agric. Dec. 1722 (1998). The case was remanded for factual determination.

United States Court of Appeals
District of Columbia Circuit

Before: **WILLIAMS** and **GARLAND**, Circuit Judges, and **SILBERMAN**, Senior Circuit Judge.

Opinion for the Court filed by Circuit Judge **GARLAND**.

GARLAND, Circuit Judge:

Kirby Produce Company, Inc. petitions for review of an order of the Department of Agriculture, which revoked its license as a merchant of perishable agricultural products for not promptly paying for fruit and vegetable shipments, in violation of the Perishable Agricultural Commodities Act (PACA), 7 U.S.C. § 499a *et seq*. The

Agriculture Department revoked Kirby's license without a hearing, concluding that there was no dispute of material fact warranting a hearing. Because the grounds upon which the Department made that conclusion were arbitrary and capricious, we grant the petition and remand for further proceedings.

I

PACA regulates "the shipment of perishable agricultural commodities in interstate and foreign commerce through a system of licensing and administrative supervision of the conduct of licensees." *Quinn v. Butz,* 510 F.2d 743, 746 (D.C. Cir. 1975). Every "commission merchant" of such commodities must be licensed by the Secretary of Agriculture. *See* 7 U.S.C. § 499c.[1] PACA licensees are forbidden to engage in specified unfair practices, including the failure to "make full payment promptly in respect of any transaction" in a perishable agricultural commodity. 7 U.S.C. § 499b(4). "Full, prompt payment" means payment within ten days after the date the produce is accepted, unless otherwise agreed to in writing before the time of sale. 7 C.F.R. § 46.2(aa)(5), (11). If the Secretary determines that a licensee has violated the prompt payment requirement, the Secretary may suspend the offender's PACA license, and, if the violation was flagrant or repeated, may revoke it. 7 U.S.C. § 499h(a).

Although the Secretary is statutorily authorized to revoke a license for flagrant violations, Department of Agriculture policy during the relevant time period permitted a licensee to avoid revocation by making full payment prior to the date set for a hearing on the violations. Such payment would convert a "no-pay" case into a "slow-pay" case, and would result in license suspension rather than revocation. *See In re Kirby Produce Co.,* 58 Agric. Dec. 1011 (1999) (citing *In re Gilardi Truck & Transp.,* 43 Agric. Dec. 118 (1984)).[2]

In March 1996, various creditors, including PACA creditors, filed suit against Kirby in the United States District Court for the Eastern District of Tennessee, seeking payment for produce debts worth $2.3 million. In June 1996, the district court issued an order, consented to by all parties, that established a payment

[1] A "commission merchant" is "any person engaged in the business of receiving in interstate or foreign commerce any perishable agricultural commodity for sale, on commission, or for or on behalf of another." 7 U.S.C. § 499a(5).

[2] The Department has since changed its standard for no-pay cases. For all complaints filed after January 25, 1999, a case is deemed no-pay if the alleged debts remain unpaid by the earlier of: (a) the hearing date, or (b) 120 days after the filing of the complaint. *See In re Scamcorp, Inc.,* 57 Agric. Dec. 527, 562 n.13 (1998).

arrangement and claims procedure. The order did not require payment by a date certain. *See Brown's Produce v. Kirby Produce Co.,* No. 3:96–cv–526 (E.D. Tenn. June 25, 1996).

On October 20, 1997, the Agriculture Department's Agricultural Marketing Service (the "Service") filed an administrative complaint, charging Kirby with violating PACA by failing promptly to make full payment for approximately $1.6 million in fruits and vegetables from August 1995 through July 1996. The complaint sought revocation of Kirby's license for willful, flagrant, and repeated violations. Kirby's amended answer denied the complaint's material allegations, and the Service requested a hearing. The Administrative Law Judge (ALJ) scheduled one for January 13, 1999.

On November 10, 1998, Kirby's attorney filed a motion with the ALJ, seeking an adjournment of the hearing until Kirby paid its judgment creditors pursuant to the June 1996 order in the *Brown* case. The motion advised the ALJ of the *Brown* order and attached a copy. It also noted that "the payment of all produce debt prior to the hearing substantially reduces the potential sanction which may be imposed upon the Respondent," and concluded that "[f]ailure to grant this motion for adjournment will frustrate the order . . . and prejudice Respondent's position at the time of the hearing." App. at 20.

Shortly thereafter, the Agricultural Marketing Service filed a motion with the ALJ, seeking a decision on its complaint without a hearing. The Service contended that Kirby's consent to the *Brown* order constituted an admission of all material facts in the complaint. It argued that this admission, coupled with Kirby's apparent inability to pay prior to the hearing date, justified a decision without a hearing. Kirby objected on the grounds that the *Brown* order was an admission of nonpayment only as of June 1996, and that it still had the right to demonstrate full payment before the January 1999 hearing date.

On December 31, 1998, the ALJ canceled the hearing and revoked Kirby's license, concluding that Kirby's motion and attachments had admitted "all the material allegations of fact contained in the complaint." On May 28, 1999, Kirby appealed to the Agriculture Department's Judicial Officer, to whom the Secretary has delegated authority for final decisionmaking in adjudicatory proceedings. *See* 7 C.F.R. § 2.35. Kirby contended, inter alia, that it had in fact made full payment by January 13, 1999, the date for which the hearing had been scheduled. Notwithstanding that it had violated PACA by failing to pay promptly, Kirby argued that its full payment by the date of the hearing converted the case into a slow-pay case for which revocation was unwarranted.

The Judicial Officer issued his decision on July 12, 1999. He began by "agree[ing] with Respondent's contention that if Respondent paid all of its produce

sellers by the date of the hearing, this case would be a 'slow-pay' case," and Kirby would suffer suspension rather than revocation. *In re Kirby Produce Co.,* 58 Agric. Dec. at 1011. However, instead of adjudicating whether Kirby had in fact paid by January 13, 1999, the Officer determined that Kirby's consent to the *Brown* order constituted an admission that it had failed to pay promptly, and that Kirby's motion for a continuance of the hearing constituted an admission that the company would not be able to pay by the hearing date. The Judicial Officer concluded that these admissions eliminated any issue of material fact and justified revocation of Kirby's license without a hearing. Thereafter, Kirby sought reconsideration, which the Judicial Officer denied. Kirby now petitions for review of the order revoking its license. *See* 28 U.S.C. § 2342(2).

II

We review final decisions in PACA cases under the deferential standard of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), (E). Under that standard, we must "uphold the Judicial Officer's decision unless we find it to be arbitrary, capricious, an abuse of discretion, not in accordance with law, or unsupported by substantial evidence." *JSG Trading Corp. v. USDA,* 176 F.3d 536, 541 (D.C. Cir. 1999).

Kirby concedes that it failed promptly to pay creditors for its PACA debts. But the company contends that it was able to pay in full–and in fact did pay in full–by the January 13, 1999 scheduled hearing date, and it denies that its November 10, 1998 motion was an admission to the contrary. Accordingly, Kirby argues that there was an issue of material fact as to its qualification for slow-pay status, and that the Department's decision to revoke its license without a hearing was arbitrary and capricious.

PACA states that upon issuing a PACA complaint, the Secretary shall "afford [the respondent] an opportunity for a hearing thereon before a duly authorized examiner of the Secretary." 7 U.S.C. § 499f(c)(2). Although a hearing is not required if there is no genuine factual dispute, *see Veg-Mix, Inc. v. USDA,* 832 F.2d 601, 607-08 (D.C. Cir. 1987), the Agriculture Department's regulations require a hearing "[i]f any material issue of fact is joined by the pleadings." 7 C.F.R. § 1.141(b). In its briefs and at oral argument, the Department conceded that if there had been an issue of material fact regarding Kirby's ability to pay by the scheduled hearing date, revocation without a hearing would have been improper.

The Judicial Officer based his conclusion that there was no material dispute on two grounds. The first was that Kirby's consent to the *Brown* order constituted an admission that the company had not promptly paid its PACA creditors. That point

is correct and undisputed, but it is also plainly insufficient to eliminate dispute as to whether Kirby could have made full payment by January 13, 1999.

The Officer's second ground was that Kirby's November 10, 1998 motion for an indefinite adjournment constituted an admission that the company would not be able to pay by January 13 of the following year. The Judicial Officer did not explain why it regarded Kirby's motion as an admission. Indeed, the Judicial Officer reached that conclusion without adjudicating Kirby's claim that it had in fact made full payment by January 13, and despite acknowledging that if Kirby actually had paid by that date, revocation could have been avoided. *See In re Kirby Produce Co.,* 58 Agric. Dec. at 1011.

Kirby's motion for adjournment stated: "[T]he payment of all produce debt prior to the hearing substantially reduces the potential sanction. . . . Failure to grant this motion for adjournment *will . . . prejudice* Respondent's position at the time of the hearing." App. at 20 (emphasis added). At oral argument, the Agriculture Department asserted that the term "prejudice" referred to Kirby's classification as a no-pay violator and that, by using the verb "will" rather than "could," Kirby implicitly admitted that its PACA debts could not possibly be paid by the time of the hearing. But under Agriculture Department precedent, an implicit or equivocal admission is insufficient to remove a fact from material dispute. *See In re H. Schnell & Co.,* 57 Agric. Dec. 1722 (1998) (holding that before a hearing may be dispensed with, oral statements of a respondent's attorney "must *clearly* constitute an admission of the material allegations of the complaint") (emphasis added). That rule is especially apt in this circumstance. Litigants that move to extend deadlines often lament the harm likely to result if their motions are denied. To construe such a statement as admitting default, however, confuses prediction of risk with confession of impossibility. Kirby clearly intended to emphasize the risk that its payments could not be made before January 13, but it was not reasonable to infer that Kirby intended to admit that nonpayment was certain.

The Judicial Officer's unadorned statement, that Kirby's request for a continuance of the hearing "constitutes an admission" that Kirby would not be able to make full payment by the date of the hearing, did not represent analysis; it merely expressed a conclusion. Such a conclusion was particularly unreasonable in light of Kirby's protestations that it had intended no such admission. And it was doubly so in light of the Judicial Officer's refusal to determine whether Kirby had in fact paid by January 13, after the Officer acknowledged that if Kirby had actually met that deadline, revocation could have been avoided. *See In re Kirby Produce Co.,* 58 Agric. Dec. at 1011. Indeed, in his decision denying reconsideration, the Judicial Officer only added to the arbitrariness of his reasoning. There, in the face of Kirby's representation that full payment had been made prior to January 13,

1999, and again without determining whether that representation was correct, the Judicial Officer ruled that Kirby's "admission" that it "would not be able to" pay removed any issue of material fact as to whether it actually did pay by that date. *In re Kirby Produce Co.,* 58 Agric. Dec. 1032 (1999).

At oral argument, the Department offered to provide this court with an inspector's affidavit attesting that, as of October 31, 2000, Kirby still had not paid $1.1 million of its PACA debt. After argument, Kirby submitted a declaration by its chief executive officer, made under penalty of perjury, that the company had in fact paid in full prior to January 13, 1999. Although both statements obviously cannot be true, it is just as clear that this court is not the proper authority to make the necessary factual determination. That is a task for the agency upon remand. *See Veg-Mix, Inc.,* 832 F.2d at 609.

III

In revoking Kirby's license without a hearing, the Judicial Officer relied upon his conclusion that the company had admitted that it could not make payment by the date that had been scheduled for that hearing. That conclusion was arbitrary and capricious. We therefore grant Kirby's petition for review and remand the case for further proceedings consistent with this opinion.

———————

DEPARTMENTAL DECISIONS

In re: H.C. MACCLAREN, INC.
PACA Docket No. D-99-0012.
Decision and Order.
Filed November 8, 2001.

Alteration of inspection certificates – False accounts of sales – Egregious violation defined – Willful violations – Flagrant and repeated violations – Liability for employee violations – Reason to know – Sanction recommendation – Sanction policy – Civil penalty – License revocation.

The Judicial Officer (JO) revoked Respondent's PACA license for making false and misleading statements, for a fraudulent purpose, in connection with transactions involving perishable agricultural commodities in willful violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). The JO found that Respondent's employees altered 53 United States Department of Agriculture (USDA) inspection certificates and made eight false accounts of sales resulting in Respondent's underpayment to its produce suppliers and/or brokers of $137,502.15. The JO found that Respondent's employees acted within the scope of their employment when they altered the USDA inspection certificates and made the false accounts of sales; therefore, the JO concluded, as a matter of law, that Respondent was responsible for its employees' violations (7 U.S.C. § 499p). The JO rejected Respondent's request for the assessment of a civil penalty and reversed the Chief ALJ's assessment of a $50,000 civil penalty stating that Respondent's violations were egregious and egregious violations warranted either suspension or revocation of the violator's PACA license. The JO held the Chief ALJ erroneously failed to find that Respondent's violations were willful. The JO found Complainant failed to prove by a preponderance of the evidence that Respondent's principals knew of the violations but found that Respondent's principals should have known of the violations. The JO rejected Complainant's contention that the Chief ALJ's failure to discuss more of the violative transactions and the testimony of each of Complainant's witnesses were error. The Judicial Officer rejected Respondent's contention that the assessment of civil penalties in similar cases which were settled by the entry of consent decisions should determine the sanction in the proceeding. The Judicial Officer stated that consent orders are given no weight in determining the sanction in a litigated case.

Eric Paul and Ruben D. Rudolph, Jr., for Complainant.
Stephen P. McCarron, for Respondent.
Initial decision issued by James W. Hunt, Chief Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

The Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a "Complaint" on June 17, 1999. Complainant instituted this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the

PACA (7 C.F.R. pt. 46); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges that: (1) during the period June 1994 through November 1996, H.C. MacClaren, Inc. [hereinafter Respondent], made, for a fraudulent purpose, false and misleading statements in connection with transactions in perishable agricultural commodities that Respondent purchased, accepted, and sold in interstate commerce in that Respondent altered 53 United States Department of Agriculture inspection certificates to falsely indicate the percentage of defects, the range of defects, the number of cartons, and/or the temperature range of perishable agricultural commodities and, in one case, the inspection applicant's name; (2) Respondent submitted the 53 United States Department of Agriculture inspection certificates to 22 of Respondent's suppliers and/or brokers and, as a result, Respondent underpaid these 22 suppliers and/or brokers $130,903; (3) during the period June 1994 through November 1996, Respondent made, for a fraudulent purpose, false and misleading statements in connection with transactions in perishable agricultural commodities that Respondent purchased, accepted, and sold in interstate commerce in that Respondent made false accounts of sale that incorrectly reported the net proceeds that Respondent received for its sale of perishable agricultural commodities in interstate commerce; (4) Respondent submitted these false accounts of sale to seven of Respondent's suppliers and, as a result, Respondent paid these seven suppliers $6,599.15 less than it would have paid if the accounts of sale had been accurate; and (5) Respondent committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Compl. ¶¶ III-V). On July 7, 1999, Respondent filed an "Answer to Complaint" denying the material allegations of the Complaint.

On September 20 and 21, 2000, Chief Administrative Law Judge James W. Hunt [hereinafter the Chief ALJ] presided over an oral hearing in Detroit, Michigan. Eric Paul and Ruben D. Rudolph, Jr., Office of the General Counsel, United States Department of Agriculture, represented Complainant. Stephen P. McCarron, McCarron & Diess, Washington, DC, represented Respondent.

On December 4, 2000, Respondent filed "Brief of Respondent," and Complainant filed "Complainant's Proposed Findings of Fact, Conclusions and Order." On December 12, 2000, Complainant filed "Complainant's Proposed Findings of Fact, Conclusions and Order (with Revised Transcript Citations)" [hereinafter Complainant's Post-Hearing Brief]. On January 3, 2001, Respondent filed "Reply Brief of Respondent" and Complainant filed "Reply Brief."

On March 23, 2001, the Chief ALJ issued a "Decision and Order" [hereinafter Initial Decision and Order] in which the Chief ALJ: (1) concluded that during the

period June 1994 through November 1996, Respondent, by altering United States Department of Agriculture inspection certificates and accounts of sales, made, for a fraudulent purpose, false and misleading statements in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (2) assessed Respondent a $50,000 civil penalty (Initial Decision and Order at 18).

On May 23, 2001, Complainant appealed to the Judicial Officer. On July 19, 2001, Respondent filed "Respondent's Opposition to Complainant's Appeal Petition." On September 11, 2001, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I agree with the Chief ALJ's Initial Decision and Order, except for the sanction imposed by the Chief ALJ against Respondent. Therefore, except for the Chief ALJ's sanction, the Chief ALJ's discussion of the sanction, and other minor modifications, pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt the Chief ALJ's Initial Decision and Order as the final Decision and Order. Additional conclusions by the Judicial Officer follow the Chief ALJ's conclusion of law as restated.

Complainant's exhibits are designated by "CX." York Stenographic Services, Inc., the court reporting company responsible for transcribing the September 2000 hearing, provided a transcript on October 13, 2000. This October 13, 2000, transcript is in two volumes. One volume of the transcript relates to the segment of the hearing conducted on September 20, 2000, and contains pages numbered 2 through 291. The second volume of the transcript relates to the segment of the hearing conducted on September 21, 2000, and contains pages numbered 2 through 204. The Hearing Clerk requested that York Stenographic Services, Inc., provide a second transcript with the pages sequentially numbered. York Stenographic Services, Inc., provided the second transcript in which the pages are numbered 2 through 466. The Chief ALJ's Initial Decision and Order references the October 13, 2000, transcript. Therefore, in this final Decision and Order, I reference the October 13, 2000, transcript, to wit: references in this Decision and Order to "Tr. Vol. I" relate to the September 20, 2000, hearing transcript segment; and references to "Tr. Vol. II" relate to the September 21, 2000, hearing transcript segment.

APPLICABLE STATUTORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

. . . .

§ 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 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[.] . . .

. . . .

§ 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.

. . . .

(e) Alternative civil penalties

In lieu of suspending or revoking a license under this section when the Secretary determines, as provided in section 499f of this title, that a commission merchant, dealer, or broker has violated section 499b of this title 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 employees, 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.

. . . .

§ 499n. Inspection of perishable agricultural commodities

. . . .

(b) Issuance of fraudulent certificates; penalties

Whoever shall falsely make, issue, alter, forge, or counterfeit, or cause or procure to be falsely made, issued, altered, forged, or counterfeited, or willingly aid, cause, procure or assist in, or be a party to the false making, issuing, altering, forging, or counterfeiting of any certificate of inspection issued under authority of this chapter, sections 491, 493 to 497 of this title, or any Act making appropriations for the Department of Agriculture; or shall utter or publish as true or cause to be uttered or published as true any such false, forged, altered, or counterfeited certificate, for a fraudulent purpose, shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not more than $500 or by imprisonment for a period of not more than one year, or both, at the discretion of the court.

. . . .

§ 499p. Liability of licensees for acts and omissions of agents

In construing and enforcing the provisions of this chapter, the act, omission, or failure of any agent, officer, or other person acting for or employed by any commission merchant, dealer, or broker, within the scope of his employment or office, shall in every case be deemed the act, omission, or failure of such commission merchant, dealer, or broker as that of such agent, officer, or other person.

7 U.S.C. §§ 499b(4), 499h(a), (e), 499n(b), 499p.

CHIEF ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION AND ORDER (AS RESTATED)

Statement of the Case

At the hearing, Respondent did not deny that three of its employees altered 53 United States Department of Agriculture inspection certificates and made eight false accounts of sales during the period June 1994 through November 1996, as alleged in the Complaint (Tr. Vol. I at 6). The evidence presented by Complainant establishes that Norman Olds, Frederick Gottlob, and Alan Johnston, three of Respondent's commission-paid salespersons, altered the United States Department of Agriculture inspection certificates in the course of their employment. Norman Olds and Frederick Gottlob each altered 26 United States Department of Agriculture inspection certificates. Alan Johnston altered one United States Department of Agriculture inspection certificate. Complainant estimated that Respondent gained $85,498.30 from Norman Olds' alterations, $44,743.20 from Frederick Gottlob's alterations, and $661.50 from Alan Johnston's alteration. (CX 12-CX 60.) Respondent did not challenge Complainant's estimates which were attached as Appendix A to the Complaint. These estimated gains are accordingly deemed to be admitted and are attached as Appendix A to this Decision and Order and incorporated in this Decision and Order by reference.

The evidence presented by Complainant establishes that Norman Olds and Frederick Gottlob made eight false accounts of sales in the course of their employment. Norman Olds made one false account of sale and Frederick Gottlob made seven false accounts of sales. Complainant estimated that Respondent gained $485.25 from Norman Olds' false account of sale and $6,113.90 from Frederick Gottlob's seven false accounts of sales. (CX 61-CX 68.) Respondent did not

challenge Complainant's estimates which were attached as Appendix B to the Complaint. These estimated gains are accordingly deemed to be admitted and are attached as Appendix B to this Decision and Order and incorporated in this Decision and Order by reference.

The following are examples of the transactions in which Norman Olds, Frederick Gottlob, and Alan Johnston made alterations.

Inspection Certificate M-910462-1. United States Department of Agriculture inspection certificate M-910462-1 relates to a f.o.b. purchase by Respondent on April 19, 1995, of 920 cartons of iceberg lettuce from Dole Fresh Vegetables, Inc. The United States Department of Agriculture inspector found some decay in the lettuce and the shipping temperature of the lettuce (42 to 46 degrees) was excessive for the commodity. Norman Olds, who handled this transaction, altered the United States Department of Agriculture inspection certificate to show that the temperature was within shipping contract specifications (37 to 41 degrees) to make it appear that the decay was not attributable to the high shipping temperature. Norman Olds then negotiated a $15,640 reduction in the amount Respondent owed Dole Fresh Vegetables, Inc. (CX 21.)

Inspection Certificate K-164560-5. United States Department of Agriculture inspection certificate K-164560-5 relates to a purchase on March 23, 1996, of lettuce by Respondent from Anderson Farms. Frederick Gottlob handled the transaction and altered the United States Department of Agriculture inspection certificate to increase the number of United States Department of Agriculture-inspected containers from 160 to 460 to increase the extent of the damage found in the lettuce. Frederick Gottlob was then, because of the misrepresentation, able to negotiate a $2,887.80 reduction in the amount Respondent owed Anderson Farms and increase the amount of his commission. (CX 41.)

The Anderson Farms transaction was also one of the eight false accounts of sales (CX 61-CX 68). These false accounts of sales involved arrangements between Respondent and shippers whereby Respondent handled produce for a shipper's account. Frederick Gottlob altered the records in the Anderson Farms account to change the gross proceeds of the transaction from $2,681 to $2,232; expenses from $1,192.20 to $1,639.50; and net proceeds from $1,488.80 to $592.50. Frederick Gottlob's false accounting understated the actual net proceeds by $896.30. (CX 65.)

Inspection Certificate K-164203-2. United States Department of Agriculture inspection certificate K-164203-2, the only inspection certificate altered by Alan Johnston, was changed by Alan Johnston to double the number of inspected cartons of apples purchased on February 20, 1996, from Hansen Fruit & Cold Storage Co., Inc., from 49 to 98. This alteration had the effect of increasing the number of

defects. Based on this alteration, Alan Johnston obtained a $705.50 reduction in the amount owed Hansen Fruit & Cold Storage Co., Inc. Alan Johnston said he made the change in the United States Department of Agriculture inspection certificate to correct a counting error by the inspector. (CX 37.)

The evidence clearly establishes that Respondent's employees made, for a fraudulent purpose, false and misleading statements on 53 United States Department of Agriculture inspection certificates and eight accounts of sales. As Respondent's salespersons willfully committed these unlawful acts in the scope of their employment, the acts are deemed to be the acts of Respondent (7 U.S.C. § 499p).[1] Accordingly, I find Respondent willfully violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

As for the sanction for the violations, Complainant contends Respondent's PACA license should be revoked (Complainant's Post-Hearing Brief at 40). Respondent requests the assessment of a civil money penalty of $100,000 or less (Brief of Respondent at 6).

Respondent is a corporation organized and existing under the laws of the State of Michigan. Respondent's business address is 7201 W. Fort, Suite 81, Detroit, Michigan 48209. Pursuant to the licensing provisions of the PACA, Respondent was issued PACA license number 740476 on September 18, 1974. Respondent's PACA license has been renewed annually. (Answer to Complaint ¶ 2.)

Respondent operates as a broker under the PACA. Respondent's president, director, and 51 percent stockholder is Gregory MacClaren. Respondent's vice-president, director, and 49 percent stockholder is Darrell Moccia. (Tr. Vol. II at 40-41, 87; CX 6 at 1, CX 7 at 19.) Gregory MacClaren and Darrell Moccia, together with four salespersons, buy and sell produce for the company. They all work in the same area with raised dividers separating the desks and handle about 400 transactions a month. (Tr. Vol. I at 23-25, 133-34, 232-33; Tr. Vol. II at 41-42.)

Each transaction has its own file. The salesperson handling a transaction places identifying initials on the outside file jacket and writes on the jacket the amount of the invoice which is used by an office worker to pay the invoice and calculate the salesperson's commission. United States Department of Agriculture inspection certificates, invoices, and other records relating to the transaction are placed in the file. (Tr. Vol. I at 29, 50; Tr. Vol. II at 69-70.) Darrell Moccia testified that, prior to the United States Department of Agriculture's investigation, he did not routinely

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[1] *See also In re The Produce Place*, 53 Agric. Dec. 1715, 1761-63 (1994); *In re Jacobson Produce, Inc.* (Decision as to Jacobson Produce, Inc.), 53 Agric. Dec. 728, 754 (1994), *appeal dismissed*, No. 94-4418 (2d Cir. Apr. 1996).

look in the files prepared by the salespersons, except when he received a complaint from a shipper. He said he had relied on the office staff to bring any problems to his attention. (Tr. Vol. II at 51-54.)

In December 1996, United States Department of Agriculture investigators visited Respondent's place of business for the purpose of checking on a transaction involving another company that was under investigation for possible altered United States Department of Agriculture inspection certificates. When the investigators checked Respondent's file relating to this transaction, they found two copies of the same United States Department of Agriculture inspection certificate. The two copies contained conflicting entries. Neither Gregory MacClaren nor Darrell Moccia could explain the discrepancy. The United States Department of Agriculture investigators then looked at 36 files and found the entries on the United States Department of Agriculture inspection certificates in 11 of the files handled by Norman Olds, Frederick Gottlob, and Alan Johnston did not match the entries on the United States Department of Agriculture's copies of the certificates. (Tr. Vol. I at 9-15.) Norman Olds, Frederick Gottlob, and Alan Johnston admitted making alterations to the United States Department of Agriculture inspection certificates (Tr. Vol. I at 18-23, 131-33, 225-28, 263-64; CX 3 at 2-4). Gregory MacClaren and Darrell Moccia told the investigators that they were unaware of the alterations but that they wanted to cooperate and do what was necessary to get "to the bottom" of the matter. They then instituted their own investigation. Darrell Moccia told Norman Olds "if you did it, you might as well get everyone [sic] of [the files] out and let's get it out in the open. Because if there's [sic] ill gains in it in our books, I want them out, I want to pay the bills." (Tr. Vol. II at 44-45.)

Darrell Moccia and Gregory MacClaren then had Norman Olds, Alan Johnston, and Frederick Gottlob go through their files to find and retrieve any altered United States Department of Agriculture inspection certificates (Tr. Vol. I at 20, 264-65). Norman Olds testified that he and his wife went through his files involving all the transactions he handled in his 7 years with Respondent (Tr. Vol. I at 266). He gave the files with altered United States Department of Agriculture inspection certificates to a United States Department of Agriculture investigator who observed that some of the file jackets for the transactions handled by Norman Olds contained the initials "DNM" rather than "NO." DNM are the initials of Darrell N. Moccia. Norman Olds and Darrell Moccia testified that Norman Olds had used the initials DNM for some transactions because of a 2-year "no-compete" agreement that Norman Olds had with the produce company for whom he worked before being hired by Respondent. Norman Olds, with Darrell Moccia's concurrence, had put the initials DNM rather than his own initials, NO, on the jacket files for those transactions he handled that involved companies that also did business with his former employer

to avoid a conflict with the no-compete agreement. Darrell Moccia put the initials DM on the transactions he handled to distinguish them from the DNM transactions handled by Norman Olds. The office workers who paid the invoices and computed the commissions knew that files with the initials DNM meant Norman Olds and those with DM meant Darrell Moccia. (Tr. Vol. I at 193-94, 213-15, 255-57, 281-82.)

Norman Olds, Alan Johnston, and Frederick Gottlob gave statements to United States Department of Agriculture investigators admitting that they had altered United States Department of Agriculture inspection certificates. They each stated that Gregory MacClaren and Darrell Moccia were not aware of their actions. (CX 3 at 2-4; Tr. Vol. I at 228-29.) Frederick Gottlob added in his statement that he had acted "independently" (CX 3 at 3). However, at the hearing Frederick Gottlob testified that, while his statement was true "at the time" he prepared it, he was told by Norman Olds some months later that Gregory MacClaren and Darrell Moccia had been aware that the United States Department of Agriculture inspection certificates were being altered. He said that Norman Olds was a partner in the business, a supervisor, and the office manager, that he had gotten the idea to alter certificates from Norman Olds, that Norman Olds showed him how to make the alterations, and that the alterations were a secret between he and Norman Olds. Frederick Gottlob said the practice of altering the United States Department of Agriculture inspection certificates had started after Norman Olds began working for Respondent, which was about 2 years after Frederick Gottlob's date of employment. However, he hedged this assertion when asked if he had altered any United States Department of Agriculture inspection certificates before Norman Olds' arrival, with the response "It's possible that I did. I'm not sure." (Tr. Vol. I at 132, 144, 152, 157-58, 172.)

As for falsifying accounts of sales, the record shows that Frederick Gottlob, who called the practice "creaming the file," was responsible for seven of the eight accounts of sales that Complainant alleges were falsified (CX 61-CX 63, CX 65-CX 68). Frederick Gottlob, however, implied that other salespersons had also falsified accounts of sales by claiming that it "was a common practice in the office" and that Greg MacClaren was aware of it. He also asserted that everyone joked about the practice (Tr. Vol. I at 135-36, 167). Frederick Gottlob named Daniel Schmidlin as one of the salespersons he saw falsifying an account of sale and said Gregory MacClaren had made up a letterhead to create a false account of sale for a transaction with a company called Metro Produce. However, he qualified his assertion by saying that he did not know whether Gregory MacClaren had falsified the account. He also said that he learned the "white-out trick" that he used to alter United States Department of Agriculture inspection certificates from Gregory

MacClaren who had used white-out on documents to be used for a shipment to Canada. (Tr. Vol. I at 135-37, 159, 161-62, 166-68.) Gregory MacClaren explained that he had sometimes re-used manifest papers for the shipment of grapes to Canada by using white-out to create a blank manifest form to write in the information for a new shipment of grapes. He said no false information was put on the forms. (Tr. Vol. II at 106-07, 138-40.) Complainant does not allege that this practice was unlawful.

Daniel Schmidlin, who was not alleged to have altered United States Department of Agriculture inspection certificates or to have made false accounts of sales, testified that he was not aware that Norman Olds or Frederick Gottlob or anyone at Respondent altered United States Department of Agriculture inspection certificates or made false accounts of sales until the United States Department of Agriculture conducted its investigation. He also said that Norman Olds was just another salesperson and was not his supervisor. (Tr. Vol. I at 242-50.)

Norman Olds testified that he was not a supervisor but that, under the terms of his employment with Respondent, he was to receive 10 percent of the company's stock after being there 10 years. He said he never told Frederick Gottlob or anyone at the company that he had altered United States Department of Agriculture inspection certificates and was unaware that Frederick Gottlob had also altered them. (Tr. Vol. I at 265-66, 278-81.)

Perry Chiarelli, who worked for Respondent for about 6 weeks as a salesperson, said he received training from Darrell Moccia on being a buyer and broker and received coaching from Norman Olds on dealing with trucking companies and growers. He testified that Norman Olds was Respondent's best salesperson and was "kind of like our supervisor" (Tr. Vol. I at 183). Perry Chiarelli said he saw Norman Olds alter a United States Department of Agriculture inspection certificate and quit a week later. When Gregory MacClaren asked him why he was quitting, Perry Chiarelli responded that he was not comfortable working with "scoundrels." However, he said he did not go into specifics with Gregory MacClaren as to the persons he regarded as scoundrels, but testified that he meant "not only the buyers but the growers and even the brokers, just the industry as I had seen it firsthand" (Tr. Vol. I at 184). He also talked to Darrell Moccia when he quit but said he did not remember whether he used the word scoundrel with Darrell Moccia. He said he told Darrell Moccia that United States Department of Agriculture inspection certificates were being altered but then said he was not sure whether he had actually used the word "alterations" in his conversation with Darrell Moccia and that he may have said "I was not comfortable with what Norm [Olds] was doing as far as the inspections I could have said." (Tr. Vol. I at 175-80, 183-84, 187-88.)

Jayne Mounce, one of Respondent's office workers, said that Norman Olds was

a supervisor but that she never saw him directing the other salespersons. She also said she was not aware that United States Department of Agriculture inspection certificates had been altered until the time of the United States Department of Agriculture investigation. (Tr. Vol. I at 194-95, 213-14.)

Alan Johnston, who admitted altering a United States Department of Agriculture inspection certificate after a United States Department of Agriculture inspector made a mistake in counting the number of cartons in a shipment from Hansen Fruit & Cold Storage Co., Inc., said he called Hansen Fruit & Cold Storage Co., Inc., about the inspector's mistake and told them that he had altered the United States Department of Agriculture inspection certificate to reflect the correct count. He said that Hansen Fruit & Cold Storage Co., Inc., did not "have a problem with that." Alan Johnston, however, followed up with a letter to Hansen Fruit & Cold Storage Co., Inc., to document what he had done because he said he realized he should not have altered the United States Department of Agriculture inspection certificate. He said he sat next to Norman Olds but was not aware that Norman Olds or Frederick Gottlob had altered United States Department of Agriculture inspection certificates. (Tr. Vol. I at 225-38; CX 3 at 4.)

Norman Olds and Frederick Gottlob offered to resign from the company, but Gregory MacClaren gave them the option of staying and paying Respondent the amount it owed the produce shippers because of the altered United States Department of Agriculture inspection certificates. Gregory MacClaren told them "we're going to try to work through this" by making restitution to the shippers. Norman Olds and Frederick Gottlob were told to call all shippers who were affected by the altered United States Department of Agriculture inspection certificates and Gregory MacClaren made follow-up calls to the same shippers. He testified that he has paid back almost 100 percent of the amounts Respondent underpaid shippers because of the alterations. (Tr. Vol. II at 98-103, 109.)

Norman Olds continued working as a salesperson with an agreed upon amount deducted from his pay as restitution to cover the loss caused by his misdeeds. Frederick Gottlob continued working for another month and a half. However, Gregory MacClaren and Darrell Moccia said Frederick Gottlob's attitude changed and when his sales would equal his "draw," he would stop making sales. Darrell Moccia said that Frederick Gottlob "kept spouting off that he had a wife that had a good job and he didn't really need to work hard and make a lot of money." Frederick Gottlob, who testified after receiving a grant of immunity from federal criminal prosecution, admitted that he did not have the "greatest attitude." Gregory MacClaren fired Frederick Gottlob in April 1997 after an encounter over Frederick Gottlob's work performance. Respondent sued Frederick Gottlob, Frederick Gottlob countersued, but the suits were later dropped by both sides. Frederick

Gottlob left the company without paying any restitution to Respondent. (Tr. Vol. I at 138, 152, 155-57, 172-73, 275, 288-89; Tr. Vol. II at 49-50, 90, 104-09.)

Discussion

Congress amended the PACA in 1995 to provide that a civil penalty may be assessed for a violation of section 2 of the PACA (7 U.S.C. § 499b) in lieu of license suspension or revocation. 7 U.S.C. § 499h(e). The legislative history relevant to this 1995 amendment of the PACA establishes that Congress viewed a civil penalty as a less stringent sanction than license revocation or suspension and provides one example of a violation of the PACA in which a civil penalty, rather than license revocation or suspension, might be appropriate, as follows:

> *Section 11—Imposition of civil penalty in lieu of suspension or revocation*
>
> Section 11 authorizes USDA to assess civil monetary penalties not to exceed $2000 for violation of Section 2 in lieu of license suspension or revocation for each violation or each day it continues. Currently, if an entity operating within PACA is found to employ a person responsibly connected with a violating entity the only recourse available to USDA is to initiate a revocation hearing for the entity's license. This provision allows USDA to take a less stringent step by assessing a civil penalty on the entity in lieu of license revocation in cases where entities are found employing a person responsibly connected with a violating entity. However, USDA is required to give consideration to the business size, number of employees, seriousness, nature and amount of the violation when assessing the amount of the penalty.

H.R. Rep. No. 104-207, at 10-11 (1995), *reprinted in* 1995 U.S.C.C.A.N. 453, 457-58.

The Administrator, Agricultural Marketing Service, Mr. Lon F. Hatamiya, supported expansion of authority to assess civil penalties during the March 16, 1995, hearing conducted on the PACA:

> MR. HATAMIYA. . . .
>
> . . . .

> In addition, PACA's monetary penalties need revision. PACA currently authorizes monetary penalties only for misbranding violations. In all other disciplinary actions, USDA's only recourse is suspending or revoking a PACA license. The monetary penalty, rather than putting the violator out of business, would often better serve the public interest.
>
> . . . .
>
> MR. BISHOP. You want flexibility in the assessment of fees?
>
> MR. HATAMIYA. . . .
>
> . . . .
>
> Another area that we think needs some revision is an area of monetary penalties. The only penalty that we can impose right now is a total revocation or suspension of a license. We believe that putting somebody out of business is not in the best public interest, that imposing penalties may be a better resulting action.
>
> MR. BISHOP. You want a fine?
>
> MR. HATAMIYA. Yes, Essentially, yes.

Perishable Agricultural Commodities Act: Hearing on H.R. 1103 Before the Subcomm. on Risk Management and Specialty Crops of the House Comm. on Agriculture, 104th Cong. 12, 34 (1995).

The Administrator, Agricultural Marketing Service, also submitted a written statement, which was made part of the record of the hearing, stating that license suspension or revocation is appropriate for egregious violations of the PACA, as follows:

> A second area of possible revision in the PACA involves the law's penalties. PACA currently authorizes monetary penalties and administrative actions only for misbranding violations. In all other areas of administrative disciplinary action the PACA only provides authority for suspending or revoking a PACA license. Certainly, those very powerful sanctions are at times the appropriate sanctions for egregious violations of the law.

> However, in other areas, the public interest could better be served by not forcing the violator out of business, but by imposing a monetary penalty instead.

Perishable Agricultural Commodities Act: Hearing on H.R. 1103 Before the Subcomm. on Risk Management and Specialty Crops of the House Comm. on Agriculture, 104th Cong. 106 (1995).

The Administrator of the Agricultural Marketing Service's statements make clear that, although the United States Department of Agriculture supported the 1995 amendments to the PACA which authorize the Secretary of Agriculture to assess a civil penalty in lieu of license revocation or suspension, license revocation or license suspension would be appropriate for "egregious" violations of the PACA.

"Egregious" is defined as "conspicuously bad" (Webster's Collegiate Dictionary 369 (10th ed. 1997)). The intentional alteration and falsification of United States Department of Agriculture inspection certificates and making of false accounts of sales for a fraudulent purpose that cause produce shippers monetary loss clearly meets this definition of egregious. The alteration of United States Department of Agriculture inspection certificates is particularly egregious because these certificates play a critical role in the produce industry. Steven J. Koran, regional sales manager for Dole Fresh Vegetables, Inc., one of the produce suppliers Respondent underpaid as a result of its alterations of United States Department of Agriculture inspection certificates, testified regarding the role of United States Department of Agriculture inspection certificates, as follows:

> [BY MR. PAUL:]
>
> Q. Okay. Please indicate to me what role do USDA inspections play in the produce business.
>
> [BY MR. KORAN:]
>
> A. The role of the USDA inspections is pretty much our eyes and ears for any sort of quality claims. It's pretty much the only method we have to settle any disputes on quality grade.
>
> Q. What is Dole's practice with respect to the use of inspections or requiring of inspection certificates?

A. Pretty much any time there's a quality issue we require an inspection to be taken before any adjustment be taken off of the file from the agreed upon FOB price.

Q. If a receiver requests an adjustment, do you ever grant one without an inspection?

A. On very rare occasions if the quantity of the item is insignificant but not very often.

Tr. Vol. I at 62-63.

Similarly, Cloyse Edward Little, the general manager of Mills Distributing Company, a produce supplier Respondent underpaid as a result of its alterations of United States Department of Agriculture inspection certificates, testified that United States Department of Agriculture inspection certificates play an extremely important role in the produce industry (Tr. Vol. I at 85-86). The important role of United States Department of Agriculture inspection certificates is reflected in section 14(b) of the PACA (7 U.S.C. § 499n(b)) which makes the alteration of a United States Department of Agriculture inspection certificate a criminal offense.

Complainant contends Respondent knew that Norman Olds, Frederick Gottlob, and Alan Johnston altered United States Department of Agriculture inspection certificates and that Norman Olds and Frederick Gottlob made false accounts of sales or, if it did not know, Respondent's lack of knowledge was due to its willful ignorance and Respondent's PACA license should therefore be revoked (Complainant's Post-Hearing Brief at 28-33).

The record clearly establishes that Norman Olds, Frederick Gottlob, and Alan Johnston, for a fraudulent purpose, knowingly altered 53 United States Department of Agriculture inspection certificates and Norman Olds and Frederick Gottlob knowingly made eight false accounts of sales in connection with transactions involving perishable agricultural commodities that Respondent purchased, accepted, and sold in interstate commerce. The false and misleading statements which Respondent's employees knowingly placed on United States Department of Agriculture inspection certificates and accounts of sales for a fraudulent purpose are prohibited by section 2(4) of the PACA (7 U.S.C. § 499b(4)).

The knowledge that can be attributed to a corporate PACA licensee, such as Respondent, is not limited to that which is known by its officers, owners, and directors. The relationship between a PACA licensee and its employees acting within the scope of their employment is governed by section 16 of the PACA

(7 U.S.C. § 499p) which provides that, in construing and enforcing the PACA, the act of any agent, officer, or other person acting for or employed by a broker, within the scope of his or her employment or office, shall in every case be deemed the act of the broker as that of the agent, officer, or other person. Essentially, section 16 of the PACA (7 U.S.C. § 499p) provides an identity of action between a PACA licensee and the PACA licensee's agents and employees. Respondent's employees, Norman Olds, Frederick Gottlob, and Alan Johnston, were acting within the scope of their employment when they knowingly and willfully violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Thus, as a matter of law, the knowing and willful violations by Respondent's employees are deemed to be knowing and willful violations by Respondent (7 U.S.C. § 499p).[2]

The evidence offered to establish Respondent's owners, Gregory MacClaren and Darrell Moccia, knew that United States Department of Agriculture inspection certificates were being altered was the testimony of Perry Chiarelli and Frederick Gottlob. Perry Chiarelli, however, could not recall whether he had told Gregory MacClaren and Darrell Moccia that Norman Olds had altered a United States Department of Agriculture inspection certificate or whether he had just complained that he was quitting because he considered everyone connected with the produce industry "scoundrels."

As for Frederick Gottlob's testimony, it was too inconsistent and unsubstantiated to be given much credence. He first gave a statement that he said was true "at the time" that he had acted independently and that Gregory MacClaren and Darrell Moccia were unaware of his misdeeds. He then changed his statement by testifying that he had started altering United States Department of Agriculture inspection certificates at Norman Olds' instigation and that he had later learned from Norman Olds that Gregory MacClaren and Darrell Moccia had known of their actions. He then even changed this statement by conceding that he may have started altering United States Department of Agriculture inspection certificates before Norman Olds was employed by Respondent. He claimed Norman Olds was not only a salesperson but also a partner, a supervisor, and office manager. Norman Olds was a potential partner and a top salesperson who "supervised" to the extent of coaching Perry Chiarelli on how to become a salesperson, but there is no evidence that he had the authority or responsibility of a supervisor or an office manager. Moreover, if Norman Olds were a supervisor or manager, it would have meant that, with Gregory MacClaren and Darrell Moccia working in the same area, there would have been the very unlikely ratio of three supervisors and managers to three salespersons.

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[2]See note 1.

Finally, Frederick Gottlob, who was responsible for seven of the eight false accounts of sales, claimed that falsifying accounts of sales was such a common practice everyone joked about it. He specifically named Daniel Schmidlin and Gregory MacClaren as two of the other culprits. There was a lack of corroboration for this assertion, and I do not find Frederick Gottlob a credible witness. His testimony has little value. I find Complainant failed to prove by a preponderance of the evidence that Gregory MacClaren and Darrell Moccia knew of the violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) before the violations were discovered during a United States Department of Agriculture investigation in December 1996.

However, I find Gregory MacClaren and Darrell Moccia should have known of the violations before they were brought to their attention during a United States Department of Agriculture investigation. Commission merchants, brokers, and dealers are prohibited from: (1) making, for a fraudulent purpose, any false or misleading statement in connection with a transaction involving any perishable agricultural commodity; (2) failing to truly and correctly account in respect of any transaction in any perishable agricultural commodity to the person with whom the transaction is had; and (3) failing, without reasonable cause, to perform any specification of duty, express or implied, arising out of any undertaking in connection with a transaction involving a perishable agricultural commodity. (7 U.S.C. § 499b(4)). Cloyse Edward Little, the general manager of Mills Distributing Company, who supervises seven salespersons and has been in the produce industry since 1956, testified that he examines the salespersons' transaction files, including inspection certificates, to evaluate their performance and commissions and that a manager cannot do an adequate job of managing unless he or she reviews the salespersons' transactions files (Tr. Vol. I 93-94). Similarly, Jane E. Servais, Complainant's sanction witness, testified as to the responsibilities of a principal of a PACA licensee to review its salespersons' transaction files, as follows:

BY MR. PAUL:

Q. Now, Ms. Servais, does the agency consider that licensees have a responsibility to have true and accurate records?

[BY MS. SERVAIS:]

A. Yes.

Q. And to supervise their employees in the preparation of such records?

A. They have to provide oversight. They are responsible for the acts of their employees.

Q. And you've heard the testimony that the Respondent's principles [sic] have indicated as to not looking in file jackets. And does that conform with your understanding of appropriate supervision?

A. I don't think any supervisor looks over every employee on every single transaction. But there are checks and balances in place in all businesses, or should be. The fact that they should have, and had opportunity and had access to these files, yes, I do believe they should have, at least on a random sampling basis, check over what their employees were doing.

Tr. Vol. II at 182-83.

In light of the prohibitions in section 2(4) of the PACA (7 U.S.C. § 499b(4)), Gregory MacClaren's and Darrell Moccia's failure to review at least a portion of the transaction files prepared by Respondent's salespersons constitutes gross negligence. Given the large number of altered United States Department of Agriculture inspection certificates and false accounts of sales, Gregory MacClaren's and Darrell Moccia's review of a portion of the transaction files prepared by Respondent's salespersons would likely have resulted in Gregory MacClaren's and Darrell Moccia's discovery of Respondent's violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) prior to December 1996.

Complainant contends PACA license revocation is the only appropriate sanction in this case because the "message" a monetary penalty would send to Respondent and other regulated produce brokers and dealers is that the sanction for altering United States Department of Agriculture inspection certificates and making false accounts of sales is only a "cost of doing business" (Tr. Vol. II at 180).

The United States Department of Agriculture'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 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3):

[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.

Complainant's sanction witness, Ms. Servais, an administrative official charged with the responsibility for achieving the purposes of the PACA, recommended the revocation of Respondent's PACA license and provided the reasons for her recommendations, including the seriousness of Respondent's violations, the number of Respondent's violations, the time during which the violations occurred, the number of Respondent's employees who altered United States Department of Agriculture inspection certificates and made false accounts of sales, the amount of money Respondent underpaid its suppliers and/or brokers, and the mitigating and aggravating circumstances relevant to Respondent's violations[3] (Tr. Vol. II at 171-90).

The recommendations of administrative officials charged with the responsibility for achieving the congressional purpose of the regulatory statute are highly relevant to any sanction to be imposed and are entitled to great weight in view of the experience gained by administrative officials during their day-to-day supervision of the regulated industry. *In re S.S. Farms Linn County, Inc.*, 50 Agric. Dec. at 497.

Respondent's principals, Gregory MacClaren and Darrell Moccia, acted responsibly when they became aware of the fraudulent practices of Respondent's salespersons. Respondent took prompt measures to discover all of the United States Department of Agriculture inspection certificates that had been altered and all of the false accounts of sales that Respondent's salespersons had made and to provide restitution to the produce shippers for the underpayments resulting from these altered inspection certificates and false accounts of sales. I agree with Complainant's sanction witness that Respondent's restitution of the amounts it underpaid its suppliers and/or brokers because of the alterations of United States Department of Agriculture inspection certificates and the making of false accounts of sales is a mitigating circumstance.

Complainant noted that Respondent retained the salespersons who were

[3]Ms. Servais testified Respondent's restitution of the amounts that it underpaid its suppliers and/or brokers because of the alterations of United States Department of Agriculture inspection certificates and the making of false accounts of sales and the corrective action Respondent took to ensure that future violations of the PACA would not occur are mitigating circumstances. Ms. Servais further testified Respondent's retention of the salespersons who altered United States Department of Agriculture inspection certificates and made false accounts of sales after Respondent's principals learned of their identities is an aggravating circumstance. (Tr. Vol. II at 175, 195.)

responsible for the unlawful conduct. However, Respondent did so on the condition that they pay restitution. Respondent fired the one salesperson, Frederick Gottlob, who did not pay restitution. Nonetheless, I agree with Complainant's sanction witness that Respondent's retention of salespersons who altered United States Department of Agriculture inspection certificates and made false accounts of sales after Respondent's principals learned of their identities is an aggravating circumstance.

The purpose of a sanction in a PACA administrative disciplinary proceeding is to deter the violator and other potential violators from future violations of the PACA. Complainant's sanction witness testified that revocation of Respondent's PACA license is necessary to deter Respondent and other potential violators from future violations of the PACA (Tr. Vol. II at 173-74). However, Complainant's sanction witness also testified that she did not know whether a civil penalty would be just as effective a deterrent as the suspension or revocation of a PACA license (Tr. Vol. II at 200). Therefore, while I agree with Ms. Servais' sanction recommendation, I give no weight to her testimony on the deterrent effect of the various sanctions that may be imposed against Respondent.

Respondent, as a matter of law, is responsible for the unlawful conduct of its agents, officers, and other persons working for or employed by Respondent, and Norman Olds', Frederick Gottlob's, and Alan Johnston's alteration of United States Department of Agriculture inspection certificates and making false accounts of sales constitute egregious violations of the PACA. I find Respondent's principals' prompt admission of Respondent's violations of the PACA; efforts to identify all altered United States Department of Agriculture inspection certificates, false accounts of sales, and underpaid suppliers and/or brokers; corrective actions to ensure that violations of the PACA do not occur in the future; and prompt payment of the amounts underpaid as a result of Respondent's violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) are mitigating circumstances. Nevertheless, considering the seriousness of Respondent's willful violations, the number of Respondent's willful violations,[4] the 29-month period during which the willful violations occurred, the number of Respondent's employees who altered United States Department of Agriculture inspection certificates and made false accounts of sales, the amount of money Respondent underpaid its suppliers and/or brokers, Respondent's retention of the salespersons who engaged in the unlawful conduct, and Respondent's principals' failure to review transaction files prepared by Respondent's salespersons, I conclude a civil penalty would not be sufficient to

[4]Ms. Servais testified that in no previous case had the United States Department of Agriculture discovered as many altered United States Department of Agriculture inspection certificates as it discovered during the investigation of this case (Tr. Vol. II at 189).

deter Respondent and other potential violators from future violations of the PACA. Further, I conclude revocation of Respondent's PACA license is necessary to deter future violations of the PACA by Respondent and other potential violators.

Findings of Fact

1. Respondent is a corporation organized and existing under the laws of the State of Michigan. Respondent's business address is 7201 W. Fort, Suite 81, Detroit, Michigan 48209.

2. Pursuant to the licensing provisions of the PACA, license number 740476 was issued to Respondent on September 18, 1974. Respondent's PACA license has been renewed annually.

3. Respondent operates as a broker under the PACA. Respondent's president, director, and 51 percent stockholder is Gregory MacClaren. Respondent's vice-president, director, and 49 percent stockholder is Darrell Moccia.

4. During the period June 1994 through November 1996, Gregory MacClaren and Darrell Moccia, and Respondent's salespersons, Norman Olds, Frederick Gottlob, Alan Johnston, and Daniel Schmidlin, bought and sold perishable agricultural commodities for Respondent. The salespersons were paid by commission.

5. During the period June 1994 through November 1996, Respondent, through its salespersons Norman Olds, Frederick Gottlob, and Alan Johnston, made false and misleading statements in connection with interstate transactions in perishable agricultural commodities by altering 53 United States Department of Agriculture inspection certificates involving 49 transactions to underpay 22 of Respondent's suppliers and/or brokers in amounts totaling $130,903 as set forth in Appendix A of this Decision and Order.

6. During the period June 1994 through November 1996, Respondent, through its salespersons Norman Olds and Frederick Gottlob, made eight false accounts of sales to underpay seven suppliers in amounts totaling $6,599.19 as set forth in Appendix B of this Decision and Order.

7. Respondent's owners, Gregory MacClaren and Darrell Moccia, did not know, but should have known, during the period June 1994 through November 1996, that the United States Department of Agriculture inspection certificates, referenced in paragraph 5 of these Findings of Fact, were altered and that the false accounts of sales, referenced in paragraph 6 of these Findings of Fact, were made.

8. In December 1996, Respondent's owners, Gregory MacClaren and Darrell Moccia, first learned of the altered United States Department of Agriculture inspection certificates referenced in paragraph 5 of these Findings of Fact and the

false accounts of sales referenced in paragraph 6 of these Findings of Fact.

9. In December 1996, Respondent's owners, Gregory MacClaren and Darrell Moccia, took prompt action to provide restitution to the suppliers and/or brokers who were underpaid because of the altered United States Department of Agriculture inspection certificates and false accounts of sales.

Conclusion of Law

Respondent's alterations of 53 United States Department of Agriculture inspection certificates and making of eight false accounts of sales, for a fraudulent purpose, constitute repeated, flagrant, and willful violations of section 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)).

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Complainant raises six issues in Complainant's Appeal Petition. First, Complainant contends the Chief ALJ's failure to conclude that Respondent's violations of the PACA were willful, is error (Complainant's Appeal Pet. at 5-7). Respondent argues that willfulness is irrelevant (Respondent's Opposition to Complainant's Appeal Pet. at 1 n.1).

I agree with Complainant's contention that the Chief ALJ erroneously failed to conclude that Respondent's violations of section 2(4) of the PACA (7 U.S.C. § 499(b)(4)) were willful. A violation 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.[5] The record

[5] *See, e.g., Allred's Produce v. United States Dep't of Agric.*, 178 F.3d 743, 748 (5th Cir. 1999); *Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996); *Potato Sales Co. v. Dep't of Agric.*, 92 F.3d 800, 805 (9th Cir. 1996); *Cox v. United States Dep't of Agric.*, 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 Sunland Packing House Co.*, 58 Agric. Dec. 543, 593 (1999); *In re Western Sierra Packers, Inc.*, 57 Agric. Dec. 1578, 1602 (1998); *In re Limeco, Inc.*, 57 Agric. Dec. 1548, 1560 (1998), *appeal dismissed*, No. 98-5571 (11th Cir. Jan. 28, 1999); *In re Queen City Farms, Inc.*, 57 Agric. Dec. 813, 827 (1998), *appeal dismissed sub nom. Litvin v. United States Dep't of Agric.*, No. 98-1991 (1st Cir. Nov. 9, 1998); *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 552, (1998); *In re Tolar Farms*, 56 Agric. Dec. 1865, 1879 (1997), *appeal dismissed*, No. 98-5456 (11th Cir. July 39, 1999); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 917, 925 (1997), *aff'd*, 166 F.3d 1200 (Table), 1998 WL 863340 (2d Cir. 1998), *cert. denied*, 526 U.S. 1098
(continued...)

clearly establishes that Norman Olds, Frederick Gottlob, and Alan Johnston, for a fraudulent purpose, intentionally altered 53 United States Department of Agriculture inspection certificates and Norman Olds and Frederick Gottlob, for a fraudulent purpose, intentionally made eight false accounts of sales in connection with transactions involving perishable agricultural commodities that Respondent purchased, accepted, and sold in interstate commerce. The false and misleading statements which Respondent's employees willfully placed on United States Department of Agriculture inspection certificates and accounts of sales are prohibited by section 2(4) of the PACA (7 U.S.C. § 499b(4)).

The relationship between a PACA licensee and its employees acting within the scope of their employment is governed by section 16 of the PACA (7 U.S.C. § 499p) which provides that, in construing and enforcing the PACA, the act of any agent, officer, or other person acting for or employed by a broker, within the scope of his or her employment or office, shall in every case be deemed the act of the broker as that of the agent, officer, or other person. Essentially, section 16 of the PACA (7 U.S.C. § 499p) provides an identity of action between a PACA licensee and the PACA licensee's agents and employees.

Respondent's employees Norman Olds, Frederick Gottlob, and Alan Johnston

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[5](...continued)
(1999); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 895-96 (1997); *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234, 1244 (1996), *aff'd*, 136 F.3d 89 (2d Cir. 1997); *In re Andershock's Fruitland, Inc.*, 55 Agric. Dec. 1204, 1232-33 (1996), *aff'd*, 151 F.3d 735 (7th Cir. 1998); *In re Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 626 (1996); *In re Moreno Bros.*, 54 Agric. Dec. 1425, 1432 (1995); *In re Granoff's Wholesale Fruit & Produce, Inc.*, 54 Agric. Dec. 1375, 1378 (1995); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1330 (1995), *aff'd*, 104 F.3d 139 (8th Cir. 1997), *cert. denied sub nom. Heimann v. Department of Agric.*, 522 U.S. 951 (1997); *In re National Produce Co.*, 53 Agric. Dec. 1622, 1625 (1994); *In re Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1612 (1993). *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.'") 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. United States Dep't of Agric.*, 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's violations were willful.

were acting within the scope of their employment when they willfully violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Thus, as a matter of law, the willful violations by Respondent's employees are deemed to be willful violations by Respondent.[6] Therefore, in this Decision and Order, I restate the Chief ALJ's Initial Decision and Order to reflect my conclusion that Respondent's violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) are willful.

I reject Respondent's argument that willfulness is irrelevant. Respondent's willfulness has a direct bearing on the sanction which I impose for Respondent's 61 violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Moreover, I conclude that, as a matter of law, Respondent's violations are repeated and flagrant. Respondent's violations are "repeated" because repeated means more than one, and Respondent's violations are flagrant because of the number of violations, the amount of money involved, the type of violations, and the 29-month period during which Respondent committed the violations.[7]

Second, Complainant contends the Chief ALJ erred in finding that Respondent and its owners, Gregory MacClaren and Darrell Moccia, "did not know, and should not have known," that United States Department of Agriculture inspection certificates were altered or that false accounts of sales were made (Complainant's Appeal Pet. at 8-13). In response, Respondent states the Chief ALJ's findings of

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[6] *See In re Jacobson Produce, Inc.*, 53 Agric. Dec. 728 (1994), *appeal dismissed*, No. 94-4118 (2d Cir. Apr. 1996).

[7] *See, e.g.*, *Allred's Produce v. United States Dep't of Agric.*, 178 F.3d 743, 748 (5th Cir. 1999) (stating that violations are repeated under the PACA if they are not done simultaneously and whether violations are flagrant under the PACA is a function of the number of violations, the amount of money involved, and the time period during which the violations occurred; holding that 86 violations over nearly 3 years for an amount totaling over $300,000 were willful and flagrant); *Farley & Calfee v. United States Dep't of Agric.*, 941 F.2d 964, 968 (9th Cir. 1991) (holding that 51 violations of the payment provisions of the PACA falls plainly within the permissible definition of repeated); *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); *Wayne Cusimano, Inc. v. Block*, 692 F.2d 1025, 1029 (5th Cir. 1982) (holding 150 transactions occurring over a 15-month period involving over $135,000 to be frequent and flagrant violations of the payment provisions of the PACA); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 997 (1981) (describing 20 violations of the payment provisions of the PACA as flagrant); *Reese Sales Co. v. Hardin*, 458 F.2d 183, 187 (9th Cir. 1972) (finding 26 violations of the payment provisions of the PACA involving $19,059.08 occurring over 2½ months to be repeated and flagrant); *Zwick v. Freeman*, 373 F.2d 110, 115 (2d Cir.) (concluding that because the 295 violations of the payment provisions of the PACA 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), *cert. denied*, 389 U.S. 835 (1967).

fact and credibility determinations are "supported by substantial evidence and entitled to great weight" (Respondent's Opposition to Complainant's Appeal Pet. at 1 n.1).

I agree with Complainant's contention that Respondent knew of the alterations of 53 United States Department of Agriculture inspection certificates and the making of eight false accounts of sales. The record clearly establishes that Norman Olds, Frederick Gottlob, and Alan Johnston, for a fraudulent purpose, knowingly altered 53 United States Department of Agriculture inspection certificates and Norman Olds and Frederick Gottlob knowingly made eight false accounts of sales in connection with transactions involving perishable agricultural commodities that Respondent purchased, accepted, and sold in interstate commerce. The false and misleading statements that Respondent's employees knowingly placed on United States Department of Agriculture inspection certificates and accounts of sales for a fraudulent purpose are prohibited by section 2(4) of the PACA (7 U.S.C. § 499b(4)).

The knowledge that can be attributed to a corporate PACA licensee, such as Respondent, is not limited to that which is known by its officers, owners, and directors. The relationship between a PACA licensee and its employees acting within the scope of their employment is governed by section 16 of the PACA (7 U.S.C. § 499p) which provides that, in construing and enforcing the PACA, the act of any agent, officer, or other person acting for or employed by a broker, within the scope of his or her employment or office, shall in every case be deemed the act of the broker as that of the agent, officer, or other person. Essentially, section 16 of the PACA (7 U.S.C. § 499p) provides an identity of action between a PACA licensee and the PACA licensee's agents and employees. Respondent's employees Norman Olds, Frederick Gottlob, and Alan Johnston were acting within the scope of their employment when they knowingly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Thus, as a matter of law, the knowing violations by Respondent's employees are deemed to be knowing violations by Respondent.[8]

I agree with the Chief ALJ's finding that Complainant failed to prove by a preponderance of the evidence that Gregory MacClaren and Darrell Moccia knew of the violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) before they were discovered during a United States Department of Agriculture investigation in December 1996. However, I find that Gregory MacClaren and Darrell Moccia should have known of the violations before they were brought to their attention during the United States Department of Agriculture investigation and, in this Decision and Order, I restate the Chief ALJ's Initial Decision and Order to reflect

[8]See note 6.

my finding and to provide my reasons for this finding.

Third, Complainant contends the Chief ALJ erred in failing to find that Respondent's violations were egregious violations for which license revocation would be the appropriate sanction (Complainant's Appeal Pet. at 13-15).

The Chief ALJ, citing *In re Kanowitz Fruit & Produce Co., Inc.*, 56 Agric. Dec. 917 (1997), correctly states the United States Department of Agriculture has held that PACA license revocation or suspension is the appropriate sanction for egregious violations of the PACA. Further, I agree with the Chief ALJ's conclusion that "[t]he intentional alteration and falsification of a USDA inspection certificate that causes produce shippers monetary loss clearly meets the definition of egregious." (Initial Decision and Order at 12.) Despite the Chief ALJ's finding that Respondent's violations of the PACA are egregious and the Chief ALJ's conclusion that the appropriate sanction for egregious violations of the PACA is revocation or suspension of the violator's PACA license, the Chief ALJ assessed Respondent a $50,000 civil penalty for its 61 violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Initial Decision and Order at 16). I disagree with the Chief ALJ's assessment of a $50,000 civil penalty for Respondent's 61 egregious violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) which resulted in underpayment to Respondent's produce suppliers and/or brokers of $137,502.15. Respondent's violations of the PACA are not rendered any less serious or egregious because they were personally performed for Respondent by employees acting within the scope of their employment rather than by Respondent's officers and owners.[9] Further, in light of the number of violations, the seriousness of the violations, the 29-month period during which the violations occurred, the number of Respondent's employees who altered United States Department of Agriculture inspection certificates and made false accounts of sales, the amount of money which Respondent underpaid its produce suppliers and/or brokers, Respondent's retention of the salespersons who engaged in the unlawful conduct, and Respondent's principals' failure to review transaction files prepared by Respondent's salespersons, I do not find the mitigating circumstances sufficient to warrant the assessment of a civil monetary penalty rather than the revocation of Respondent's PACA license.

Fourth, Complainant contends the Chief ALJ erred in failing to enter relevant findings of fact. Specifically, Complainant contends the Chief ALJ failed to discuss a number of the transactions in which Respondent made false statements for a

[9]*See In re Potato Sales, Co., Inc.*, 54 Agric. Dec. 1220, 1233 (1995) (revoking the respondent's PACA license for willfully, repeatedly, and flagrantly misrepresenting the origin of apples in violation of the PACA despite the respondent's president's and owner's lack of actual knowledge of the violations).

fraudulent purpose. (Complainant's Appeal Pet. at 15-16.)

Respondent does not deny that it made, for a fraudulent purpose, false and misleading statements on 53 United States Department of Agriculture inspection certificates and eight accounts of sales in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)), as alleged in the Complaint. The Chief ALJ concluded that Respondent, by altering 53 United States Department of Agriculture inspection certificates and making eight false accounts of sales, for a fraudulent purpose, violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Initial Decision and Order at 18). However, the Chief ALJ chose to discuss only examples of the transactions in which Respondent altered United States Department of Agriculture inspection certificates and made false accounts of sales for a fraudulent purpose, rather than to discuss all of Respondent's fraudulent transactions (Initial Decision and Order at 4-5). I do not find the Chief ALJ's failure to discuss additional transactions, in which Respondent made false statements for a fraudulent purpose, error, as Complainant suggests.

Moreover, Complainant contends the Chief ALJ's failure to discuss Steven J. Koran's testimony (Tr. Vol. I at 59-80), Cloyse Edward Little's testimony (Tr. Vol. I at 83-104), Richard Alcocer's testimony (Tr. Vol. I at 105-18), and Jeb Johnson's testimony (Tr. Vol. I 118-29), is error (Complainant's Appeal Pet. at 15-16).

The Administrative Procedure Act requires that each initial decision include findings, conclusions, and the reasons for the findings and conclusions, as follows:

> **§ 557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record**
>
> . . . .
>
> (c) . . . .
>
> . . . All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of–
>
> (A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and
>
> (B) the appropriate rule, order, sanction, relief, or denial thereof.

5 U.S.C. § 557(c).

Similarly, section 1.132 of the Rules of Practice defines the word "decision" as follows:

> **§ 1.132 Definitions.**
>
> As used in this subpart, 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:
>
> . . . .
>
> *Decision* means: (1) The Judge's initial decision made in accordance with the provisions of 5 U.S.C. 556 and 557, and includes the Judge's (i) findings and conclusions and the reasons or basis therefor on all material issues of fact, law or discretion, (ii) order, and (iii) rulings on proposed findings, conclusions and orders submitted by the parties[.]

7 C.F.R. § 1.132.

Neither the Administrative Procedure Act nor the Rules of Practice require that an administrative law judge discuss the testimony given by each witness. Therefore, while I quote Steven J. Koran's testimony and reference Cloyse Edward Little's testimony in this Decision and Order, I do not find the Chief ALJ erred by failing to discuss the testimony given by Steven J. Koran, Cloyse Edward Little, Richard Alcocer, and Jeb Johnson.

Complainant contends Steven J. Koran's, Cloyse Edward Little's, Richard Alcocer's, and Jeb Johnson's testimony establish "the key role played by USDA inspection certificates in the industry and the absolute reliance that was placed upon them in the transactions that are the subject of this proceeding" and the Chief ALJ's "failure to give due consideration to their testimony may have been a significant factor in his selection of sanction in this case" (Complainant's Appeal Pet. at 16).

While the Chief ALJ did not discuss Steven J. Koran's, Cloyse Edward Little's, Richard Alcocer's, and Jeb Johnson's testimony, the Chief ALJ concluded that Respondent's violations of the PACA are serious (Initial Decision and Order at 16). Moreover, the Chief ALJ characterized Respondent's violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) as "egregious," stated that the definition of the word "egregious" is "outstandingly bad," and noted that section 14(b) of the PACA (7 U.S.C. § 499n(b)) makes the alteration and falsification of a United States

Department of Agriculture inspection certificate a crime (Initial Decision and Order at 12). Therefore, I reject Complainant's speculation that the Chief ALJ's assessment of a $50,000 civil penalty may have been based on the Chief ALJ's underestimation of the importance of United States Department of Agriculture inspection certificates to the produce industry.

Fifth, Complainant contends the Chief ALJ erred in failing to accord due deference to the agency's sanction recommendation (Complainant's Appeal Pet. at 16-18). Respondent contends the Chief ALJ was not required to follow Complainant's sanction recommendation (Respondent's Opposition to Complainant's Appeal Pet. at 3).

The Chief ALJ states the United States Department of Agriculture's policy is that "deference is to be accorded to the opinion of a sanction witness who has acquired specialized knowledge of the produce industry." (Initial Decision and Order at 15.)

I disagree with the Chief ALJ's description of the United States Department of Agriculture's sanction policy. The United States Department of Agriculture'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 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3):

> [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 United States Department of Agriculture's policy is to give appropriate weight to the recommendations of administrative officials charged with the responsibility for achieving the congressional purpose of the regulatory statute; it is not to accord deference to the recommendations of any sanction witness who has acquired knowledge of the produce industry, as the Chief ALJ states.

The Initial Decision and Order establishes that the Chief ALJ considered and rejected the sanction recommendation given by Complainant's sanction witness, Ms. Servais. While the Chief ALJ is required to give appropriate weight to recommendations of administrative officials charged with achieving the congressional purpose of the PACA, I agree with Respondent that the Chief ALJ is not required to follow the recommendation of Complainant's sanction witness. It is well settled that the recommendations of administrative officials as to the sanction

is not controlling, and in appropriate circumstances, the sanction imposed may be less, or different, than that recommended by administrative officials.[10] Ms. Servais' testimony regarding her recommendation that Respondent's PACA license be revoked includes the basis for her recommendation and her reasons for rejecting Respondent's contention that the assessment of a civil penalty would be appropriate in this case. Ms. Servais' reasons for her recommendation include the number and type of violations, the 29-month period during which the violations occurred, the number of Respondent's employees who altered United States Department of Agriculture inspection certificates and made false accounts of sales, and the amount of money Respondent underpaid its suppliers and/or brokers. (Tr. Vol. II at 171-90.) While I give no weight to Ms. Servais' testimony on the deterrent effect of the various sanctions that may be imposed against Respondent, I agree with Ms. Servais that these factors establish that the assessment of a civil penalty against Respondent is not appropriate. Further, I conclude that revocation of Respondent's PACA license is necessary to deter Respondent and other potential violators from future violations of the PACA. Consequently, I revoke Respondent's PACA license.

Sixth, Complainant contends the Chief ALJ erred in failing to provide a rational basis for his selection of a $50,000 civil penalty (Complainant's Appeal Pet. at 18-19).

I agree with Complainant's contention that the Chief ALJ did not provide a rational basis for his assessment of a $50,000 civil penalty against Respondent. The Chief ALJ, citing *In re Kanowitz Fruit & Produce Co., Inc.*, 56 Agric. Dec. 917 (1997), correctly states the United States Department of Agriculture has held that

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[10] *In re Karl Mitchell*, 60 Agric. Dec. 91, 130 (2001), *appeal docketed*, No. 01-71486 (9th Cir. Sept. 10, 2001); *In re American Raisin Packers, Inc.*, 60 Agric. Dec. 165, 190 n.8 (2001), *appeal docketed*, No. CIV F 015606 AWI SMS (E.D. Cal. May 18, 2001); *In re Fred Hodgins*, 60 Agric. Dec. 73, 88 (2001) (Decision and Order on Remand), *appeal docketed*, No. 01-3508 (6th Cir. May 12, 2001); *In re Reginald Dwight Parr*, 59 Agric. Dec. 601, 626 (2000), *aff'd per curiam*, No. 00-60844 (5th Cir. Sept. 5, 2001); *In re Greenville Packing Co.*, 59 Agric. Dec. 194, 226-27 (2000), *aff'd in part and transferred in part*, No. 00-CV-1054 (N.D.N.Y. Sept. 4, 2001); *In re James E. Stephens*, 58 Agric. Dec. 149, 182 (1999); *In re Western Sierra Packers, Inc.*, 57 Agric. Dec. 1578, 1604 (1998); *In re Colonial Produce Enterprises, Inc.*, 57 Agric. Dec. 1498, 1514 (1998); *In re Judie Hansen*, 57 Agric. Dec. 1072, 1141 (1998), *appeal dismissed*, 221 F.3d 1342
(Table), 2000 WL 1010575 (8th Cir. 2000) (per curiam); *In re Richard Lawson*, 57 Agric. Dec. 980, 1031-32 (1998), *appeal dismissed*, No. 99-1476 (4th Cir. June 18, 1999); *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 574 (1998); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 283 (1998); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1918-19 (1997), *aff'd*, 178 F.3d 743 (5th Cir.), *cert. denied*, 528 U.S. 1021 (1999); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 942, 953 (1997) (Order Denying Pet. for Recons.); *In re William E. Hatcher*, 41 Agric. Dec. 662, 669 (1982); *In re Sol Salins, Inc.*, 37 Agric. Dec. 1699, 1735 (1978); *In re Braxton McLinden Worsley*, 33 Agric. Dec. 1547, 1568 (1974).

PACA license revocation or suspension is the appropriate sanction for egregious violations of the PACA. Further, I agree with the Chief ALJ's conclusion that "[t]he intentional alteration and falsification of a USDA inspection certificate that causes produce shippers monetary loss clearly meets the definition of egregious." (Initial Decision and Order at 12.) Despite the Chief ALJ's finding that Respondent's violations of the PACA are egregious and the Chief ALJ's conclusion that the appropriate sanction for an egregious violation of the PACA is revocation or suspension of the violator's PACA license, the Chief ALJ assessed Respondent a $50,000 civil penalty for Respondent's 61 violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Initial Decision and Order at 16). I disagree with the Chief ALJ's assessment of a $50,000 civil penalty for Respondent's 61 egregious violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) which resulted in underpayment to Respondent's produce suppliers and/or brokers of $137,502.15. Respondent's violations of the PACA are not rendered any less serious or egregious because they were personally performed for Respondent by employees acting within the scope of their employment rather than by Respondent's officers and owners.[11] Further, in light of the number of Respondent's willful violations, the seriousness of Respondent's willful violations, the 29-month period during which the violations occurred, the number of Respondent's employees who altered United States Department of Agriculture inspection certificates and made false accounts of sales, the amount of money which Respondent underpaid its produce suppliers and/or brokers, Respondent's retention of the salespersons who engaged in the unlawful conduct, and Respondent's principals' failure to review transaction files prepared by Respondent's salespersons, I conclude a civil penalty would not be sufficient to deter Respondent and other potential violators from future violations of the PACA. Further, I conclude revocation of Respondent's PACA license is necessary to deter future violations of the PACA by Respondent and other potential violators.

Respondent cites three cases involving the alteration of United States Department of Agriculture inspection certificates in which civil penalties were assessed and states Complainant has not shown that there has been an increase in the making of false or misleading statements for a fraudulent purpose in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)) because of the assessment of civil penalties in these cases (Respondent's Opposition to Complainant's Appeal Pet. at 3 n.2).

I agree with Respondent that in *In re Evergreen International, Inc.*, 59 Agric. Dec. 506 (2000) (unpublished); *In re R.A.M. Produce Distributors, Inc.*, 58 Agric. Dec. 707 (1999) (unpublished); and *In re Jacobson Produce, Inc.*, 55 Agric. Dec.

[11]See note 9.

709 (1996) (Modified Order and Order Lifting Stay), respondents found to have altered United States Department of Agriculture inspection certificates were assessed civil penalties. Moreover, I agree with Respondent that Complainant failed to show that there has been an increase in the making of false or misleading statements for a fraudulent purpose in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)) because of the assessment of civil penalties in these cases. In addition, Complainant's sanction witness testified that she does not know whether a civil penalty might be just as effective a deterrent as suspension or revocation of a violator's PACA license (Tr. Vol. II at 200).

However, I disagree with Respondent's contention that it should be assessed a civil penalty in this case on the basis of the assessment of civil penalties in the three cases which it cites. Two of the cases cited by Respondent, *In re Evergreen International, Inc.*, 59 Agric. Dec. 506 (2000) (unpublished), and *In re R.A.M. Produce Distributors, Inc.*, 58 Agric. Dec. 707 (1999) (unpublished), were settled by the issuance of consent decisions. The Judicial Officer has long held that consent orders are given no weight in determining the sanction in a litigated case.[12] In a case in which the parties agree to the entry of a consent decision, there is generally no record or argument to establish the basis for the sanction. The sanction may appear to be less than warranted because of problems of proving the allegations of the complaint or because of unrevealed mitigating circumstances. Other circumstances, such as personnel and budget considerations and the delay inherent in litigation, may also cause the sanction in a consent decision to appear less severe than appropriate. Conversely, the sanction in a consent decision may seem more severe than appears warranted because of unrevealed aggravating circumstances. Thus, I do not find that sanctions agreed to by parties and embodied in consent decisions are relevant to the issue of whether a sanction assessed in a litigated case is appropriate.

In the only litigated case cited by Respondent, *In re Jacobson Produce, Inc.* (Decision as to Jacobson Produce, Inc.), 53 Agric. Dec. 728 (1994), the Judicial Officer suspended the respondents' PACA licenses for 90 days for false and misleading statements made for a fraudulent purpose by means of altering seven United States Department of Agriculture inspection certificates. After appeal to the United States Court of Appeals for the Second Circuit, the parties agreed to the modification of the order in *In re Jacobson Produce, Inc.* (Decision as to Jacobson

[12] *See In re Onofrio Calabrese*, 51 Agric. Dec. 131, 155 (1992), *aff'd sub nom. Balice v. United States Dep't of Agric.*, No. CV-F-92-5483-GEB (E.D. Cal. July 14, 1998), *printed in*, 57 Agric. Dec. 841 (1998), *aff'd*, No. 98-16766 (9th Cir. Feb. 8, 2000); *In re Blackfoot Livestock Comm'n Co.*, 45 Agric. Dec. 590, 636 (1986), *aff'd*, 810 F.2d 916 (9th Cir. 1987); *In re Braxton McLinden Worsley*, 33 Agric. Dec. 1547, 1569 (1974); *In re Dean Witter & Co.*, 33 Agric. Dec. 11, 13 (1973).

Produce, Inc.), 53 Agric. Dec. 728 (1994), and in accordance with their Joint Motion to Modify Order, I assessed Jacobson Produce, Inc., a $90,000 civil penalty. *In re Jacobson Produce, Inc.*, 55 Agric. Dec. 709 (1996) (Modified Order and Order Lifting Stay). I find, just as with a consent decision, there is no record or argument to establish the basis for the sanction modification agreed to by the parties in *In re Jacobson Produce, Inc*. Therefore, I do not find the sanction agreed to by the parties in *In re Jacobson Produce, Inc.*, and embodied in *In re Jacobson Produce, Inc.*, 55 Agric. Dec. 709 (1996) (Modified Order and Order Lifting Stay), should be given any weight in determining the sanction to be imposed in this proceeding.

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

ORDER

Respondent's PACA license is revoked. The revocation of Respondent's PACA license shall become effective 60 days after service of this Order on Respondent.

_____

APPENDIX A: ALTERED INSPECTIONS

HCM File #	Seller/Broker	Inspection Certificate #	Date of Inspection	Number of Alterations	Location of Alterations	Gain Attributed to Alteration of Certificate
43260	Dole Fresh Vegetables, Inc., Salinas, California	M-889371-1	8/16/94	6	Lot A- Decay (average defects) Lot A - Decay (serious damage) Lot A - Statement Added to Decay Lot A - Checksum (average defects) Lot A - Checksum (serious damage) Remarks/Grade	**Invoice/Price:** $3882.25 **Credit/Payment:** ($2494.75) **Gain:** $1387.50
43262	Dole Fresh Vegetables, Inc., Salinas, California	M-908010-2	8/16/94	2	Lot A - Soft rot (average defects) Lot A - Checksum (average defects)	**Invoice/Price:** $4165.50 **Credit/Payment:** ($2916.00) **Gain:** $1249.50
43283	Steinbeck Country Marketing Inc. Salinas, California	M-908091-2	8/25/94	2	Temperatures (2)	**Invoice/Price:** $2839.20 **Credit/Payment:** ($1271.50) **Gain:** $1567.70
43330	Fresh Western Marketing, Inc. Salinas, California JJ Marketing Co. Chualar, California	M-908208-2	8/25/94	2	Temperatures (2)	**Invoice/Price:** $6186.00 **Credit/Payment:** $552.50 **Gain:** $6738.00 **Brokerage fee ret'd:**$212.50 **Gain:** $212.50

HCM File #	Seller/Broker	Inspection Certificate #	Date of Inspection	Number of Alterations	Location of Alterations	Gain Attributed to Alteration of Certificate
44420	Varsity Produce Sales, Inc., Bakersfield. California	M-909716-3	2/20/95	2	Temperatures (2)	**Invoice/Price:** $3316.70 **Credit/Payment:** ($1295.75) **Gain:** $2020.95
44494	Teixeira Farms, Inc. Santa Maria, California	M-909861-7	3/7/95	2	Temperatures (2)	**Invoice/Price:** $2313.00 **Credit/Payment:** ($997.00) **Gain:** $1316.00
44589	Merrill Farms Salinas, California	M-909991-2	3/20/95	6	Temperatures (2) Decay (average defects) Decay (serious damage) Checksum (average defects) Checksum (serious damage)	**Invoice/Price:** $10325.80 **Credit/Payment:** ($8813.80) **Gain:** $1512.00
44642	The Players Sales, Inc. Blythe, California	M-910136-1	3/27/95	3	Temperatures (2) Number of Containers	**Invoice/Price:** $5581.80 **Credit/Payment:** ($4321.80) **Gain:** $1260.00
44861	Merrill Farms Salinas, California	M-910349-0 M-910477-9	4/24/95 4/24/95	2 2	Temperatures (2) Temperatures (2)	**Invoice/Price:** $10515.10 **Credit/Payment:** $266.00 **Gain:** $10781.00

HCM File #	Seller/Broker	Inspection Certificate #	Date of Inspection	Number of Alterations	Location of Alterations	Gain Attributed to Alteration of Certificate
44871	Dole Fresh Vegetables, Inc. Salinas, California	M-910462-1	4/24/95	2	Temperatures (2)	**Invoice/Price:** $22575.00 **Credit/Payment:** ($6935.00) **Gain:** $15640.00
45041	Tanimura & Antle, Inc. San Francisco, California	M-910621-2	5/11/95	1	Number of Containers	**Invoice/Price:** $5658.50 **Credit/Payment:** ($828.50) **Gain:** $4830.00
45131	Growers Vegetable Express Salinas, California	M-910845-7	5/23/95	3	Temperatures (2) Number of Containers	**Invoice/Price:** $1865.75* **Credit/Payment:** $378.00 **Gain:** $2243.75
45245	Tanimura & Antle, Inc. San Francisco, California	M-910937-2	6/5/95	2	Temperatures (2)	**Invoice/Price: $** 8070.00 **Credit/Payment:** ($ 1868.40) **Gain:** $ 6201.60
45269	Tom Bengard Ranch, Inc. Salinas, California	M-910983-6	6/5/95	1	Temperatures (1)	**Invoice/Price: $** 5386.00 **Credit/Payment:** ($ 4636.00) **Gain:** $ 750.00

HCM File #	Seller/Broker	Inspection Certificate #	Date of Inspection	Number of Alterations	Location of Alterations	Gain Attributed to Alteration of Certificate
45290	Tanimura & Antle, Inc. San Francisco, California	M-911039-6	6/12/95	2	Temperatures (2)	**Invoice/Price: $** 4748.50 **Credit/Payment:** ($ 250.30) **Gain:** $ 4498.20
45458	Dole Fresh Vegetables, Inc. Salinas, California	M-911285-5	6/30/95	3	Temperatures (2) Other (comments)	**Invoice/Price: $** 6359.50 **Credit/Payment:** ($ 3508.30) **Gain:** $ 2851.20
45625	C & V Farms Watsonville, California	M-911464–6 M-911615-3	7/26/95 8/2/95	2 2	Lot A - Temperatures (2) Temperatures (2)	**Invoice/Price: $** 3159.25 **Credit/Payment:** $ 844.50 **Gain:** $ 4003.75
45912	Tom Bengard Ranch, Inc. Salinas, California	K-162638-1	9/12/95	1	Applicant	**Invoice/Price: $** 1893.45 **Credit/Payment:** ($1292.85) **Gain:** $ 600.60
46135	Green Gro Gonzales, California	K-162860-1	10/9/95	2	Temperatures (2)	**Invoice/Price: $** 1968.00 **Credit/Payment:** ($ 988.80) **Gain:** $ 979.20

HCM File #	Seller/Broker	Inspection Certificate #	Date of Inspection	Number of Alterations	Location of Alterations	Gain Attributed to Alteration of Certificate
46446	Tanimura & Antle, Inc. San Francisco, California	K-163146-4	11/14/95	2	Discoloration (average defects) Checksum (average defects)	**Invoice/Price: $** 4223.50 **Credit/Payment:** ($ 2263.50) **Gain:** $ 1900.00
46912	E. Schaffner Packing, Inc. El Centro, California	K-163644-8	1/11/96	2	Temperatures (2)	**Invoice/Price: $** 8336.35 **Credit/Payment:** ($ 1661.50) **Gain:** $ 6674.85
46985	Anderson Farms Huron, California	K-163725-5	1/16/96	1	Number of Containers	**Invoice/Price: $** 1345.20* **Credit/Payment:** ($ 228.00) **Gain:** $ 1117.20
46989	Yurosek Marketing, Inc. Bakersfield, California	K-075735-1	1/22/96	2	Discoloration (average defects) Checksum (average defects)	**Invoice/Price: $** 4221.60 **Credit/Payment:** ($ 3101.65) **Gain:** $ 1120.00
47210	Dole Fresh Vegetables Inc. Salinas, California	K-164090-3	2/15/96	3	Lot B - Discoloration (average defects) (2) Lot B - Checksum (average defects)	**Invoice/Price: $** 6678.00* **Credit/Payment:** ($ 3561.60) **Gain:** $ 3116.40

HCM File #	Seller/Broker	Inspection Certificate #	Date of Inspection	Number of Alterations	Location of Alterations	Gain Attributed to Alteration of Certificate
47244	Anderson Farms Huron, California	K-164124-0	2/21/96	2	Temperatures (2)	**Invoice/Price: $** 960.00 **Credit/Payment:** ($ 423.00) **Gain:** $ 537.00
47259	Hansen Fruit & Cold Storage Co., Inc. Yakima, Washington	K-164203-2	2/23/96	1	Number of Containers	**Invoice/Price: $** 1470.00* **Credit/Payment:** ($ 808.50) **Gain:** $ 661.50
47415	E. Schaffner Packing, Inc. El Centro, California	K-164430-1	3/18/96	1	Number of Containers	**Invoice/Price: $** 3410.55 **Credit/Payment:** ($ 1237.75) **Gain:** $ 2172.80
47432	E. Schaffner Packing, Inc. El Centro, California	K-164467-3	3/19/96	1	Number of Containers	**Invoice/Price: $** 3099.60 **Credit/Payment:** ($ 1386.00) **Gain:** $ 1713.60
47507	Durant Distributing, Inc. Santa Maria, California	K-163381-4	3/25/96	2	Temperatures (2)	**Invoice/Price: $** 183.75* **Credit/Payment:** $ 115.75 **Gain:** $ 299.50

HCM File #	Seller/Broker	Inspection Certificate #	Date of Inspection	Number of Alterations	Location of Alterations	Gain Attributed to Alteration of Certificate
47521	Anderson Farms Huron, California	K-164560-5	3/29/96	1	Number of Containers	**Invoice/Price: $** 3480.00 **Credit/Payment:** ($ 592.50) **Gain:** $ 2287.50
47657	Anderson Farms Huron, California	K-164658-7	4/8/96	2	Temperatures (1) Number of Containers	**Invoice/Price: $** 1415.00 **Credit/Payment:** ($ 975.00) **Gain:** $ 440.00
47676	Tanimura & Antle, Inc. San Francisco, California	K-164649-6	4/9/96	2	Discoloration (average defects) Checksum (average defects)	**Invoice/Price: $** 5750.00 **Credit/Payment:** ($ 1348.00) **Gain:** $ 4402.00
47714	Dole Fresh Vegetables Inc. Salinas, California	K-164712-2	4/15/96	4	Lot A - Temperatures (2) Lot B - Temperatures (2)	**Invoice/Price: $** 11383.50 **Credit/Payment:** ($ 5591.50) **Gain:** $ 5792.50
		K-164713-0	4/15/96	2	Temperatures (2)	
47737	Dole Fresh Vegetables Inc. Salinas, California	K-164806-2	4/20/96	6	Lot A - Temperatures (2) Lot B - Temperatures (2) Lot C- Temperatures (2)	**Invoice/Price: $** 4815.50 **Credit/Payment:** ($ 3689.10) **Gain:** $ 1126.40

HCM File #	Seller/Broker	Inspection Certificate #	Date of Inspection	Number of Alterations	Location of Alterations	Gain Attributed to Alteration of Certificate
47904	Pacific International Marketing, Inc. Salinas, California	K-164974-8 K-165052-2	5/4/96 5/4/96	2 2	Temperatures (2) Temperatures (2)	**Invoice/Price: $** 4368.00 **Credit/Payment:** ($ 2979.20) **Gain:** $ 1388.80
47972	C & V Farms Watsonville, California	K-165045-6	5/8/96	6	Lot B - Decay (average defects) Lot B - Decay (serious damage) Lot B - Decay (offsize/defects) Lot B - Checksum (average defects) Lot B - Checksum (serious damage) Lot C - Number of Containers	**Invoice/Price: $** 4159.50 **Credit/Payment:** (2530.75) **Gain:** $ 1628.75
48075	Mills Distributing Company Salinas, California	K-165244-5	5/21/96	8	Temperatures (2) Decay (average defects) Decay (serious damage) Decay (offsize/defects) Checksum (average defects) Checksum (serious damage) Number of Containers	**Invoice/Price: $** 5314.75 **Credit/Payment:** ($ 4864.75) **Gain:** $ 450.00

HCM File #	Seller/Broker	Inspection Certificate #	Date of Inspection	Number of Alterations	Location of Alterations	Gain Attributed to Alteration of Certificate
48085	C & V Farms Watsonville, California	K-165099-3	5/22/96	1	Number of Containers	**Invoice/Price: $** 4617.29 **Credit/Payment:** ($ 1126.00) **Gain:** $ 3491.25
48173	Yurosek Marketing, Inc. Bakersfield, California	K-165174-4	6/3/96	2	Lot A - Discoloration (average defects) Lot A - Checksum	**Invoice/Price: $** 5904.00 **Credit/Payment:** (5038.60) **Gain:** $ 865.40
48248	Ocean Valley Sales Salinas, California	K-165402-9	6/6/96	3	Temperatures (2) Number of Containers	**Invoice/Price: $** 9061.55 **Credit/Payment:** ($ 4188.50) **Gain:** $ 4873.05
48358	Durant Distributing Inc. Santa Maria, California	K-165323-7	6/19/96	2	Temperatures (2)	**Invoice/Price: $** 840.00 **Credit/Payment:** ($ 160.00) **Gain:** $ 680.00
48452	Merrill Farms Salinas, California	K-165656-0	6/28/96	3	Temperatures (2) Number of Containers (3)	**Invoice/Price: $** 1128.75 **Credit/Payment:** ($ 796.25) **Gain:** $ 332.50

HCM File #	Seller/Broker	Inspection Certificate #	Date of Inspection	Number of Alterations	Location of Alterations	Gain Attributed to Alteration of Certificate
48454	Mills Distributing Company Salinas, California	K-165514-1	7/2/96	1	Number of Containers	**Invoice/Price: $** 1109.25 **Credit/Payment:** ($ 768.00) **Gain:** $ 341.25
48796	Neil Bassetti Farms Greenfield, California	K-166059-6	8/13/96	8	Temperatures (2) Number of Containers Decay (average defects) Decay (serious damage) Decay (offsize/defects) Checksum (average defects) Checksum (serious damage)	**Invoice/Price: $** 4439.00 **Credit/Payment:** ($ 1415.00) **Gain:** $ 3024.00
48802	Mills Distributing Company Salinas, California	K-166052-1	8/12/96	1	Number of Containers	**Invoice/Price: $** 2091.00 **Credit/Payment:** ($ 1627.25) **Gain:** $ 463.75
48873	Neil Bassetti Farms Greenfield, California	K-259824-1	8/23/96	2	Temperatures (2)	**Invoice/Price: $** 2156.50 **Credit/Payment:** ($ 1972.75) **Gain:** $ 183.75

HCM File #	Seller/Broker	Inspection Certificate #	Date of Inspection	Number of Alterations	Location of Alterations	Gain Attributed to Alteration of Certificate
48999	Mills Distributing Company Salinas, California	K-260005-4	9/18/96	3	Temperatures (2) Number of Containers	**Invoice/Price:** $ 2017.00 **Credit/Payment:** ($ 1282.00) **Gain:** $ 735.00
49178	Fresh Western Marketing, Inc. Salinas, California	K-260186-2	10/14/96	2	Temperatures (2)	**Invoice/Price: $** 8073.50 **Credit/Payment:** ($1857.50) **Gain:** $ 6216.00
49336	Mills Distributing Company Salinas, California	K-260398-3	11/6/96	1	Number of Containers	**Invoice/Price:** $ 4019.50 **Credit/Payment:** ($ 1794.70) **Gain:** $ 2224.80

Definitions

Invoice: price listed on invoice from supplier to Respondent.

Price: where price was not agreed upon by Respondent and its supplier, price is calculated as Market News price reduced by freight cost, broker's fee, and Respondent's profit or commission.

Credit: payment made by supplier to Respondent or credit claimed by Respondent on another invoice because of losses on the listed transaction.

Payment: partial payment made by Respondent towards the invoice or price; indicated by "( )"

Gain: total gain realized by Respondent on the listed transaction.

HCM File #	Seller/Broker	Reported Gross Proceeds	Reported Expenses	Reported Net Proceeds	Actual Gross Proceeds	Actual Expenses	Actual Net Proceeds	Difference
44420	Varsity Produce Sales, Inc. Bakersfield, California	$1904.00	$1694.55	$209.45	$2476.00	$1548.35	$927.65	$718.20
44494	Teixeira Farms, Inc. Santa Maria, California	$2604.00	$1624.00	$980.00	$2500.00	$1345.00	$1155.00	$175.00
44861	Merrill Farms Salinas, California	$1215.10	$1481.10	($266.00)	$1953.00	$1307.50	$645.50	$912.50
46912	E. Schaffner Packing, Inc. El Centro, California	$ 4914.00	$ 3276.00	$ 1638.00	$ 4504.50	$ 2381.25	$ 2123.25	$ 485.25
47521	Anderson Farms, Huron, California	$ 2232.00	$ 1639.50	$ 592.50	$ 2681.00	$ 1192.20	$ 1488.80	$ 896.30
47972	C & V Farms Watsonville, California	$ 2613.65	$ 2040.15	$ 573.50	$ 3719.00	$ 1995.39	$ 1720.61	$ 1147.00

HCM FILE #	SELLER/BROKER	REPORTED GROSS PROCEEDS	REPORTED EXPENSES	REPORTED NET PROCEEDS	ACTUAL GROSS PROCEEDS	ACTUAL EXPENSES	ACTUAL NET PROCEEDS	DIFFERENCE
48085	C & V Farms Watsonville, California	$ 4226.25	$ 3123.75	$ 1102.50	$ 5376.50	$ 2883.75	$ 2492.75	$ 1390.25
49336	Mills Distributing Company, Salinas, California	$ 3283.20	$ 1512.00	$ 1771.20	$3874.00	$ 1228.15	$ 2645.85	$ 874.65

In re: PMD PRODUCE BROKERAGE CORP.
PACA Docket No. D-99-0004.
Decision and Order on Remand.
Filed November 26, 2001.

PACA – Failure to pay – Discharge of official duties – Burden of proof – Preponderance of the evidence – Due process – Petition to reopen hearing – Publication of facts and circumstances.

The Judicial Officer (JO) affirmed the Initial Decision and Order on Remand issued by Chief Administrative Law Judge (ALJ) James W. Hunt concluding Respondent committed repeated, flagrant, and willful violations of the Perishable Agricultural Commodities Act, 1930 (PACA), by failing to make full payment promptly for produce. The JO rejected Respondent's contention that the ALJ failed to consider the evidence before issuing a decision. The Judicial Officer stated that in the absence of clear evidence to the contrary, public officers are presumed to have properly discharged their official duties. ALJs must consider the record in a proceeding prior to the issuance of a decision in that proceeding and an ALJ is presumed to have considered the record prior to the issuance of his or her decision. The JO refused to draw an inference from a similarity between a party's filing and an ALJ's decision that the ALJ failed to properly discharge his or her duty to consider the record prior to the issuance of a decision. The JO also rejected Respondent's contention that the ALJ's findings of fact were unreliable. The JO concluded, after reviewing the record, that the ALJ's findings of fact were supported by reliable, probative, and substantial evidence. Moreover, the JO stated Complainant proved by a preponderance of the evidence that Respondent violated 7 U.S.C. § 499b(4), as alleged in the Complaint. The JO further rejected Respondent's contention that it was denied due process. Finally, the Judicial Officer denied Respondent's petition to reopen the hearing. As Respondent no longer had a PACA license, the JO ordered the publication of the facts and circumstances set forth in the Decision and Order on Remand.

Ruben D. Rudolph, Jr., for Complainant.
Paul T. Gentile, for Respondent.
Initial decision issued by James W. Hunt, Chief Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

The Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a "Complaint" on November 16, 1998. Complainant instituted the proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. pt. 46) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges that: (1) during the period February 1993 through September 1996, PMD Produce Brokerage Corp. [hereinafter Respondent] failed to make full payment promptly to 18 sellers of the agreed purchase prices in the total amount of $767,426.45 for 633 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in interstate commerce; and (2) Respondent's failures to make full payment promptly of the agreed purchase prices for perishable agricultural commodities that Respondent purchased, received, and accepted in interstate and foreign commerce constitute willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Compl. ¶¶ III-IV). Respondent filed an "Answer" on January 6, 1999, denying the material allegations of the Complaint (Answer ¶¶ 3-4).

Administrative Law Judge Edwin S. Bernstein [hereinafter the ALJ] scheduled a hearing for November 17, 1999 (Notice of Hearing filed September 7, 1999). On November 12, 1999, Complainant filed a "Motion for Bench Decision" and "Complainant's Proposed Findings of Fact, Conclusions, and Order," requesting that the ALJ issue a decision orally at the close of the hearing in accordance with section 1.142(c)(1) of the Rules of Practice (7 C.F.R. § 1.142(c)(1)). Respondent received a copy of Complainant's Motion for Bench Decision and Complainant's Proposed Findings of Fact, Conclusions, and Order on November 15, 1999 (Tr. 6).

On November 17, 1999, the ALJ presided over a hearing in New York, New York. Deborah Ben-David, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented Complainant.[1] Paul T. Gentile, Gentile & Dickler, New York, New York, represented Respondent. During the November 17, 1999, hearing, Respondent requested that the ALJ refrain from issuing a decision orally at the close of the hearing to provide Respondent additional time within which to submit proposed findings of fact, conclusions, order, and a brief in support of proposed findings of fact, conclusions, and order (Tr. 94).

The ALJ denied Respondent's request and issued a decision orally at the close of the November 17, 1999, hearing. The ALJ: (1) found, during the period February 1993 through September 1996, Respondent failed to make full payment promptly to 18 sellers of the agreed purchase prices in the total amount of $767,426.45 for 633 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in interstate or foreign commerce; (2) found a

[1]On January 13, 2000, Jane McCavitt entered an appearance on behalf of Complainant (Notice of Appearance). On August 3, 2001, Ruben D. Rudolph, Jr., entered an appearance on behalf of Complainant and gave notice that he was replacing Jane McCavitt as counsel for Complainant (Notice of Substitution of Counsel).

compliance review conducted between October 20, 1999, and November 1, 1999, revealed Respondent continued to owe approximately $769,000 for purchases of perishable agricultural commodities from produce sellers listed in the Complaint; (3) concluded Respondent's failures to make full payment promptly of the agreed purchase prices for 600 lots of perishable agricultural commodities that Respondent purchased, received, and accepted in interstate or foreign commerce, as specified in the Complaint, are willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (4) ordered publication of the facts and circumstances of Respondent's violations (Tr. 95-101). On November 30, 1999, the ALJ filed a "Bench Decision," which is the written excerpt of the decision orally announced at the close of the November 17, 1999, hearing.

On January 7, 2000, Respondent filed a petition to reopen the hearing and appealed to the Judicial Officer. On February 14, 2000, Complainant filed "Complainant's Response to Respondent's Appeal." On February 15, 2000, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Respondent's petition to reopen the hearing and a decision. On February 18, 2000, I denied Respondent's January 7, 2000, appeal petition on the ground that it was late-filed. *In re PMD Produce Brokerage Corp.*, 59 Agric. Dec. 344 (2000) (Order Denying Late Appeal).

On March 15, 2000, Respondent filed "Respondent's Petition for Reconsideration." On March 29, 2000, Complainant filed "Complainant's Response to Respondent's Motion for Reconsideration." On March 30, 2000, the Hearing Clerk transmitted the record to the Judicial Officer for reconsideration of *In re PMD Produce Brokerage Corp.*, 59 Agric. Dec. 344 (2000) (Order Denying Late Appeal). On March 31, 2000, I denied Respondent's Petition for Reconsideration. *In re PMD Produce Brokerage Corp.*, 59 Agric. Dec. 351 (2000) (Order Denying Pet. for Recons.).

Respondent sought judicial review of the Order Denying Late Appeal. The United States Court of Appeals for the District of Columbia Circuit reversed the Order Denying Late Appeal. *PMD Produce Brokerage Corp. v. United States Dep't of Agric.*, 234 F.3d 48 (D.C. Cir. 2000).

On February 2, 2001, I held a telephone conference with counsel for Complainant and counsel for Respondent. Counsel informed me that neither Complainant nor Respondent would seek further judicial review of *In re PMD Produce Brokerage Corp.*, 59 Agric. Dec. 344 (2000) (Order Denying Late Appeal). I informed counsel that I was troubled by the ALJ's denial of Respondent's request for an opportunity to submit proposed findings of fact, conclusions, order, and a brief in accordance with section 1.142(b) of the Rules of

Practice (7 C.F.R. § 1.142(b)). Complainant and Respondent requested the opportunity to brief the issue of Respondent's opportunity to submit proposed findings of fact, conclusions, order, and a brief in accordance with section 1.142(b) of the Rules of Practice (7 C.F.R. § 1.142(b)). I granted Complainant's and Respondent's requests for the opportunity to brief the issue. On March 2, 2001, Complainant filed "Complainant's Objection to Remanding Case to Administrative Law Judge for Further Procedures." On April 4, 2001, Respondent filed "Respondent's Brief in Support of Judicial Officer Remanding to the Administrative Law Judge for Further Procedure."

On April 5, 2001, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Respondent's January 7, 2000, petition to reopen the hearing and a ruling on the issue regarding remand to an administrative law judge. On April 6, 2001, I denied Respondent's petition to reopen the hearing and remanded the proceeding to Chief Administrative Law Judge James W. Hunt [hereinafter the Chief ALJ] to: (1) provide Respondent with an opportunity to submit for consideration proposed findings of fact, conclusions, order, and a brief in accordance with section 1.142(b) of the Rules of Practice (7 C.F.R. § 1.142(b)); and (2) issue a decision. *In re PMD Produce Brokerage Corp.*, 60 Agric. Dec. 364 (2001) (Order Denying Pet. to Reopen Hearing and Remand Order).

On May 17, 2001, Respondent filed "Respondent's Proposed Findings of Fact, Conclusions and Order." On June 6, 2001, the Chief ALJ issued a "Decision on Remand" [hereinafter Initial Decision and Order on Remand] in which the Chief ALJ adopted the ALJ's November 30, 1999, Bench Decision.

On July 25, 2001, Respondent filed "Respondent's Petition for Reconsideration" requesting that the Chief ALJ reverse the Bench Decision and the Initial Decision and Order on Remand or order a new hearing. On September 7, 2001, Complainant filed "Complainant's Reply to Respondent's Petition for Reconsideration." On September 12, 2001, the Chief ALJ issued "Order Denying Petition for Reconsideration."

On October 22, 2001, Respondent filed a petition for a new hearing and appealed to the Judicial Officer. On November 9, 2001, Complainant filed "Complainant's Response to Respondent's Appeal." On November 15, 2001, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Respondent's petition for a new hearing and a decision.

Based upon a careful consideration of the record, I agree with the Chief ALJ's Initial Decision and Order on Remand. Therefore, pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt, except for minor, non-substantive changes, the Chief ALJ's Initial Decision and Order on Remand as

the final Decision and Order on Remand. Additional conclusions by the Judicial Officer follow the Chief ALJ's discussion as restated.

Complainant's exhibits are designated by "CX." Transcript references are designated by "Tr."

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

. . . .

§ 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 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[.]

§ 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.

. . . .

(e) Alternative civil penalties

In lieu of suspending or revoking a license under this section when the Secretary determines, as provided in section 499f of this title, that a commission merchant, dealer, or broker has violated section 499b of this title 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 employees, 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.

7 U.S.C. §§ 499b(4), 499h(a), (e).

7 C.F.R.:

TITLE 7—AGRICULTURE

. . . .

SUBCHAPTER B—MARKETING OF PERISHABLE AGRICULTURAL COMMODITIES

PART 46—REGULATIONS (OTHER THAN RULES OF PRACTICE) UNDER THE PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930

DEFINITIONS

. . . .

§ 46.2 Definitions.

The terms defined in the first section of the Act shall have the same meaning as stated therein. Unless otherwise defined, the following terms whether used in the regulations, in the Act, or in the trade shall be construed as follows:

. . . .

(aa) *Full payment promptly* is the term used in the Act in specifying the period of time for making payment without committing a violation of the Act. "Full payment promptly," for the purpose of determining violations of the Act, means:

. . . .

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

. . . .

(11) Parties who elect to use different times of payment than those set forth in paragraphs (aa)(1) through (10) of this section must reduce their agreement to writing before entering into the transaction and maintain a copy of the agreement in their records. If they have so agreed, then payment within the agreed upon time shall constitute "full payment promptly": *Provided*, That the party claiming the existence of such an agreement for time of payment shall have the burden of proving it.

7 C.F.R. § 46.2(aa)(5), (11).

CHIEF ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION AND ORDER ON REMAND (AS RESTATED)

The record establishes that, as found by the ALJ in his decision orally announced at the close of the November 17, 1999, hearing, during the period February 1993 through September 1996, Respondent failed to make full payment promptly to 18 sellers of the agreed purchase prices in the total amount of $767,426.45 for 633 lots of perishable agricultural commodities which Respondent

purchased, received, and accepted in interstate or foreign commerce.

Respondent contends Complainant failed to meet its burden of proving that Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Respondent contends Complainant did not obtain information about a case pending before the United States District Court for the Southern District of New York, which relates to "extended payment terms and other matters that could directly effect [sic] the Complainant's contention that the Respondent violated the PACA" and "Complainant became aware, or should have been aware, prior to the hearing, that creditors had received payments from the Respondent pursuant to a payment plan entered between and among certain produce creditors and the Respondent[.]" (Respondent's Proposed Findings of Fact, Conclusions and Order at 2).

Section 46.2(aa)(11) of the Regulations (7 C.F.R. § 46.2(aa)(11)) provides that parties may enter into a payment plan that varies the time for payment set forth in section 46.2(aa)(1)-(10) of the Regulations (7 C.F.R. § 46.2(aa)(1)-(10)). However, such a payment plan must be reduced to writing before the parties enter into the transaction and "the party claiming the existence of such an agreement for time of payment shall have the burden of proving it." 7 C.F.R. § 46.2(aa)(11). Thus, Respondent had the burden to not only allege a written payment plan but also to prove its existence. Moreover, Respondent, as the party having the best knowledge of the court case and any alleged agreement with its creditors, had the burden of proof with respect to those matters. *Lindahl v. OPM*, 776 F.2d 276, 280 (Fed. Cir. 1985). Respondent did not meet its burden of proving the existence of its alleged payment plan.

Having considered the record in the light of Respondent's Proposed Findings of Fact, Conclusions and Order, I adopt the findings of fact, conclusion of law, and discussion in the ALJ's November 30, 1999, Bench Decision, which is the written excerpt of the ALJ's decision orally announced at the close of the November 17, 1999, hearing.

ADMINISTRATIVE LAW JUDGE'S BENCH DECISION (AS RESTATED)

Findings of Fact

1. Respondent is a corporation organized and existing under the laws of New York State. Respondent's business mailing address is 60 Kenwood Road, Garden City, New York 11530. (Answer ¶ 2.)

2. At all times material to this proceeding, Respondent was either licensed or

operating subject to license under the PACA. PACA license number 860612 was issued to Respondent on February 4, 1986. Respondent's PACA license terminated on February 4, 1999, when Respondent failed to pay the annual renewal fee. (Answer ¶ 2; CX 1; Tr. 69-70.)

3. During the period February 1993 through September 1996, Respondent failed to make full payment promptly to 18 sellers of the agreed purchase prices in the total amount of $767,426.45, for 633 lots of perishable agricultural commodities that Respondent purchased, received, and accepted in interstate or foreign commerce (CX 4-CX 22; Tr. 34-57).

4. Between October 20, 1999, and November 1, 1999, a United States Department of Agriculture investigator contacted 16 of the 18 unpaid produce sellers to determine the status of the outstanding debts listed in the Complaint. This compliance review revealed that Respondent continued to owe approximately $769,000 for purchases that Respondent made from produce sellers listed in the Complaint during the time period set forth in the Complaint. (Tr. 31-33.)

Conclusion of Law

Respondent's failures to make full payment promptly of the agreed purchase prices for 633 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in interstate or foreign commerce, as specifically alleged in paragraph 3 of the Complaint, are willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Discussion

Section 2(4) of the PACA (7 U.S.C. § 499b(4)) makes it unlawful for any commission merchant, dealer, or broker to fail to make full payment promptly with respect to any transaction involving any perishable agricultural commodity made in interstate or foreign commerce. "Full payment promptly" is defined in 7 C.F.R. § 46.2(aa)(5) as requiring payment for produce purchased by a buyer, within 10 days after the day on which the produce is accepted. Section 46.2(aa)(11) of the Regulations (7 C.F.R. § 46.2(aa)(11)) states that parties who elect to use different times of payment than those set forth in section 46.2(aa)(1)-(10) of the Regulations (7 C.F.R. § 46.2(aa)(1)-(10)) must reduce their agreement to writing before entering into the transaction and maintain a copy of the agreement in their records.

At the November 17, 1999, hearing, Michael Saunders, a United States Department of Agriculture investigator, testified without contradiction that the

amounts alleged in the Complaint were, in fact, unpaid by Respondent and that all of these amounts involved transactions in interstate or foreign commerce (Tr. 11, 25).

Two representatives of Respondent's produce sellers, Marc Rubin of Rubin Brothers Produce Corporation and James Bevilacqua of D'Arrigo Brothers Company, testified (Tr. 61-66, 81-88). Mark Werner, the principal owner of Respondent, also testified (Tr. 90-93). There was no testimony to establish that any written agreement had been entered into between Respondent and any of its produce sellers prior to the transactions, which are the subject of this proceeding, which altered the terms of payment. None of the amounts alleged in the Complaint were paid within 10 days. In fact, as of the date of the hearing, most of the amounts still remain unpaid.

Respondent's failures to make full payment promptly of the agreed purchase prices for these 633 lots of perishable agricultural commodities over a period of approximately 42 months in amounts totaling $767,426.45 constitute repeated and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 997 (1981).

Respondent's 633 violations are repeated because repeated means more than one. Respondent's violations are flagrant because of the number of violations, the amount of money involved, and the period of time during which the violations occurred.

Furthermore, Respondent's violations are willful. A violation is willful under the Administrative Procedure Act (5 U.S.C. § 558(c)) if, irrespective of evil motive or erroneous advice, a person intentionally does an act prohibited by a statute or carelessly disregards the requirements of a statute. *Cox v. United States Dep't of Agric.*, 925 F.2d 1102, 1105 (8th Cir.), *cert. denied*, 502 U.S. 860 (1991); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 997 (1981).

Respondent knew, or should have known, that it could not make prompt payment for the large amounts of perishable agricultural commodities it ordered, yet Respondent continued to make purchases. Respondent was aware of the requirements of the PACA, or should have been aware of the requirements of the PACA, yet continued to buy, knowing that each purchase would result in another violation. Respondent should have made sure that it had sufficient capitalization with which to operate. Respondent knowingly shifted the risk of non-payment to Respondent's produce sellers, who involuntarily became Respondent's creditors. Under these circumstances, Respondent intentionally violated the PACA and

operated in careless disregard of the payment requirements of the PACA.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent's October 22, 2001, Appeal Petition

Respondent raises four issues and petitions for a new hearing in Respondent's October 22, 2001, Appeal Petition. First, Respondent contends the ALJ did not consider the evidence when he issued a decision orally at the close of the November 17, 1999, hearing. Respondent bases this contention on the similarity between the ALJ's November 17, 1999, oral decision and Complainant's Proposed Findings of Fact, Conclusions, and Order filed November 12, 1999. (Respondent's October 22, 2001, Appeal Pet. at 3.)

In the absence of clear evidence to the contrary, public officers are presumed to have properly discharged their official duties.[2] Administrative law judges must

[2] *See United States v. Mezzanatto*, 513 U.S. 196, 210 (1995) (stating the fact that there is potential for abuse of prosecutorial bargaining power is an insufficient basis for foreclosing plea negotiation; the great majority of prosecutors are faithful to their duties and absent clear evidence to the contrary, courts presume that public officers properly discharge their duties); *INS v. Miranda,* 459 U.S. 14, 18 (1982) (per curiam) (stating although the length of time to process the application is long, absent evidence to the contrary, the court cannot find that the delay was unwarranted); *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926) (stating a presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume they have properly discharged their official duties); *Sunday Lake Iron Co. v. Wakefield TP,* 247 U.S. 350, 353 (1918) (stating the good faith of taxing officers and the validity of their actions are presumed; when assailed, the burden of proof is on the complaining party); *Chaney v. United States*, 406 F.2d 809, 813 (5th Cir.) (stating the presumption that the local selective service board considered the appellant's request for reopening in accordance with 32 C.F.R. § 1625.2 is a strong presumption that is only overcome by clear and convincing evidence), *cert. denied*, 396 U.S. 867 (1969); *Lawson Milk Co. v. Freeman*, 358 F.2d 647, 649 (6th Cir. 1966) (stating without a showing that the action of the Secretary of Agriculture was arbitrary, his action is presumed to be valid); *Donaldson v. United States*, 264 F.2d 804, 807 (6th Cir. 1959) (stating the presumption of regularity supports official acts of public officers and in the absence of clear evidence to the contrary, courts presume they have properly discharged their duties); *Panno v. United States*, 203 F.2d 504, 509 (9th Cir. 1953) (stating a presumption of regularity attaches to official acts of the Secretary of Agriculture in the exercise of his congressionally delegated duties); *Reines v. Woods*, 192 F.2d 83, 85 (Emer. Ct. App. 1951) (stating the presumption of regularity, which attaches to official acts, can be overcome only by clear evidence to the contrary); *NLRB v. Bibb Mfg. Co.*, 188 F.2d 825, 827 (5th Cir. 1951) (holding duly appointed police officers are presumed to discharge their duties lawfully and that presumption may only be overcome by clear and convincing evidence); *Woods v. Tate*, 171 F.2d 511, 513 (5th Cir. 1948) (concluding an order of the Acting Rent Director, Office of Price Administration, is presumably valid and genuine in the absence of proof or

(continued...)

[2](...continued)
testimony to the contrary); *Pasadena Research Laboratories, Inc. v. United States*, 169 F.2d 375, 381-82 (9th Cir.) (stating the presumption of regularity applies to methods used by government chemists and analysts and to the care and absence of tampering on the part of postal employees), *cert. denied*, 335 U.S. 853 (1948); *Laughlin v. Cummings*, 105 F.2d 71, 73 (D.C. Cir. 1939) (stating there is a strong presumption that public officers exercise their duties in accordance with law); *In re Lamers Dairy, Inc.*, 60 Agric. Dec. ___, slip op. at 37-40 (Aug. 16, 2001) (stating, in the absence of clear evidence to the contrary, administrative law judges are presumed to have adequately reviewed the record in a proceeding prior to the issuance of a decision in the proceeding), *appeal docketed*, No. 01C0890 (E.D. Wis. Sept. 5, 2001); *In re Greenville Packing Co.*, 59 Agric. Dec. 194, 220-22 (2000) (stating, in the absence of evidence to the contrary, Food Safety and Inspection Service inspectors are presumed to have properly issued process deficiency records), *aff'd in part and transferred in part*, No. 00-CV-1054 (N.D.N.Y. Sept. 4, 2001); *In re Dwight L. Lane*, 59 Agric. Dec. 148, 177-78 (2000) (stating a United States Department of Agriculture hearing officer is presumed to have adequately reviewed the record and no inference is drawn from an erroneous decision that the hearing officer failed to properly discharge his official duty to review the record), *aff'd*, A2-00-84 (D.N.D. July 18, 2001), *appeal docketed*, No. 01-3257 (8th Cir. Sept. 17, 2001); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 280-82 (1998) (stating, in the absence of clear evidence to the contrary, United States Department of Agriculture inspectors and investigators are presumed to have properly discharged their duty to document violations of the Animal Welfare Act); *In re Auvil Fruit Co.*, 56 Agric. Dec. 1045, 1079 (1997) (stating without a showing that the official acts of the Secretary of Agriculture are arbitrary, his actions are presumed to be valid); *In re Kim Bennett*, 55 Agric. Dec. 176, 210-11 (1996) (stating, instead of presuming United States Department of Agriculture attorneys and investigators warped the viewpoint of United States Department of Agriculture veterinary medical officers, the court should have presumed that training of United States Department of Agriculture veterinary medical officers was proper because there is a presumption of regularity with respect to official acts of public officers); *In re C.I. Ferrie*, 54 Agric. Dec. 1033, 1053 (1995) (stating use of United States Department of Agriculture employees in connection with a referendum on the continuance of the Dairy Promotion and Research Order does not taint the referendum process, even if petitioners show some United States Department of Agriculture employees would lose their jobs upon defeat of the Dairy Promotion and Research Order, because a presumption of regularity exists with respect to official acts of public officers); *In re Mil-Key Farm, Inc.*, 54 Agric. Dec. 26, 55 (1995) (stating without a showing that the official acts of the Secretary of Agriculture are arbitrary, his actions are presumed to be valid); *In re Hershey Chocolate U.S.A.*, 53 Agric. Dec. 17, 55 (1994) (stating without a showing that the official acts of the Secretary of Agriculture are arbitrary, his actions are presumed to be valid), *aff'd*, No. 1:CV-94-945 (M.D. Pa. Feb. 3, 1995); *In re King Meat Co.*, 40 Agric. Dec. 1468, 1494 (1981) (stating there is a presumption of regularity with respect to the issuance of instructions as to grading methods and procedures by the Chief of the Meat Grading Branch, Food Safety and Quality Service, United States Department of Agriculture), *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); *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1361 (1978) (rejecting respondent's theory that United States Department of Agriculture shell egg graders switched cases of eggs to discredit respondent, in view of the presumption of regularity
(continued...)

consider the record in a proceeding prior to the issuance of a decision in that proceeding.[3] An administrative law judge is presumed to have considered the record prior to the issuance of his or her decision. I draw no inference from a similarity between a party's filing and an administrative law judge's decision that the administrative law judge failed to properly discharge his or her duty to consider the record prior to the issuance of a decision. Moreover, the record establishes the ALJ presided at the reception of the evidence during the November 17, 1999, hearing. Further still, the ALJ's oral decision at the close of the hearing is supported by evidence in the record. The ALJ's presence during the reception of the evidence and the support in the record for the ALJ's oral decision belies Respondent's contention that the ALJ did not consider the evidence prior to the issuance of the oral decision. Therefore, I reject Respondent's contention that the ALJ did not consider the evidence before issuing the oral decision at the close of the November 17, 1999, hearing.

Second, Respondent contends the ALJ's factual findings are unreliable and should not serve as a basis for the Bench Decision. Specifically, Respondent contends that each witness called by Complainant acknowledged that no effort was made to review the record in a case pending in the United States District Court for the Southern District of New York regarding claims made by Respondent's unpaid produce creditors. Further, Respondent contends that each witness called by Complainant acknowledged that no effort was made to review a written agreement among Respondent and its produce creditors whereby Respondent's produce creditors agreed to extended payment terms and the waiver of their rights under the PACA. Respondent asserts that as a result of this failure to review the record in the case pending in the United States District Court for the Southern District of New York and the written agreement among Respondent and its produce creditors, the evidence introduced during the November 17, 1999, hearing was "incomplete, insufficient, and unreliable." (Respondent's October 22, 2001, Appeal Pet. at 4-5.)

I infer Respondent contends that a review of the record in the unnamed case to which Respondent refers and the written agreement among Respondent and its produce creditors would reveal that Respondent's produce creditors extended the time Respondent had to pay its debt for perishable agricultural commodities. I

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[2](...continued)
supporting acts of public officials), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980).

[3]*See* 5 U.S.C. § 556(d).

further infer Respondent takes the position that this purported written agreement containing extended payment terms would be sufficient to establish that Respondent did not violate section 2(4) of the PACA (7 U.S.C. § 499b(4)).

I agree with the Chief ALJ that Respondent, as the party having the better knowledge of a case in which it was apparently a party and the agreement it made with its produce creditors, has the burden of introducing evidence regarding the case and the agreement. Moreover, while section 46.2(aa)(11) of the Regulations (7 C.F.R. § 46.2(aa)(11)) provides that parties to a transaction involving perishable agricultural commodities may elect to use different times of payment than those set forth in section 46.2(aa)(1)-(10) of the Regulations (7 C.F.R. § 46(aa)(1)-(10)), the agreement must be reduced to writing before the parties enter the transaction and the party claiming the existence of the agreement has the burden of proving it.

Mark Werner, Respondent's principal owner, testified that in 1996, after Respondent stopped doing business, Respondent entered into an agreement with its creditors in accordance with which Respondent was to pay its debts over an extended period of time (Tr. 90-93). However, neither Mr. Werner nor any other witness testified that Respondent entered into written agreements electing to use different times of payment than those set forth in section 46.2(aa)(1)-(10) of the Regulations (7 C.F.R. § 46(aa)(1)-(10)) before entering into the perishable agricultural commodities transactions that are the subject of this proceeding. To the contrary, Mr. Werner's testimony establishes that the agreement Respondent made with its creditors to extend the time for payment was made in 1996 after Respondent entered the transactions that are the subject of this proceeding. Further, Michael Saunders, the United States Department of Agriculture investigator who investigated Respondent's violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), testified that, during his review of Respondent's records, he did not find any evidence of written agreements between Respondent and any of its produce sellers in which the parties elected to use different times of payment than those set forth in section 46.2(aa)(1)-(10) of the Regulations (7 C.F.R. § 46(aa)(1)-(10)) (Tr. 27).

I disagree with Respondent's contention that the evidence introduced during the November 17, 1999, hearing was "incomplete, insufficient, and unreliable." Instead, I conclude, after reviewing the record, the ALJ's findings of fact are supported by reliable, probative, and substantial evidence. Complainant proved by a preponderance of the evidence that during the period February 1993 through September 1996, Respondent failed to make full payment promptly to 18 sellers of the agreed purchase prices in the total amount of $767,426.45, for 633 lots of perishable agricultural commodities that Respondent purchased, received, and

accepted in interstate or foreign commerce in willful violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).[4]

Third, Respondent asserts that prior to the commencement of this proceeding, Respondent and its produce creditors entered into an agreement that calls for payment to be made by Respondent to its produce creditors over a period of time exceeding 30 days. Respondent contends, as a consequence of this agreement, Complainant no longer has a "statutory interest" in transactions that are the subject

[4]Complainant, as the proponent of an order, has the burden of proof in this proceeding conducted under the Administrative Procedure Act (5 U.S.C. § 556(d)). The standard of proof applicable to adjudicatory proceedings under the Administrative Procedure Act 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). It has long been held that the standard of proof in administrative disciplinary proceedings conducted under the PACA is preponderance of the evidence. *In re Mangos Plus, Inc.*, 59 Agric. Dec. 392, 399 n.2 (2000), *appeal voluntarily dismissed*, No. 00-1465 (D.C. Cir. Aug. 15, 2001); *In re Sunland Packing House Co.*, 58 Agric. Dec. 543, 566-67 (1999); *In re Produce Distributors, Inc.* (Decision as to Irene T. Russo, d/b/a Jay Brokers), 58 Agric. Dec. 506, 534-35 (1999), *aff'd sub nom. Russo v. United States Dep't of Agric.*, 199 F.3d 1323 (Table), 1999 WL 1024094 (2d Cir. 1999), *printed in* 58 Agric. Dec. 999 (1999), *cert. denied*, 531 U.S. 928 (2000); *In re JSG Trading Corp.* (Decision as to JSG Trading Corp., Gloria & Tony Enterprises, d/b/a G&T Enterprises, and Anthony Gentile), 57 Agric. Dec. 640, 685-86 (1998), *remanded*, 176 F.3d 536 (D.C. Cir. 1999), *reprinted in* 58 Agric. Dec. 474 (1999), *final decision on remand*, 58 Agric. Dec. 1041 (1999), *aff'd*, 235 F.3d 608 (D.C. Cir.), *cert. denied*, 122 S. Ct. 458 (2001); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1893 (1997), *aff'd*, 178 F.3d 743 (5th Cir.), *cert. denied*, 528 U.S. 1021 (1999); *In re Kanowitz Fruit & Produce Co.*, 56 Agric. Dec. 917, 927 (1997), *aff'd*, 166 F.3d 1200 (Table), 1998 WL 863340 (2d Cir. 1998), *cert. denied*, 526 U.S. 1098 (1999); *In re Havana Potatoes of New York Corp.*, 56 Agric. Dec. 1017, 1021 (1997) (Order Denying Pet. for Recons.); *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234, 1247 n.2 (1996), *aff'd*, 136 F.3d 89 (2d Cir. 1997); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1269 (1995), *aff'd*, 104 F.3d 139 (8th Cir. 1997), *cert. denied sub nom. Heimann v. Department of Agric.*, 522 U.S. 951 (1997); *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*, 519 U.S. 807 (1996); *In re DiCarlo Distributors, Inc.*, 53 Agric. Dec. 1680, 1704 (1994), *appeal withdrawn*, 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 Bros. 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).

of the Complaint, as follows:

> It is well settled that in the event parties to a produce transaction agree in writing to payment terms that exceed thirty (30) days, the transaction no longer falls within the trust provisions of the PACA and the parties cannot avail themselves of the rights, protection and remedies of the PACA. In effect, the parties waive their rights under the PACA and, in doing so, recognize that they do not need or desire the protection of the statute or the administrative agency, in this case the Complainant, to enforce the provisions of the PACA. As a consequence, the Complainant no longer has a statutory interest in the transactions that are the subject matter of this complaint.

Respondent's October 22, 2001, Appeal Pet. at 5 (emphasis in original).

Section 46.2(aa)(11) of the Regulations (7 C.F.R. § 46.2(aa)(11)) provides that parties to a transaction involving perishable agricultural commodities may elect to use different times of payment than those set forth in section 46.2(aa)(1)-(10) of the Regulations (7 C.F.R. § 46(aa)(1)-(10)). Any such agreement must be reduced to writing before the parties enter the transaction regarding perishable agricultural commodities and the party claiming the existence of the agreement has the burden of proving it. The record contains no evidence that Respondent entered into a written agreement with any of its produce sellers for extended payments prior to the transactions which are the subject of this proceeding.

Respondent did introduce evidence that in 1996, after Respondent stopped doing business, Respondent entered into an agreement with its creditors in accordance with which Respondent was to pay its debts over an extended period of time (Tr. 90-93). However, such an agreement does not constitute a basis for Respondent's contention that "Complainant no longer has a statutory interest in the transactions that are the subject matter of [the C]omplaint." (Respondent's October 22, 2001, Appeal Pet. at 5).

Fourth, Respondent contends that it is entitled to due process and has been denied due process (Respondent's October 22, 2001, Appeal Pet. at 6).

The Fifth Amendment to the Constitution of the United States provides that no person shall be deprived of life, liberty, or property, without due process of law. I agree with Respondent that it is entitled to due process in this proceeding. However, I disagree with Respondent's contention that it was denied due process in this proceeding. The record clearly establishes that Respondent was given notice

of the proceeding in accordance with both the due process clause of the Fifth Amendment to the Constitution of the United States and the Administrative Procedure Act (5 U.S.C. § 554(b)). Further, Respondent was given an opportunity for a hearing and Respondent took advantage of that opportunity.

Finally, Respondent requests a new hearing in order to preserve Respondent's rights and ensure confidence in and integrity of the disciplinary system. Respondent states that during this new hearing "a through [sic] presentation of all the evidence and issues should be considered." (Respondent's October 22, 2001, Appeal Pet. at 6.)

Section 1.146(a)(2) of the Rules of Practice provides that a party may petition to reopen a hearing, as follows:

> **§ 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).

I deny Respondent's petition for a new hearing because Respondent has not stated the nature and purpose of the evidence to be adduced. Moreover, Respondent has not set forth a good reason for Respondent's failure at the November 17, 1999, hearing to adduce evidence that Respondent now wants to adduce. Finally, Respondent does not identify the issues in this proceeding which it believes should be considered that have not been considered.

Sanction

The Judicial Officer's former policy, which was adopted in *In re Gilardi Truck & Transportation, Inc.*, 43 Agric. Dec. 118 (1984), and is applicable to this

proceeding, had been to revoke the license of any PACA licensee who failed to pay in accordance with the PACA and owed more than a *de minimis* amount to produce sellers by the date of the hearing or, if no hearing was held, by the time the answer was due. Cases in which a respondent had failed to pay by the date of the hearing were referred to as "no-pay" cases. License revocation could be avoided and the suspension of a license of a PACA licensee who failed to pay in accordance with the PACA would be ordered if a PACA violator made full payment by the date of the hearing (or, if no hearing was held, by the time the answer was due) and was in full compliance with the PACA by the date of the hearing. Cases in which a respondent had paid and was in full compliance with the PACA by the time of the hearing were referred to as "slow-pay" cases. The *Gilardi* doctrine was subsequently tightened in *In re Carpenito Bros., Inc.*, 46 Agric. Dec. 486 (1987), *aff'd*, 851 F.2d 1500, 1988 WL 76618 (D.C. Cir. 1988), by requiring that a respondent's present compliance not involve credit agreements for more than 30 days.[5]

PACA license revocation is the appropriate sanction in a "no-pay" case. However, Respondent chose not to renew its PACA license and thereby allowed its license to lapse on February 4, 1999. Whenever the Secretary of Agriculture determines that a commission merchant, dealer, or broker has violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), the Secretary of Agriculture is authorized to publish the facts and circumstances of the violation. 7 U.S.C. § 499h(a). In light of the lapse of Respondent's PACA license, the appropriate sanction for Respondent's violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) is the publication of the facts and circumstances of Respondent's violations.

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

[5] In *In re Scamcorp, Inc.*, 57 Agric. Dec. 527 (1998), the Judicial Officer changed the "slow-pay/no-pay" policy. However, the new policy applies to PACA disciplinary cases instituted after January 25, 1999, the date *In re Scamcorp, Inc.*, was published in *Agriculture Decisions*, or after personal notice of *In re Scamcorp, Inc.*, served on a respondent, whichever occurs first. The instant proceeding was instituted before January 25, 1999, and neither party alleges that Respondent was given personal notice of *In re Scamcorp, Inc.* Moreover, application of the new "slow-pay/no-pay" policy to this proceeding would not change the disposition of this proceeding.

ORDER

Respondent has committed willful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). The facts and circumstances set forth in this Decision and Order on Remand shall be published, effective 60 days after service of this Order on Respondent.

PERISHABLE AGRICULTURAL COMMODITIES ACT

REPARATION DECISIONS

SPENCER FRUIT COMPANY v. L & M COMPANIES, INC.
PACA Docket No. R-01-0023.
Decision and Order.
Filed July 3, 2001.

Contracts — Mistake

Federal inspections – credibility rebutted by bribery of federal inspectors

Burden of proof – not met where federal inspections found unconvincing due to bribery of inspectors

Complainant sold a load of grapes to Respondent, and Respondent sold the load to a firm on the Hunts Point Terminal Market whose employee later pleaded guilty to bribing federal inspectors. On the basis of inspections performed by inspectors who later pleaded guilty to accepting bribes, contract modifications were negotiated by the Hunts Point firm with Respondent, and by Respondent with Complainant. It was held that the modifications negotiated between Complainant and Respondent were based upon a mutual mistake of fact, and were voidable by Complainant.

Under the original f.o.b. contract the Respondent who accepted the grapes had the burden of proving a breach on the part of Complainant. Although under the Act federal inspections are prima facie evidence of the truth of the statements recorded therein, it was held that such prima facie evidence is rebuttable, and that the credibility of the inspections was rebutted by the guilty pleas of the inspectors coupled with the implication of the buyer in the bribery of inspectors. It was found that the federal inspections were unconvincing, and that the Respondent failed to prove a breach of contract. The Complainant was awarded the original contract price that was based on inspections by inspectors who pleaded guilty to accepting bribes.

George S. Whitten, Presiding Officer.
Complainant, Pro se.
Louis W. Diess, III, 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 $16,540.50 in connection with transactions in interstate commerce involving two truckloads of grapes.

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 $30,000.00, and therefore the documentary 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 did not file a statement in reply. Neither party filed a brief.

Findings of Fact

1. Complainant, Spencer Fruit Company, is a partnership composed of Spencer Fruit Company Investors, LP, and Far Western Securities Company. Complainant's address is P. O. Box 1246, Reedly, California.

2. Respondent, L & M Companies, Inc., is a corporation doing business as L & M West Coast, whose address is 2925 Huntleigh Dr., Suite 204, Raleigh, North Carolina. At the time of the transactions involved herein Respondent was licensed under the Act.

3. On or about September 17, 1998, Complainant sold to Respondent, 540 cartons of Pride and Joy brand Flame grapes at $8.00 per carton, or $4,320.00, and 900 cartons of Sun Star brand Thompson Seedless grapes at $7.00 per carton, or $6,300.00, plus $1.50 per carton for cooling and palletizing, or $2,160.00, plus $10.00 for an air bag, and $23.50 for a temperature recorder, less a shipper discount of $.25 per carton, or $260.00, or a total for the load of $12,453.50, f.o.b.

4. Respondent resold the load to Johnson Associated Fruit Company, Inc., in Rockaway, New Jersey, and Johnson Associated Fruit Company, Inc. resold the load to Jacobson Produce in Bronx, New York.

5. On or about September 17, 1998, Complainant shipped the load of grapes to Respondent in New York, New York. Following arrival of the load of grapes at the place of business of Jacobson Produce the grapes were federally inspected on September 23, 1998, after unloading from the truck, with the following results in relevant part:

LOT: A
TEMPERATURES: 35 to 37 F
PRODUCT: Table Grapes
BRAND/MARKINGS: "Sun Star" 19 lbs. TH. SDLSS
ORIGINS: CA
LOT ID.: 820-362
NUMBER OF CONTAINERS: 90?
INSP. COUNT: ?

LOT: B
TEMPERATURES: 36 to 37 F
PRODUCT: Table Grapes
BRAND/MARKINGS: "Pride & Joy" 19 lbs. A. SDLSS
ORIGINS: CA
LOT ID.:
NUMBER OF CONTAINERS: 5??
INSP. COUNT: ?

LOT	AVERAGE DEFECTS	including SER. DAM.	Including V. S. DAM.	OFFSIZE/DEFECT	OTHER
A	12 %	00 %	%	Shattered berries (8 to 16%).	
	04 %	00 %	%	Sunken and Shriveled Cap stems	
	04 %	00 %	%	Brown discoloration	
	02 %	02 %	%	Wet and Sticky berries	
	01 %	01 %	%	Crushed and Split berries	
	1/2%	1/2%	%	Decay	
	23 %	03 %	%	Checksum	
B	14 %	00 %	%	Shriveled berries (5 to 21%)	
	09 %	00 %	%	Shattered berries (8 to 11%)	
	03 %	03 %	%	Wet and Sticky berries	
	01 %	01 %	%	Crushed and Split berries	
	01 %	01 %	%	Decay	
	28 %	05 %	00 %	Checksum	

GRADE:

. . .

Inspector's Signature [Michael Tsamis]

6. On the basis of the inspection Respondent negotiated an adjustment with

Complainant in the amount of $9,033.00, and remitted a balance of $3,420.50.

7. On or about November 10, 1998, Complainant sold to Respondent, 2,002 cartons of Sun Star brand Red Globe grapes at $7.00 per carton, or $14,014.00, plus cooling and palletizing at $1.50 per carton, or $3,003.00, and a temperature recorder at $23.50, less a shipper discount of $.25 per carton, or $500.50, or a total of $16,540.00, f.o.b.

8. Respondent resold the load to Jacobson Produce in Bronx, New York.

9. On or about November 10, 1998, Complainant shipped the load of grapes to Respondent in New York, New York. Following arrival of the load of grapes at the place of business of Jacobson Produce the grapes were federally inspected on November 12, 1998, at 9:15 a.m., while still loaded on the truck, with the following results in relevant part:

LOT: A
TEMPERATURES: 36 to 38 F
PRODUCT: table grapes
BRAND/MARKINGS: "Sunstar" Red Globe, 19 lbs n/wt
ORIGINS: CA
LOT ID.: 919-361, 362
NUMBER OF CONTAINERS: 2000 lugs
INSP. COUNT: N

LOT	AVERAGE DEFECTS	including SER. DAM.	Including V. S. DAM.	OFFSIZE/DEFECT	OTHER
A	12 %	12 %	%	Wet and sticky (0 to 45%)	Decay Early to moderate some advance stages
	01 %	01 %	%	Torn around capstem	
	04 %	04 %	%	Decay (- ½ to 16%)	
	17 %	17 %	%	Checksum	

GRADE:

REMARKS: inspected During process of unloading

. . .

Inspector's Signature: [Edmond Esposito]

10. On the basis of the inspection Respondent negotiated an adjustment with Complainant in the amount of $7,507.50 and remitted a balance of $9,032.50.

11. Two employees of Jacobson Produce, Lawrence Gisser and John Tucci, pleaded guilty to the bribing of federal fruit and vegetable inspectors to secure the falsification of federal inspections. The two inspectors, Michael Tsamis and Edmond Esposito, who inspected the two loads of produce involved in this proceeding pleaded guilty to taking bribes to falsify federal inspections of fruit and vegetables.

12. The informal complaint was filed on December 9, 1999, which was within the time permitted under section 6(a)(1) of the Act, as amended.

Conclusions

The background to this proceeding involves the joint investigation by the Department's Office of the Inspector General, and the F.B.I., known as Operation Forbidden Fruit. As a consequence of the investigation nine USDA fruit and vegetable inspectors were arrested in October of 1999 for taking bribes from employees of various produce firms on the Hunts Point Terminal Market, Bronx, New York. Eight of the inspectors have pleaded guilty in Federal Court to the acceptance of bribes, and the remaining inspector is a cooperating witness who agreed to plead guilty, and has testified in open court as to his guilt. Fifteen employees of fourteen produce firms were implicated in the investigation. One of the employees of one of the produce firms has been acquitted, one has been convicted in a jury trial, and two employees of one firm are unindicted cooperating witnesses. In all, twelve employees of Hunts Point firms have either been convicted of, or pleaded guilty to, the bribery of a public official.

Complainant seeks to recover the amounts of the adjustments which it granted to Respondent on the two loads of grapes, and states that the "balance is due to federal inspections done by fraudulent federal inspectors." Implicit in Complainant's claim is the contention that these adjustments, which were granted because of the problems shown by the inspections performed on arrival at Jacobson Produce, would not have been made had Complainant known that the receiving firm had been involved in the bribery of the inspectors that inspected the grapes that were the subject of the adjustment. There is no contention that Respondent had any knowledge, at the time of the negotiation of the adjustments, of the involvement in the bribery by the employees of Jacobson or by the federal inspectors. In essence Complainant is contending that the adjustments were based upon a mutual mistake of fact.

The Restatement (Second) of Contracts, section 152, states that:

> (1) Where a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk of the mistake under the rule stated in § 154.
>
> (2) In determining whether the mistake has a material effect on the agreed exchange of performances, account is taken of any relief by way of reformation, restitution or otherwise.

There has been no relief granted to Complainant such as is referred to in paragraph (2) above, and it is clear that Complainant does not bear the risk of the mistake under the rule stated in section 154. That section states:

A party bears the risk of a mistake when

> (a) the risk is allocated to him by agreement of the parties, or
>
> (b) he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or
>
> (c) the risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so.

First, as to clause (a), the risk of the mistake was not allocated to Complainant by any agreement between the parties. Second, as to clause (b), it is clear that Complainant was not aware, at the time the adjustments were made, that he had only limited knowledge with respect to the integrity of the federal inspections. The general limited knowledge that all people share is not in view here. Instead, what is meant by clause (b) is awareness of a specific area of limited knowledge, coupled with a determination to treat that area of limited knowledge as unimportant for purposes of the contract. As we have pointed out:

> Any belief that is not in accord with the facts must *always* be due to limited knowledge. If § 154(b) had in view that general awareness of limited knowledge which all reflective humans possess, all parties would always bear the risk of their mistake under §§ 152 and 153 and there would be no

law relating to mistake.[1]

And third, as to clause (c) there is nothing in the circumstances of this case that would make it reasonable to allocate the risk of the mistake to Complainant.

Complainant made the adjustments because the federal inspections indicated that Complainant had breached the contract of sale. A basic assumption on which Complainant made the adjustments was the integrity of the federal inspection process applicable to produce inspected at Jacobson Produce. Clearly, if Complainant had known that employees of Jacobson Produce had bribed federal inspectors, and that the very inspectors who inspected the subject grapes were guilty of accepting bribes to falsify inspections, Complainant would not have been willing to rely upon the inspections performed by those inspectors as a basis for adjusting the contract of sale. There is no reason to believe that Respondent was any more aware of these factors than was Complainant. We conclude that Complainant and Respondent, in agreeing to the adjustments, made a mistake as to a basic assumption on which the adjustments were made. The contract modification is voidable at Complainant's option, and Complaint seeks to avoid the modification by its action herein. We conclude that the modifications should be set aside.

The two loads of grapes were accepted by Respondent, and Respondent, therefore, became liable to Complainant for their full contract price, less any damages resulting from any breach of contract on the part of Complainant. Respondent had the burden of proving both a breach and damages.

The Act, section 14(a), provides in relevant part that:

> . . . official inspection certificates for fresh fruits and vegetables issued by the Secretary of Agriculture pursuant to any law shall be received by all officers and all courts of the United States, in all proceedings under this chapter, and in all transactions upon contract markets under Commodities Exchange Act (7 U.S.C. 1 et seq.) as prima-facie evidence of the truth of the statements therein contained.

This provision is no more than the typical statutory exception to the hearsay rule which excludes documents apart the testimony of the person who wrote them.[2] Prima facie evidence is always subject to rebuttal and contradiction. The guilty

[1] *Nalbandian Farms, Inc. v. McDonnell & Blankfard, Inc.,* 46 Agric. Dec. 674, at 682 (1987).

[2] *See* C. McCormick, *Handbook of the Law of Evidence*, §§ 291-292, pp. 614-615 (1954).

pleas of the inspectors, coupled with the implication of the receiving firm in the bribery of inspectors, rebuts the prima facie evidence presented by the federal inspections submitted in evidence in this proceeding. As the trier of the facts we are unconvinced by the statements in the federal inspections which testify to the poor condition of the subject grapes. Respondent submitted no further evidence of the condition of the grapes on arrival in New York. We find that Respondent has not met its burden of proving a breach on the part of Complainant. Accordingly, Respondent is liable to Complainant for the balance of the contract price of the two loads of grapes, or $16,540.50.

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.[3] 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.[4] We have determined that a reasonable rate is 10 percent per annum.

Complainant was required to pay a $300.00 handling fee to file its formal complaint. Pursuant to 7 U.S.C. 499(e)(a), the party found to have violated Section 2 of the Act is liable for any handling fees paid by the injured party.

Order

Within 30 days from the date of this order Respondent shall pay to Complainant, as reparation, $16,540.50, with interest thereon at the rate of 10% per annum from December 1, 1998, until paid, plus the amount of $300.

Copies of this order shall be served upon the parties.

ZEUS SERVICE, S.A. v. L.A. WROTEN CO., INC.
PACA Docket No. R-98-0062.
Order of Dismissal.
Filed August 27, 2001.

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[3] *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).

[4] *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).

Attorney Fees, effect of dismissal without prejudice on award.

Where a Chilean complainant, who had posted the double bond required by section 6(e) of the Act, requested a voluntary dismissal of its complaint due to the refusal of two of its key witnesses to come from Chile to attend the hearing in the United States, a dismissal without prejudice was ordered, and Respondent was, therefore, not the prevailing party under the fee-shifting provision of section 6(e).

George S. Whitten, Presiding Officer.
Lawrence H. Meuers, for Complainant.
Stephen P. McCarron, for Respondent.
Decision and Order issued by William G. Jenson, Judicial Officer.

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 sought an award of reparation in connection with a contract to consign 128,000 boxes of Chilean sweet onions to Respondent for sale in the United States. In the formal complaint Complainant sought damages for unauthorized deductions allegedly made by Respondent in the amount of $124,492.54 (Count I), for breach of contract by the refusal to accept the balance of the onions in the amount of $794,784.03 (Count II), and for negligent sale of the onions received in the amount of $268,125.60 (Count III).

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. Thereafter, depositions were taken, and, following many delays, the matter was set for oral hearing in Florida. Approximately six weeks before the oral hearing was scheduled to begin Complainant encountered difficulty in getting two Chilean witnesses to attend, and requested that their testimony be taken by video conference at Complainant's expense. Respondent opposed this request on the grounds that the credibility of these witnesses was crucial to the outcome of the case, the language barrier would be exacerbated if the testimony was received by video conference, and that Respondent felt it necessary that it be allowed to cross-examine the two witnesses in person. For the reasons put forward by Respondent the presiding officer denied Complainant's request. Complainant then filed a motion for voluntary dismissal of the complaint. Respondent objected to the dismissal of the complaint on the ground that Complainant, as a non-resident of the United States was required,

pursuant to section 6(e) of the Act[1], to post a bond in double the amount of its claim conditioned on the payment of costs, including a reasonable attorney's fee if respondent prevailed. Respondent maintained that by reason of Complainant's voluntary dismissal Respondent had prevailed and was entitled to attorney fees. The presiding officer gave both parties opportunity to brief the issue.

In contrast to section 7(a) of the Act, section 6(e) does not require that an oral hearing take place for an award of attorney fees to the prevailing party to be made. In spite of this, Complainant, in its brief, seeks to apply section 47.19(d) of the Rules of Practice to this situation. However, such an application is not possible since that section was implemented in direct consequence of the passage of the fees and expenses provision of section 7(a) of the Act, and relates only to that section. There is no provision in the Rules of Practice that relates to the "payment of costs, including a reasonable attorney's fee" under section 6(e) of the Act. However, the award of costs and attorney fees are clearly authorized under that section of the Act.

A more central question to this case is whether Respondent should be deemed to have prevailed in this proceeding as a result of Complainant's voluntary dismissal of its complaint. A voluntary dismissal is generally without prejudice under the Federal Rules of Civil Procedure.[2] As Moore points out:

> This leaves the plaintiff free to refile the action at a later date and does not in any way alter the legal relationship between the parties. As such, a dismissal without prejudice does not render the defendant a prevailing party for purposes of the fee-shifting statutes.[3]

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[1]7 U.S.C. 499f. The section reads as follows: "In case a complaint is made by a nonresident of the United States, or by a resident of the United States to whom the claim of a nonresident of the United States has been assigned, the complainant shall be required, before any formal action is taken on his complaint, to furnish a bond in double the amount of the claim conditioned upon the payment of costs, including a reasonable attorney's fee for the respondent if the respondent shall prevail, and any reparation award that may be issued by the Secretary of Agriculture against the complainant on any counter claim by respondent: Provided, That the Secretary shall have authority to waive the furnishing of a bond by a complainant who is a resident of a country which permits the filing of a complaint by a resident of the United States without the furnishing of a bond."

[2]See Fed. R. Civ. P. 41(a). The Federal Rules of Civil Procedure are, of course, not applicable to this administrative proceeding. However, for purposes of the application of the fee-shifting provisions of section 6(e) of the Act, the way in which the Rules deal with voluntary dismissals, together with the federal case law as to the consequences for fee-shifting, is analogous and compelling.

[3]10 Moore's Federal Practice, § 54.171[3][c][iv] (Matthew Bender 3d ed.).

The case cited by Moore[4] concerned a voluntary dismissal under Rule 41(a)(1)(i). Dismissals under 41(a)(2) are also without prejudice unless specified in the order of the district court. In this case Complainant was intent on the prosecution of its case until two of its key witnesses refused to come to the United States from Chile to testify. Complainant urged that the testimony of these witnesses be taken by video conference, and we declined to order such testimony at Respondent's request. Complainant's request for voluntary dismissal, therefore, says nothing as to the merits of its case, and such dismissal will be granted without prejudice. Since the dismissal will be without prejudice, we cannot say that Respondent has prevailed in this proceeding, and we cannot award costs or attorney fees to Respondent.

Order

The complaint is dismissed without prejudice.
Copies of this order shall be served upon the parties.

PSM PRODUCE, INC. v. BOYER PRODUCE, INC.
PACA Docket No. R-99-0007.
Decision and Order.
Filed September 20, 2001.

Contracts, failure to show breach – Inspections, not necessary, show count under certain circumstances.

Where a purchase and sale contract called for numerous bulk loads to contain a specific number of pumpkins, and for payment to be made on the basis of a per pound price for the total weight of the loads, but limited to the total poundage assuming a 15 pound per pumpkin average, the delivery of loads containing pumpkins which averaged more than 15 pounds was not a breach of contract, and no notice of breach was required. The inventory count performed by the receiving retail stores was accepted as adequate evidence of the number of pumpkins delivered where such count was adequately documented, and no federal inspection was necessary to prove the count received.

George S. Whitten, Presiding Officer.
Byron E. White, for Complainant.
Tyrie A. Boyer, for Respondent.
Decision and Order issued by William G. Jenson, Judicial Officer.

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[4] *Szabo Food Serv. v. Canteen Corp.,* 823 F2d 1073 (7th Cir. 1987) *cert. dismissed*, 485 U.S. 901 (1988).

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 $28,747.33 in connection with multiple transactions in interstate commerce involving pumpkins.

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. Following the timely filing of the answer Respondent filed a motion to permit the late filing of a counterclaim, together with a proposed counterclaim. The proposed counterclaim arose out of the same transactions as those which are the subject of the formal complaint. Although the motion had not been ruled upon, and the counterclaim was a proposed counterclaim which had not been timely filed, it was nevertheless inadvertently served upon Complainant, and Complainant filed a reply thereto. Since Respondent's counterclaim alleged damages in the amount of $34,482.33, and Respondent requested an oral hearing, the matter was initially handled as an oral hearing case. Pursuant to the request of Respondent the deposition of Phil Ratliff, president of Complainant, was taken. Subsequently the presiding officer noted the mistake, denied Respondent's motion for permission to file a counterclaim, and ruled that the counterclaim should not have been served, and should be rejected. Respondent filed a petition to the Secretary for reconsideration of this ruling, and on December 14, 1999, we issued an order affirming the ruling of the presiding officer.

The amount claimed in the formal complaint does not exceed $30,000.00, and therefore the documentary 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, Respondent filed an answering statement which included the deposition of Phil Ratliff, Complainant's president, and Complainant filed a statement in reply. Both parties filed briefs.

Findings of Fact

1. Complainant, PSM Produce, Inc. (hereafter sometimes PSM), is a

corporation whose address is P. O. Box 543, Green Valley, Arizona.

2. Respondent, Boyer Produce, Inc. (hereafter sometimes Boyer), is a corporation whose address is 15A SW2nd Avenue, Williston, Florida. At the time of the transactions involved herein Respondent was licensed under the Act.

3. On or about September 15, 1997, CDC Sales (hereafter sometimes CDC), of McAllen, Texas, through its owner and principal Dean Bearden, and acting as an agent for Complainant which was CDC's undisclosed principal, entered into an agreement to supply pumpkins to Respondent to meet the needs of Respondent's customers, primarily Walmart, but also Albertson's. It was agreed between Dean Bearden and Kennedy G. Boyer, president of Respondent, that the pumpkins to be shipped to Walmart would average 15 pounds, and that the smallest would be the approximate size of a volleyball. The pumpkins shipped to Albertson's would average 18 pounds and be shipped in bins instead of in bulk. All of the Albertson's loads were shipped to Plant City, Florida and were priced at 8.5 cents per pound f.o.b. Shipments of the bulk pumpkins to Walmart were to be on a delivered basis. Pricing was to be established upon a base price of $.065 per pound with freight cost added in so that the delivered price would vary depending on the destination. The total delivered prices were to be 10 cents per pound on shipments to Alabama, 9.5 cents per pound on shipments to Mississippi, 10.5 cents per pound on shipments to Georgia, and 11 cents per pound on shipments to Florida. It was also agreed that, as to the 15 pound average pumpkins to be shipped to Walmart, the number of pounds to be paid by Respondent would not exceed the actual number of pumpkins received multiplied by 15. The agreement as to the pumpkins to be shipped in bulk to Walmart was memorialized by the following writing:

FAX

DATE: 9/15/97

TO: Dean
ATTENTION:
FROM: Ken

CONTENTS: 25 loads of pumpkins at

0.10	¢/lb Dlvd to Alb
0.095	¢ Dlvd to Miss
0.105	¢/lb. Dlvd to Ga
0.11	¢/lb. Dlvd to Fla.

Starting 9/27 thru 10 Oct 97
Will pay on pumpkins receive/and (sic) 15 lb Ave.

Approx down size is volley ball[1]
CDC to arrange transportation.

/s/ Dean Bearden Thank you,

/s/ Ken Boyer

4. CDC issued "confirmations" which were generally dated the day following shipment. Instead of stating the names of the seller and buyer, these "confirmations" stated near the top of the page, on the left, under the designation "SHIP TO:," "PACIFIC SOUTHWEST MARKETING, P.O. BOX 543, GREENVALLEY, AZ, 85614, and parallel to this on the right, also under the designation "SHIP TO:," "BOYER PROD. WILLISTON, FLA." Generally, a purchase order number was also stated next to "BOYER PROD.," and underneath was a third "SHIP TO;" which was generally followed by a statement of the ultimate destination or destinations. The body of the "confirmation" contained a statement of the quantity in pounds followed by a description. A typical specimen of one of the descriptions reads: "BULK PUMPKINS 15# AVE. AT .065 PER # FOB. APPROX. CT. 3050 FREIGHT: A&A WILL INVOICE BOYER .035 PER #"

5. PSM issued invoices as to each load. These were usually dated on, or the day after, the date of CDC's "confirmations." However, a few were dated the day before the "confirmations," and a few were dated three to twenty-one days following the date on the "confirmations." All of the invoices gave the name and address of Boyer under both the headings "Bill To," and "Ship To." In addition, the same poundage as on the "confirmations" was given, together with a computation of the amount due at $.065 per pound on the bulk loads, or $.085 per pound on the loads shipped in bins. One load was billed on a delivered basis at $.1025 per pound, and accompanied by the statement that freight was prepaid by the shipper.

6. On September 25, 1997, CDC, acting as agent for Complainant, sold to Respondent one load of pumpkins in 44 bins weighing 35,660 pounds total [PSM Inv. 1450; CDC Conf. 5076; Boyer load 3443]. The pumpkins were shipped on September 25, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Albertson's in Plant City, Florida. CDC's "confirmation" shows the price as $.085 per pound, f.o.b., but Complainant invoiced Respondent at $.065 per pound, f.o.b. On September 30, 1997, trouble was reported by the receiver to Boyer, and by Boyer to CDC as follows: "Truck delivered to Walmart

[1]A regulation volley ball is approximately 8.27 inches in diameter.

instead of Albertson's - Hired WestWind to p/u from Wal-Mart and re-del to Albertson's. Albertson's rejected for size. . . . FINAL SETTLEMENT: Sent to Meeks Farms to rework & Re -del. To Albertson's on 10/2." A federal inspection was performed at the place of business of Albertson's in Plant City, Florida, on 10/1/97, at 7:10 a.m., with the following results in relevant part:

LOT: A
TEMPERATURES: 77 to 82°F
PRODUCT: Pumpkins
BRAND/MARKINGS: "No Brand"
ORIGINS: TX
LOT ID.:
NUMBER OF CONTAINERS: 44 Bins
INSP. COUNT: Y

LOT	AVERAGE DEFECTS	including SER. DAM.	Including V. S. DAM.	OFFSIZE/DEFECT	OTHER
A					Weight 2 to 33 ¾ mostly 4 to 24 (illegible) lbs per pumpkin average 15.43 lbs.

GRADE:

REMARKS: Weight reported only at applicant's request.

On the same day, at 3:20 p.m., at the place of business of Meek Farm Produce & Brokerage, Inc., Plant City, Florida, a second federal inspection of the pumpkins was performed with the following results in relevant part:

LOT: A
TEMPERATURES: 82 to 86°F
PRODUCT: Pumpkins
BRAND/MARKINGS: "No Brand"
ORIGINS: TX
LOT ID.:
NUMBER OF CONTAINERS: 44 bins
INSP. COUNT: Y

LOT	AVERAGE DEFECTS	including SER. DAM.	Including V. S. DAM.	OFFSIZE/DEFECT	OTHER

SIZE: 8¼ to 14¼ inch in diameter

Mostly 9¼ to 12 inch in diameter

Average 10.75 inches in diameter with 32% of pumpkins 8¼ inches to 10 inches and 68% of pumpkins 10 to 14¼ inches in diameter

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GRADE:

REMARKS: Restricted to size only at applicant's request.

Respondent remitted $1,122.00, after deducting $1,195.90 from the $2,317.90 invoice amount. Complainant has agreed to this deduction, and there is no further amount due on this load.

7. On September 29, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 45,880 pounds [PSM Inv. 1463; CDC Conf. 5084; Boyer load 3444]. The pumpkins were shipped on September 29, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Huntsville, Alabama. On arrival the load was found to contain 1,592 pumpkins. Complainant invoiced Respondent at the rate of $.065 per pound for the 45,880 pounds, or $2,982.20. Respondent paid Complainant $732.00, and Complainant has agreed to accept this amount.

8. On September 30, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 46,640 pounds [PSM Inv. 1466; CDC Conf. 5085; Boyer load 3445]. The pumpkins were shipped on September 30, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Jasper, Alabama. Complainant invoiced Respondent at the rate of $.065 per pound for the 46,640 pounds, or $3,031.60, f.o.b. Respondent paid Complainant $2,246.60.

9. On September 29, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 41,540 pounds [PSM Inv. 1460; CDC Conf. 5083; Boyer load

3446]. The pumpkins were shipped on September 29, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Prattville, and Selma, Alabama. Walmart in Prattville received 1,052 pumpkins, and Walmart in Selma received 1,300 pumpkins. Complainant invoiced Respondent at the rate of $.065 per pound for the 41,540 pounds, or $2,700.10, f.o.b. Respondent paid Complainant $2,070.60.

10. On September 30, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 42,880 pounds [PSM Inv. 1464; CDC Conf. 5086; Boyer load 3447]. The pumpkins were shipped on September 30, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart, in Huntsville, Alabama. Walmart received 2,859 pumpkins. Complainant invoiced Respondent at the rate of $.065 per pound for the 42,880 pounds, or $2,787.20, f.o.b. Respondent has paid Complainant in full for these pumpkins.

11. On September 30, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 43,740 pounds [PSM Inv. 1467; CDC Conf. 5087; Boyer load 3448]. The pumpkins were shipped on September 30, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart, in Muscle Shoals, Alabama. Complainant invoiced Respondent at the rate of $.065 per pound for the 43,740 pounds, or $2,843.10, f.o.b. Respondent paid Complainant $2,295.00.

12. On October 1, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 45,200 pounds [PSM Inv. 1468; CDC Conf. 5090; Boyer load 3452]. The pumpkins were shipped on October 1, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Athens, Alabama, and Lawerenceburg, Tennessee. Walmart received a total of 2,243 pumpkins. Complainant invoiced Respondent at the rate of $.065 per pound for the 45,200 pounds, or $2,938.00, f.o.b. Respondent paid Complainant $1,792.00.

13. On October 2, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 44,100 pounds [PSM Inv. 1474; CDC Conf. 5093; Boyer load 3453]. The pumpkins were shipped on October 2, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Tuscaloosa, Alabama. Walmart received 2,236 pumpkins. Complainant invoiced

Respondent at the rate of $.065 per pound for the 44,100 pounds, or $2,866.50, f.o.b. Respondent paid Complainant $1,810.50.

14. On October 2, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 46,520 pounds [PSM Inv. 1476; CDC Conf. 5094; Boyer load 3454]. The pumpkins were shipped on October 2, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Newman, Georgia. Complainant invoiced Respondent at the rate of $.065 per pound for the 46,520 pounds, or $3,023.80, f.o.b. Respondent paid Complainant $2,224.75.

15. On October 2, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 43,100 pounds [PSM Inv. 1477; CDC Conf. 5095; Boyer load 3455]. The pumpkins were shipped on October 2, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Sylacauga and Bessemer, Alabama. The store in Sylacauga received 975 pumpkins, and the store in Bessemer received 1,400 pumpkins, or a total of 2,375 pumpkins. Complainant invoiced Respondent at the rate of $.065 per pound for the 43,100 pounds, or $2,801.50, f.o.b. Respondent paid Complainant $1,896.00.

16. On September 27, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 42,180 pounds [PSM Inv. 1462; CDC Conf. 5082; Boyer load 3456]. The pumpkins were shipped on September 27, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Gainsville, Georgia. Walmart received 2,400 pumpkins. Complainant invoiced Respondent at the rate of $.065 per pound for the 42,180 pounds, or $2,741.70, f.o.b. Respondent paid Complainant $2,107.20.

17. On October 3, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 44,720 pounds [PSM Inv. 1484; CDC Conf. 5097; Boyer load 3457]. The pumpkins were shipped on October 3, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Ft. Payne, Georgia, and Cleveland, Tennessee. Complainant invoiced Respondent at the rate of $.065 per pound for the 44,720 pounds, or $2,906.80, f.o.b. Respondent paid Complainant $1,439.85.

18. On October 4, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 45,360 pounds [PSM Inv. 1487; CDC Conf. 5102; Boyer load

3458]. The pumpkins were shipped on October 4, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Florance, Alabama. Complainant invoiced Respondent at the rate of $.065 per pound for the 45,360 pounds, or $2,948.40, f.o.b. Respondent paid Complainant $1,944.90.

19. On October 4, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 42,900 pounds [PSM Inv. 1488; CDC Conf. 5103; Boyer load 3459]. The pumpkins were shipped on October 4, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Fayetteville, Georgia. Complainant invoiced Respondent at the rate of $.065 per pound for the 42,900 pounds, or $2,788.50, f.o.b. Walmart received 2,252 pumpkins. Respondent paid Complainant $1,774.00.

20. On October 7, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 43,940 pounds [PSM Inv. 1515; CDC Conf. 5140; Boyer load 3460]. The pumpkins were shipped on October 7, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Cartersville and Marietta, Georgia. Complainant invoiced Respondent at the rate of $.065 per pound for the 43,940 pounds, or $2,856.10, f.o.b. Walmart Stores received 1,400 pumpkins at the Cartersville location, and 800 pumpkins at the Marietta location. Respondent paid Complainant $1,707.40.

21. On October 6, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 47,340 pounds [PSM Inv. 1498; CDC Conf. 5108; Boyer load 3461]. The pumpkins were shipped on October 6, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Hiram, Georgia. Complainant invoiced Respondent at the rate of $.065 per pound for the 47,340 pounds, or $3,077.10, f.o.b. Walmart received 3,122 pumpkins. Respondent paid Complainant $3,023.55, and has waived any contest as to the remainder of the invoiced amount being due.

22. On October 3, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 46,520 pounds [PSM Inv. 1491; CDC Conf. 5099; Boyer load 3462]. The pumpkins were shipped on October 3, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Rome, Georgia. Complainant invoiced Respondent at the rate of $.065 per pound for the

46,520 pounds, or $3,023.80, f.o.b. Walmart received 2,459 pumpkins. Respondent paid Complainant $2,012.10.

23. On October 3, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 42,560 pounds [PSM Inv. 1486; CDC Conf. 5098; Boyer load 3463]. The pumpkins were shipped on October 3, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Thompson and Conyers, Georgia. Complainant invoiced Respondent at the rate of $.065 per pound for the 42,560 pounds, or $2,766.40, f.o.b. Walmart Stores received 1,000 pumpkins at the Thompson location, and 1,124 pumpkins at the Conyers location. Respondent paid Complainant $1,642.90.

24. On October 6, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 45,900 pounds [PSM Inv. 1497; CDC Conf. 5109; Boyer load 3464]. The pumpkins were shipped on October 6, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Stockbridge, and Rincon, Georgia. Complainant invoiced Respondent at the rate of $.065 per pound for the 45,900 pounds, or $2,983.50, f.o.b. Walmart received 1,200 pumpkins at the Stockbridge location, and 1,500 pumpkins at the Rincon location, of which 54 were damaged and left on the truck. Respondent paid Complainant $2,355.00.

25. On October 3, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 45,410 pounds [PSM Inv. 1489; CDC Conf. 5100; Boyer load 3465]. The pumpkins were shipped on October 3, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Calhoun and Ogelthorpe, Georgia. Complainant invoiced Respondent at the rate of $.065 per pound for the 45,410 pounds, or $2,951.65, f.o.b. Walmart received 752 pumpkins at the Calhoun location, and 1,500 pumpkins at the Ogelthorpe location. Respondent paid Complainant $1,730.50.

26. On October 1, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 46,780 pounds [PSM Inv. 1470; CDC Conf. 5091; Boyer load 3466]. The pumpkins were shipped on October 1, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Russelville, Decatur, and Cullman, Alabama. Complainant invoiced Respondent at the rate of $.065 per pound for the 46,780 pounds, or $3,040.70, f.o.b. Walmart Stores received 800 pumpkins at the Russelville location, 800 pumpkins at the

Decatur location, and 474 pumpkins at the Cullman location. Respondent paid Complainant $1,473.70.

27. On September 30, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 43,220 pounds [PSM Inv. 1461; CDC Conf. 5088; Boyer load 3467]. The pumpkins were shipped on September 30, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Scottsboro, Roanoke, Huntsville, and Northport, Alabama. Complainant invoiced Respondent at the rate of $.065 per pound for the 43,220 pounds, or $2,809.30, f.o.b. Respondent paid Complainant $2,384.30.

28. On October 1, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 45,460 pounds [PSM Inv. 1469; CDC Conf. 5092; Boyer load 3468]. The pumpkins were shipped on October 1, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Covington, Savanna, and Bremen, Georgia. Complainant invoiced Respondent at the rate of $.065 per pound for the 45,460 pounds, or $2,954.90, f.o.b. Walmart Stores received 800 pumpkins at the Covington location, 1,200 pumpkins at the Savanna location, and 724 pumpkins at the Bremen location. Respondent paid Complainant $2,471.90.

29. On October 2, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 45,420 pounds [PSM Inv. 1478; CDC Conf. 5096; Boyer load 3469]. The pumpkins were shipped on October 2, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Cumming, Moultrie, and Cordele, Georgia. Complainant invoiced Respondent at the rate of $.065 per pound for the 45,420 pounds, or $2,952.30, f.o.b. Respondent paid Complainant $1,963.20.

30. On October 3, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 43,800 pounds [PSM Inv. 1490; CDC Conf. 5101; Boyer load 3470]. The pumpkins were shipped on October 3, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Hazelhurst, Milledgeville, and Stone Mountain, Georgia. Complainant invoiced Respondent at the rate of $.065 per pound for the 43,800 pounds, or $2,847.00, f.o.b. Walmart Stores received 800 pumpkins at the Hazelhurst location, 800 pumpkins at the Milledgeville location, 300 pumpkins at the Stone Mountain location, and from Stone Mountain a remaining 345 pumpkins were sent to Walmart

Stores in Athens, Georgia, but were to be billed to the Stone Mountain location of Walmart Stores. Ninety four pumpkins were refused and taken to a landfill. Respondent paid Complainant $1,783.67.

31. On September 27, 1997, CDC, acting as agent for Complainant, sold to Respondent one load of pumpkins in 48 bins weighing 38,500 pounds total [PSM Inv. 1465; CDC Conf. 5081; Boyer load 3471]. The pumpkins were shipped on September 27, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart in Plant City, Florida. However, Respondent intended the load for Albertson's, and redirected the load to that firm in Plant City. Albertson's accepted the load under protest as to size, and the protest was communicated by Respondent to CDC. Complainant invoiced Respondent at the rate of $.085 per pound for the 38,500 pounds, or $3,272.50, f.o.b. Respondent paid Complainant $1,401.70.

32. On October 9, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 45,420 pounds [PSM Inv. 1504; CDC Conf. 5118; Boyer load 3472]. The pumpkins were shipped on October 9, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Hopkinsville, and Madisonville, Kentucky. Complainant invoiced Respondent at the rate of $.1025 per pound for the 45,420 pounds, or $4,769.10, delivered. Respondent paid Complainant $3,717.90.

33. On October 9, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 46,120 pounds [PSM Inv. 1503; CDC Conf. 5114; Boyer load 3475]. The pumpkins were shipped on October 9, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Bowling Green, Kentucky. Walmart Stores received 2,256 pumpkins. Complainant invoiced Respondent at the rate of $.065 per pound for the 46,120 pounds, or $2,997.80, f.o.b. Respondent paid Complainant $1,708.40.

34. On October 9, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 46,320 pounds [PSM Inv. 1501; CDC Conf. 5117; Boyer load 3477]. The pumpkins were shipped on October 9, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Frankfort, Kentucky. Complainant invoiced Respondent at the rate of $.065 per pound for the 46,320 pounds, or $3,010.80, f.o.b. Respondent paid Complainant $3,010.80, and nothing further is due on this load.

35. On October 4, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 42,600 pounds [PSM Inv. 1485; CDC Conf. 5105; Boyer load 3482]. The pumpkins were shipped on October 4, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Cookville, Tennessee. Complainant invoiced Respondent at the rate of $.065 per pound for the 42,6000 pounds, or $2,769.00, f.o.b. Respondent paid Complainant $2,222.47.

36. On October 4, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 44,760 pounds [PSM Inv. 1492; CDC Conf. 5104; Boyer load 3484]. The pumpkins were shipped on October 4, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Gainsville, Georgia. Complainant invoiced Respondent at the rate of $.065 per pound for the 44,760 pounds, or $2,909.40, f.o.b. Respondent paid Complainant in full for this load.

37. On October 8, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 43,560 pounds [PSM Inv. 1495; CDC Conf. 5116; Boyer load 3485]. The pumpkins were shipped on October 8, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Gainsville, Georgia. Walmart stores received 2,556 pumpkins. Complainant invoiced Respondent at the rate of $.065 per pound for the 43,560 pounds, or $2,831.40, f.o.b. Respondent paid Complainant $2,283.30.

38. On October 7, 1997, CDC, acting as agent for Complainant, sold to Respondent one load of pumpkins in 48 bins weighing 35,760 pounds total [PSM Inv. 1495; CDC Conf. 5112; Boyer load 3486]. The pumpkins were shipped on October 7, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Albertson's, in Plant City, Florida. The load was rejected by Respondent's customer who reported that there were no bottoms or lids on the bins, and that the pumpkins were muddy and oversized. The pumpkins were taken to Meeks Farm to be reworked. Complainant invoiced Respondent at the rate of $.085 for 35,760 pounds, or $3,039.60. Respondent has paid Complainant $389.12.

39. On October 7, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 45,840 pounds [PSM Inv. 1499; CDC Conf. 5113; Boyer load 3487]. The pumpkins were shipped on October 7, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in

Cummins, Georgia. Complainant invoiced Respondent at the rate of $.065 per pound for the 45,840 pounds, or $2,979.60, f.o.b. Respondent paid Complainant $2,678.78. Respondent admits that there is a balance of $300.82 still due on this load.

40. On October 12, 1997, CDC, acting as agent for Complainant, sold to Respondent one load of pumpkins in 44 bins weighing 32,960 pounds total [PSM Inv. 1505; CDC Conf. 5119; Boyer load 3489]. The pumpkins were shipped on October 12, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Albertson's, in Plant City, Florida. On arrival the pumpkins were reported by Albertson's to have decay and some green color. The pumpkins were sent to Meeks Farm for reworking. On October 15, 1997, at 11:00 a.m., the pumpkins were federally inspected at the place of business of Meeks Farm Produce & Brokerage, Inc., Plant City, Florida, with the following results in relevant part:

LOT	TEMPERATURES	PRODUCT	BRAND/MARKINGS	ORIGIN	LOT ID.	NUMBER OF CONTAINERS	INSP. COUNT
A	67 to 68 °F	Pumpkins	"No Brand"	NM		42	
	Y						

LOT		AVERAGE	including SER DAM	including V. S. DAM	OFFSIZE/DEFECT	OTHER
A	15	%	15 %	%	Soft rot (8 to 20%)	Soft rot Mostly early some advanced stages.
	15	%	15 %	%	checksum	Many pumpkins show green color affecting 1/4 to 1/2 of surface not affecting grade.

REMARKS: Presence of green color not affecting grade shown only at applicant's request.

Complainant invoiced Respondent at the rate of $.085 for 32,960 pounds, or $2,801.60. Respondent did not pay Complainant any amount for this load.

41. On October 12, 1997, CDC, acting as agent for Complainant, sold to Respondent one load of pumpkins in 44 bins weighing 35,360 pounds total [PSM Inv. 1506; CDC Conf. 5120; Boyer load 3491]. The pumpkins were shipped on

October 12, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Albertson's, in Plant City, Florida. Complainant invoiced Respondent at the rate of $.085 for 32,720 pounds, or $2,781.20. Respondent has paid Complainant the full invoice amount for this load.

42. On October 14, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 44,260 pounds [PSM Inv. 1510; CDC Conf. 5125; Boyer load 3492]. The pumpkins were shipped on October 14, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, at eight locations in, Georgia and South Carolina. Complainant invoiced Respondent at the rate of $.065 per pound for the 44,260 pounds, or $2,876.90, f.o.b. Respondent paid Complainant $2,771.85. Respondent admits that there is a balance of $105.05 still due on this load.

43. On October 14, 1997, CDC, acting as agent for Complainant, sold to Respondent one load of pumpkins in 44 bins weighing 34,060 pounds total [PSM Inv. 1509; CDC Conf. 5130; Boyer load 3503]. The pumpkins were shipped on October 14, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Albertson's, in Plant City, Florida. Complainant invoiced Respondent at the rate of $.085 for 34,060 pounds, or $2,895.10. Respondent has paid Complainant the full invoice amount for this load.

44. The formal complaint was filed on May 18, 1998, which was within nine months after the cause of action herein accrued.

Conclusions

Complainant, PSM, brings this action to recover balances alleged due on 38 loads of pumpkins sold to Respondent by CDC over a three week period in late September and early October of 1997. The evidence clearly shows that CDC, in making the sales, was acting as an agent for PSM who was, initially at least, in the position of an undisclosed principal. At some point prior to the close of the shipment period PSM's existence as the principal was disclosed. It is not material to ascertain exactly when this took place since PSM clearly has standing, both as an undisclosed principal and a disclosed principal, to bring this action.[2] It is also clear that, under the close agency relationship that existed between PSM and CDC,

[2] *See Diazeteca Co. v. The Players Sales, Inc.,* 53 Agric. Dec. 909 (1994).

even after disclosure of PSM as the principal, CDC was able to bind its principal, and able to receive all contractual notice in place of its principal.[3]

The primary issue that underlies most of the disputed transactions concerns the proper interpretation of the written contract set forth in Finding of Fact 3. The evidence shows that, except as to one load, Complainant unilaterally changed the terms of the contract to f.o.b., and proceeded to bill on an f.o.b. basis. CDC furthered this change in the contract by noting on it's a confirmation@ the new f.o.b. terms, and that the freight charge would be billed to Respondent by the trucking firms. This would have been a clear breach of the contract, except that Respondent acquiesced in the change, thus creating a modification of the original contract terms. However, the crucial provision: AWill pay on pumpkins receive/and (sic) 15 lb Ave.@ was never changed, and must be viewed as governing all the bulk load transactions. Respondent asserts that the meaning of this provision was based upon Walmart's requirements that entailed the sale of the pumpkins to the ultimate consumer on a per pumpkin basis. Walmart wanted pumpkins that averaged 15 pounds, but as long as the pumpkins were at least the size of a volley ball, was not concerned if they were moderately oversized. However, since they would be selling the pumpkins at a fixed per pumpkin price, rather than on the basis of weight, they intended to pay on a per pumpkin basis as though each pumpkin weighed 15 pounds. This, at any rate, is Respondent's view of the background against which the meaning of the provision quoted above must be assessed. Respondent maintains that it is liable to Complainant only for the number of pumpkins received, and that the price paid for the pumpkins received is to be governed by the agreed maximum of 15 pounds per pumpkin. It would not be a breach of the contract if the weight received exceeded the 15 pound average, but such average would limit the amount to be paid under the contract.

Complainant, in its opening statement, discounted the written contract signed by its agent Charles Bearden, and asserted that the pumpkins were sold on a transaction by transaction basis. Complainant attached the affidavit of Charles Bearden in which Mr. Bearden stated:

> Mr. Ken Boyer's so called "contract" was just an understanding on general pricing structure and weights to be shipped to general locations. When Mr. Boyer contacted myself in an effort to

[3] *See Western Cold Storage v. Schons*, 38 Agric. Dec. 903 (1979); *Johnson Produce v. R. L. Burnett Brokerage Co.,* 37 Agric. Dec. 1743 (1978); and *George Arakelian v. Leonard O'Day,* 31 Agric. Dec. 1395 (1972).

> purchase pumpkins, we did not discuss specific locations and times that the pumpkins were to be shipped and delivered. This was not a contract, by any means, but a general understanding on general pricing structure and no specific details were known at that time. The only contract we had between PSM Produce, Inc. and Boyer Produce, Inc. was the confirmation of sales.

Complainant, no doubt led astray by Mr. Bearden's specious reasoning in his statement quoted above, never addressed the crucial question of the meaning of the contract signed by its agent. This is unfortunate, for Respondent's assessment of its meaning is essentially unopposed in the record. While the important clause, "Will pay on pumpkins receive/and (sic) 15 lb Ave.," is certainly susceptible of the interpretation urged by Respondent, the clause is not a model of clarity. However, the meaning was clarified early in the series of transactions. The third of the bulk loads, shipped on September 27, 1997, contained 45,880 pounds of pumpkins, but the produce manager at Walmart in Huntsville, Alabama noted on the bill of lading that the load contained only 1,592 pumpkins, or an average weight per pumpkin of 28.82 pounds. Bearden made the following handwritten note on the "confirmation":

> 10/2
>
> Upon Del. Rec. said (illegible) was to (sic) Big. Could only pay by each. Reported same to Phil.

By the making of this note, and by reporting the message to Complainant, Bearden, in effect, acknowledged the correctness of Respondent's view of the meaning of the phrase: "Will pay on pumpkins receive/and (sic) 15 lb Ave." We conclude that the meaning of the phrase is that attributed to it by Respondent.

Complainant's Phil Ratliff, in his deposition, accepted the fact that the parties had agreed that the pumpkins should average 15 pounds. However, he maintained that a substantial variation from that average would be a breach of contract which would have to be proven by a federal inspection, and that notice of the breach would have to be given in a timely fashion. We see no basis for such an interpretation. A variation upwards from the 15 pound average was never viewed by any of the Walmart stores as a breach of the contract such stores had with Respondent, and, under what we have concluded is the proper interpretation of the crucial clause of the written contract, such a variation would not be a breach of the

contract between Complainant and Respondent. Consequently, no notice of a breach would be required when a load arrived that exceed a 15 pound average weight.

The question of proof is another matter. We have often discounted testimonial evidence concerning the condition of perishable commodities and stated the necessity of obtaining a neutral inspection showing the exact extent of damage.[4] However, the reason for this requirement primarily concerns the need for a standardized assessment of the damage according to established categories, and based on statistically valid sampling methods. It is also helpful that the methods used by federal inspectors accord with the Department's published grade standards, and the allowed tolerances under those standards, and under the suitable shipping condition rule applicable in f.o.b. sales. The fact that a federal inspection is neutral is adds credence to the results. However, here there was no reason for Walmart, or Respondent, to call for a federal inspection in the absence of a breach. Moreover, the counting of the pumpkins was a normal and necessary function for Walmart to receive the pumpkins into its inventory, since they would be sold by Walmart to its customers on a per pumpkin basis, and paid for by Walmart on a per pumpkin basis. The pertinent evidentiary problem concerns whether the alleged arrival count is adequately documented (in some cases it is not), and the evident conflict with the number of pumpkins stated on CDC's "confirmations." As to this latter problem, we note that the "confirmations" state that the count is approximate. In some instances it is evident that this approximate count was arrived at by simply dividing the weight by 15. In other instances it is not apparent how the approximate number was arrived at. The figure comes from Bearden, and there was no showing that he was present at the loading, nor was there any showing as to who might have reported the approximate pumpkin count to him. We conclude that the actual count at destination, when properly documented, takes precedence over the approximate count on CDC's "confirmations."

Part of Respondent's deduction from the invoice prices billed by Complainant was for excess freight. Respondent does not explain this deduction. Freight is most often billed at a flat rate. Respondent did not offer in evidence any of the freight bills, and we have no way of knowing that any excess freight was actually incurred by Respondent. Accordingly, we will disallow all of Respondent's deductions for excess freight.

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[4] *Mutual Vegetable Sales v. Select Distributors, Inc.*, 38 Agric. Dec. 1359 (1979); See also *Tyre Farm, Inc. v. Dandrea Produce, Inc.*, 45 Agric. Dec. 796 (1986); *G. J. Albert, Inc. v. Salvo,* 36 Agric. Dec. 240 (1977); *Salt Lake Produce Co., Inc. v. Butte Produce Company, Inc.,* 32 Agric. Dec. 1732 (1973); and *B. G. Anderson Company, Inc. v. Mountain Produce Co.,* 29 Agric. Dec. 513 (1970)

We now must deal with each transaction. Complainant had difficulty making up its mind whether it wished to admit that no further payment is due on the first transaction, that covered by Finding of Fact 6.[5] In the formal complaint, as well as in the informal complaint, Complainant submitted its invoices as to each transaction, but merely stated the total amounts paid by Respondent in several large payments, and the total amount it deemed due on the total of all the transactions, namely $31,525.52, less two allowances of $1,870.00 on PSM invoice 1465 (Finding of Fact 31), and $906.76 on PSM invoice 1505 (Finding of Fact 40), or a net amount of $28,747.96. It is only when we examine the answer of Respondent that we are enabled to see the amounts paid by Respondent on each transaction, and the balances in dispute. Complainant never challenged these amounts. Respondent has asserted that Complainant admitted in the deposition of Phil Ratliff, taken December 7, 1998, that no further amount was due from Respondent on the first load. In that deposition the following exchange took place:

> Q. All right, sir. Now, did you look at Exhibit 26 to see what I was talking about up there at the load number one? That is 3443. You invoiced for 35,660 pounds. You invoiced for $2,317.90. And Boyer paid $1122.60 (sic). And you've told me that you don't have any argument with Boyer being credited for those expenses. Is that correct?
>
> A. No. And part of the justification, back to the answer as far as why we invoice him for that in our original filing, is because the paperwork that he provided to me that we worked off of did not have this on it.
>
> Q. All right. But you agree now that he is entitled to that credit.
>
> A. There was never an argument with the inspection, he was entitled.
>
> . . .
>
> A. The only point of contention I think that was mentioned throughout the shuffle of paperwork and so forth was the authorization of Meeks to sell. But - - as far as the losses that

[5]This problem is present as to most of the admissions noted in the Findings of Fact, but will be dealt with in detail only here.

> they incurred and so forth in handling. So I don't have any problems with that.
>
> Q. You don't have any problem now after reading that with the authorization of Meeks, do you?
>
> A. I have no problem with the fact that they are entitled to compensation.
>
> Q. And that Boyer is entitled to credit?
>
> A. That's what I said.
>
> . . .
>
> Q. I see. All right. So that - - that does reflect then that you received $1122 (sic) from Boyer on load 3443.
>
> A. Correct, when we received his check and his paperwork.
>
> Q. And today you have no argument with that.
>
> A. No. I didn't have an argument with it to begin with.[6]

However, in Complainant's opening statement filed January 20, 2000, Phil Ratliff, on behalf of Complainant, asserted that all the amounts claimed in the formal complaint were still due. In Respondent's answering statement the assertion was made that the unpaid balance as to this load was admitted by Ratliff to not be due, and the deposition of Ratliff was attached. Finally, in the statement in reply, Complainant explicitly and unequivocally admitted that no amount is now claimed due as to this load. However, in its brief, Complainant again asserted that Respondent is not entitled to any damages or deductions from Complainant's invoices," and urged that an "order be issued for the full amount claimed by the complaint." We find this vacillation inexplicable, and conclude that no amount is due on this transaction.

The second transaction is set forth in Finding of Fact 7. Complainant invoiced Respondent for 45,880 pounds of bulk pumpkins shipped to Walmart in Huntsville, Alabama, at the rate of $.065 per pound, or $2,982.20. Respondent paid Complainant $732.00, and Complainant has admitted in Ratliff's deposition (see page 101), and in the Statement in Reply that no further amount is due on this transaction. In spite of the contrary position taken by Complainant in its brief, we find that no further amount is due as to this load.

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[6]Deposition of Phil Ratliff taken December 7, 1998, at the request of Respondent, pp. 95-97.

The transaction covered by Finding of Fact 8 consisted of one bulk load of pumpkins weighing 46,640 pounds shipped to Walmart in Jasper, Alabama. Complainant invoiced Respondent at the rate of $.065 per pound for the 46,640 pounds, or $3,031.60, f.o.b, and Respondent paid Complainant $2,246.60. At an average of 15 pounds per pumpkin the load should have contained 3,109 pumpkins. The CDC "confirmation" states that the approximate count was 3,100. Respondent claims that the load contained only 2,586 pumpkins and paid on that basis, less costs for the excess freight. However, the only evidence that the load contained 2,586 pumpkins was in the form of a handwritten notation on the bill of lading. This notation consisted only of the figure "2586" with a circle drawn around it. Next to the figure was the figure "2500" without a circle. There was no signature, nor were there any initials, clearly associated with either figure. We have already indicated our low regard for the evidence of approximate count contained on the CDC "confirmation." Our regard for this evidence on the bill of lading is even lower. We conclude that Respondent owes Complainant a balance of $785.00 on this transaction.

The transaction covered by Finding of Fact 9 consisted of one bulk load of pumpkins weighing 41,540 pounds shipped to Walmart Stores, in Prattville, and Selma, Alabama. Complainant invoiced Respondent at the rate of $.065 per pound for the 41,540 pounds, or $2,700.10, f.o.b. Respondent paid Complainant $2,070.60. Respondent asserts that the load contained 2,352 pumpkins, which would make the pumpkins average 17.66 pounds. The evidence for the number of pumpkins received consists of a "STORE DROP SHEET" which is a pre-printed form under the Boyer letterhead, with columns for "STORE #," STORE NAME ADDRESS PHONE," "QUANTITY ORDERED," "QUANTITY RECEIVED," "RECEIVER'S SIGNATURE," and the "STORE STAMP." The drop sheets apparently accompanied the loads and were presented to the receiving stores by the trucker to be filled out. The store number column, store name-address-phone column, and quantity ordered column are printed and appear to have been filled out before the truck left. The quantity received, and receiver's signature columns are filled out in hand, and appropriate store stamps also appear on the face of the drop sheet. The amount received at store number 483 at Pratteville, Alabama is stated to be 1,052 pumpkins, and the amount received at store number 700 at Selma, Alabama is stated to be 1,300 pumpkins. We consider this to constitute the preponderant evidence of the actual number of pumpkins contained on this load. Respondent's liability should be calculated on the basis of a total of 2,352 pumpkins with an average weight of 15 pounds, or a total of 35,280 pounds for the load. At $.065 per pound Respondent's liability for this load was $2,293.28. Respondent has

paid Complainant $2,070.60, which leaves a balance still due on this load of $222.68.

The transaction covered by Finding of Fact 10 covered a shipment of bulk pumpkins on September 30, 1997, to Walmart, in Huntsville, Alabama. Respondent submitted a drop sheet which showed that Walmart received 2,859 pumpkins. The shipment weighed 42,880 pounds, or 15 pounds average per pumpkin. Complainant invoiced Respondent at the rate of $.065 per pound for the 42,880 pounds, or $2,787.20, f.o.b., and Respondent has paid Complainant in full for these pumpkins.

The transaction covered by Finding of Fact 11 was shipped on September 30, 1997, to Walmart, in Muscle Shoals, Alabama. Complainant invoiced Respondent at the rate of $.065 per pound for the 43,740 pounds contained on the load, or $2,843.10, f.o.b. Respondent paid Complainant $2,295.00. Respondent did not submit a drop sheet covering this load. The bill of lading, however, has a store stamp from Walmart Store #01-0660 in Muscle Shoals, Alabama on its face, and at the bottom of the bill of lading, in handwriting different from any other thereon, is the following: "Rec' by store 2550." Respondent would have us accept this as proof that only 2,550 pumpkins were received. The statement at the bottom of the bill of lading is not signed, and may have been written by someone at Respondent's firm for submission in this proceeding. We do not think this is sufficient proof of the number of pumpkins received. We find Respondent is liable for the difference between the $2,295.00 paid and the $2,843.10 for which it was invoiced, or $548.10.

The load of pumpkins covered by Finding of Fact 12 was shipped on October 1, 1997, to Walmart Stores, in Athens, Alabama, and Lawerenceburg, Tennessee. The drop sheet shows that 800 pumpkins were received and signed for at Lawerenceburg, Tennessee, and 1,443 pumpkins were received and signed for at the store in Athens, Alabama. There is also a notation that 30 were trashed. There is no way to discern if the trashed pumpkins were part of the 1,443 pumpkins, or in addition thereto. Since Respondent had the burden of proving the number of pumpkins received we will adopt the assumption most unfavorable to Respondent, and conclude that the 30 trashed pumpkins were in addition to the 1,443. The Regulations require, in the case of produce received on joint account, on consignment, or handled for or on behalf of another person, that "[a] clear and complete record shall be maintained showing justification for dumping of produce

. . . ."[7] If such records are kept, a dump certificate is not necessary if the quantity dumped is not in excess of 5 percent.[8] Although the receipt of purchased merchandise is not covered in the regulation, we could allow the dumping of such a small quantity without inspection on the basis of an analogy to the regulation were it not for the fact that no justification for the dumping is alleged. We conclude that Respondent is liable for the 30 pumpkins dumped, and that such pumpkins were in addition to the 1,443 pumpkins received at that location. The total number of pumpkins we find to have been shipped and received for this load is 2,273. This number multiplied by the 15 pound average for which Respondent is liable under the contract yields 34,095 as the poundage for this load. Respondent is liable to Complainant for this amount at $.065 per pound, or $2,216.18. Respondent has paid Complainant $1,792.00, which leaves $424.18 still due from Respondent to Complainant on this load.

The transaction covered by Finding of Fact 13 was shipped on October 2, 1997, to Walmart Stores, in Tuscaloosa, Alabama, and contained 44,100 pounds. Respondent submitted a drop sheet which showed that Walmart received 2,236 pumpkins. At an average weight of 15 pounds per pumpkin the load would have weighed 33,540 pounds for which Respondent should have been liable under the contract at a rate of $.065 per pound, or $2,180.10. Complainant invoiced Respondent at the rate of $.065 per pound for the 44,100 pounds, or $2,866.50, f.o.b. Respondent paid Complainant $1,810.50. Respondent owes Complainant a balance of $369.60 on this load.

The transaction covered by Finding of Fact 14 was shipped on October 2, 1997,to Walmart Stores, in Newman, Georgia. Respondent did not submit a drop sheet as to this load. A note on the bill of lading states "Rec' by store 2,550." This note is in a different hand from anything else on the bill of lading, and is unsigned. We do not think that this amounts to adequate proof of the number of pumpkins received. However, CDC's "confirmation" states that the approximate count was 2,907 pumpkins. If we take this as an accurate reflection of the number of pumpkins on this load, Respondent is liable for this number multiplied by 15 pounds, or 43,605 pounds. At $.065 per pound Respondent's liability to Complainant is $2,834.32. Complainant invoiced Respondent for the 46,520 pounds, or $3,023.80,

[7] 7 C.F.R. § 46.22.

[8] Ibid.

f.o.b. Respondent paid Complainant $2,224.75. We conclude that Respondent owes Complainant the difference between $2,834.32, and the $2,224.75 already paid, or a balance of $609.57 on this load.

The transaction covered by Finding of Fact 15 consisted of one bulk load of pumpkins weighing 43,100 pounds shipped on October 2, 1997, to Walmart Stores, in Sylacauga and Bessemer, Alabama. The drop sheet shows that the store in Sylacauga received 975 pumpkins, and the store in Bessemer received 1,400 pumpkins, or a total of 2,375 pumpkins. Complainant invoiced Respondent at the rate of $.065 per pound for the 43,100 pounds, or $2,801.50, f.o.b. Respondent's liability on the basis of 2,375 pumpkins weighing an average of 15 pounds, or 35,625 pounds, is $2,315.62. Respondent has already paid Complainant $1,896.00, which leaves a balance still due from Respondent to Complainant of $419.62.

Finding of Fact 16 covers a bulk load containing 42,180 pumpkins shipped September 27, 1997, to Walmart Stores, in Gainsville, Georgia. The drop sheet showed that Walmart received 2,400 pumpkins. Complainant invoiced Respondent at the rate of $.065 per pound for the 42,180 pounds, or $2,741.70, f.o.b. Respondent's liability on the basis of 2,400 pumpkins weighing an average of 15 pounds, or 36,000 pounds, is $2,340.00. Respondent has already paid Complainant $2,107.20, which leaves the sum of $232.80 still due from Respondent to Complainant.

The transaction covered by Finding of Fact 17 consisted of a bulk load of 44,720 pumpkins shipped on October 3, 1997, to Walmart Stores, in Ft. Payne, Georgia, and Cleveland, Tennessee. The drop sheet shows the quantity ordered for each store, and a signature beside the quantity ordered for the Tennessee store. There is no signature beside the quantity ordered for the Georgia store, and no quantity received is shown for either store. We conclude that Respondent has not shown the quantity received. However, CDC's "confirmation" states that the approximate count was 2,795 pumpkins. If we take this as an accurate reflection of the number of pumpkins on this load Respondent is liable for this number multiplied by 15 pounds, or 41,925 pounds. At $.065 per pound Respondent's liability to Complainant is $2,725.12. Complainant invoiced Respondent for the 44,720 pounds, or $2,906.80, f.o.b. Respondent paid Complainant $1,439.85. We conclude that Respondent owes Complainant the difference between $2,725.12, and the $1,439.85 already paid, or a balance of $1,285.27 on this load.

Finding of Fact 18 covers a load of bulk pumpkins weighing 45,360 pounds shipped on October 4, 1997, to Walmart Stores, in Florance, Alabama. There is no drop sheet. The bill of lading has a notation on its face: "2355 cnt#." This note is in a hand different from any other on the bill of lading, and there is no signature

beside it. We conclude that Respondent has not shown the quantity received. However, CDC's "confirmation" states that the approximate count was 2,835 pumpkins. If we take this as an accurate reflection of the number of pumpkins on this load Respondent is liable for this number multiplied by 15 pounds, or 42,525 pounds. At $.065 per pound Respondent's liability to Complainant is $2,764.12. Complainant invoiced Respondent at the rate of $.065 per pound for the 45,360 pounds, or $2,948.40, f.o.b. Respondent paid Complainant $1,944.90. We conclude that Respondent owes Complainant the difference between $2,764.12, and the $1,944.90 already paid, or a balance of $819.22 on this load.

Finding of Fact 19 concerns a bulk load containing 42,900 pounds of pumpkins shipped October 4, 1997, to Walmart Stores, in Fayetteville, Georgia. Complainant invoiced Respondent at the rate of $.065 per pound for the 42,900 pounds, or $2,788.50, f.o.b. The drop sheet shows that Walmart received 2,252 pumpkins, and the notation is signed by a Walmart official and accompanied by the store stamp. We conclude that 2,252 pumpkins were received. The bill of lading has a notation that 21 pumpkins were rotten, and this notation is initialed with the same initials as those of the Walmart official who signed the drop sheet. Moreover, the same official signed the face of the bill of lading. We accept the representation that 21 pumpkins were rotten.[9] However, how are we to know whether the 21 rotten pumpkins were in addition to the 2,252 noted on the drop sheet as received, or a part of that number? Respondent's computations appear to assume that the rotten pumpkins were a part of the 2,252 received, but how this was determined is not stated. Since Respondent had the burden of proof in regard to this point and has not addressed the issue, we find that the 2,252 pumpkins shown as received on the drop sheet did not include the rotten pumpkins. Respondent's basic liability to Complainant was for the 2,252 pumpkins at an average of 15 pounds, or 33,780 pounds at $.065 per pound, or $2,195.70. Respondent has paid Complainant $1,774.00, and owes Complainant the balance of $421.70.

The transaction covered by Finding of Fact 20 consisted of a bulk load containing 43,940 pounds of pumpkins shipped on October 7, 1997 to Walmart Stores, in Cartersville and Marietta, Georgia. Complainant invoiced Respondent at the rate of $.065 per pound for the 43,940 pounds, or $2,856.10, f.o.b. The drop sheet shows that Walmart Stores received 1,400 pumpkins at the Cartersville location, and 800 pumpkins at the Marietta location. At an average of 15 pounds per pumpkin Respondent's basic liability was for 33,000 pounds at $.065 per pound, or

[9]See discussion above covering the transaction covered by Finding of Fact 12.

$2,145.00. Respondent has paid Complainant $1,707.40, and owes Complainant the balance of $437.60.

Finding of Fact 21 covers a bulk load containing 47,340 pounds shipped to Walmart Stores, in Hiram, Georgia. Complainant invoiced Respondent at the rate of $.065 per pound for the 47,340 pounds, or $3,077.10, f.o.b. Respondent paid Complainant $3,023.55, and has waived any contest as to the remainder of the invoiced amount being due. Accordingly, Respondent is liable to Complainant for the balance of $53.55.

Finding of Fact 22 covers a bulk load of pumpkins shipped to Rome, Georgia. Complainant invoiced Respondent at the rate of $.065 per pound for 46,520 pounds, or $3,023.80, f.o.b. The drop sheet shows that Walmart received 2,459 pumpkins. At an average weight of 15 pounds per pumpkin Respondent's liability was for 36,885 pounds at $.065 per pound, or $2,397.52. Respondent has paid Complainant $2,012.10, and owes Complainant the balance of $385.42.

The transaction represented by Finding of Fact 23 consisted of a 42,560 pound bulk load of pumpkins shipped to Walmart Stores, in Thompson and Conyers, Georgia. Complainant invoiced Respondent at the rate of $.065 per pound for the 42,560 pounds, or $2,766.40, f.o.b. The drop sheet shows that Walmart Stores received 1,000 pumpkins at the Thompson location, and 1,124 pumpkins at the Conyers location, or a total of 2,124 pumpkins. Accordingly, Respondent's basic liability is for 2,124 pumpkins at an average of 15 pounds per pumpkin, or 31,860 pounds. At $.065 per pumpkin this amounts to $2,070.90. Respondent already paid Complainant $1,642.90, which leaves a balance still due to Complainant of $428.00.

The transaction covered by Finding of Fact 24 consisted of a bulk load of pumpkins weighing 45,900 pounds shipped to Walmart Stores, in Stockbridge, and Rincon, Georgia. Complainant invoiced Respondent at the rate of $.065 per pound for the 45,900 pounds, or $2,983.50, f.o.b. Respondent did not submit a drop sheet covering this load. The bill of lading, however, had two notations on its face, written in different hands. First, was the statement: "#745 Stockbridge 1200 pumpkins," with a signature beside it, and second, was the statement: "store #1011 Received 1446 – left 54 damaged on truck," with a different signature at the side. We consider this to be adequate evidence of the number of pumpkins received, and it seems evident that the 54 left damaged on the truck were not a part of the 1,446 received. We conclude therefore that Respondent received 2,646 pumpkins on this load. Respondent's basic liability should be computed on the basis of 2,646 pumpkins multiplied by the 15 pound average, or 39,690 pounds, at $.065 per

pound, or $2,579.85. Respondent paid Complainant $2,355.00, and is, therefore, liable to Complainant for the balance of $224.85.

Finding of Fact 25 covered a load of 45,410 pounds of bulk pumpkins shipped on October 3, 1997, to Walmart Stores, in Calhoun and Ogelthorpe, Georgia. Complainant invoiced Respondent at the rate of $.065 per pound for the 45,410 pounds, or $2,951.65, f.o.b. Respondent submitted a drop sheet showing that Walmart received 752 pumpkins at the Calhoun location, and 1,500 pumpkins at the Ogelthorpe location, or a total of 2,252 pumpkins. At an average of 15 pounds per pumpkin Respondent's basic liability for this load was for 33,780 pounds at $.065 per pound, or $2,195.70. Respondent has paid Complainant $1,730.50, and is liable to Complainant for the balance of $465.20.

Finding of Fact 26 covers a bulk load of 46,780 pounds of pumpkins shipped on October 1, 1997, to Walmart Stores, in Russelville, Decatur, and Cullman, Alabama. Complainant invoiced Respondent at the rate of $.065 per pound for the 46,780 pounds, or $3,040.70, f.o.b. Respondent submitted a drop sheet showing that Walmart Stores received 800 pumpkins at the Russelville location, 800 pumpkins at the Decatur location, and 474 pumpkins at the Cullman location, or a total of 2,074 pumpkins. Respondent's basic liability for this number of pumpkins at 15 pounds average was for 31,110 pounds, which multiplied by $.065 per pound yields $2,022.15 as the amount which Respondent should have paid to Complainant. Respondent paid Complainant $1,473.70, which leaves a balance still due of $548.45.

The transaction represented by Finding of Fact 27 consisted of 43,220 pounds of bulk pumpkins which were shipped to Walmart Stores, in Scottsboro, Roanoke, Huntsville, and Northport, Alabama. Respondent submitted a drop sheet covering this load. However, the drop sheet shows the quantities ordered for each store (650) preprinted under the appropriate column, and then a hand drawn bracket encompassing each of these amounts with the number “2598" beside the bracket. There is no signature associated with this notation, but there are three store stamps at the bottom of the sheet, each of which is signed. We do not know who bracketed the amounts ordered and wrote in the number “2598." In the absence of a count from each of the stores we do not see how the noted amount can have much evidentiary value, and conclude that Respondent has not shown that the number of pumpkins received was 2,598. The approximate count noted on the face of CDC's “confirmation” is 2,881, which is the correct number for an approximate 15 pound average. We conclude that Respondent's basic liability for this load is the amount invoiced by Complainant, or $2,809.30, f.o.b. Respondent paid Complainant

$2,384.30, which leaves a balance of $425.00 still due from Respondent to Complainant.

Finding of Fact 28 covered a load of 45,460 pounds of bulk pumpkins shipped on October 1, 1997, to Walmart Stores, in Covington, Savanna, and Bremen, Georgia. Complainant invoiced Respondent at the rate of $.065 per pound for the 45,460 pounds, or $2,954.90, f.o.b. The drop sheet shows that Walmart Stores received 800 pumpkins at the Covington location, 1,200 pumpkins at the Savanna location, and 724 pumpkins at the Bremen location, or a total of 2,724. At 15 pounds average per pumpkin Respondent's basic liability for this load was for 40,860 pounds, which at $.065 per pound amounts to $2,655.90. Respondent has already paid Complainant $2,471.90, which leaves $181.00 still due from Respondent to Complainant on this load.

The transaction covered by Finding of Fact 29 consisted of a load containing 45,420 pounds of bulk pumpkins shipped on October 2, 1997, to Walmart Stores, in Cumming, Moultrie, and Cordele, Georgia. Respondent submitted a drop sheet covering this transaction, but it was structured in the same manner as that submitted in reference to the load covered by Finding of Fact 27, except that the store stamps were placed in the proper position on the side of the sheet and are not signed. We do not know who bracketed the amounts ordered and wrote in the number “2400." Again, in the absence of a count from each of the stores we do not see how the noted amount can have much evidentiary value, and conclude that Respondent has not shown that the number of pumpkins received was 2,400. CDC represented on the “confirmation” that the load contained 2,838 pumpkins, and we will accept this as the proper count for the shipment. Using this figure Respondent's basic liability was for 42,585 pounds at $.065, or $2,768.02. Complainant invoiced Respondent at the rate of $.065 per pound for the 45,420 pounds, or $2,952.30, f.o.b, and Respondent paid Complainant $1,963.20. Respondent is liable to Complainant for the balance of $804.82.

Finding of Fact 30 cover a load of 43,800 pounds of bulk pumpkins shipped on October 3, 1997, to Walmart Stores, in Hazelhurst, Milledgeville, and Stone Mountain, Georgia. Complainant invoiced Respondent at the rate of $.065 per pound for the 43,800 pounds, or $2,847.00, f.o.b. The drop sheet shows that Walmart Stores received 800 pumpkins at the Hazelhurst location, 800 pumpkins at the Milledgeville location, 300 pumpkins at the Stone Mountain location, and that from Stone Mountain a remaining 345 pumpkins were sent to Walmart Stores in Athens, Georgia, but were to be billed to the Stone Mountain location of Walmart Stores. At the bottom of the drop sheet it is noted that 94 pumpkins were refused and taken to a landfill. In his deposition Mr. Ratliff conceded that Respondent was

entitled to credit for these 94 pumpkins, however, there is no way to ascertain if the 94 were a part of the 345 received at Athens, or in addition to the other pumpkins on the load. Respondent's computations appear to assume that the refused pumpkins were a part of the 2,245 received, but how this was determined is not stated. Since Respondent had the burden of proof in regard to this point and has not addressed the issue, we find that the 2,245 pumpkins shown as received on the drop sheet did not include the refused pumpkins. Respondent's basic liability for these pumpkins at 15 pounds average per pumpkin, or 33,675 pounds, and $.065 per pound, is $2,188.87. Respondent has paid Complainant $1,783.67, which leaves $405.05 still due from Respondent to Complainant on this load.

The transaction covered by Finding of Fact 31 consisted of a 38,500 pound load of pumpkins in 48 bins shipped on September 27, 1997 to Respondent's customer, Walmart in Plant City, Florida. However, Respondent intended the load for Albertson's, and redirected the load to that firm in Plant City. Albertson's accepted the load under protest as to size, and a preponderance of the evidence indicates that the protest was communicated by Respondent to CDC. Complainant invoiced Respondent at the rate of $.085 per pound for the 38,500 pounds, or $3,272.50, f.o.b. Respondent paid Complainant $1,401.70. Complainant has agreed, in its statement in reply, to the deduction of $1,870.80 taken by Respondent, and, in spite of the contrary position taken in Complainant's brief, we find that there is no balance due from Respondent to Complainant on this load.

Finding of Fact 32 concerns a 45,420 pound bulk load of pumpkins shipped on October 9, 1997, to Walmart Stores, in Hopkinsville, and Madisonville, Kentucky. Respondent did not submit a drop sheet as to this load, but the bill of lading has a notation as to the number of pumpkins received. A handwritten note on the face of the bill of lading states:

Store 653 – Total 1,130 pumpkins
Store 655 – Total 1,100 pumpkins

Jerry Bailey driver did not help unload

In addition, there is an unsigned handwritten note in a different hand on the right margin which states: "Store rec' 2430." If we assume that Jerry Bailey wrote the first note, we still do not know who Jerry Bailey is, or what his position of responsibility was. We find that the notes on the bill of lading do not furnish sufficient evidence of the number of pumpkins received. The notation on CDC's bill of lading appears to state that approximately 3,026 pumpkins were loaded. This

closely approximates a 15 pound average. We find that Respondent is not entitled to a deduction on this load. Complainant stated that the trucker refused to invoice Respondent for the freight. Complainant, therefore, invoiced Respondent at the rate of $.1025 per pound for the 45,420 pounds, or $4,769.10, delivered. Respondent paid Complainant $3,717.90. Respondent owes Complainant the balance of $1,051.20.

Finding of Fact 33 covered a 46,120 pound bulk load of pumpkins shipped on October 9, 1997, to Walmart Stores, in Bowling Green, Kentucky. Respondent submitted a drop sheet showing that Walmart Stores received 2,256 pumpkins. At 15 pounds average the weight of the pumpkins received would have been 33,840 pounds. At $.065 per pound Respondent's basic liability for this load would have been $2,199.60. Complainant invoiced Respondent at the rate of $.065 per pound for the 46,120 pounds, or $2,997.80, f.o.b. Respondent paid Complainant $1,708.40. Respondent owes Complainant a balance on this load of $491.20.

The transaction covered by Finding of Fact 34 consisted of a 46,320 pound load of bulk pumpkins shipped on October 9, 1997, to Walmart Stores, in Frankfort, Kentucky. Complainant invoiced Respondent at the rate of $.065 per pound for the 46,320 pounds, or $3,010.80, f.o.b. Respondent paid Complainant $3,010.80, and nothing further is due on this load. The transaction covered by Finding of Fact 35 consisted of 42,600 pounds of bulk pumpkins shipped on October 4, 1997, to Walmart Stores, in Cookville, Tennessee. Respondent did not submit a drop sheet covering this load, and the bill of lading merely has an unsigned notation on the face that states: “count 2493.” This is not sufficient to establish the number of pumpkins received. CDC's “confirmation” states that 2,653 pumpkins were shipped, and we will accept this number as a basis for computing Respondent's liability. The 2,653 pounds at an average weight of 15 pounds would total 39,795 pounds, which at $.065 per pound results in a basic liability for Respondent of $2,586.67. Complainant invoiced Respondent at the rate of $.065 per pound for the 42,6000 pounds, or $2,769.00, f.o.b. Respondent paid Complainant $2,222.47. Accordingly, Respondent is liable to Complainant for the balance of $364.20.

Finding of Fact 36 covered a load of bulk pumpkins weighing 44,760 pounds shipped to Walmart Stores, in Gainsville, Georgia. Complainant invoiced Respondent at the rate of $.065 per pound for the 44,760 pounds, or $2,909.40, f.o.b. Respondent has paid Complainant in full for this load.

Finding of Fact 37 covered a 43,560 pound load of bulk pumpkins shipped on October 8, 1997, to Walmart Stores, in Gainsville, Georgia. Respondent submitted a drop sheet showing that 2,556 pumpkins were received. Respondent's basic liability for these pumpkins at an average of 15 pounds per pumpkin is for 38,340

pounds at $.065 per pound, or $2,492.10. Complainant invoiced Respondent at the rate of $.065 per pound for the 43,560 pounds, or $2,831.40, f.o.b. Respondent paid Complainant $2,283.30, and is liable to Complainant for the balance of $208.80.

The transaction covered by Finding of Fact 38 consisted of a load of 35,760 pounds of pumpkins in 48 bins shipped to Albertson's, in Plant City, Florida. The load was rejected by Respondent's customer who reported that there were no bottoms or lids on the bins, and that the pumpkins were muddy and oversized. The pumpkins were taken to Meeks Farm to be reworked. Complainant invoiced Respondent at the rate of $.085 for 35,760 pounds, or $3,039.60. Respondent has paid Complainant $389.12, and Complainant admitted in its statement in reply that Respondent is entitled to a deduction of $2,650.43. We conclude that no further payment is due from Respondent to Complainant on this load.

Finding of Fact 39 covered a load containing 45,840 pounds of bulk pumpkins shipped to Walmart Stores, in Cummins, Georgia. Complainant invoiced Respondent at the rate of $.065 per pound for the 45,840 pounds, or $2,979.60, f.o.b. Respondent paid Complainant $2,678.78. Respondent admits that there is a balance of $300.82 still due on this load.

The transaction covered by Finding of Fact 40 consisted of a load of pumpkins in 44 bins weighing 32,960 pounds total. The pumpkins were shipped on October 12, 1997, to Respondent's customer, Albertson's, in Plant City, Florida. On arrival the pumpkins were reported by Albertson's to have decay and some green color, and a federal inspection confirmed the presence of significant soft rot. The pumpkins were sent to Meeks Farm for reworking. Complainant invoiced Respondent at the rate of $.085 for 32,960 pounds, or $2,801.60. Respondent did not pay Complainant any amount for this load, and Complainant admitted in its statement in reply that Respondent is entitled to a deduction of the entire invoice amount on this load.

The transaction covered by Finding of Fact 41 consisted of a load pumpkins in 44 bins weighing 35,360 pounds shipped to Albertson's, in Plant City, Florida. Complainant invoiced Respondent at the rate of $.085 for 32,720 pounds, or $2,781.20. Respondent has paid Complainant the full invoice amount for this load.

Finding of Fact 42 covered a bulk load of pumpkins weighing 44,260 pounds shipped to Walmart Stores, at eight locations in, Georgia and South Carolina. Complainant invoiced Respondent at the rate of $.065 per pound for the 44,260 pounds, or $2,876.90, f.o.b. Respondent paid Complainant $2,771.85. Respondent admits that there is a balance of $105.05 still due on this load.

Finding of Fact 43 covered a load of pumpkins in 44 bins weighing 34,060 pounds total. The pumpkins were shipped on October 14, 1997, to Respondent's customer, Albertson's, in Plant City, Florida. Complainant invoiced Respondent at

the rate of $.085 for 34,060 pounds, or $2,895.10. Respondent has paid Complainant the full invoice amount for this load.

The total we have found due and owing from Respondent to Complainant is $13,017.95. Respondent's failure to pay Complainant this amount is 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.[10] 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.[11] We have determined that a reasonable rate is 10 percent per annum.

Complainant was required to pay a $300.00 handling fee to file its formal complaint. Pursuant to 7 U.S.C. 499(e)(a), the party found to have violated Section 2 of the Act is liable for any handling fees paid by the injured party.

Order

Within 30 days from the date of this order respondent shall pay to complainant, as reparation, $13,017.95, with interest thereon at the rate of 10% per annum from November 1, 1997, until paid, plus the amount of $300.

Copies of this order shall be served upon the parties.

OCEAN BREEZE EXPORT, INC. v. RIALTO DISTRIBUTING, INC.
PACA Docket No. R-00-0113.
Decision and Order.
Filed October 1, 2001.

F.O.B., terms assumed – Burden of proof, accepted goods

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[10] *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).

[11] 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).

In an international shipment of grapes to Venezuela, the seller sought to prove that the contract terms were f.o.b. acceptance final, and the buyer sought to prove that the terms were f.o.b. Neither party succeeded in proving its allegations, and it was therefore assumed that the terms were f.o.b. It was also found that where goods are accepted the burden of proving a breach of contract, and resulting damages, falls upon the buyer.

George S. Whitten, Presiding Officer.
Pro se, Complainant.
Pro se, 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 $15,843.70 in connection with a transaction in foreign commerce involving table grapes.

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 $30,000.00, and therefore the documentary 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 filed an answering statement. Complainant did not file a statement in reply. Complainant filed a brief.

Findings of Fact

1. Complainant, Ocean Breeze Export, Inc., is a corporation whose address 1342 Rocky Hill Drive, Exeter, California.

2. Respondent, Rialto Distributing, Inc., is a corporation whose address is P. O. Box 14119, Pinedale, California. At the time of the transaction involved herein Respondent was licensed under the Act.

3. On or about November 18, 1998, Complainant agreed to sell to Respondent 2,435 containers of Red Globe grapes at $9.50 per container f.o.b.

4. On November 23, 1998, Complainant, at Respondent's direction, shipped 1,646 containers of the grapes to Respondent's customer in Venezuela. Complainant

invoiced Respondent on December 11, 1998, for the 1,646 cartons, and the invoice included charges for a temperature recorder at $23.50, a phytosanitary certificate at $32.00, a USDA inspection at $64.20, Fedex overnight mail at $15.00, and SO2 gas at $72.00, for a total amount of $15,843.70.

5. The grapes arrived in Venezuela on December 8, 1998, and were inspected on that date by an agency of the Venezuelan government. Respondent provided a translation of the inspection which reads as follows:

> The date of December 8, 1998 in agreement with the bill of lading BL#EISU415800259001, through Evergreen shipping lines it was realized, on the inspection No. 26690 of containers EMCU5163369, sent by the shipper identified as Rialto Dist., Inc. PO Box 14119, Pinedale, CA USA 93650, and consigned to Brinceno, Uribe, & Ojeda at Mercado Mayorista de Valencia, Venezuela. It was observed, that there were general damages observed in 60% and of ripening of the product variety grapes, red globe label Ocean Breeze, packed in 19lbs styro for a total of 1646 cnts in the load.

The 60% general damage included rot and fungus; Temperature control of the Container EMCU5163369 posted at set point 1.05 c at the moment of arrival at the port of port Cabello, Venezuela. In Valencia, Venezuela on the 11th day of the month of December in the year 1998.

6. Respondent notified Complainant of a breach of contract on December 9, 1998.

7. Respondent has not paid Complainant any part of the purchase price of the grapes.

8. The informal complaint was filed on February 8, 1999, which was within nine months after the cause of action herein accrued.

[Numbers 5,6, & 7 renumbered to 6,7, & 8, respt.. – Editor]

Conclusions

Complainant, by this reparation action, seeks to recover the purchase price of a container of table grapes sold to Respondent, and shipped to Venezuela. Complainant asserts that the sale was on an f. o. b. acceptance final basis. In support of this contention Complainant's president, Richard Bennett, asserts in the informal complaint, and the sworn formal complaint, that the grapes were purchased by David Sabovich on behalf of Respondent and sold by Les Davis, salesman, on

behalf of Complainant. Mr. Bennett states further that these persons agreed at the time of the sale to f.o.b. acceptance final terms. However, Complainant nowhere submitted a statement by Les Davis, the person with direct knowledge of the contract terms. Respondent, in the answer sworn to by its president, Mike Vukovich, asserts that the terms of sale were not f.o.b. acceptance final, but were simply f.o.b. However, even though Respondent admitted that the contract was negotiated on its behalf by David Sabovich, Respondent also failed to submit a statement by Mr. Sabovich. Complainant also points to its invoice for the load which states under the heading "TERMS": "Net 14 Days / FOB Accept". The word "Accept" is at the edge of the page and gives the impression that the remainder of the phrase was intended to be present. However, the invoice was issued on December 11, 1998, or eighteen days after shipment, and two days after notice of the breach was given by Respondent. Complainant had the burden of proving that the terms of the contract were f.o.b. acceptance final, and we conclude that it has not met that burden.[1] While Respondent, as the proponent of the proposition that contract terms were f.o.b., failed to offer a statement by Mr. Sabovich, we nevertheless find that the applicable terms were f.o.b. We reach this conclusion because f.o.b. terms are assumed where no contract terms are mentioned,[2] and it is reasonable that the same rule should apply where no contract terms are proven.

The Regulations,[3] 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,[4] 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

[1] *See La Casita Farms, Inc. v. Johnson City Produce Co.*, 34 Agric. Dec. 506 (1975).

[2] *See Hunts Point Tomato Co., Inc. v. S & K Farms, Inc.*, 42 Agric. Dec. 1224, at 1225, (1983). See also UCC § 2-503, Comment 5, and J. White & R. Summers, *Handbook of the Law Under the Uniform Commercial Code,* § 5-2, p. 143 (1972).

[3] 7 C.F.R. § 46.43(i).

[4] 7 C.F.R. § 46.43(j).

and conditions, will assure delivery without abnormal deterioration at the contract destination agreed upon between the parties." [5]

Respondent accepted the grapes on arrival at destination in Venezuela, and thus became liable for the full contract price of the load less any damages resulting from any breach of contract on the part of Complainant. The burden of proving a breach and resulting damages rests upon Respondent.[6] Respondent asserts that the Venezuelan inspection proves that there was a breach of the contract. However, the translation of that inspection provided by Respondent gives a very unsatisfactory statement as to the damage present in the grapes. The inspection states: "It was observed, that there were general damages observed in 60% and of ripening of the product variety grapes, . . ." This does not state the nature of the damage present in the grapes, unless it is intended to classify the damage as "ripening." However, ripening is not a recognized condition or grade factor under the United States

[5] The suitable shipping condition provisions of the Regulations (7 C.F.R. § 46.43(j)) which require delivery to contract destination "without *abnormal* deterioration," or what is elsewhere called "good delivery" (7 C.F.R. § 46.44), are based upon case law predating the adoption of the Regulations. See Williston, *Sales* § 245 (rev. ed. 1948). 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 w hich were not present, or were not present in sufficient degree to be cognizable by the federal inspector, at shipping point. Conversely, since the inherently perishabl e 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 m eans 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 destinatio n, 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 rather than an f.o.b. sale. *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). For all commodities other than lettuce (for which specific good delivery standards have been promulgated) what is "normal" or abnormal deterioration is judicially determined. *See Harvest Fresh Produce Inc. v. Clark-Ehre Produce Co.*, 39 Agric. Dec. 703 (1980).

[6] See UCC 2-607(4). *See also The Grower-Shipper Potato Co. v. Southwestern Produce Co.,* 28 Agric. Dec. 511 (1969).

Standards for Grades of Table Grapes,[7] and we know of no damage or grade factor with which it could be associated. The Venezuelan inspection also states that "[t]he 60% general damage included rot and fungus." However, since there is no statement as to the percentage of rot and fungus contained within the 60% general damages we have no way of knowing that the percentage exceeded what would be allowed under the suitable shipping condition warranty. We conclude that the inspection does not prove a breach of warranty.

Even if the inspection had shown condition problems in the grapes that exceeded what would be allowed under the suitable shipping condition warranty, Respondent would still have failed to prove a breach of that warranty. This is true because the warranty is applicable only if "the shipment is handled under normal transportation services and conditions."[8] The burden of proving that transportation services and conditions were normal falls upon the buyer where a shipment is accepted.[9] In this case the inspection only states that "[t]emperature control of the Container EMCU5163369 posted at set point 1.05 c at the moment of arrival at the port of Cabello, Venezuela." A statement of the setting of the temperature control is not nearly as important as a certification of the pulp temperature of the grapes. Apparently no pulp temperatures were taken by the Venezuelan inspector. This could have been overcome by Respondent if there had been an adequate temperature recorder on board the shipment. However, for some reason only an eight day recorder was placed on board. The tape from this recorder showed good temperatures during the first eight days of transit, but this leaves us without any indication as to the temperatures at which the grapes were held during the remaining seven days of transit. We conclude that Respondent failed to show that transportation services and conditions were normal, and for this additional reason has failed to show a breach of contract on the part of Complainant.

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[7] The United States Standards for Grades of Table Grapes (European or Vinifera Type), §51.880, published by the United States Department of Agriculture, Agricultural Marketing Service, Fruit and Vegetable Division, Fresh Products Branch, and available in printed form from that source, or on the Internet at http://www.ams.usda.gov/standards/stanfrfv.htm.

[8] 7 C.F.R §46.43(j).

[9] *Mecca Farms, Inc. v. Bianchi Pre-Pack, Inc.,* 50 Agric. Dec. 1929 (1991); *O.P. Murphy Co., Inc. a/t/a Murphy & Sons v. Kelvin S. Ng d/b/a Ken Yip Co.,* 41 Agric. Dec. 772 (1982); *Dave Walsh v. Rozak's*, 39 Agric. Dec. 281 (1980).

Since Respondent accepted the grapes it became liable to Complainant for the full purchase price of $15,843.70. 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.[10] 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.[11] We have determined that a reasonable rate is 10 percent per annum.

Complainant was required to pay a $300.00 handling fee to file its formal complaint. Pursuant to 7 U.S.C. 499(e)(a), the party found to have violated Section 2 of the Act is liable for any handling fees paid by the injured party.

Order

Within 30 days from the date of this order respondent shall pay to complainant, as reparation, $15,843.70, with interest thereon at the rate of 10% per annum from January 1, 1999, until paid, plus the amount of $300.

Copies of this order shall be served upon the parties.

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[10] *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).

[11] *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).

MISCELLANEOUS ORDERS

In re: KIRBY PRODUCE COMPANY, INC.
PACA Docket No. D-98-0002.
Remand Order.
Filed August 27, 2001.

Remand – Full compliance – "No-pay"/"Slow-pay" – Full payment.

The Judicial Officer remanded the proceeding to Chief ALJ James W. Hunt for further proceedings in accordance with the instructions in *Kirby Produce Company, Inc. v. United States Dep't of Agric.*, 256 F.3d 830 (D.C. Cir. 2001).

Eric Paul, for Complainant.
Paul T. Gentile, for Respondent.
Initial decision issued by James W. Hunt, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

The Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a "Complaint" on October 20, 1997. Complainant instituted the proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. §§ 46.1-.49); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151).

The Complaint alleges that: (1) during the period August 1995 through July 1996, Kirby Produce Company, Inc. [hereinafter Respondent], failed to make full payment promptly to 20 sellers of the agreed purchase prices for 206 lots of perishable agricultural commodities in the total amount of $1,609,859.45, which Respondent purchased, received, and accepted in interstate commerce; and (2) Respondent's failures to make full payment promptly of the agreed purchase prices for perishable agricultural commodities that it purchased, received, and accepted in interstate commerce constitute willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Compl. ¶¶ III-IV).

On November 12, 1997, Respondent filed an "Answer," and on December 4, 1997, Respondent filed an "Amended Answer" denying the material allegations of the Complaint.

Administrative Law Judge James W. Hunt [hereinafter the Chief ALJ[1]] scheduled a hearing to commence in Knoxville, Tennessee, on January 13, 1999 (Summary of Telephone Conference; Notice of Hearing). On November 12, 1998, Respondent filed a motion to continue the hearing until Respondent has made full payment to all perishable agricultural commodities sellers, pursuant to an Order issued on June 25, 1996, by United States District Court Judge Leon Jordan in *Brown's Produce v. Kirby Produce Co.*, Case No. 3:96-CV-526 (E.D. Tenn. June 25, 1996) (Letter dated November 10, 1998, from Paul T. Gentile to the Chief ALJ). On November 16, 1998, the Chief ALJ denied Respondent's motion to continue the hearing (Order Denying Motion to Continue Hearing).

On December 4, 1998, Complainant filed: (1) "Request for Official Notice" requesting that the Chief ALJ take official notice of the Order, the list of Respondent's creditors, and a Marketing Agreement issued in *Brown's Produce v. Kirby Produce Co.*; (2) "Motion for Decision Without Hearing by Reason of Admissions" [hereinafter Motion for Default Decision]; and (3) a proposed "Decision Without Hearing by Reason of Admissions." Complainant contends in Complainant's Motion for Default Decision that Respondent and its creditors consented to the Order issued in *Brown's Produce v. Kirby Produce Co.*, and that Respondent's agreement to the issuance of the Order and the attached list of creditors constitutes an admission of the material allegations of the Complaint (Motion for Default Decision at 2-3).

On December 29, 1998, Respondent filed "Objection and Opposition to Motion for Decision Without Hearing by Reason of Admission," stating that Complainant cannot use the June 25, 1996, Order issued by United States District Court Judge Leon Jordan in *Brown's Produce v. Kirby Produce Co.* as an admission to the Complaint and that Respondent is entitled to a hearing.

On December 31, 1998, the Chief ALJ issued "Order Canceling Hearing" and "Decision Without Hearing by Reason of Admissions" [hereinafter Initial Decision and Order]. The Chief ALJ: (1) found that Respondent and its creditors consented to the June 25, 1996, Order issued by United States District Court Judge Leon Jordan in *Brown's Produce v. Kirby Produce Co.*; (2) found that Respondent's agreement to the June 25, 1996, Order issued by United States District Court Judge Leon Jordan in *Brown's Produce v. Kirby Produce Co.* and attachments to the Order constitutes an admission of the material allegations of the Complaint; (3) found that, during the period August 1995 through April 1996, Respondent

[1]The Secretary of Agriculture appointed James W. Hunt as Chief Administrative Law Judge on November 7, 1999.

purchased, received, and accepted in interstate and foreign commerce, from 19 sellers, 204 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of $1,602,736.15; (4) concluded that Respondent's failures to make full payment promptly to the 19 perishable agricultural commodities sellers constitute willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (5) revoked Respondent's PACA license (Initial Decision and Order at 2-4).

On March 3, 1999, Respondent filed "Respondent's Motion for Reconsideration of Decision Without Hearing by Reason of Admissions," which the Chief ALJ denied.

On May 28, 1999, Respondent appealed to the Judicial Officer. On July 12, 1999, I issued a Decision and Order: (1) finding that, during the period August 1995 through April 1996, Respondent purchased, received, and accepted in interstate commerce, from 19 sellers, 204 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of $1,602,736.15; (2) finding that, as of December 2, 1998, $1,215,723.99 remained past due and unpaid, with $387,012.16 paid late; (3) concluding that Respondent's failures to make full payment promptly with respect to the 204 transactions constitute willful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (4) revoking Respondent's PACA license. *In re Kirby Produce Company, Inc.*, 58 Agric. Dec. 1011, 1017-18, 1032 (1999).

On August 19, 1999, Respondent filed a petition for reconsideration of *In re Kirby Produce Company, Inc.*, 58 Agric. Dec. 1011 (1999), which I denied. *In re Kirby Produce Company, Inc.*, 58 Agric. Dec. 1032 (1999) (Order Denying Pet. for Recons.).

Respondent sought judicial review of *In re Kirby Produce Company, Inc.*, 58 Agric. Dec. 1011 (1999). The United States Court of Appeals for the District of Columbia Circuit granted Respondent's petition for review and remanded the case to United States Department of Agriculture to conduct further proceedings. *Kirby Produce Company, Inc. v. United States Dep't of Agric.*, 256 F.3d 830 (D.C. Cir. 2001).

On August 22, 2001, counsel for Complainant informed me that Complainant would not seek further judicial review of *In re Kirby Produce Company, Inc.*, 58 Agric. Dec. 1011 (1999), and counsel for Respondent informed me that Respondent would not seek further judicial review of *In re Kirby Produce Company, Inc.*, 58 Agric. Dec. 1011 (1999).

The United States Court of Appeals for the District of Columbia Circuit indicates that, on remand, the United States Department of Agriculture must determine whether Respondent made full payment to the 20 produce sellers identified in the Complaint by January 13, 1999, the date the Chief ALJ originally scheduled the hearing to commence. The Court states that such payment would convert the "no-pay" case into a "slow-pay" case and would result in a PACA license suspension rather than a PACA license revocation. *Kirby Produce Company, Inc. v. United States Dep't of Agric.*, 256 F.3d 830 (D.C. Cir. 2001). However, the Judicial Officer's former policy, which was adopted in *In re Gilardi Truck & Transportation, Inc.*, 43 Agric. Dec. 118 (1984), and is applicable to this proceeding, had been to revoke the license of any PACA licensee who failed to pay in accordance with the PACA and owed more than a *de minimis* amount to produce sellers by the date of the hearing. Cases in which a respondent had failed to pay by the date of the hearing were referred to as "no-pay" cases. License revocation could be avoided and the suspension of a license of a PACA licensee who failed to pay in accordance with the PACA would be ordered if a PACA violator made full payment by the date of the hearing and was in full compliance with the PACA by the date of the hearing. Cases in which a respondent had paid and was in full compliance with the PACA by the time of the hearing were referred to as "slow-pay" cases. The *Gilardi* doctrine was subsequently tightened in *In re Carpenito Bros., Inc.*, 46 Agric. Dec. 486 (1987), *aff'd*, 851 F.2d 1500, 1988 WL 76618 (D.C. Cir. 1988), by requiring that a respondent's present compliance not involve credit agreements for more than 30 days.

Therefore, I remand the proceeding to the Chief ALJ to determine, after providing the parties with an opportunity for a hearing, whether Respondent is in full compliance with the PACA at the time the hearing in this proceeding actually commences. Using the date the hearing actually commences rather than January 13, 1999, the date the Chief ALJ originally scheduled the hearing to commence, to determine whether this is a "no-pay" or a "slow-pay" case, comports with the Judicial Officer's "no-pay-slow-pay" policy that is applicable to this proceeding and does not adversely affect Respondent. Further, I believe, using the date the hearing actually commences rather than January 13, 1999, the date the Chief ALJ originally scheduled the hearing to commence, to determine whether this is a "no-pay" or a "slow-pay" case, is in accord with the purpose for which the United States Court of Appeals for the District of Columbia Circuit remanded this proceeding to the United States Department of Agriculture.

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In re: HARTFORD PACKING CO., INC.
PACA Docket No. D-01-0010.
Order Granting Motion to Withdraw Appeal.
Filed October 5, 2001.

Motion to withdraw appeal petition.

The Judicial Officer (JO) granted Respondent's motion to withdraw its appeal petition. The JO stated that, while a party's motion to withdraw its own appeal petition is generally granted, a withdrawal of an appeal petition is not a matter of right. The JO stated that, based on the limited record before him, he found no basis for denying Respondent's motion to withdraw its appeal petition. Based on his granting Respondent's motion to withdraw its appeal petition, the JO concluded that Chief Administrative Law Judge James W. Hunt's Decision Without Hearing by Reason of Default filed in the proceeding on September 5, 2001, was the final decision in the proceeding.

Ruben D. Rudolph, Jr., for Complainant.
Respondent, Pro se.
Initial decision issued by James W. Hunt, Chief Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

The Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a "Complaint" on March 1, 2001. Complainant instituted the proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. pt. 46); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges that: (1) during the period February 4, 1999, through October 5, 1999, Hartford Packing Co., Inc. [hereinafter Respondent], failed to make full payment promptly to nine sellers of the agreed purchase prices, or the balances thereof, in the total amount of $535,244.36 for 309 lots of vegetables which Respondent purchased, received, and accepted in interstate commerce; and (2) Respondent's failures to make full payment promptly of the agreed purchase prices, or the balances thereof, for perishable agricultural commodities that Respondent purchased, received, and accepted in interstate commerce constitute willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Compl. ¶¶ III, IV).

The Hearing Clerk served Respondent with the Complaint, the Rules of Practice, and a service letter on March 5, 2001.[1] Respondent failed to answer the Complaint within 20 days after service, as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). On April 4, 2001, the Hearing Clerk sent a letter to Respondent informing Respondent that its answer to the Complaint had not been received within the time required in the Rules of Practice.[2]

On April 5, 2001, 31 days after the Hearing Clerk served Respondent with the Complaint, Respondent filed a letter dated April 2, 2001, in response to the Complaint. On August 3, 2001, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a "Motion for Decision Without Hearing By Reason of Default" [hereinafter Motion for Default Decision] and a proposed "Decision Without Hearing By Reason of Default" [hereinafter Proposed Default Decision]. On August 15, 2001, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Respondent filed objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision.

On September 5, 2001, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Chief Administrative Law Judge James W. Hunt [hereinafter the Chief ALJ] issued a "Decision Without Hearing by Reason of Default": (1) finding that, during the period February 4, 1999, through October 5, 1999, Respondent failed to make full payment promptly to nine sellers of the agreed purchase prices, or the balances thereof, in the total amount of $535,244.36 for 309 lots of vegetables which Respondent received, accepted, and sold in interstate commerce; (2) concluding that Respondent's failures to make full payment promptly to nine sellers of the agreed purchase prices, or the balances thereof, in the total amount of $535,244.36 for 309 lots of vegetables, which Respondent received, accepted, and sold in interstate commerce, constitute willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (3) ordering the publication of the facts and circumstances set forth in the Decision Without Hearing by Reason of Default (Decision Without Hearing by Reason of Default at 2-3).

On September 18, 2001, Respondent appealed to the Judicial Officer.[3] On September 27, 2001, Respondent filed a letter requesting that it be allowed to

[1]See United States Postal Service Domestic Return Receipt for Article Number PO93174978.

[2]Letter dated April 4, 2001, from Joyce A. Dawson, Hearing Clerk, to Hartford Packing Co., Inc.

[3]See letter dated September 14, 2001, from Robert C. Downs to the Chief ALJ.

withdraw its appeal petition [hereinafter Motion to Withdraw Appeal Petition].[4] On October 3, 2001, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a ruling on Respondent's Motion to Withdraw Appeal Petition.

A party's motion to withdraw its own appeal petition is generally granted; however, withdrawal of an appeal petition is not a matter of right. In considering whether to grant a motion to withdraw an appeal petition, the Judicial Officer must consider the public interest.[5] Based on the limited record before me, I find no basis for denying Respondent's Motion to Withdraw Appeal Petition. Further, on October 3, 2001, Ruben D. Rudolph, Jr., Complainant's counsel, by telephone, informed the Office of the Judicial Officer that Complainant does not oppose Respondent's Motion to Withdraw Appeal Petition.

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

Order

Respondent's Motion to Withdraw Appeal Petition is granted. The Chief ALJ's Decision Without Hearing by Reason of Default filed September 5, 2001, is the final decision in this proceeding. The Order issued by the Chief ALJ in the Decision Without Hearing by Reason of Default filed September 5, 2001, shall become effective 14 days after service of this Order on Respondent.

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[4] See letter dated September 27, 2001, from Robert C. Downs to Jane E. Servais.

[5] *See Ford Motor Co. v. NLRB*, 305 U.S. 364, 370 (1939) (stating where the NLRB petitions for enforcement of its order against an employer and jurisdiction of the court has attached, permission to withdraw the petition rests in the sound discretion of the court to be exercised in light of the particular circumstances of the case); *American Automobile Mfrs. Ass'n v. Commissioner, Massachusetts Dep't of Envtl. Prot.*, 31 F.3d 18, 22 (1st Cir. 1994) (stating the court of appeals has broad discretion to grant or deny voluntary motions to dismiss appeal); *HCA Health Services of Virginia v. Metropolitan Life Ins. Co.*, 957 F.2d 120, 123 (4th Cir. 1992) (stating an appellant's motion to voluntarily dismiss its own appeal is generally granted, although courts of appeal have discretionary authority not to dismiss the case in appropriate circumstances); *United States v. State of Washington, Dep't of Fisheries*, 573 F.2d 1117, 1118 (9th Cir. 1978) (stating the court has discretionary authority to decline to grant the appellants' motion to dismiss their own appeal); *In re Vermont Meat Packers, Inc.*, 48 Agric. Dec. 158 (1989) (stating withdrawal of appeal is not a matter of right); *In re Smith Waller*, 34 Agric. Dec. 373, 374 (1975) (stating the rules of practice do not permit a party to withdraw an appeal as a matter of right; in considering whether to grant a motion to withdraw an appeal, the Judicial Officer must consider the public interest); *In re Henry S. Shatkin*, 34 Agric. Dec. 296, 297 (1975) (stating the rules of practice do not permit a party to withdraw an appeal as a matter of right; in considering whether to grant a motion to withdraw an appeal, the Judicial Officer must consider the public interest).

In re: LINDEMANN PRODUCE, L.L.C.
PACA Docket No. D-01-0028.
Order Dismissing the Complaint.
Filed November 7, 2001.

Charles Spicknall, for Complainant.
Lawrence H. Meures, for Respondent.
Order issued by Dorothea A. Baker, Administrative Law Judge.

Complainant's motion to dismiss the disciplinary complaint filed on August 27, 2001 against Lindemann Produce L.L.C. alleging violations of Section 2(4) of the Perishable Agricultural Commodities Act, 1930, as amended, (7 U.S.C. §499a *et seq*.) is granted. The complaint in the above-captioned matter is dismissed without prejudice.

_____

In re: JANET S. ORLOFF, MERNA K. JACOBSON, TERRY A. JACOBSON.
PACA Docket No. APP- 01-0002.
Order to Dismiss as to Terry A. Jacobson.
Filed November 9, 2001.

Ruben D. Rudolph, for Respondents.
Paul T. Gentile, for Petitioners.
Order issued by Jill S. Clifton, Administrative Law Judge.

The Chief, PACA Branch, Agricultural Marketing Service has withdrawn his determination that Terry A. Jacobson was responsibly connected with Jacobson Produce, Inc. during Jacobson Produce, Inc.'s repeated and flagrant violations of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §499a *et seq*.). Therefore, the above-encaptioned matter is hereby ordered dismissed with regard to Terry A. Jacobson.

Copies hereof shall be served upon the parties.

_____

In re: JANET S. ORLOFF, MERNA K. JACOBSON, TERRY A. JACOBSON.
PACA Docket No. APP- 01-0002.
Order to Dismiss as to Janet S. Orloff.

Filed November 9, 2001.

Ruben D. Rudolph, for Respondents.
Paul T. Gentile, for Petitioners.
Order issued by Jill S. Clifton, Administrative Law Judge.

The Chief, PACA Branch, Agricultural Marketing Service has withdrawn his determination that Janet S. Orloff was responsibly connected with Jacobson Produce, Inc. during Jacobson Produce, Inc.'s repeated and flagrant violations of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §499a *et seq*.). Therefore, the above-encaptioned matter is hereby ordered dismissed with regard to Janet S. Orloff.

Copies hereof shall be served upon the parties.

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In re: KIRBY PRODUCE COMPANY, INC.
PACA Docket No. D-98-0002.
Order Denying Complainant's Request for Reconsideration of Remand Order.
Filed November 27, 2001.

Reconsideration of remand order – Decision defined – Slow-pay – No-pay.

The Judicial Officer denied Complainant's request for reconsideration of *In re Kirby Produce Co.*, 60 Agric. Dec. ___ (Aug. 27, 2001) (Remand Order). The Judicial Officer rejected Complainant's contention that the Court in *Kirby Produce Co. v. United States Dep't of Agric.*, 256 F.3d 830 (D.C. Cir. 2001), remanded *Kirby* with a mandate that the United States Department of Agriculture adopt a new "slow-pay"/"no-pay" policy for the *Kirby* proceeding. The Judicial Officer concluded the Court in *Kirby Produce Co. v. United States Dep't of Agric.* remanded the proceeding to the United States Department of Agriculture to determine whether the case is a "no-pay" or a "slow-pay" case using the United States Department of Agriculture's "slow-pay"/"no-pay" policy adopted in *In re Gilardi Truck & Transp., Inc.*, 43 Agric. Dec. 118 (1984).

Eric Paul, for Complainant.
Paul T. Gentile, for Respondent.
Initial decision issued by James W. Hunt, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

The Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a "Complaint" on October 20, 1997. Complainant instituted the proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C.

§§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. pt. 46) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-151).

Complainant alleges that: (1) during the period August 1995 through July 1996, Kirby Produce Company, Inc. [hereinafter Respondent], failed to make full payment promptly to 20 sellers of the agreed purchase prices for 206 lots of perishable agricultural commodities in the total amount of $1,609,859.45, which Respondent purchased, received, and accepted in interstate commerce; and (2) Respondent's failures to make full payment promptly of the agreed purchase prices for perishable agricultural commodities that it purchased, received, and accepted in interstate commerce constitute willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Compl. ¶¶ III-IV). On November 12, 1997, Respondent filed an "Answer," and on December 4, 1997, Respondent filed an "Amended Answer" denying the material allegations of the Complaint.

Administrative Law Judge James W. Hunt [hereinafter the Chief ALJ[1]] scheduled a hearing to commence in Knoxville, Tennessee, on January 13, 1999 (Summary of Telephone Conference; Notice of Hearing). On November 12, 1998, Respondent filed a motion to continue the hearing until Respondent has made full payment to all perishable agricultural commodities sellers, pursuant to an Order issued on June 25, 1996, by United States District Court Judge Leon Jordan in *Brown's Produce v. Kirby Produce Co.*, Case No. 3:96-CV-526 (E.D. Tenn. June 25, 1996) (Letter dated November 10, 1998, from Paul T. Gentile to the Chief ALJ). On November 16, 1998, the Chief ALJ denied Respondent's motion to continue the hearing (Order Denying Motion to Continue Hearing).

On December 4, 1998, Complainant filed: (1) "Request for Official Notice" requesting that the Chief ALJ take official notice of the Order, the list of Respondent's creditors, and a Marketing Agreement issued in *Brown's Produce v. Kirby Produce Co.*; (2) "Motion for Decision Without Hearing by Reason of Admissions" [hereinafter Motion for Default Decision]; and (3) a proposed "Decision Without Hearing by Reason of Admissions." Complainant contends in Complainant's Motion for Default Decision that Respondent and its creditors consented to the Order issued in *Brown's Produce v. Kirby Produce Co.*, and that Respondent's agreement to the issuance of the Order and the attached list of

[1]The Secretary of Agriculture appointed James W. Hunt Chief Administrative Law Judge on November 7, 1999.

creditors constitutes an admission of the material allegations of the Complaint (Motion for Default Decision at 2-3).

On December 29, 1998, Respondent filed "Objection and Opposition to Motion for Decision Without Hearing by Reason of Admission," stating that Complainant cannot use the June 25, 1996, Order issued by United States District Court Judge Leon Jordan in *Brown's Produce v. Kirby Produce Co.* as an admission to the Complaint and that Respondent is entitled to a hearing.

On December 31, 1998, the Chief ALJ issued "Order Canceling Hearing" and "Decision Without Hearing by Reason of Admissions" [hereinafter Initial Decision and Order]. The Chief ALJ: (1) found that Respondent and its creditors consented to the June 25, 1996, Order issued by United States District Court Judge Leon Jordan in *Brown's Produce v. Kirby Produce Co.*; (2) found that Respondent's agreement to the June 25, 1996, Order issued by United States District Court Judge Leon Jordan in *Brown's Produce v. Kirby Produce Co.* and attachments to the Order constitutes an admission of the material allegations of the Complaint; (3) found that, during the period August 1995 through April 1996, Respondent purchased, received, and accepted in interstate and foreign commerce, from 19 sellers, 204 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of $1,602,736.15; (4) concluded that Respondent's failures to make full payment promptly to the 19 perishable agricultural commodities sellers constitute willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (5) revoked Respondent's PACA license (Initial Decision and Order at 2-4). On March 3, 1999, Respondent filed "Respondent's Motion for Reconsideration of Decision Without Hearing by Reason of Admissions," which the Chief ALJ denied.

On May 28, 1999, Respondent appealed to the Judicial Officer. On July 12, 1999, I issued a Decision and Order: (1) finding that, during the period August 1995 through April 1996, Respondent purchased, received, and accepted in interstate commerce, from 19 sellers, 204 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of $1,602,736.15; (2) finding that, as of December 2, 1998, $1,215,723.99 remained past due and unpaid, with $387,012.16 paid late; (3) concluding that Respondent's failures to make full payment promptly with respect to the 204 transactions constitute willful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (4) revoking Respondent's PACA license. *In re Kirby Produce Co.*, 58 Agric. Dec. 1011, 1017-18, 1032 (1999).

On August 19, 1999, Respondent filed a petition for reconsideration of *In re Kirby Produce Co.*, 58 Agric. Dec. 1011 (1999), which I denied. *In re Kirby Produce Co.*, 58 Agric. Dec. 1032 (1999) (Order Denying Pet. for Recons.).

Respondent sought judicial review of *In re Kirby Produce Co.*, 58 Agric. Dec. 1011 (1999). The United States Court of Appeals for the District of Columbia Circuit granted Respondent's petition for review and remanded the case to United States Department of Agriculture to conduct further proceedings. *Kirby Produce Co. v. United States Dep't of Agric.*, 256 F.3d 830 (D.C. Cir. 2001).

On August 22, 2001, counsel for Complainant informed me that Complainant would not seek further judicial review of *In re Kirby Produce Co.*, 58 Agric. Dec. 1011 (1999), and counsel for Respondent informed me that Respondent would not seek further judicial review of *In re Kirby Produce Co.*, 58 Agric. Dec. 1011 (1999). On August 27, 2001, I remanded the proceeding to the Chief ALJ to determine, after providing the parties with an opportunity for a hearing, whether Respondent is in full compliance with the PACA at the time of the hearing. *In re Kirby Produce Co.*, 60 Agric. Dec. ___ (Aug. 27, 2001) (Remand Order).

On October 5, 2001, Complainant filed a "Request for Reconsideration of Remand Order" pursuant to section 1.172 of the Rules of Practice Governing Cease and Desist Proceedings Under Section 2 of the Capper-Volstead Act (7 C.F.R. § 1.172). On October 9, 2001, Complainant filed "Correction of Initial Page of Request for Reconsideration of Remand Order" stating Complainant erroneously submitted Complainant's Request for Reconsideration of Remand Order pursuant to the Rules of Practice Governing Cease and Desist Proceedings Under Section 2 of the Capper-Volstead Act, which are not applicable to this proceeding, and Complainant should have filed Complainant's Request for Reconsideration of Remand Order pursuant to section 1.146 of the Rules of Practice (7 C.F.R. § 1.146). On November 19, 2001, Respondent filed "Opposition to Request for Reconsideration of Remand Order."[2] On November 20, 2001, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a ruling on

[2]Respondent's response to Complainant's Request for Reconsideration of Remand Order was required to be filed no later than November 19, 2001 (Informal Order dated October 30, 2001). The Hearing Clerk stamped Respondent's Opposition to Request for Reconsideration of Remand Order with a time and date stamp indicating that Respondent filed Respondent's Opposition to Request for Reconsideration of Remand Order on November 20, 2001. However, Ms. Lawuan Waring, a legal technician employed by the Office of the Hearing Clerk, informed the Office of the Judicial Officer that Respondent's Opposition to Request for Reconsideration of Remand Order reached the Hearing Clerk on November 19, 2001. Therefore, I conclude Respondent's Opposition to Request for Reconsideration of Remand Order was timely filed on November 19, 2001. *See* 7 C.F.R. § 1.147(g).

Complainant's Request for Reconsideration of Remand Order, as amended by Complainant's Correction of Initial Page of Request for Reconsideration of Remand Order [hereinafter Request for Reconsideration of Remand Order].

As an initial matter, I find Complainant's Request for Reconsideration of Remand Order cannot be considered pursuant to section 1.146 of the Rules of Practice (7 C.F.R. § 1.146), which provides that a party to a proceeding under the Rules of Practice may file a petition for reconsideration of the decision of the Judicial Officer. Section 1.132 of the Rules of Practice defines the word "decision" as follows:

> **§ 1.132 Definitions.**
>
> As used in this subpart, 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:
>
> . . . .
>
> *Decision* means: (1) The Judge's initial decision made in accordance with the provisions of 5 U.S.C. 556 and 557, and includes the Judge's (i) findings and conclusions and the reasons or basis therefor on all material issues of fact, law or discretion, (ii) order, and (iii) rulings on proposed findings, conclusions and orders submitted by the parties; and
>
> (2) The decision and order by the Judicial Officer upon appeal of the Judge's decision.

7 C.F.R. § 1.132.

In re Kirby Produce Co., 60 Agric. Dec. ___ (Aug. 27, 2001) (Remand Order), is not a decision and order by the Judicial Officer upon appeal of an administrative law judge's decision. Therefore, the August 27, 2001, Remand Order is not a *decision* as defined in section 1.132 of the Rules of Practice (7 C.F.R. § 1.132), and section 1.146 of the Rules of Practice (7 C.F.R. § 1.146), which provides that a party may file a petition for reconsideration of the Judicial Officer's *decision*, is not the proper section of the Rules of Practice under which to request reconsideration of the August 27, 2001, Remand Order. However, I find that Complainant may request reconsideration of the August 27, 2001, Remand Order pursuant to section 1.143(b)(1) of the Rules of Practice (7 C.F.R. § 1.143(b)(1)), which provides that any motion will be entertained other than a motion to dismiss on the pleading.

Therefore, I treat Complainant's Request for Reconsideration of Remand Order as a request made pursuant to section 1.143 of the Rules of Practice (7 C.F.R. § 1.143).

Complainant requests that I modify the August 27, 2001, Remand Order to require the Chief ALJ to determine whether Respondent was in full compliance with the PACA on January 13, 1999, the date the Chief ALJ originally scheduled the hearing to commence. Complainant contends the August 27, 2001, Remand Order, in which I remanded the proceeding to the Chief ALJ to determine whether Respondent is in compliance with the PACA at the time the hearing in this proceeding actually commences, does not comply with the mandate in *Kirby Produce Co. v. United States Dep't of Agric.* (Request for Recons. of Remand Order at 2-4.) Respondent states the August 27, 2001, Remand Order is in accordance with the United States Department of Agriculture's "slow-pay"/"no-pay" policy and nothing in *Kirby Produce Co. v. United States Dep't of Agric.* indicates the United States Court of Appeals for the District of Columbia Circuit intended to modify or reverse the United States Department of Agriculture's "slow-pay"/"no-pay" policy (Opposition to Request for Recons. of Remand Order at second unnumbered page).

I agree with Complainant that there is language in *Kirby Produce Co. v. United States Dep't of Agric.* indicating that, on remand, the United States Department of Agriculture must determine whether Respondent made full payment to the 20 produce sellers identified in the Complaint by January 13, 1999, the date the Chief ALJ originally scheduled the hearing to commence. The Court states that under the United States Department of Agriculture's policy, which was in effect at the time, payment by the date set for a hearing would convert a "no-pay" case into a "slow-pay" case and would result in license suspension rather than license revocation, as follows:

> Although the Secretary is statutorily authorized to revoke a license for flagrant violations, Department of Agriculture policy during the relevant time period permitted a licensee to avoid revocation by making full payment prior to the date set for a hearing on the violations. Such payment would convert a "no-pay" case into a "slow-pay" case, and would result in license suspension rather than revocation. *See In re Kirby Produce Co.*, 58 Agric. Dec. 1011 (1999) (citing *In re Gilardi Truck & Transp.*, 43 Agric. Dec. 118 (1984)).

Kirby Produce Co. v. United States Dep't of Agric., 256 F.3d at 831 (footnote omitted).

However, the Judicial Officer's former policy, which was adopted in *In re Gilardi Truck & Transp., Inc.*, 43 Agric. Dec. 118 (1984), and is applicable to this proceeding, had been to suspend (rather than revoke) the license of a PACA licensee who made full payment and was in full compliance with the PACA *by the date of the hearing*. The cases cited by the Court establish that the United States Department of Agriculture's policy was that full payment, together with full compliance with the PACA *by the date of the hearing*, would convert a "no-pay" case into a "slow-pay" case and would result in license suspension rather than license revocation.[3] Moreover, Complainant cites no case in which the United States Department of Agriculture's policy was that full payment by the date set for a hearing (rather than the date of the hearing) would convert a "no-pay" case into a "slow-pay" case.

I do not read *Kirby Produce Co. v. United States Dep't of Agric.* as requiring the United States Department of Agriculture to adopt a new "slow-pay"/"no-pay" policy for this proceeding. Instead, I find the Court remanded the proceeding for the United States Department of Agriculture to determine whether this is a "no-pay" case or a "slow-pay" case using the United States Department of Agriculture's "slow-pay"/"no-pay" policy set out in *In re Gilardi Truck & Transp., Inc.*, as modified by *In re Carpenito Bros., Inc.*, 46 Agric. Dec. 486 (1987).

Complainant also contends the August 27, 2001, Remand Order would improperly allow payments made 6 and 7 years late to constitute slow payment, warranting license suspension. Complainant suggests that full payment made 6 or 7 years late constitutes "glacial" payment, warranting license revocation. Further, Complainant states it was never contemplated by the Judicial Officer in *In re Gilardi Truck & Transp., Inc.*, that a "no-pay" case could be converted into a "slow-pay" case by making full payment 6 to 7 years after a respondent violates the PACA and the Regulations by failing to make full payment promptly. (Request for Recons. of Remand Order at 5-7.)

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[3]*See In re Kirby Produce Co.*, 58 Agric. Dec. 1011, 1018 (1999) (stating the Judicial Officer's former policy, which is applicable to this proceeding, had been to revoke the license of any PACA licensee who failed to pay in accordance with the PACA and owed more than a *de minimis* amount to produce sellers by the date of the hearing); *In re Gilardi Truck & Transp., Inc.*, 43 Agric. Dec. 118, 150 (1984) (stating 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 payment provisions, the case will be treated as a "no-pay" case).

The Judicial Officer's former policy, which was adopted in *In re Gilardi Truck & Transp., Inc.*, had been to allow the PACA licensee to avoid license revocation by paying in full and being in full compliance with the PACA by the date of the hearing. The "slow-pay"/"no-pay" policy in *Gilardi* is not limited by the time between a payment violation and the hearing. I reject Complainant's suggestion that I disregard the "slow-pay"/"no-pay" policy that was in effect at the time Complainant instituted this disciplinary proceeding and adopt a "slow-pay"/"glacial-pay"/"no-pay" policy for this proceeding.

Finally, Complainant states the United States Court of Appeals for the District of Columbia Circuit based its remand of this proceeding to the United States Department of Agriculture primarily upon a declaration made to the Court by Respondent's chief executive officer under penalty of perjury that full payment had been made to the produce sellers identified in the Complaint by January 13, 1999. Complainant contends this declaration is false. Complainant requests, based on Respondent's purportedly false declaration, that I modify the August 27, 2001, Remand Order to instruct the Chief ALJ that Respondent is estopped from presenting evidence of payments made to produce sellers after January 13, 1999. (Request for Recons. of Remand Order at 7-8.)

I reject Complainant's request that I instruct the Chief ALJ that Respondent is estopped from presenting evidence of payments made to produce sellers after January 13, 1999. The United States Court of Appeals for the District of Columbia Circuit remanded the proceeding to the United States Department of Agriculture to determine whether this is a "no-pay" case, warranting revocation of Respondent's PACA license, or a "slow-pay" case, warranting suspension of Respondent's PACA licence. Critical to that determination are payments that Respondent has made or will make to the produce sellers identified in the Complaint by the date of the hearing. Prohibiting Respondent from introducing evidence of payments it made or will make between January 13, 1999, and the date the Chief ALJ holds the hearing, would not only deny Respondent due process, but would also contravene the Court's explicit reasons for remanding the case to the United States Department of Agriculture for further the proceedings. *Kirby Produce Co. v. United States Dep't of Agric.*

For the foregoing reasons and the reasons set forth in *In re Kirby Produce Co.*, 60 Agric. Dec. ___ (Aug. 27, 2001) (Remand Order), I deny Complainant's request for reconsideration of the August 27, 2001, Remand Order.

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PERISHABLE AGRICULTURAL COMMODITIES ACT

DEFAULT DECISIONS

In re: LYONS DISTRIBUTORS, INC.
PACA Docket No. D-00-0020.
Decision Without Hearing by Reason of Default.
Filed February 22, 2001.

Ruben D. Rudolph, Jr., for Complainant.
Respondent, Pro se.
Decision issued by Dorothea A. Baker, Administrative Law Judge.

This is a disciplinary proceeding under the Perishable Agriculture Commodites Act, 1930, as amended (7 U.S.C. § 499a *et seq*.) (hereinafter referred to as the "Act"), instituted by a Complaint filed on August 1, 2000, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The Complaint alleges that during the period October 1997 through May 1999, Respondent Lyons Distributors, Inc., (hereinafter "Respondent") failed to make full payment promptly to 14 sellers, of the agreed purchase prices, or balances thereof, in the total amount of $1,335,444.33 for 98 lots of perishable agricultural commodities which it received, accepted and sold in interstate and foreign commerce.

A copy of the Complaint was served upon Respondent on August 1, 2000, which Respondent has not answered. The time for filing an answer having expired, 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).

Finding of Fact

1. Respondent is a corporation organized and existing under the laws of the state of Connecticut. Its business address was 184 Atlantic Street, Stamford, Connecticut 06901. Its mailing address is P.O. Box 671, Stamford, Connecticut 06904-0671.

2. At all times material herein, Respondent was licensed under the provisions of the PACA. License number 731359 was issued to Respondent on May 8, 1973.

This license terminated on May 8, 1999, 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. As more fully set forth in paragraph III of the Complaint, during the period October 1997 through May 1999, Respondent purchased, received, and accepted in interstate and foreign commerce, from 14 sellers, 98 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 $1,335,444.33.

Conclusions

Respondent's failure to make full payment promptly with respect to the 98 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, 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 effective May 20, 2001. - Editor]

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In re: PACKED FRESH PRODUCE, INC.
PACA Docket No. D-00-0021.
Decision Without Hearing by Reason of Default.
Filed March 20, 2001.

Ruben D. Rudolph, Jr., for Complainant.
Respondent, Pro se.

Decision issued by James W. Hunt, Administrative Law Judge.

This is a disciplinary proceeding under the Perishable Agriculture Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.) (hereinafter referred to as the "Act"), instituted by a Complaint filed on August 2, 2000, by the Acting Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The Complaint alleges that during the period October 1999 through January 2000, Respondent Packed Fresh Produce, Inc., (hereinafter "Respondent") failed to make full payment promptly to 12 sellers, of the agreed purchase prices, or balances thereof, in the total amount of $1,673,191.38 for 143 lots of perishable agricultural commodities which it received, accepted and sold in interstate commerce.

A copy of the Complaint was served upon Respondent on August 20, 2000, which Respondent has not answered. The time for filing an answer having expired, 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).

Finding of Fact

1. Respondent is a corporation organized and existing under the laws of the state of New Jersey. Its business address was 115 Graham Lane, Lodi, New Jersey 07644-1622. Its mailing address is 716 Newman Springs Road, Suite 312, Lincroft, New Jersey 07738-1523.

2. At all times material herein, Respondent was licensed under the provisions of the PACA. License number 991181 was issued to Respondent on June 4, 1999. This license was suspended on April 4, 2000, pursuant to Section 13(a) of the PACA (7 U.S.C. § 499m), when Respondent failed to allow inspection of its records. This license subsequently terminated on June 4, 2000, 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. As more fully set forth in paragraph III of the Complaint, during the period October 1999 through January 2000, Respondent purchased, received, and accepted in interstate commerce, from 12 sellers, 143 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 $1,673,191.38.

Conclusions

Respondent's failure to make full payment promptly with respect to the 143 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, 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 effective May 20, 2001. - Editor]

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In re: FRESHWAY PRODUCE, INC.
PACA Docket No. D-00-0024.
Decision Without Hearing by Reason of Default.
Filed June 19, 2001.

Christopher Young-Morales, for Complainant.
Respondent, Pro se.
Decision issued by Dorothea A. Baker, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agriculture Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.) (hereinafter referred to as the "Act"), instituted by a Complaint filed on August 29, 2000, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The Complaint alleges that during the

period November 1998 through March 1999, Respondent Freshway Produce, Inc., (hereinafter "Respondent") failed to make full payment promptly to 17 sellers, of the agreed purchase prices, or balances thereof, in the total amount of $223,879.74 for 52 lots of perishable agricultural commodities which it received, accepted and sold in interstate and foreign commerce.

The Hearing Clerk's efforts to serve the Complaint by Certified Mail were not successful and the Complaint and accompanying data were subsequently served on Respondent in conformity with Section 1.147 of the Rules of Practice. Respondent has not answered the Complaint. The time for filing an answer having expired, 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).

Finding of Fact

1. Respondent is a corporation organized and existing under the laws of the state of Florida. Its business address was 831 N.W. 21st Terrace, Miami, Florida 33127. Its mailing address is 15476 N.W. 77th Court, #437, Miami Lakes, Florida 33016.

2. At all times material to the allegations in the Complaint, Respondent was licensed under the provisions of the PACA. License number 981129 was issued to Respondent on April 29, 1998. This license terminated on April 29, 1999, pursuant to Section 4(a) of the PACA, when Respondent failed to pay the required annual renewal fee.

3. As more fully set forth in paragraph III of the Complaint, during the period November 1998 through March 1999, Respondent purchased, received, and accepted in interstate and foreign commerce, from 17 sellers, 52 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 $223,879.74.

Conclusions

Respondent's failure to make full payment promptly with respect to the 52 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, 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 effective September 2, 2001. - Editor]

In re: MAJESTIC PRODUCE CORP.
PACA Docket No. D-01-0005.
Decision Without Hearing by Reason of Default.
Filed June 19, 2001.

Kimberly Hart, for Complainant.
Respondent, Pro se.
Decision 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 December 6, 2000, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture.

The complaint alleges that during the period June 1997 through February 1999, Respondent failed to make full payment promptly to 13 sellers in the total amount of $676,276.81 for 209 lots of perishable agricultural commodities that it purchased, received and accepted in interstate commerce.

A copy of the complaint was served upon Respondent on January 10, 2001 in conformity with Section 1.147 of the Rules of Practice. This 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, Majestic Produce Corp., is a corporation organized and existing under laws of the state of New York. Its mailing address is 402 E. 83rd Street, Brooklyn, New York, 11236.
2. At all times material herein, Respondent was either licensed under, or operating subject to, the provisions of the Act. PACA license number 961833 was issued to Respondent on June 24, 1996. This license was administratively suspended June 2, 1999, pursuant to section 13(a) of the Act, when representatives of the Secretary were refused access to Respondent's records (7 U.S.C. §499m(a)). Respondent's license subsequently terminated on June 24, 1999, when Respondent failed to pay the required annual renewal fee.
3. The Secretary has jurisdiction over Respondent and the subject matter involved herein.
4. As set forth in paragraph III of the complaint, during the period June 1997 through February 1999, Respondent purchased, received and accepted in interstate commerce 209 shipments of perishable agricultural commodities from 13 sellers, but failed to make full payment promptly of the agreed purchase prices or balance thereof in the total amount of $676,276.81.
5. Respondent filed a Chapter Eleven Petition in the U.S. Bankruptcy Court for the Eastern District of New York on January 25, 1999. The Bankruptcy Court assigned case number 99-10971-260 to the filing. Respondent admitted in its Bankruptcy schedules that all 13 sellers listed in paragraph III of the complaint hold unsecured claims for produce debt in the total amount of $710,941.98.

Conclusions

Respondent's failure to make full payment promptly with respect to the transactions set forth in Finding of Fact No. 4 above, constitutes willful, flagrant, and repeated 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, flagrant and repeated violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)), 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 withing 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 effective September 2, 2001. - Editor]

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In re: GOLDSTONE'S PRODUCE, INC.
PACA Docket No. D-00-0001.
Decision Without Hearing by Reason of Default.
Filed July 12, 2001.

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

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, as amended (7 U.S.C. § 499a *et seq*.) hereinafter referred to as the "Act," instituted by a complaint filed on October 7, 1999, by the Associate Deputy Director, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period January 1998 through September 1998, Respondent purchased, received and accepted in interstate and foreign commerce, from 14 sellers, 203 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balances thereof in the total amount of $313,419.29.

Service of the complaint in this proceeding on Respondent was initially attempted at the business address set forth in the complaint, 813 N.W. 21st Terrace, Miami, FL 33127. When service could not be made at this address, a second attempt was made on December 28, 1999, by certified mail addressed to Mr. Jorge

L. Herrera, President, Goldstone's Produce, Inc., 1265 MW 22nd Street, Miami, FL 33142. This letter was returned on January 14, 2000 because the forwarding order had expired. On April 26, 2000, the complaint and transmittal letter were again re-mailed by certified mail to Mr. Jorge L. Herrera, President, Goldstone's Produce, Inc., at a third address, 13000 S.W. 197th Avenue, Miami, FL 33196. This was a forwarding address which had been obtained from the United States Postal Service, Miami, Florida. This certified mail letter was returned "unclaimed" on May 18, 2000. Accordingly, on June 8, 2000, service was made by regular mail sent to the same address in conformity with Section 1.147 of the Rules of Practice (7 C.F.R. § 1.147). The time for filing an answer admitting, denying, or explaining each of the allegations of the complaint in accordance with Section 1.136 of the Rules of Practice (7 C.F.R. § 1.136) having run, and upon the motion of the Complainant for issuance of the 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 Goldstone's Produce, Inc. is a corporation organized and existing under the laws of the State of Florida. Its business mailing address was 831 N.W. 21st Terrace, Miami, FL 33127.

2. At all times material herein, Respondent was licensed under the provisions of PACA. License number 930646 was issued to Respondent on February 10, 1993. This license was suspended on June 25, 1998, pursuant to Section 7(d) of the PACA (7 U.S.C. § 499g), for failure to pay a reparation order and subsequently terminated on February 10, 1999, 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. As more fully set forth in paragraph III of the complaint, during the period January 1998 through September 1998, Respondent purchased, received and accepted from 14 sellers in interstate and foreign commerce, 203 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices in the total amount of $313,419.29.

Conclusions

Respondent's failure to make full payment promptly with respect to the 203 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 be made that Respondent Goldstone's Produce, Inc. has committed willful, flagrant and repeated violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)).

This Order shall take effect on the 11th day after the Decision becomes final. Pursuant to the Rules of Practice governing proceedings under the Act, this Decision will become final without further proceeding 35 days after service 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, 1.145).

Copies of this Order shall be served upon the parties.

[This Decision and Order became effective October 14, 2001. - Editor]

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In re: 4 SEASONS INTERNATIONAL, INC.
PACA Docket No. D-01-0006.
Decision Without Hearing by Reason of Default.
Filed August 3, 2001.

Christopher P. Young-Morales, for Complainant.
Respondent, Pro se.
Decision issued by Jill S. Clifton, 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 9, 2001, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The Complaint alleges that during the period November 1998 through January 2000, Respondent purchased, received, and accepted, in interstate and foreign commerce, from 8 sellers, 97 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices in the total amount of $638,662.90.

A copy of the Complaint was served upon Respondent; Respondent did not

answer the Complaint. The time for filing an answer having expired, 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 is a corporation organized and existing under the laws of the state of Texas. Its business addresses were 8609 NW Plaza Drive, Suite 209, Dallas, Texas 75225 and 2501 Military Highway, Suite D-15, McAllen, Texas 78502. Its mailing address is P.O. Box 12003, Dallas, Texas 75225.

2. At all times material herein, Respondent was licensed under the provisions of the PACA. Pursuant to the licensing provisions of the Act, license number 981395 was issued to Respondent on June 16, 1998. This license terminated on June 16, 1999, pursuant to Section 4(a) of the Act (7 U.S.C. § 499d(a)) when respondent failed to pay the required annual license fee. License number 991669 was issued to Respondent on August 16, 1999. This license terminated on August 16, 2000, when it was not renewed.

3. As more fully set forth in paragraph III of the Complaint, during the period November 1998 through January 2000, Respondent purchased, received, and accepted, in interstate and foreign commerce, from 8 sellers, 97 lots of fruits and vegetables, all being perishable agricultural commodities, and failed to make full payment promptly of the agreed purchase prices, in the total amount of $638,662.90.

Conclusions

Respondent's failure to make full payment promptly with respect to the 97 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), 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 effective September 27, 2001. -Editor]

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In re: SCARPACI BROTHERS, INC.
PACA Docket No. D-00-0014.
Decision and Order.
Filed August 6, 2001.

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

Preliminary Statement

This disciplinary proceeding, brought under the Perishable Agricultural Commodities Act, 1930, as amended, (7 U.S.C. § 499a *et seq.*), hereinafter "PACA", was initiated on April 18, 2000, by a complaint filed by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, alleging that Respondent willfully violated the PACA by failing to make full payment promptly to eighteen sellers of the agreed purchase prices in the total amount of $599,504.49 for 134 lots perishable agricultural commodities that it purchased, received and accepted in interstate commerce during the period March 1998 through July 1999. The complaint also alleges that PACA license number 930672, which was issued to Respondent on February 17, 1993, terminated on February 17, 2000, when it was not renewed. The complaint requests that the Administrative Law Judge find that Respondent has committed willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) and order that the facts and circumstances of such violations be published.

The complaint was served on Respondent by certified mail delivered to: (1) Stanley G. Makoroff, its Trustee in a Chapter 7 bankruptcy proceeding, and (2) Todd Scarpaci, its President. No answer to the allegations of the complaint has

been filed on behalf of Respondent by Mr. Makoroff. On June 5, 2000, Todd Scarpaci filed an answer admitting that Respondent had failed to pay $599,504.49 to its wholesalers as alleged in the complaint, but denying that Respondent's failures to pay were willful.[1] This answer neither disputes the unpaid purchase amounts and other details of the 134 transactions that were alleged in paragraph III of the complaint, or the further allegation set forth in paragraph IV of the complaint that Respondent has admitted in a bankruptcy Schedule F- Creditors Holding Unsecured Non-Priority Claims, filed in *In re Scarpaci Brothers, Inc.*, Case No. 99-26153 MBM (United States Bankruptcy Court for the Western District of Pennsylvania), "that it owes 17 of the 18 sellers named in paragraph III of the complaint herein (Consolidated Services, Inc. is not listed as a creditor in Schedule F) amounts equal or greater than those alleged unpaid in paragraph III for inventory purchases made in 1998 and 1999." Respondent admits in its answer that the chapter 11 bankruptcy it filed on August 18, 1999 was "filed involentarily (sic) due to pressure applied on the same day thru temporary restraining order."

A copy of the Rules of Practice which govern the conduct of these proceedings (7 C.F.R. § 1.130 - 1.151) accompanied the complaint. Respondent was required under section 1.136(b)(1) of these Rules of Practice (7 C.F.R. § 1.136(b)(1)) to clearly admit, deny, or explain each of the allegations of the complaint. Under section 1.136(c) of these Rules of Practice (7 C.F.R. § 1.136(c)) Respondent's failure to deny the above specific allegations in its answer constitutes an admission of said allegations unless the parties have agreed to a consent decision.

Complainant filed a request that official notice be taken of documents filed by Respondent in its bankruptcy proceeding, and the bankruptcy proceeding docket sheet, and a motion with supporting memorandum seeking a decision without hearing by reason of admissions made by Respondent in its answer and in its bankruptcy petition and schedules. Based upon a careful consideration of the

[1] Mr. Scarpaci's letter answer contains the following three statements respecting the alleged failures to make full payment promptly in the total amount of $599,504.49:

(1) "It is true that Scarpaci Bros was unable to make payments to wholesalers thus forcing bankruptcy and liquidation."

(2) "Scarpaci Bros, unwilfuly violated section 2(4) PACA (7 USC 499b(4) We simply were not able to pay due to uncollectable receivables which we had no control over."

(3) "Rich Armstrong the investigator on the case told me that what he found was what you have announced, $599,504.49."

pleadings and precedent decisions cited by Complainant[2], official notice is taken of the requested bankruptcy documents and docket sheet and this decision is issued without further procedure or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

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 brought 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 5(c)(7 U.S.C. § 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. (emphasis added).

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

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[2] See, *In re Kirby Produce Company, Inc.*, 58 Agric. Dec. 1011 (1999); *In re Five Star Food Distributors, Inc*., 56 Agric. Dec. 880 (1997) *In re Granoff's Wholesale Fruit & Produce, Inc.*, 54 Agric. Dec. 1375 (1995); *In re Veg-Mix, Inc.*, 44 Agric. Dec. 1583 (1985), *remanded on other grounds*, *Veg-Mix, Inc. v. U.S. Dept. Of Agriculture*, 832 F.2d 601 (D.C. Cir. 1987); *In re Fava & Company, Inc.*, 44 Agric Dec. 870 (1985)(decision), 46 Agric. Dec. 79 (1987)(ruling on certified question issued December 4, 1984).

(a) Whenever (a) the Secretary determines, as provided in section 6 of this Act (7 U.S.C. § 499f) that any commission merchant, dealer, or broker has violated any of the provisions of section 2 of this act (7 U.S.C. § 499b), or (b) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 14(b) of this Act (7 U.S.C. § 499n(b)), the Secretary may publish the fact 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.

Pertinent Regulation

Section 46.2(aa) of the Regulations (7 C.F.R. § 46.2(aa)) provides:

(aa) *Full payment promptly* is the term used in the Act in specifying the period of time for making payment without committing a violation of the Act. "Full payment promptly" for the purpose of determining violations of the Act, means:

. . .

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

. . .

(11) Parties who elect to use different times of payment than those set forth in paragraphs (aa) (1) through (10) of this section must reduce their agreement to writing before entering into the transaction and maintain a copy of the agreement in their records. If they have so agreed, then payment within the agreed upon time shall constitute "full payment promptly", *Provided*, That the party claiming the existence of such agreement for time of payment shall have the burden of proving it.

Findings of Fact

1. Scarpaci Brothers, Inc. (hereinafter, "Respondent"), is a corporation incorporated in the state of Pennsylvania. It business address while operating was 2100 Smallman Street, Pittsburgh, Pennsylvania, 15222. Its current addresses are c/o Stanley G. Markoroff, Trustee, 1200 Koppers Builing, Pittsburg, Pennsylvania, 15219 and c/o Todd Michael Scarpaci, 122 Judith Drive, Venetia, Pennsylvania, 15317.

2. At all times material herein, Respondent was either licensed or operating subject to license under the provisions of the PACA. License number 930672 was issued to Respondent on February 17, 1993. This license terminated February 17, 2000, when it was not renewed.

3. Respondent, during the period March 1998 through July 1999, on or about the dates and in the transactions set forth in paragraph III of the complaint, failed to make full payment promptly to 18 sellers of the agreed purchase prices in the total amount of $599,504.49 for 134 lots of perishable agricultural commodities that were purchased, received, and accepted in interstate commerce.

4. On August 18, 1999, Respondent filed a voluntary petition pursuant to Chapter 11of the Bankruptcy Code (11 U.S.C. § 1101) in the United States Bankruptcy Court for the Western District of Pennsylvania. The Chapter 11 proceeding, *In re Scarpaci Brothers, Inc.*, Case No. 99-26153 MBM, was converted to a Chapter 7 proceeding on October 25, 1999.

5. Respondent filed a bankruptcy schedule, Schedule F- Creditors Holding Unsecured Non-Priority Claims, in which Respondent admitted that it owes 17 of the 18 sellers named in paragraph III of the complaint herein (Consolidation Services, Inc. is not listed as a creditor in Schedule F) amounts equal or greater than those alleged unpaid in paragraph III for inventory purchases made in 1998 and 1999.

6. By signing the Declaration that accompanied Respondent's bankruptcy schedules, Respondent's president Todd M. Scarpaci declared under penalty of perjury that Respondent owed fixed and undisputed amounts totaling $573,089.73 to these 17 produce sellers as of September 1, 1999. The amounts alleged unpaid by Complainant in paragraph III of the complaint and admitted unpaid by Respondent's Schedule F listing to these 17 produce firms are as follows:

Seller	**Complaint**	**Schedule F**
Stanley Orchard Sales, Inc.	$26,290.08	$26,290.00
Ron Funkhouser Sales, LTD	5,040.00	5,040.00
Wilkinson-Cooper Produce, Inc.	14,705.65	15,032.00
Walden-Sparkman, Inc.	10,650.00	10,650.00
Earl Roy Produce	8,634.32	12,594.00
Mieze Jet Air Sales, Inc.	238,764.30	253,776.00
Lane Packing Company	8,414.25	10,433.00
Main Street Produce, Inc.	10,030.83	10,030.00
C H Robinson	9,386.70	12,586.00
Williams Farm, PT.	77,822.05	78,535.00

Gallop Farms	2,360.00	2,360.00
Ohio Valley Mushroom Farm	386.75	386.00
Hearty Fresh	28,475.00	32,356.00
Thomas Produce Co.	34,802.50	38,348.00
Action Produce Company	62,171.25	84,325.00
Thomas B. Smith Farms	21,188.00	21,188.00
Lewis Taylor Farms, Inc.	14,399.00	14,399.00
	$573,089.73	**$628,328.00**

7. Respondent has admitted by Exhibit A to the Voluntary Petition filed in its bankruptcy proceeding that it had total assets of $254,000,00 and total liabilities of $1,004,398.00 as of August 30, 1999. Included in Respondent's total assets were accounts receivable with a current market value of $180,000.00.

8. Respondent has admitted by its answer that the chapter 11 bankruptcy it filed on August 18, 1999 was "filed involentarily (sic) due to the pressure applied on the same day thru temporary restraining order."

Conclusions

Respondent's admitted failures to make full payment promptly to 18 sellers for purchases of 134 lots of perishable agricultural commodities in the amount of $599,504.49 in interstate commerce during the period March 1998 through July 1999 constitute willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Under the controlling decisions of the Secretary of Agriculture, Respondent's admission that $599,504.49, as specified by the complaint, remains unpaid to eighteen sellers of perishable agricultural commodities warrants a finding that Respondent committed willful, flagrant and repeated violations of section 2(4) of the PACA and an order that the facts and circumstances of its violation be published. Although the issuance and publication of a finding that Respondent has committed flagrant and repeated violations of section 2(4) of the PACA does not require a determination of willfulness, Respondent's violations were clearly willful. Respondent's denial that its violations of section 2(4) of the PACA were willful is entirely without merit as a matter of law since the violations occurred over a sixteen month period during which Respondent must have known that it had inadequate working capital to make full payment promptly. Therefore, the full finding sought by the complaint, that Respondent committed willful, flagrant and repeated

violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) should be made and published without hearing.

The complaint alleges, and we conclude based upon Respondent's admissions, that during the period March 1998, through July 1999, Respondent failed to make full payment promptly to 18 sellers of agreed purchase prices in the total amount of $599,504.49 for 134 lots of perishable agricultural commodities which it purchased, received and accepted in interstate commerce. The transaction details were set forth in a two page table in paragraph III of the complaint. The specific commodities listed were all perishable agricultural commodities under the PACA.[3] The eighteen sellers named were either shown to be located in another state or, if located in Pennsylvania, to have sold commodities whose out of state origins were expressly set forth. The date(s) on which the 134 lots were accepted, and the date(s) on which payments were due under the PACA were also set forth over a sixteen month plus period by specific seller. Finally, the total amount past due and unpaid was set forth for each seller. Respondent has not denied the truth and accuracy of the specific facts alleged in this paragraph III table. Respondent has expressly acknowledged in its answer: (1) that it was unable to make payment to its wholesalers; and (2) that the total amount alleged as past due and unpaid, $599,504.49, was the same amount that the agency investigator, Rich Armstrong, identified as being unpaid during the investigation that he conducted. Respondent has not disputed that the 134 payment violations occurred as alleged, but only that these violations were willful. Respondent has further failed to deny, and, therefore, has admitted that it filed a schedule of unsecured nonpriority claims in its bankruptcy proceeding that identifies 17 of the 18 sellers listed in paragraph III of the complaint as being owed amounts equal or greater than the unpaid and past due amounts set forth in paragraph III. This admission, and the admissions made in Respondent's bankruptcy documents of which official notice has been taken pursuant to section 1.143 of the Rules of Practice (7 C.F.R. § 1.143), establish that the $573,089.73 produce debt that Respondent owes to these seventeen unpaid sellers for 124 transactions[4] is part of the acknowledged unsecured debt for which Respondent has sought relief from the Bankruptcy Court as a non-operating Chapter

[3] Mixed fruits & vegetables, onions, watermelons, peaches, sweet potatoes, and mushrooms were listed.

[4] The $26,414.76 that Consolidation Services, Inc. is owed for 10 lots of watermelons was not scheduled as an acknowledged unsecured debt on Respondent's bankruptcy Schedule F.

7 debtor. By so scheduling this produce debt, Respondent has implicitly asserted that there is no prospect of full payment of this debt at any future date.

Respondent has further admitted in the bankruptcy documents that it incurred unsecured debts totaling $813,229, most of which is shown on its Schedule F as being owed to 17 of the 18 unpaid sellers named in the complaint. This produce debt was incurred while Respondent was in a seriously impaired financial condition.

Respondent filed a voluntary petition under chapter 11 of the United States Bankruptcy Code (11 U.S.C.§ 1101) that was converted to a Chapter 7 case on October 25, 1999. Respondent listed its produce debts in its Schedule F - Creditors Holding Unsecured Nonpriority Claims as debts incurred "for the purchase of inventory in 1998" or "for the purchase of inventory in 1999" and indicated that these debts were fixed and undisputed by failing to mark each scheduled debt as "c" (contingent), "u" (unliquidated) or "d" (disputed) as is required for contested claims when completing this Official Bankruptcy Form. See West's Bankruptcy Code, Rules and Forms, 887 (1996 Edition). Respondent's president, Todd M. Scarpaci, declared under penalty of perjury that the information provided in Respondent's Voluntary Petition was true and correct. He declared under penalty of perjury that the Debtor's Schedules were true and correct to the best of his knowledge, information, and belief, in his Declaration Concerning Debtor's Schedules, on September 1, 1999.[5]

Respondent has admitted in bankruptcy pleadings of which the Secretary may take official notice that as of September 1, 1999, it owed fixed amounts that total $573,089.73 to 17 of the 18 sellers that are alleged to be unpaid for agreed purchase prices in the total amount of $599,504.49 in this proceeding. Bankruptcy Schedule F contains a table with columns for the name and address of the creditor and the amount of the claim. Included among the 43 creditors named are 31 firms whose undisputed claims are noted as having been incurred for the purchase of inventory in 1998 or 1999. Seventeen of these 31 produce firms are listed as unpaid sellers in the complaint. A comparison with the table set forth in paragraph III of the complaint reveals that the amounts acknowledged as owed by Respondent are identical (except for rounding down to the last full dollar) for eight of the produce sellers, and slightly or considerably higher for nine of the produce sellers. One firm alleged to be unpaid for $26,414.72 in the complaint, Consolidation Service, Inc.,

[5] Official notice was not requested and taken of the original petition that Respondent's answer and the bankruptcy docket report acknowledge was filed on August 18, 1999, but of the replacement petition that was executed on September 1, 1999.

is not identified as a creditor on Schedule F. The amounts alleged unpaid by Complainant and admitted unpaid by Respondent with respect to the other seventeen produce firms are set forth in Finding of Fact No. 6, *supra*. Respondent has admitted by this Schedule F listing, that it has failed to pay these seventeen sellers at least $573,089.73. A decision and order that relies upon such admissions may be issued in disciplinary proceedings brought under the PACA.[6]

We conclude that Respondent is not entitled to a hearing on its denial that its admitted failures to pay were willful. Respondent has admitted it its answer failing to pay for 134 purchases of perishable agricultural commodities totaling $599,504.49 made in interstate commerce from 18 sellers over a 16 month period. Respondent has confirmed this produce debt by admitting in its bankruptcy Schedule F that undisputed amounts totaling $573,089.73 are owed to 17 of these 18 produce sellers. The dollar amount, the number, and the lengthy time period make these payment violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) willful, repeated, and flagrant, as a matter of law. The violations 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 period during which the violations occurred.[7] The fact that they occurred over an

[6] *See*, *In re Kirby Produce Company*, 58 Agric. Dec. 1011(1999); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880 (1997) ; *In re Granoff's Wholesale Fruit & Produce, Inc.*, 54 Agric. Dec. 1375 (1995); *In re Veg-Mix, Inc.*, 44 Agric. Dec. 1583 (1985), *remanded on other grounds*, *Veg-Mix, Inc. v. U.S. Dept. of Agriculture*, 832 F.2d 601 (D.C. Cir. 1987). [This footnote was cited as FN 4 - Editor]

[7] *See*, e.g., *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. 183 (9th Cir. 1972)(finding 26 violations involving $19,059.08 occurring over 2 1/2 months to be repeated and flagrant); *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 295 violations to be "flagrant" violations of the PACA in that they occurred over several months and involved more than $250,000); *In re Havana Potatoes of New York Corp. and Havpo, Inc.,* 55 Agric. Dec. 1234 (1996), *aff'd,* 1997 WL 829211 (2d Cir. December 19, 1997), court decision printed at 56 Agric. Dec. 1790 (1997), (Havana's failure to pay 66 sellers $1,960,958.74 for 345 lots of perishable agricultural commodities during the period of February 1993 through January 1994 constitutes willful, flagrant and repeated violations of 7 U.S.C. § 499b(4), and Havpo's failure to pay 6 sellers $101,577.50 for 23 lots of perishable agricultural commodities during the period of August 1993 through January 1994 constitutes willful, flagrant and repeated violations of 7 U.S.C. § 499b(4)); and *In re Five Star Food Distributors*, 56 Agric. Dec. 880, at 896-97 (1997) (holding that 174 violations involving 14 sellers and at least $238,374.08 over a 11 month period were "willful, repeated, and flagrant, as a matter

(continued...)

extended period during which Respondent must have known that it did not possess sufficient funds to comply with the payment requirements of the PACA establishes that the violations were willful. It is not necessary to find that Respondent made any of the purchases alleged with a deliberate intent not to pay for such purchases in order to conclude that its actions were willful. Respondent recklessly and negligently continued to make new purchases while being many months past due in making payment for prior purchases subject to the Act. Respondent's answer acknowledges that Respondent continued to make produce purchases until forced to seek relief in bankruptcy after one of its creditors obtained a temporary restraining order on August 18, 1999. Such conduct is willful.

A violation 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.[8] A more stringent definition of the word "willfulness," as that word is used in 5 U.S.C. § 558(c), has been followed in the Fourth and Tenth Circuits. A willful violation has been defined in these Circuits as an intentional misdeed or such gross neglect of a known duty as to be the equivalent of an intentional misdeed.[9] Even under this more stringent definition, the Department's Judicial Officer has determined that payment violations similar to the violations established by Respondent's admissions would still be willful because of a gross neglect of the express provisions of the PACA known by Respondent to require prompt payment. *See, In re Five Star Food Distributors, Inc., supra*, at 897, where the Judicial Officer explained:

(...continued)
of law").

[8] *See*, *Cox v. USDA*, 925 F.2d 1102, 1105 (8th Cir.), *reprinted in* 50 Agric. Dec. 14 (1991), *cert. denied*, 502 U.S. 560 (1991); *Finer Foods Sales Co. v. Block*, *supra*, 708 F.2d at 777-78; *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 997 (1991); *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 Five Star Food Distributors, Inc., supra,* at 896*; In re Havana Potatoes of New York Corp., and Havpo*, *Inc.*, *supra*, at 1244.

[9] *See*, *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); and *Capital Packing Co. v. United States*, 350 F.2d 67, 78-79 (10th Cir. 1965).

> Respondent knew or should have known that it could not make prompt payment for the large amount of perishable agricultural commodities it ordered. Nonetheless, Respondent continued over an 11 month period to make purchases knowing it could not pay for the produce as the bills came due. Respondent should have made sure that it had sufficient capitalization with which to operate. It did not, and consequently could not pay its suppliers of perishable agricultural commodities. Respondent deliberately shifted the risk of nonpayment to sellers of the perishable agricultural commodities. Under these circumstances, Respondent has both intentionally violated the PACA and operated in careless disregard of the payment requirements in section 2(4) of the PACA (7 U.S.C. § 499b(4)), and Respondent's violations are, therefore, willful. *In re Hogan Distrib., Inc., supra*, 55 Agric. Dec. at 630; *In re The Norinsberg Corp.,* 52 Agric. Dec. 1617, 1622 (1993), *aff'd*, 47 F.3d 1224 (D.C. Cir.), *cert. denied*, 116 S. Ct. 474 (1995); *In re Kornblum & Co.*, 52 Agric. Dec. 1571, 1573-74 (1993); *In re Full Sail Produce, Inc.*, 52 Agric. Dec. 608, 622 (1993); *In re Vic Bernacchi & Sons, Inc.,* 51 Agric. Dec. 1425, 1429 (1992); *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1641 (1976), *aff'd per curiam*, 568 F.2d 772 (4th Cir.)(Table), *cert. denied*, 439 U.S. 819 (1978).

The situation in the present proceeding is virtually identical to that in *Five Star*. Respondent reported in Exhibit A to its Voluntary Petition having total assets of $254,000.00 and total liabilities of $1,004,398.00 as of August 30, 1999. Respondent has reported in bankruptcy Schedule B-Personal Property that the "accounts receivable of the business" have a current market value of $180,000.00. Respondent must have known at the time that it made most of the purchases of perishable agricultural commodities for which it has failed to pay that its financial condition was so impaired as to preclude compliance with the "make full payment promptly" requirement of section 2(4) of the PACA (7 U.S.C. § 499b(4)). Under this section of the PACA and the substantive regulations that define prompt payment, 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. Respondent has not disputed in its answer, and, therefore, has admitted that payment was due in the transactions involved in this proceeding on the payment due dates asserted in the complaint, which dates were either 10 days after the relevant delivery dates or such other number of days as was set forth in writing on the unpaid sales invoices. By scheduling some $573,089.73 of this interstate produce debt as unsecured debt in its Chapter 7 bankruptcy proceeding, Respondent has acknowledged that funds do

not exist for the full payment of these debts. Accordingly, Respondent willfully violated section 46.2(aa) of the regulations which provides:

> 'Full payment promptly' is the term used in the Act in specifying the period of time for making payment without committing a violation of the Act. Insofar as pertinent here, 'Full payment promptly' for the purpose of determining violations of the Act, means:
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> . . . .
>
> (5) Payment for produce purchased by a buyer, within 10 days after the day on which the produce is accepted;
>
> . . . .
>
> (11) Parties who elect to use different times of payment than those set forth in paragraphs (aa) (1) through (10) of this section must reduce their agreement to writing before entering into the transaction and maintain a copy of the agreement in their records. If they have so agreed, then payment within the agreed upon time shall constitute "full payment promptly", Provided, That the party claiming the existence of such agreement for time of payment shall have the burden of proving it.

7 C.F.R. § 46.2(aa)(5),(11)

The Department's Judicial Officer has held that obviously meritless denials and affirmative defenses do not require a PACA hearing, and has placed the burden on the Respondent to show a substantial issue requiring a hearing. *In re Fava & Co.*, 44 Agric. Dec. 870 (1985). The United States Court of Appeals for the District of Columbia Circuit in upholding the Department's reliance upon admissions made in a bankruptcy proceeding has expressly noted that the Department's view in *Fava* accorded with its rulings that an agency may ordinarily dispense with a hearing when no genuine dispute exists. See *Veg-Mix, Inc., et al. v. USDA*, 83 F.2d 601 (1987), *reprinted* at 55 Agric. Dec. 537, 542 (1996). Respondent's assertion that it "unwilfuly violated section 2(4) of the PACA" because of "uncollectable receivables which we had no control over" does not establish the existence of a genuine dispute requiring the holding of a hearing in this proceeding. A similar denial of willfulness was rejected without hearing in *Peter DeVito Company, Inc.*, 57 Agric. Dec. 830 (1997). The Administrative Law Judge concluded that:

> Respondent's failures to pay for numerous and substantial produce obligations, which respondent has acknowledged as liquidated, undisputed and non contingent debts, within the time limits established by a substantive regulation duly promulgated under the PACA are wilful as a matter of law, and respondent's denials in its answer that "it willfully failed to promptly pay the prices therefor" and "it wilfully and flagrantly violated Sec. 2(4) of the P.A.C.A. (7 U.S.C. sec. 499b(4))" do not establish the existence of a *bona fide* dispute as to material facts that would require the holding of a hearing pursuant to the Rules of Practice in the proceeding.

57 Agric. Dec. at 835 (1997)

Respondent has sought to place the blame for its "unwilful," repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) on the existence of uncollectible receivables. The financial difficulties excuse that Respondent has asserted, even if established to be factually accurate, would also have no material effect on the determination of proper sanction in this proceeding. It has been the Department's sanction policy since 1991 to examine the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, as set forth in *In re S.S. Linn County, Inc.*, 50 Agric. Dec. 476 (1991). Yet, the adoption of this sanction policy has not altered the doctrine in *In re Caito Produce Co.*, 48 Agric. Dec. 602 (1989) that because of the peculiar nature of the perishable agricultural commodities industry, and the 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, or a substitute finding of willful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) and publication of the facts and circumstances of the violation in cases where the license has terminated, where there have been repeated failures to pay a substantial amount of money over an extended period of time. *In re Hogan Distributing, Inc.*, 55 Agric. Dec. 622 (1996); and see *Atlantic Produce Co. and Joseph Pinto*, 54 Agric. Dec. 701 (1995), at 712, where the Judicial Officer has noted that "even though 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 flagrant or wilful."

The Judicial Officer recently reaffirmed the Department's policy of dispensing with a hearing and relying upon clear admissions made by a Respondent in other court proceedings, noting that the undisputed facts so admitted need not prove all

the allegations in the complaint. In this case, *In re Kirby Produce Company*, 58 Agric. Dec. 1011 (1999), the same finding that Respondent's failures to make full payment promptly constituted willful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) would have been issued unless the proven violations had been determined to be *de minimis*. *Id*. at 1025-27.

Respondent does not currently have a valid PACA license. As a result, the proper sanction for its admitted violations is a finding that it committed willful, flagrant and repeated violations of section 2(4) of the PACA and an order that the facts and circumstances of its violations be published. See, *In re Kirby Produce Company*, 58 Agric. Dec. 1011 (1999); *In re H. Schnell & Company, Inc.*, 58 Agric. Dec. 1002 (1999); *In re Hogan Distributing, Inc.*, 55 Agric. Dec. 622, 633 (1996); *In re National Produce Co*., *Inc.,* 53 Agric. Dec. 1622, 1626 (1964). A civil penalty is not appropriate in lieu of a finding of the commission of willful, flagrant and repeated violations when, as herein, a Respondent has not made full payment of its produce obligations. *In re H. Schnell & Company, Inc.*, *supra* at 1010-11. A civil penalty is never appropriate in "no pay" cases. *In re Scamcorp, Inc., d/b/a Goodness Greeness,* 57 Agric. Dec. 527, 570-71 (1998). Accordingly, the following Order is issued.

Order

Respondent Scarpaci Brothers, Inc. has committed willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

The facts and circumstances set forth herein shall be published.

This order shall become final and effective without further proceeding 35 days after service thereof upon Respondent, unless there is an appeal to the Judicial Officer 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 effective October 6, 2001 – Editor]

_____

In re: F. STEA & SON, INC.
PACA Docket No. D-01-0003.
Decision Without Hearing by Reason of Default.
Filed August 28, 2001.

Andrew Stanton, for Complainant.
Respondent, Pro se.

Decision 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*.), hereinafter referred to as the "Act", instituted by a complaint filed on October 25, 2000, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period September 1999 through October 1999, Respondent failed to make full payment promptly to six sellers the agreed purchase prices in the total amount of $424,948.00 for 32 lots of perishable agricultural commodities that Respondent purchased, received and accepted in interstate and foreign commerce.

A copy of the complaint was served upon Respondent, and it 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. F. Stea & Son, Inc. (hereinafter, "Respondent"), is a corporation organized and existing under the laws of the State of Pennsylvania. Its mailing address is 3300 South Galloway Street, Unit 90, Philadelphia, Pennsylvania 19148.

2. At all times material herein, Respondent was licensed under the provisions of the PACA. License number 981954 was issued to Respondent on September 17, 1998. This license terminated on September 17, 2000, 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. As more fully set forth in paragraph 3 of the complaint, Respondent, during the period September 1999 through October 1999, failed to make full payment promptly to six sellers the agreed purchase prices in the total amount of $424,948.00 for 32 lots of perishable agricultural commodities that Respondent purchased, received and accepted in interstate and foreign commerce.

Conclusions

Respondent's failure to make full payment promptly with respect to the transactions set forth in Finding of Fact 3 above, constitutes 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

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 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 thirty days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139, 1.145).

Copies hereof shall be served upon the parties.

[This Decision became effective November 11, 2001.-Editor]

In re: GARDEN FRESH FRUIT MARKET, INC.
PACA Docket No. D-01-0011.
Decision Without Hearing By Reason of Default.
Filed September 6, 2001.

Ruben D. Rudolph, Jr., for Complainant.
Respondent, Pro se.
Decision issued by James W. Hunt, Administrative Law Judge.

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 1, 2001, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture.

The Complaint alleges that during the period August 23, 1998, through June 24, 1999, Respondent, Garden Fresh Fruit Market, Inc., (hereinafter "Respondent") failed to make full payment promptly to 28 sellers of the agreed purchase prices, or balances thereof, in the total amount of $394,961.67 for 164 lots of fruits and vegetables, which it received, accepted, and sold in interstate and foreign

commerce.

A copy of the Complaint was served upon Respondent by certified mail on July 9, 2001. Respondent did not file an answer. 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 procedure or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. §1.139).

Finding of Fact

1. Respondent is a corporation whose business address is 126 Valencia N.E., Suite A, Albuquerque, New Mexico 87198, and whose mailing address is 300 Airport Road, N.W., Albuquerque, New Mexico 87121.

2. At all times material herein, Respondent was licensed under the provisions of the Act. License number 951755 was issued to Respondent on August 9, 1995. This license terminated on August 9, 2000, pursuant to section 4(a) of the Act (7 U.S.C. §499d(a)), when Respondent failed to pay the required annual renewal fee.

3. The Secretary has jurisdiction over Respondent and the subject matter involved herein.

4. As set forth more fully in paragraph III of the Complaint, during the period August 23, 1998, through June 24, 1999, Respondent failed to make full payment promptly to 28 sellers of the agreed purchase prices, or balances thereof, in the total amount of $394,961.67 for 164 lots of fruits and vegetables, which it received, accepted, and sold in interstate and foreign commerce.

Conclusions

Respondent's failure to make full payment promptly with respect to the transactions set forth in Finding of Fact Number 4 above, constitutes willful, flagrant, and repeated violations of section 2(4) of the Act (7 U.S.C. §499b(4)), for which the Order below is issued.

A finding is made that Respondent has committed willful, flagrant, and repeated violations of section 2(4) of the Act (7 U.S.C. §499b), and the facts and circumstances set forth above shall be published.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings after 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 October 15, 2001. - Editor]

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In re: TWO BROTHERS WHOLESALE FRUIT & PRODUCE, INC.
PACA Docket No. D-01-0004.
Decision Without Hearing by Reason of Default.
Filed September 25, 2001.

Christopher P. Young-Morales, for Complainant.
Respondent, Pro se.
Decision issued by James W. Hunt, Administrative Law Judge.

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 November 15, 2001, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The Complaint alleges that during the period February 1999 through January 2000, Respondent purchased, received, and accepted, in interstate and foreign commerce, from 22 sellers, 740 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices in the total amount of $342,602.16.

A copy of the Complaint was served upon Respondent; Respondent did not answer the Complaint. The time for filing an answer having expired, 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 is a corporation organized and existing under the laws of the state of Massachusetts. Its business address was 105 Second Street, Chelsea, Massachusetts 02150. Its current mailing address is 405 Mariners Hill Road, Marshfield, Massachusetts, 02050.

2. At all times material herein, Respondent was licensed under the provisions of the PACA. Pursuant to the licensing provisions of the Act, license number 971428 was issued to Respondent on May 12, 1997. This license terminated on May 12, 2000, pursuant to Section 4(a) of the Act (7 U.S.C. § 499d(a)) when it was

not renewed.

3. As more fully set forth in paragraph III of the Complaint, during the period February 1999 through January 2000, Respondent purchased, received, and accepted, in interstate and foreign commerce, from 22 sellers, 740 lots of fruits and vegetables, all being perishable agricultural commodities, and failed to make full payment promptly of the agreed purchase prices, in the total amount of $342,602.16.

Conclusions

Respondent's failure to make full payment promptly with respect to the 740 transactions set forth in Finding of Fact No. 3, above, constitutes willful, flagrant and repeated violations of Section 2(4) 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 of the violations 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 effective November 18, 2001. - Editor]

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In re: BOVA FRUIT CO., INC., WHOLESALE FRUITS & VEGETABLES.
PACA Docket No. D-01-0008.
Decision Without Hearing by Reason of Default.
File September 26, 2001.

Ruben Rudolph, for Complainant.

Respondent, Pro se.
Decision and Order filed 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 February 1, 2001, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture.

The Complaint alleges that during the period September 12, 1998, through September 15, 1999, Respondent, Bova Fruit Co., Inc., Wholesale Fruits & Vegetables, (hereinafter "Respondent") failed to make full payment promptly to 79 sellers of the agreed purchase prices, or balances thereof, in the total amount of $1,935,386.99 for 604 lots of fruits and vegetables, which it received, accepted, and sold in interstate and foreign commerce.

A copy of the Complaint was served upon Respondent by certified mail on April 3, 2001. Respondent did not file an answer. 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 procedure or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. §1.139).

Finding of Fact

1. Respondent is a corporation whose business address is 342 Massachusetts Avenue, Suite 500, Indianapolis, Indiana 46204-2132.

2. At all times material herein, Respondent was licensed under the provisions of the Act. License number 154994 was issued to Respondent on November 16, 1954. This license terminated on November 16, 1999, pursuant to section 4(a) of the Act (7 U.S.C. §499d(a)), when Respondent failed to pay the required annual renewal fee.

3. The Secretary has jurisdiction over Respondent and the subject matter involved herein.

4. As set forth more fully in paragraph III of the Complaint, during the period September 12, 1998, through September 15, 1999, Respondent failed to make full payment promptly to 79 sellers of the agreed purchase prices, or

balances thereof, in the total amount of $1,935,386.99 for 604 lots of fruits and vegetables, which it received, accepted, and sold in interstate and foreign commerce.

Conclusions

Respondent's failure to make full payment promptly with respect to the transactions set forth in Finding of Fact Number 4 above, constitutes willful, flagrant, and repeated violations of section 2(4) of the Act (7 U.S.C. §499b(4)), for which the Order below is issued.

A finding is made that Respondent has committed willful, flagrant, and repeated violations of section 2(4) of the Act (7 U.S.C. §499b), and the facts and circumstances set forth above shall be published.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings after 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 effective on November 7, 2001 – Editor]

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In re: THE CALLIF CO.
PACA Docket No. D-01-0013.
Motion for Decision Without Hearing.
Filed October 3, 2001.

Ann Parnes, 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 April 10, 2001, by the

Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture.

The complaint alleges that during the period July 1999 through May 2000, Respondent failed to make full payment promptly to 15 sellers in the total amount of $496,207.28 for 473 lots of perishable agricultural commodities that it purchased, received and accepted in interstate commerce.

A copy of the complaint was served upon Respondent on May 29, 2001. This 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. The Callif Co., (hereinafter "Respondent"), is a corporation organized and existing under the laws of the State of Ohio. Its business mailing address is 4561 East 5th Avenue, Columbus, Ohio 43219.
2. At all times material to the allegations in the complaint, Respondent was licensed under the provisions of the PACA. License number 881195 was issued to Respondent on May 13, 1988. This license terminated on May 13, 2000, 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. The Secretary has jurisdiction over Respondent and the subject matter involved herein.
4. As set forth in paragraph III of the complaint, during the period July 1999 through May 2000, Respondent purchased, received and accepted in interstate commerce 473 lots of perishable agricultural commodities from 15 sellers, but failed to make full payment promptly of the agreed purchase prices or balance thereof in the total amount of $496,207.28.

Conclusions

Respondent's failure to make full payment promptly with respect to the transactions set forth in Finding of Fact No. 4 above, constitutes willful, flagrant, and repeated 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, flagrant and repeated violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)), and the facts and circumstances of the violations, 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 withing 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 effective December 3, 2001 – Editor]

CONSENT DECISIONS

(Not published herein - Editor)

PERISHABLE AGRICULTURAL COMMODITIES ACT

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AGRICULTURE DECISIONS

Volume 60

July - December 2001
Part Four
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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

AGRICULTURE DECISIONS

AGRICULTURE DECISIONS is an official publication by the Secretary of Agriculture consisting of decisions and orders issued in adjudicatory administrative proceedings conducted for the Department under various statutes and regulations. 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 number, e.g., AWA Docket No. 99-0022, 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 consent decisions is included. Consent decisions are on file and may be inspected upon request made to the Hearing Clerk, Office of Administrative Law Judges.

Beginning in Volume 60, each part of AGRICULTURE DECISIONS has all the parties for that volume, including consent decisions, listed alphabetically in a supplemental List of Decisions Reported. The alphabetical List of Decisions Reported and the subject matter Index are included in a separate volume, entitled Part Four.

Direct all inquiries regarding this publication to: Editor, Agriculture Decisions, Office of Administrative Law Judges, U.S. Department of Agriculture, Room 1082 South Building, Washington, D.C. 20250-9200, Telephone: (202) 720-6645, Fax (202) 690-0790, and e-mail address of Editor.OALJ@usda.gov.

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