AGRICULTURE DECISIONS

Volume 61

July – December 2002

UNITED STATES DEPARTMENT
OF AGRICULTURE

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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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DEPARTMENTAL DECISION

In re: SUN WORLD INTERNATIONAL, INC.
AMA Docket No. F&V 925-1.
Decision and Order.
Filed November 7, 2002.

AMAA – Grapes – 15A proceedings – Rule making – Decision criteria.

The Secretary created a regional grape marketing order which did not provide criteria or guidelines for the producer's committee other than the "primary objective of promoting the orderly marketing of grapes." The Administrative Law Judge (ALJ) directed the regional grape producer committee operating under the marketing order to formulate rules and regulations relating the granting or withholding of a request for suspension of a "picking holiday." The committee had heretofore operated granted or rejected the application of a "picking holiday" based upon a informal telephone role call without any reason required to be given. Petitioner contended that the present voting methods of the committee did not reflect the needs of a minority producer which was adversely affected by non-US grape producers and which were not operating under any "picking holiday."

Brian C. Leighton, for Complainant.
Brian T. Hill, for Respondent.
Decision and Order by Chief Administrative Law Judge, James W. Hunt.

Decision

This is a proceeding under section 15(a) of the Agricultural Marketing Agreement Act of 1937, as amended, (7 U.S.C. § 608c(15)(A))("Act"), and the Order regulating the handling of grapes in a designated area of South-Eastern California (9 C.F.R. § 925) ("Order"). In an amended petition, Petitioner, Sun World International, Inc., seeks a modification of certain provisions of the Order, and/or an exemption therefrom, or from any decision or obligation that is not in accordance with law imposed by the Committee that administers the Order. In its answer, Respondent, Agricultural Marketing Service, United States Department of Agriculture, states that the Act and Order "as interpreted by Respondent and his agents and employees, were and are fully in accordance with law and binding on Petitioner" and that the amended petition should therefore be dismissed.

A hearing was held on May 8, 2002, in Palm Springs, California. Petitioner was represented by Brian C. Leighton, Esq. Respondent was represented by Brian T. Hill, Esq.

Facts

Petitioner, Sun World International Inc., ("Sun World") has its principal business address at 16350 Driver Road, Bakersfield, California 93308. Its operations include producing, packing, marketing and shipping grapes in Coachella Valley, Riverside County, California, an area covered by a Marketing Order regulating the handling of table grapes grown in South-Eastern California. Sun World is the third or fourth largest grape producer in Coachella Valley.

Sun World markets its grapes in all states and in some foreign countries. It has developed and holds patents on the grape varieties it grows which, it says, are distinct from other grapes grown in Coachella Valley. It markets the grapes under their tradenames.

The grape harvesting season in Coachella starts in May when the Perlet, a variety grown by other producers but not by Sun World, ripens. The next varieties to ripen and be harvested are Sun World's Superior Seedless, Coachella Seedless and Midnight Beauty. The next variety to ripen is the Thompson which is grown by other producers. There is some overlap in the harvesting of the Perlets and Sun World's Superior Seedless and then again some overlap in the Superiors and the Thompsons. However, there is a "window" when only Superiors are picked. According to Kevin Andrew, Sun World's Senior Vice President for Operations, there are about two weeks during the season when Superiors constitute the bulk of the grapes being harvested. Sun World says that many retailers prefer its Superiors to other varieties and that the only competition for its Superiors comes from Arizona and Mexico where a variety similar to the Superior is grown. Sun World says that the Mexican grape is a "rip off" of its Superior Seedless brand. (Tr. 19-21, 25, 94, 246-247.)

After the grapes are picked they are packed in containers and then placed in a cooler for four to six hours until they are cool enough to ship. Sun World states that it tries to ship the grapes soon after they are harvested when they are in optimum condition and that the price for grapes is highest at the beginning of the season and then declines towards the end. (Tr. 22, 23, 45, 75.)

The Marketing Order allows grapes to be packed in containers for shipment Monday through Friday, but prohibits them from being packed on Saturday, Sunday, Memorial Day, or the Fourth of July. This is referred to by industry members as the "picking holiday." However, the Marketing Order gives the Committee administering the Order the discretion to allow a suspension of the picking holiday. The twelve-person Committee is comprised of producers and handlers. Sun World has one representative on the Committee.

Sun World states that as a result of the picking holiday it sometimes has no grapes to market on Sunday after it has sold those packed on Friday even though there is a demand for its grapes on weekends from its customers. It states that it sells to retailers like Albertsons, as well as making some spot market sales, and that

its customers want to receive its grapes on Sunday as well as on other days. It says it prefers to make commitments to its customers in advance that it will supply them with grapes. It contends that it is not feasible to hire untrained extra labor to harvest and store grapes to meet its weekend demand, that it is not economically feasible to spend millions for more cooling storage capacity that will be used for only a few days, and that the quality of the grapes also diminish when they are stored. It says that when grapes are ready for harvesting they do not "take the weekend off" and that the inability to pack grapes on a weekend extends the four or five week harvest season for the Superiors an extra week when the price for the grapes declines. (Tr. 22, 127.)

Sun World alleges that, while the Committee has granted requests for a suspension of the picking holiday for other producers, it has declined requests from Sun World to suspend the holiday when it is harvesting its grapes.

In 2001, Sun World requested permission from the Committee to pack grapes on Saturday, June 16, and Saturday June 23. The request for June 23 was to pack its Coachella Seedless, Superior Seedless, and Midnight Beauty. The requests were denied. Mike Aiton, Sun World's Senior Vice President for Sales and Marketing, testified he has never been given a reason for a denial of Sun World's request for a suspension. He said that when he discussed the matter with Committee members he was told that Sun World should hire more workers, get a larger cooler, and not pack so many varieties of grapes. He said that these are attempts to tell Sun World how to run its business whereas the reason for the picking holiday is to control volume and prices and that at the time the Marketing Order was adopted Coachella produced almost one hundred percent of the table grapes. Now, he said, Coachella no longer controls the market price because of competition from Mexico which has no picking holiday. (Tr. 36, 64, 107, 120, 135.)

Andrew said that there was no oversupply of grapes when Sun World requested a suspension for June 23. Timothy Shaheen, Sun World President, testified that when Sun World's request for a suspension of the picking holiday was denied it was unable to fulfill its commitment to supply Albertsons with its Coachella-grown grapes and had to obtain grapes from Mexico. (Tr. 79, 121, 125, 135.)

When a producer files a request for a suspension of the picking holiday, the Chairman of the Committee directs the Committee manager to poll the Committee members by phone. The person making the request is not identified. The Committee members do not discuss the request and do not have to give any reason for their vote. The Manager then records the results of the vote. Robert Bianco, former Committee Chairman, said that most requests are denied. He also said that although the name of the person making the request is not disclosed, producers all know what their "neighbors are doing" and the current chairman, Mike Bozick, said that Committee members know what grapes are being picked. Respondent,

Agricultural Marketing Service ("AMS"), is notified of the vote result but does not approve or disapprove. The decision whether to suspend or not to suspend the picking holiday is entirely up to the Committee. (Tr. 175, 202-203, 215, 243, 245.)

Neither Respondent nor the Committee presented any standards that the Committee is to consider in deciding whether to allow a suspension of the picking holiday. Bozick testified that the Marketing Order is for the benefit of the industry and that the picking holiday should be suspended only if all producers are affected and should not be suspended just for the benefit of one producer. He believed that this criteria was understood by Committee members. He cited weather conditions and the inability of all producers to get their grapes to market as two examples of reasons for allowing a suspension of the picking holiday. (Tr. 156, 158, 176-177, 185, 191-192, 201.)

Bozick said that the production of Coachella grapes has not declined, but that its percentage of the market has decreased and that it would be "disastrous" not to have a picking holiday. He testified that "Nobody buys grapes on Saturday or Sunday, nobody." He said that on Monday morning the wholesale market is down and that it is also a traditionally bad marketing day with few shipments and low prices. However, he said that he did not know if this was true for the sale of Sun World's grapes. Bozick said he can "play the market" by storing his grapes in a cooler for up to three or four weeks to wait for a higher price. He said he voted no to Sun World's request for a suspension on June 23, 2001, because of the volume of grapes on the market. However, he also said that he did not know the supply of Sun World's Superior Seedless grapes at the time. (Tr. 79, 156, 157, 170-172, 181, 188, 197.).

Robert Bianco, former Chairman of the Committee, testified that Respondent AMS has never provided the Committee with any information that the Committee is to consider in deciding whether to suspend the picking holiday. He said it "wouldn't be right" and "doesn't work" to suspend the holiday for just one grower because "if we let one do it then another person would do it and then another person. You wouldn't be able to trust everybody that came in and told you I have a willing buyer." He testified that when grapes are picked on Saturday there are more picked than can be sold and that this creates an excess supply which depresses the price, but that in a "very rare situation" there would be no oversupply if the producer had a customer for the grapes it picked on Saturday. He said a vote on a suspension could be based on any reason and that when he voted for a suspension it had been because of the weather, a "late season," or some "anomaly." He also said he had voted for a late season suspension when only one to three persons were affected because he did not think it "makes any difference." (Tr. 212, 219-220, 228, 235, 237.)

Bianco said that Perlets and Thompsons compete with Sun World's Superior

Seedless but that there is a window when only Superiors are available. He acknowledged that some grocery chains specifically ask for Superiors, but said that to allow the chains to "dictate what an industry is going to do" does not provide for an "orderly market." (Tr. 247-248.)

Discussion

"Grapes Grown in a Designated Area of South-Eastern California," the marketing order involved in this proceeding, is set forth in 7 C.F.R. § 925 *et seq.* Section 925.52 provides:

> (a) The Secretary shall regulate, in the manner specified in this section, the handling of grapes upon finding from the recommendations and information submitted by the committee, or from other available information, that such regulation would tend to effectuate the declared policy of the act. Such regulation may . . . .(5) establish holidays by prohibiting the packing of all varieties of grapes during a specified period or periods.

7 C.F.R. § 925.304 provides for the establishment of such holidays:

> During the period April 20 through August 15 of each year, no person shall pack or repack any variety of grapes except Emperor, Almeria, Calmeria, and Ribier varieties, on any Saturday, Sunday, Memorial Day, or the observed Independence Day holiday, unless approved in accordance with paragraph (e) of this section, nor handle any variety of grapes except Emperor, Calmeria, Almeria, and Ribier varieties, unless such grapes meet the requirements in this section. . ..

The Secretary stated that the purpose of the picking holiday was to "avoid an oversupply of grapes early in the week." 51 FR 10220 (March 25, 1986).

Section 925.20 of the Order provides for the establishment of a committee to administer the Order (California Desert Grape Administrative Committee) whose powers, as set forth in section 925.28, include "To make and adopt rules and regulations to effectuate the terms and provisions of this part." The Committee's authority includes, in section 925.304(e), the power to suspend the picking holiday: "Upon approval of the committee, the prohibition against packing or repacking grapes on any Saturday or Sunday, or on the Memorial Day or Independence Day holidays of each year, may be modified or suspended to permit the handling of grapes provided such handling complies with procedures and safeguards specified by the committee."

This action and other actions by the Committee are subject to the Secretary's

(i.e. AMS') review: "Each and every regulation, decision, determination or other act of the committee shall be subject to the continuing right of the Secretary to disapprove of the same at any time." (7 C.F.R. § 925.62.)

Sun World contends that section 925.304(e) of the Order (7 C.F.R. § 925.304(e)) is unlawful and should be set aside because the Secretary is not involved in the decision whether to suspend the picking holiday; that the Order requiring a picking holiday is arbitrary and capricious because at the time the Order was adopted providing for a picking holiday Coachella had one hundred percent control of the table grape market whereas since then it has lost market shares to Mexico; that the delegation to the Committee to allow a suspension of the picking holiday is unlawful because the delegation does not provide "any criteria, rules, regulations, or even any involvement by USDA"; and that the authority of the Committee to suspend or not to suspend the picking holiday is not in accordance with law under 5 U.S.C. § 706(2)(A). This statutory provision provides that "The reviewing court shall - . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . ."

Respondent, AMS, denies Sun World's allegations and urges that the petition be dismissed.

The Secretary may delegate decision-making authority in a marketing order to an administrative committee comprised of industry members.

> Congress has approved the use of such producer-controlled committees on the theory that the most sound decisions will result from permitting those in the area with the greatest knowledge of the industry's needs to make recommendations to the Secretary. *Chiglades Farm LTD v. Butz,* 485 F.2d 1125, 1134 (5th Cir. 1973).

The Secretary does not have to be involved in the committee's decision-making as long as the Secretary retains the ultimate authority to review and void decisions by the committee. *Wileman Bros, et al.,* 49 Agric. Dec., 705, 822 (1990).

In this proceeding, the Secretary (AMS), while not involved in the Committee's decisions concerning whether to suspend the picking holiday, was informed of the Committee's actions. As the Order (7 C.F.R. § 925.62) clearly provides that the Secretary retains ultimate authority to void actions by the Committee, the delegation in itself was not unlawful.

Sun World's contention that changed circumstances (decline in market share) now makes the picking holiday invalid is likewise without merit. The Order's validity must be judged on the circumstances contained in the rulemaking record on which the Secretary based the Order and not on the circumstances presented later

in a proceeding brought under section (15)(A) of the Act. Therefore, if as Sun World contends "circumstances have changed so that the Order no longer produces equitable results, the remedy is through the amendatory process -- not through a § 8c(15)(A) proceeding." *Sequoia Orange Co., Inc.,* 41 Agric. Dec. 1511, 1522 (1982). "[A]ny new, relevant evidence bearing upon the validity of the Order must be presented first to the Secretary in his legislative [rulemaking] and not in his judicial [(15)(A)] capacity." *Belridge Packing Corp.,* 48 Agric. Dec. 16, 38 (1989). The Order overall is therefore presumed valid until such time as the Secretary determines otherwise.

However, there is merit in Sun World's challenge to Respondent's delegation of authority to the Committee on the ground that the Committee was not provided "any criteria" to guide it in the exercise of its authority.

When an agency delegates decision-making authority to a private party, as Respondent has done here in its legislative (rulemaking) capacity by delegating authority to a Committee comprised of the grape industry's producers and handlers, the agency has the responsibility to provide guidance in the form of standards that the party is to follow in exercising its delegated authority.

> These [omitted] opinions still stand for the proposition that a legislative body cannot constitutionally delegate to private parties the power to determine the nature of rights to property in which other individuals have a property interest, without supplying standards to guide the private parties' discretion. Otherwise, "administrative decision-making [will be] made potentially subservient to selfish or arbitrary motivation or the whims of local taste." *General Elec. v. New York State Dept. of Labor,* 936 F.2d 1448, 1455 (CA 2 1991).

The Committee has admittedly received no guidelines from Respondent on how to exercise its delegated authority to suspend the picking holiday. The only standard that can be inferred from the Order itself is that a suspension not create an oversupply of grapes. The Committee, however, did not contend that a suspension permitting Sun World to pack its grapes on the specified Saturdays would have adversely affected other producers and it did not deny that Sun World had retail customers for the grapes it proposed to pack on Saturday so as not to create an oversupply. I also find that Sun World had customers for the grapes it would have packed on Saturday. The Committee's justification for its denial of Sun World's request for a suspension of the picking holiday is its claim that the Order is for the benefit of all members of the industry and that whether a suspension should be allowed should be based on whether it will benefit all industry members and not just one.

When the regulations were promulgated, however, the Secretary stated that the Order's "primary objective is to promote orderly marketing of grapes. Consumers would benefit from a consistent supply of good quality fruit and growers would benefit from an expanded market." 45 FR 40565 (June 16, 1980). Nothing was said about preventing one producer from benefiting from a suspension as long as other producers would not be adversely affected, that is, the suspension would not create an oversupply of grapes.

As for the contention that the industry should not be dictated to by retailers who want grapes supplied to them on Sunday, this argument ignores the Secretary's intent that an objective of the Order is to benefit consumers as well as the industry. The demand by some retailers for Sun World's grapes on Sunday reflects consumer demand for, as the Order puts it, "a consistent supply of good quality fruit." The Committee's actions with respect to Sun World's attempt to satisfy this consumer demand when a suspension would not create an oversupply of grapes would appear to frustrate that objective.

Even assuming that the Committee's contention that a suspension should be allowed only if all industry members benefit is valid, the record fails to show that this was actually the reason followed by Committee members.[1] Rather, it shows that Committee members did not have to give any reason for the way they voted and Sun World was never given a reason. Moreover, the record shows that if this was a standard followed by some members, it was not a standard they consistently followed. They had allowed suspensions when only three persons, and possibly only one, would benefit. (Tr. 212.)

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[1]In its brief (page 12) Respondent appears to adopt this argument. Furthermore, any action taken by the Committee is considered that of the Secretary. *Chiglades Farm LTD, supra.* When Respondent, or its agent the Committee (*Kyer v. United States,* 369 F.2d 714, 717 (Ct.Cl. 1966)), makes a decision affecting the property interests of other persons (such as the ability of grape producers to market their product), they cannot do so on an *ad hoc* basis. *Morton v. Ruiz,* 415 U.S. 1055,1073 (1974). They must articulate a rational reason for their decision in order to withstand a challenge to the decision as being arbitrary or capricious and therefore invalid under 5 U.S.C. § 706(2)(A):

> The scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut.,* 463 U.S. 27, 41 (1983).

The contention that the only consideration in deciding whether to permit a suspension of the picking holiday is whether all industry members will benefit is not a satisfactory reason under the Order which has broader objectives. It may, however, conceivably be one of the factors for the Committee to consider.

I find that there were no standards for the Committee to follow when it made decisions on Sun World's requests to suspend the picking holiday. The delegation by Respondent to the Committee of this decision-making authority without providing rational standards for the Committee to follow is not in accordance with law under 5 U.S.C. § 706(2)(A).

Respondent shall be directed to void all decisions that may be made by the Committee concerning whether to suspend the picking holiday without standards prescribed by Respondent for the Committee to follow in exercising its decision-making authority under 5 C.F.R. § 925.304(e).

Findings of Fact

1. Petitioner, Sun World International, Inc., ("Sun World") produces, packs, markets and ships table grapes it grows in Coachella Valley, Riverside County, California.

2. Sun World's business address is 16350 Driver Road, Bakersfield, California 93308.

3. Sun World's grape operations in Coachella Valley are subject to a Market order for Grapes Grown in a Designated Area of South-Eastern California ("Order") (7 C.F.R. § 925).

4. The Order is administered by the California Desert Grape Administrative Committee ("Committee") (5 C.F.R. § 925.20).

5. The Committee is an agent of Respondent Agricultural Marketing Service.

6. The Order provides for a "picking holiday" when persons subject to the Order may not pack grapes (5 C.F.R. § 304).

7. The Order provides that the Committee may suspend the picking holiday (5 C.F.R. § 925.304(e)).

8. There were no standards for the Committee to follow when it made decisions whether to suspend the picking holiday.

Conclusion of Law

The Committee's failure to follow any standards for its decisions whether to suspend the picking holiday under 5 C.F.R. § 925.304(e) is not in accordance with law and is therefore in violation of 5 U.S.C.706(2)(A).

Order

Respondent, Agricultural Marketing Service, is directed to void any decision that may be made by the California Desert Grape Administrative Committee under

5 C.F.R. 925.304(e) that does not follow standards prescribed by Respondent.

This Decision will become final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer 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).

_____

ANIMAL WELFARE ACT

COURT DECISION

KARL MITCHELL, AN INDIVIDUAL; et al. v. USDA.
No. 01-71486.
(Cite as: 42 Fed. Appx. 991, 2002 WL 1941189 (9th Cir.))
Decided Aug. 22, 2002.

AWA – Arbitrary and Capricious, when not – Failure to file answer.

United States Court of Appeals,
Ninth Circuit.[1]

On Petition for Review of an Order of the Department of Agriculture. AGRI No. 01-0016.

Before: SCHROEDER, Chief Judge, TASHIMA and RAWLINSON, Circuit Judges.

MEMORANDUM[2]

Karl Mitchell, sole proprietor of All Acting Animals, petitions pro se for review of the Secretary of the United States Department of Agriculture's ("Secretary") decision to revoke his animal exhibitor's license and to impose a civil penalty of $16,775.00 for violations of the Animal Welfare Act ("AWA"), 7 U.S.C. §§ 2131-2159. We have jurisdiction pursuant to 7 U.S.C. § 2149(c). "[T]he scope of our review of administrative decisions is narrow: administrative agency decisions will be upheld unless arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Farley & Calfee, Inc. v. United States Dep't of Agric.,* 941 F.2d 964, 966 (9th Cir.1991) (internal quotation marks omitted). We deny the petition for review.

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[1]The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

[2]This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

Because Mitchell failed to file a timely answer to the complaint, he is deemed to have admitted the allegations of the complaint. *See* 7 C.F.R. §§ 1.136, 1.147(c)(1). Therefore, the record supports the Secretary's decision to sanction Mitchell for violations of the AWA. *See* 7 C.F.R. § 1.136(c), 1.139. Moreover, the Secretary's choice of sanction is not "unwarranted in law or unjustified in fact." *Balice v. United States Dep't of Agric.,* 203 F.3d 684, 689 (9th Cir.2000) (internal quotation marks omitted); *see also* 7 U.S.C. § 2149(a) & (b); 7 C.F.R. § 3.91(b)(2)(v).

Mitchell's remaining contentions lack merit.

PETITION FOR REVIEW DENIED.

ANIMAL WELFARE ACT

DEPARTMENTAL DECISIONS

In re: CINDY TINSLEY AND REGINALD TINSLEY.
AWA Docket No. 01-0009.
Decision and Order.
Filed March 11, 2002.

AWA – Missing records – Facility violations – Sanitation violations – Housekeeping violations – Animal health violations – Transportation of un-weaned puppies prohibited.

Respondents who owned a dog breeding kennel were charged with multiple violations of the Act occurring over several inspection visits. The Administrative Law Judge (ALJ) found that violations reported by inspector were credible and satisfied criteria to find Respondents in violation of AWA regulations and standards. Respondents made good faith effort to become compliant. Civil penalty and 30 day suspension of license imposed.

Colleen A. Carroll, for Complainant.
Daniel T. Moore, for Respondent.
Decision and Order by Chief, Administrative Law Judge, James W. Hunt.

This 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, under the Animal Welfare Act, as amended, 7 U.S.C. § 2131 ("Act"). The complaint alleges that Respondents violated the Act and the regulations (9 C.F.R. § 2.1 *et seq.*) ("regulations") and the standards (9 C.F.R. § 3.1 *et seq.*) ("standards") issued under the Act.

A hearing was held on June 20 and 21, 2001, in St. Louis, Missouri. Complainant was represented by Colleen A. Carroll, Esq. Respondents were represented by Daniel T. Moore, Esq.

Law

The complaint alleges that Respondents violated the following regulations and standards:

§ 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;

. . . .

§ 2.54 Lost tags.

Each dealer or exhibitor shall be held accountable for all official tags acquired. In the event an official tag is lost from a dog or cat while in the possession of a dealer or exhibitor, the dealer or exhibitor shall make a diligent effort to locate and reapply the tag to the proper animal. If the lost tag is not located, the dealer or exhibitor shall affix another official tag to the animal in the manner prescribed in § 2.50, and record the tag number on the official records.

. . . .

§ 2.75 Records: Dealers and exhibitors.

(a)(1) Each dealer, other than operators of auction sales and brokers to whom animals are consigned, and each 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 dealer or 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 of 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.

§ 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.

. . . .

(d) Unweaned puppies or kittens need not be individually identified as required by paragraphs (a) and (b) of this section while they are maintained as a litter with their dam in the same primary enclosure, provided the dam has been individually identified.

. . . .

§ 2.130 Minimum age requirements.

No dog or cat shall be delivered by any person to any carrier or intermediate handler for transportation, in commerce, or shall be transported in commerce by any person, except to a registered research facility, unless such dog or cat is at least eight (8) weeks of age and has been weaned.

. . . .

§ 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.

. . . .

(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 or cats must contain a roof, four sides, and a floor, and must:

. . . .

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

. . . .

§ 3.6 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;

. . . .

(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) of this subpart. Sanitation is achieved by using one of the methods

described in § 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 to ensure that there is no molding, deterioration, and caking of feed.

. . . .

§ 3.11 Cleaning, sanitization, housekeeping, 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, wetted, 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 wire 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.

(b) *Sanitization of primary enclosures and food and water receptacles.* (1) Used primary enclosures and food and water receptacles must be cleaned and sanitized in accordance with this section before they can be used to house, feed, or water another dog or cat, or social grouping of dogs and cats.

(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.

(d) *Pest control.* An effective program for the control of insects, external parasites affecting dogs and cats, and birds and mammals that are pests, must be established and maintained so as to promote the health and well-being of the animals and reduce contamination by pests in animal areas.

Statement of the Case

Respondents Cindy Tinsley and Reginald Tinsley own and operate a kennel at RR 6, Box 1147, Poplar Bluff, Missouri 63901. They have been breeding and selling dogs to dealers for ten years. They hold APHIS dealer license number 43-A-2148. The kennel averages about 80 adult dogs and 20 puppies. (Tr. 221, 230; CX 1.)

The alleged violations are based on the following six APHIS inspections of Respondents' facility: June 1 and November 23, 1998; May 24 and December 27, 1999; and May 23 and August 17, 2000.

The report for the inspection on June 1, 1998, does not indicate when the facility had previously been inspected, but stated that six items that had been identified at the previous inspection as not being in compliance with the regulations or standards had been corrected. However, it also stated that a non-compliant item relating to adequate shade for the animals had not been corrected. The report further stated that four new items had been identified as not being in compliance with the regulations or standards. These concerned the failure to completely fill out records on the disposition of animals (section 2.75(a)); the failure to remove unnecessary items from the tops of enclosures (section 3.11(c)); the failure to establish an effective program of rodent control (section 3.11(d)); and the failure to clean a feeder to remove moldy feed (section 3.9(b)). (CX 2.)

James Depue, the APHIS animal care inspector who had conducted the inspection and prepared the report, testified that 21 dogs did not have shade over their outdoor runs. (Tr. 102.) Respondent Carol Tinsley said that the sunscreen was damaged by a storm and that the animals had access to shade in their dog house. (Tr. 249.) Section 3.4(b) requires that outside areas provide dogs with protection from the direct rays of the sun. I find that Respondents violated section 3.4(b) by not providing outside shade for their animals.

James Depue testified that the kennel's records were deficient because some did not show the dog breed or date of disposition, the animals' destination, the method of transportation, and the name and address of the buyer. (Tr. 98, 130-132, 167.) Respondents argue that the regulations only require that records be kept of the name and address of the buyer; that Depue did not have any documents to substantiate his findings; and that Respondents corrected the deficiency. Section

2.75(a)(1) of the regulations, however, requires all the information that Depue found to be lacking, his testimony was credible without the need for substantiating documents, and a respondent violates the Act and regulations even though it later corrects the deficiency. *Big Bear Farm, Inc.,* 55 Agric. Dec. 107, 142 (1996). Accordingly, I find that Respondent violated section 2.75(a)(1) of the regulations.

Depue testified that the failure to remove unnecessary items from the tops of enclosures was a housekeeping problem and that these items included used syringes and needles, discarded bottles, carpet squares "and things like that." (Tr. 100.) Respondents argue that some items stored on top of enclosures, such as heating units and insect spray, were necessary for the operation of the kennel. Carol Tinsley said adult dogs prefer air conditioning (half the facility is air conditioned; while the other half has fans), while the pups prefer the warmth of the heating pads. (Tr. 229, 248.) However, she did not claim that the items specifically identified by Depue were necessary. (Respondents' brief, p. 5.) I find that even though the heating pads were a necessary part of the kennel operation, the storage of other unnecessary clutter in the enclosure was a violation of section 3.11(c).

With respect to rodent control, Depue testified that he could tell there was an inadequate program of rodent control because he saw rodent droppings and could detect their odor. (Tr. 100.) Carol Tinsley admitted that there were mice but said that she kept them under control with D-Con. (Tr. 248.) Section 3.11(d) of the standards require pest control programs to promote the health and well-being of animals and reduce the contamination of pests. While there may have been rodents, Complainant has not shown by a preponderance of the evidence that the facility was contaminated with them or that Respondents' program failed to promote the health and well-being of its animals. I therefore do not find a violation of section 3.11(d).

Depue stated that the mold in the dog feeder was evidently due to moisture getting in the feed. (Tr. 102.) Respondents state that rain on the day of the inspection had gotten into the dog dishes and that, while the food may have been wet and caked, it was not moldy. (Tr. 249, 313.) Section 3.9(b) requires that food be protected from rain and from caking as well as prohibiting mold. Respondents thus violated section 3.9(b) regardless of whether the food was moldy.

James Depue conducted the next inspection on November 23, 1998. He found that the feeders had been cleaned and that the problem of shade for the animals had been corrected, but that the facility was still non-compliant in regard to recordkeeping and housekeeping. New non-compliant items he identified were: One animal did not have the required amount of floor space and head room (section 3.6(c)), or adequate exercise room (section 3.8); and holes in enclosures needed to be repaired (section 3.6(a)(2)(iii)). (CX 3.)

Depue said, concerning the recordkeeping requirement, that there had been a

fire at Respondents' house which destroyed their records. The complaint does not allege that the lack of records in this circumstance was a violation.

With respect to housekeeping, Depue did not specify the nature of the deficiency other than to say that "things" were stored on top of enclosures "instead of being put away properly and orderly." (Tr. 107.) Section 3.11(c) requires that "Premises must be kept free of accumulations of trash, junk, waste products, and discarded matter." Complainant has not shown that the "things" Depue saw at the facility met this definition. I therefore do not find this to be a violation.

With respect to the alleged failure to provide dogs with adequate floor space, head space, and exercise room, section 3.6(c)(1)(i) of the standards is precise concerning the mathematical formula to use to determine the amount of required space. Section 3.8(c) relating to exercise space is predicated on the measurements in section 3.6(c)(1)(i). Depue, however, used his hand rather than a measuring device to estimate the space and even then did not provide any measurement figures, other than to say the space was inadequate. (Tr. 108-109, 169.) I find this imprecise method of measurement not to be substantial evidence for purposes of establishing a violation of the standards.

Depue said the holes in a shelter were due to the wood rotting and chewing by the animals. (Tr. 109.) Respondents do not deny that there were holes in the shelter. Section 3.6(a)(2)(iii) requires that enclosures contain animals securely. A hole, in itself, would not necessarily affect the security of the dogs, but rot would. I therefore find the rot to be a violation of section 3.6(a)(2)(iii).

Depue's report for his inspection on May 24, 1999, indicates that all non-compliant items had been corrected from the previous inspection except for recordkeeping. He also found two new non-compliant items: Dogs below the minimum age requirement were transported (section 2.130) and tags were lost (section 2.54). (CX 4.)

DePue testified that records "were not completely filled out" concerning the identification number for 17 dogs acquired by the kennel and the source of their acquisition. He also indicated that records were incomplete concerning the disposition of 24 animals, but his testimony is vague on exactly what information was lacking. (Tr. 103-104.) Nevertheless, to the extent Respondents failed to identify the source of the acquired dogs there was a violation of section 2.75(a)(1).

Depue testified that Respondents transported puppies under the age of eight weeks. (Tr. 110.) Section 2.130 prohibits the transportation of puppies under that age. Carol Tinsley admitted that the puppies were three weeks old when they were transported, but said she had bought the mother dog before it gave birth and that the puppies, with a veterinarian's approval, had to be transported before the required age because the former owner was moving to a new location. (Tr. 261.) These may be extenuating circumstance, but transporting dogs less than eight weeks of age is

nevertheless a violation of the specific requirement of section 2.130.

Depue said that dogs had lost their tags. (Tr. 112.) Tinsley testified that the dogs were puppies which were still with their mother and had not yet been tagged. (Tr. 262.) Section 2.50(d) provides that unweaned puppies do not have to be individually identified. I find that Complainant has not shown by a preponderance of the evidence that Respondents violated section 2.54.

Depue's report for his inspection on December 27, 1999, states that the non-compliant items relating to transporting underage puppies and the records on the disposition of dogs had been corrected, but that the records relating to the acquisition of dogs, including dog identification numbers, and dog tags were still not in compliance. He also found that Respondents were not compliant with the housekeeping requirement. (CX 5.)

Depue testified that the kennel's records on dog acquisitions did not include the animals' identification number as required by section 2.75(a). (Tr. 105.) Section 2.75(a)(1)(vi), however, does not refer to identification numbers, but to tag numbers. Depue was apparently not referring to tag numbers since he cited Respondents separately for failing to replace missing tags for 18 dogs as required by section 2.54. Respondents state that when told of the missing tags they replaced them. I find that the failure to have tags for the dogs was a violation of section 2.54 but that there was no violation of section 2.75(a) since it does not require identification of dogs apart from tags.

As for the alleged housekeeping deficiency, Depue testified that there was excessive fecal and food waste in one enclosure. (Tr. 113.) Respondents do not deny the allegation but state that the waste was cleaned the same day. The excessive waste was a violation of section 3.11(a) even though corrected.

The report for an inspection on May 23, 2000, states that the non-compliant items relating to acquisition records and lost tags had been corrected, but that the problem with waste accumulation continued. He also found three new items of non-compliance: Insufficient shade (section 3.4(b)(2)); a lack of a veterinary care program (section 2.40(b)); and a need to remove clutter (section 3.1(b)). (CX 6.)

Depue said he found waste accumulation at this inspection but in a different enclosure. (Tr. 114.) The failure to clean accumulated waste is a violation of section 3.11(a). Depue said that outdoor runs did not provide shade for 32 dogs. (Tr. 115.) Respondents argue that the temperature on the inspection day was not as high as Depue had claimed and that hairless dog breeds "like the warmth of the sun." (Respondents' Brief, p. 19.) Be that as it may, the standards still require shade and none was provided. This was a violation of section 3.4(b)(2).

Depue testified that he was told that the kennel had changed veterinarians but that it had no program of veterinary care as required by section 2.40 and that an attending veterinarian had not visited the facility in a year and a half. He said a

veterinarian should visit the facility at least once a year. (Tr. 115-116.) Carol Tinsley testified that the veterinary care program had expired in November 1999 when the veterinarian for the kennel retired, but that she had not realized the facility lacked a program by the new veterinarian until Depue brought it to her attention at the May 2000 inspection. She said that, despite the lack of a written program, the animals received received regular veterinary care. She provided copies of receipts for veterinary services that her dogs received in March and April 2000. (Tr. 270, 327; RX 15.) Section 2.40 specifically requires a written program of veterinary care including regularly scheduled visits by the attending veterinarian. The failure to have a veterinary care program and to have regularly scheduled visits from a veterinarian is a violation of section 2.40.

Depue said the non-compliance with the cleaning requirement of section 3.1(b) was the "general cleaning problem, again to removed [sic] clutter, wood and discarded items." (Tr. 116- 119.) He took pictures of the alleged clutter. (CX 8a, 8b and 8c.) Respondents state that the kennel was in the process of being renovated, that it had obtained Depue's approval to store building material in the enclosure, and that the photographs show cement, a caulking tube, plywood, and barrels that are used in the dog runs. (Tr. 241.) Section 3.1(b) provides that an enclosure must be kept "neat and free of clutter" but goes on to make an exception for the storage in the housing facility of "materials actually used and necessary for cleaning the area and fixtures or equipment necessary for proper husbandry practices and research needs." The photograph in CX 8b does appear to show what may be building material (open cement bag), and the photograph in CX 8c also shows a used caulking tube, a part of a shovel, two cans of an unidentifiable substance and an assortment of what is obviously trash. Depue said that this clutter, which included what he said was something "like a horse halter," was placed on top of a dog house. (Tr. 119.) Even though some of the material may have been used for husbandry purposes, Complainant has established by a preponderance of the evidence that other unnecessary clutter was placed in the animal enclosure in violation of section 3.1(b).

Depue conducted his last inspection on August 17, 2000. He was accompanied by Michael Ray, an APHIS field investigator, and John Slauter, an APHIS veterinary medical officer. The inspection report states that Respondents had corrected the deficiencies concerning shade for the animals, clutter, veterinary care program, and waste accumulation. However, eight new non-compliant items were identified: Outdoor runs needed to be cleaned and sanitized (section 3.11(b)); five animals required veterinary care (section 2.40(b)); repairs were needed for enclosures (section 3.6(a)(2)(i)); waste drainage pipe was clogged (section 3.1(f)); water bowl needed to be sanitized (section 3.11(b)); self-feeders were rusty and worn and needed to be sanitized (section 3.9(b)); storage area in shelter needed to

be cleaned (section 3.1(b)); and housing facilities were not kept in proper repair (section 3.1(a)). (CX 10.)

Michael Ray, the field investigator, testified that he saw dried animal waste that was more than twenty-four hours old smashed into the concrete on the outdoor dog runs. (Tr. 36.) Dr. Slauter testified that the outdoor run, used by 66 dogs (Tr. 122), had not been cleaned and sanitized on a regular basis. He said cleaning involves removing fecal material, while sanitizing involves scrubbing the area with soap and water and a disinfectant. Photographs taken at the time show even to a layman the excessive accumulation of fecal waste. Dr. Slauter further said that he asked Ms. Tinsley about sanitizing and she replied that she had not sanitized in the past two weeks. (Tr. 54-56; CX 11a, 11b, 11c, and 11d.) Tinsley said she starts work at an outside job at 6:45 a.m. and starts her care of the kennel at 5:30 p.m. Her husband starts working at the kennel between 3 and 4 p.m after he finishes his job for the day. They have no other help. She said they scrape and hose the kennel daily. (Tr. 311.) The testimony of Ray and Slauter show that, regardless of whatever cleaning the Tinsleys' performed at the kennel, it was insufficient to meet the requirements of section 3.11(a) and (b) that enclosures be cleaned as necessary to prevent an excessive build up of waste and that they be sanitized at least every two weeks.

Dr. Slauter testified that he observed three dogs with eye infections and two with excessive hair mats. He said that, apart from these five animals, the other 92 dogs at the facility were overall in good condition. Photographs taken by Michael Ray (CX 12b, 12c) shows two dogs with crusts around their eyes with one of the dogs (CX 12b) appearing to have excessive ocular discharge. Although Dr. Slauter did not personally examine the animals he estimated that the dog with the discharge had the condition for a week or more. He said the animals needed to be looked at by the attending veterinarian. Carol Tinsley said she treated the dog with eye wash and an antibiotic prescribed by her veterinarian. However, she said the veterinarian had not seen the dog. (Tr. 267, 305-308.) Jerry Eber, a veterinarian with the Missouri Department of Agriculture, agreed that the dog was in need of immediate veterinary care. (Tr. 209.) Respondents contend that since Dr. Slauter did not examine the animal he could not diagnose its condition. However, it was not for Dr. Slauter to determine the cause of an animal's ailment; it was his function to determine whether it received veterinary care. It was then Respondents' responsibility as a licensed dealer to provide veterinary care, including diagnosis and appropriate treatment. Respondents failure to provide veterinary care is a violation of section 2.40.

Dr. Slauter said that wires with sharp points protruding into an enclosure constituted a danger to a dog's legs or eyes. Depue also testified that the partition wire between two pens was unattached. (Tr. 56-58, 125-126; CX 18.) Even though Respondents contend that the wires were repaired, the occurrence of protruding and unattached wires was a violation of sections 3.1(a) and 3.6(a)(2)(i)(ii).

Depue testified that a waste drainage pipe had gotten clogged and overflowed. (Tr. 123.) Dr. Slauter said that because of improper drainage waste material did not flow away from the kennel. (Tr. 59.) This constitutes a violation of section 3.1(f) which requires that "all drains must be properly constructed, installed and maintained."

With respect to the report's finding of non-compliance concerning alleged moldy water bowls and rusty feeders, Depue said the water bowls had algae and needed to be cleaned. (Tr. 123.) The complaint, however, does not allege that this was a violation. Carol Tinsley said the rusty containers were not being used as feeders and investigator Ray also testified that they were not being used for that purpose. (Tr. 25, 236.) As the containers were not being used as feeders, there was no violation.

Dr. Slauter testified that the storage area was in "total disarray" and that it was "not good housekeeping." He said he saw a "feed bag" and "a bottle of something." (Tr. 63, 78; CX 17.) James Depue also said that storage was in disarray. (Tr. 124; CX 17.) Carol Tinsley testified that Complainant's photograph of the bags (CX 17) showed one bag containing cedar chips that were used under the hutches and the other sack was an empty feed bag that she used when she cleaned the facility. She said the container was bleach, which is used as a disinfectant. (Tr. 236.) Respondents violated section 3.1(b) to the extent of not keeping materials in the housing storage area in a neat conditon.

Complainant has not conducted any inspections of the kennel since August 2000. Respondents, which are also licensed by the state of Missouri, were inspected in June 2001 by Jerry Eber, a veterinarian with the Missouri Department of Agriculture. He testified that he found some cracks in the cement, wind damage to a dog house, plastic pans that had been chewed, and an enclosure that needed a rain gutter. He said "the overall health and condition of the dogs was fine." (Tr. 197, 218.)

Carol Tinsley testified that she takes good care of her animals and said the facility has corrected its deficiencies since the August 2000 inspection. She presented various exhibits to support this contention, including photographs of the kennel, a new power washer, records of veterinary care and two written veterinary care programs dated January 1and June 5, 2001. (Tr. 284; RX 1-15.) The veterinary care programs contain the names of the kennel's current veterinarian, Dr. Catherine Hicks. (RX 1-2.)

Complainant contends that Dr. Hicks' signatures on the two programs are forgeries and, to support its contention, offered transparent overlays as attachments to its brief to compare the signatures. Carol Tinsley denied any forgery. She said she had left the forms at Dr. Hicks' office on separate occasions and did not know the actual dates they were signed by the doctor. (Tr. 328.)

"[P]ersons skilled in a knowledge of handwriting are permitted to give their opinions as to whether the particular handwriting on the instrument alleged to be forged is genuine . . ." 95 Am. Jur. 2D *Forgery* §50. Complainant had received copies of the veterinary care programs with the alleged forgeries (RX 1-2) prior to the hearing, but did not present any persons skilled in handwriting as witnesses to testify at the hearing on whether Dr. Hicks' signatures were authentic. (Tr. 291-292.) The evidence is insufficient to show that [] RX 1 and 2 contained forged signatures.

As the penalty for the violations, Complainant seeks revocation of Respondents' license:

> The revocation is warranted based on respondents' repeated failure to comply with the Regulations and Standards, unwillingness to acknowledge or correct repeated deficiencies, and falsification of documents. Respondents have repeatedly failed to take steps necessary to ensure the animals' well-being, including following the most basic of animal husbandry practices, such as cleaning their enclosures. Respondents appear unable to modify their own practices in order to meet the minimum standards required of licensed animal dealers.

Section 2149(b) of the Animal Welfare Act (7 U.S.C. § 2149(b) provides that:

> The Secretary [of Agriculture] 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.

The Secretary's sanction policy is that:

> [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.

Richard Lawson, et al., d/b/a Noah's Ark Zoo, 57 Agric. Dec. 980, 1012 (1998)

The Animal Welfare Act states that its purpose is to provide animals with humane care and treatment (7 U.S.C. § 2131). Dr. Eber testified that the overall health and condition of the animals was fine. (Tr. 197.) Dr. Slauter also testified that, apart from the dogs with an eye condition and those with matted hair, the

animals overall were in good condition. (Tr. 41-42.) Even when the facility lacked a veterinary care program and missed an annual visit by a veterinarian, the animals were still provided with medical care. Still, even though the animals may generally have been treated humanely, their well-being could also be adversely affected by such conditions as a lack of proper housekeeping, accumulated fecal material, and inadequate waste drainage, which can harbor pests and pose a health risk to the animals. These deficiencies, as Depue noted, often recurred. (Tr. 95-96.)

Complainant, in seeking license revocation, contends that the deficiencies are due to the inability and/or unwillingness of Respondents to comply with animal care requirements. Dr. Slauter, however, did not go that far. Rather, he suggested that he believed the facility could come into compliance:

Q. And Dr. Slauter, based on your inspection and visit, albeit once, to Ms. Tinsley's facility, do you have an opinion as to Mr. Tinsley's and Ms. Tinsley's ability to come into compliance?

A. To be very honest, I've shared this before with -- when I walked away from the kennel, I felt with a lot of work, some effort, a lot of repairs, the kennel was capable of working.
It was a very old facility, clearly. I thought the potential was there, just meeting Ms. Tinsley, and talking with her, for her to comply. I was hopeful that [] would be the case, very hopeful.

Q. And did you -- do you have any opinion as to whether the Respondents are willing to do the things that you were just discussing?

A. Having been there one time, I really don't have a good reading of that. She did express to us, a willingness to correct what needed to be corrected.

(Tr. 69-70.)

James Depue's testimony on this point occurred in the following context:

Q. Okay. And on the occasions that you have inspected at Mr. and Ms. Tinsley's facility, has Ms. Tinsley evidenced to you an intention -- or ability to correct the problems that you described to her?

A. An intention or ability?

Q. Either.

A. I think that there is always an intention. I can't -- I don't think that I can judge on ability.

There does seem to be chronic problems. I don't know if it is a lack of ability, lack of funds, or what the problem is.

(Tr. 127-128.)

The testimony of Dr. Slauter and James Depue thus do not establish that non-compliance is due to Respondents' unwillingness or inability to comply. Respondents, on the other hand, indicate that they are willing and able to comply and contend that they have improved the facility since the last inspection. There have been instances of recurring violations, but there have also been corrections. Corrections of violations may be taken into account when determining the sanction to impose. *Susan DeFrancesco and East Coast Exotics, Inc.,* 59 Agric. Dec. 97, 112 (2000). APHIS has not conducted any inspections since the last inspection on August 17, 2000, concerning the extent to which Respondents may have improved the facility.

As for the opinion of an enforcement official on an appropriate penalty, Robert Gibbens, an APHIS veterinary medical officer and director for the enforcement of the Animal Welfare Act in all western states, testified that, based on his review of Respondents' file, he believed for "something like this, we would seek something like a 30 day suspension. But they would have to demonstrate compliance after that period, before the license would become valid again." (Tr. 185.)

Considering all the circumstances in this case, including the purpose of the Act, the nature of the violations, their recurrence, the corrections that Respondents have attempted, and the opinion of Dr. Gibbens, I find that a 30-day suspension of Respondents' license and a three thousand dollar penalty is appropriate. As noted by Dr. Gibbens, Respondents must demonstrate compliance before their license is restored. (9 C.F.R. §§ 2.10, 2.11(a)(2) and (3).)

Findings of Fact

1. Respondents Cindy Tinsley and Reginald Tinsley own and operate a kennel at RR 6, Box 1147, Poplar Bluff, Missouri 63901. At all times relevant to this proceeding Respondents were operating as a dealer under the Animal Welfare Act pursuant to APHIS AWA license no. 43-A-2148.

2. APHIS conducted inspections of Respondents' facility on June 1 and November 23, 1998; May 24 and December 27, 1999; and May 23 and August 17, 2000.

3. On June 1, 1998, Respondents' records on dog dispositions did not contain information on the dog breeds, dates sold, dates of disposition, their destinations, their methods of transportation, and the names and addresses of the animals' buyers.

4. On June 1, 1998, Respondents stored used and discarded material in animal enclosures.

5. On June 1, 1998, Respondents allowed rain to cause animal food to become wet and caked.

6. On June 1, 1998, Respondents did not provide shade for dogs in outdoor runs.

7. On November 23, 1999, the walls of the animal enclosures in Respondents' facility contained holes caused by rot.

8. On May 24, 1999, Respondents allowed dogs under the age of eight weeks to be transported.

9. On May 24, 1999, Respondents' records did not show the source for acquired dogs.

10. On December 27, 1999, dog enclosures at Respondents' facility contained excessive accumulations of fecal and waste material.

11. On December 27, 1999, Respondents had not replaced missing dog tags.

12. On May 23, 2000, outside dog runs at Respondents' facility did not provide dogs with shade.

13. On May 23, 1999, Respondents did not have a program of veterinary care.

14. On May 23, 2000, an animal enclosure at Respondents' facility was cluttered with unnecessary items.

15. On May 23, 2000, an animal enclosure at Respondents' facility contained an excessive accumulation of waste.

16. On August 17, 2000, Respondents did not provide dogs with proper veterinary care.

17. On August 17, 2000, wires in animal enclosures at Respondents' facility protruded into animal living space and had sharp points.

18. On August 17, 2000, waste material at Respondents' facility did not drain properly from the enclosures.

19. On August 17, 2000, dog runs at Respondents' facility contained an excessive accumulation of waste material and lacked proper sanitization.

20. On August 17, 2000, a storage area at Respondents' facility was in disarray.

Conclusions of Law

Respondents Carol Tinsley and Reginald Tinsley 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, 9 C.F.R. § 3.1 *et seq.,* issued under the Act, as follows:

1. On June 1, 1998, Respondents failed to maintain complete records showing the disposition and identification of animals in violation of section 10 of the Act (7 U.S.C. § 2140) and section 2.75(a)(1) of the regulations (9 C.F.R. § 2.75 (a)(1)).

2. On June 1, 1998, Respondents violated section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards as specified below:

a. Dogs in outdoor housing facilities were not provided with adequate protection from the elements in violation of 9 C.F.R. § 3.4(b);

b. Food receptacles for dogs were not kept clean in violation of 9 C.F.R. § 3.4(b);

c. 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 in violation of 9 C.F.R. § 3.11(c).

3. On November 23, 1998, Respondents failed to maintain primary enclosures for dogs so that they contained the animals securely in violation of 9 C.F.R. § 3.6(a)(2)(iii).

4. On May 24, 1999, Respondents transported dogs which were not at least eight weeks of age in violation of 9 C.F.R. § 2.130.

5. On May 24, 1999, Respondents failed to maintain complete records showing the identification of animals in violation of section 10 of the Act (7 U.S.C. § 2140) and 9 C.F.R. § 2.75(a)(1).

6. On December 27, 1999, Respondents failed to replace lost identification tags in violation of 9 C.F.R. § 2.54.

7. On December 27, 1999, Respondents failed to keep primary enclosures for dogs clean and sanitized in violation of 9 C.F.R. §§ 3.11(a) and (b).

8. On May 23, 2000, Respondents failed to maintain written programs of veterinary care in violation of 9 C.F.R. § 2.40.

9. On May 23, 2000, Respondents violated section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified below:

a. Animal areas inside of housing facilities were not kept neat and free of clutter in violation of 9 C.F.R. § 3.1(b);

b. Dogs in outdoor housing facilities were not provided with adequate protection from the elements in violation of 9 C.F.R. § 3.4(b);

c. Primary enclosures for dogs were not kept clean and sanitized in violation of 9 C.F.R. § 3.11(a);

10. On August 17, 2000, Respondents failed to provide needed veterinary treatment to dogs in need of care in violation of 9 C.F.R. § 2.40.

11. On August 17, 2000, Respondents violated section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified below:

a. Housing facilities for dogs were not maintained in good repair in

violation of 9 C.F.R. § 3.1(a).

b. Animal areas in the housing facility were not kept in a neat condition in violation of 9 C.F.R. § 3.1(b).

c. Housing facilities were not maintained so that animal waste and water were rapidly eliminated in violation of 9 C.F.R. § 3.1(f).

d. Primary enclosures for dogs were not constructed and maintained in good repair so that they have no sharp points in violation of 9 C.F.R. § 3.6(a)(2)(i).

e. Primary enclosures for dogs were not kept clean and sanitized in violation of 9 C.F.R. §§ 3.11(a) and (b).

Order

1. Respondents Carol Tinsley and Reginald Tinsley are jointly and severally assessed a penalty of $3,000. The penalty shall be paid by certified check or money order, made payable to the Treasurer of the United States, and forwarded within 35 days of service of this Order to:

Colleen A. Carroll, Esq.
Office of the General Counsel
Marketing Division
Room 2343 South Building
U.S. Department of Agriculture
Washington, DC 20250

2. Respondents' license under the Animal Welfare Act is hereby suspended for 30 days and thereafter until their facility is found by APHIS to be in compliance with the Act and the regulations and standards promulgated thereunder.

3. Respondents, their agents and employees, successors and assigns directly or through any corporate or other device shall cease and desist from:

(a) Failing to maintain complete records of the acquisition, disposition, description, and identification of animals;

(b) Failing to provide for the maintenance of the elimination of waste drainage from animal housing facilities;

(c) Moving dogs under the age of eight weeks of age;

(d) Failing to keep the premises clean and neat and in repair and free of accumulations of trash, junk, waste, and discarded material;

(e) Failing to replace missing dog tags;

(f) Failing to provide animals in outdoor runs with protection from the direct rays of the sun;

(g) Failing to clean animal enclosures as necessary of excessive accumulations of fecal and waste material;

(h) Failing to sanitize enclosures at least every two weeks;

(i) Failing to maintain housing facilities for animals that are structurally sound and in good repair in order to protect the animals from injury and contain them securely;

(j) Failing to develop and maintain written programs of veterinary care;

(k) Failing to provide animals with prompt veterinary care.

Pursuant to the Rules of Practice, this Decision and Order will become final without further proceedings 35 days after service upon Respondents unless it is appealed to the Judicial Officer by a party to the proceeding within 30 days after service pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

In re: MARILYN SHEPARD d/b/a CEDARCREST KENNEL.
AWA Docket No. 01-0011.
Decision and Order.
Filed August 2, 2002.

AWA – Commerce clause – Intrastate commerce – Jurisdiction, subject matter.

Respondent was found to have operated as a "dealer" in sale of puppies without having obtained a USDA license in violation of the Animal Welfare Act. The Administrative Law Judge (ALJ) held that even though the Respondent operated her wholesale puppy business wholly within Missouri, utilized a Missouri bank, and sold puppies exclusively to a Missouri pet retailer that the USDA had jurisdiction despite the lack of a interstate activity citing a contemporaneous opinion of the Attorney General in the congressional record relating to the statute.

Brian T. Hill for Complainant.
Respondent - Pro se.
Decision and Order by Dorothea A. Baker, Administrative Law Judge.

Preliminary Statement

This is an administrative disciplinary proceeding initiated by a Complaint filed November 16, 2000, pursuant to the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*), hereinafter sometimes referred to as the "Act," and the regulations and standards (9 C.F.R. § 1.1 *et seq.*) issued pursuant to the Act. The Complaint charged the Respondent with having willfully violated, on July 21, 1999 and October 21, 1999, provisions of 9 C.F.R. § 3.1(a); 9 C.F.R. § 3.4(b); 9 C.F.R. § 3.6(a)(2)(x); and 9 C.F.R. § 3.6(a)(1).

In addition, said Complaint alleged that the Respondent, at all times material herein, was operating as a dealer as defined in the Act and the regulations, without

having obtained a license, in willful violation of section 4 of the Act (7 U.S.C. § 2134) and section 2.1 of the regulations (9 C.F.R. § 2.1). The Respondent has denied the allegations of the Complaint and has asserted certain affirmative defenses including constitutional issues and lack of jurisdiction by the Secretary.

An oral hearing was held in Springfield, Missouri, on December 12, 2001, before Administrative Law Judge Dorothea A. Baker. Complainant was represented by Brian T. Hill, Esquire, Office of the General Counsel, United States Department of Agriculture. The Respondent appeared *pro se*. In due course the parties filed briefs and the case was referred for Decision on July 1, 2002.

An evaluation of the entire record and the evidence in this matter shows the preponderance of the evidence fails to show that the Complainant has borne its burden of proof with respect to alleged violations of 9 C.F.R. § 3.1(a); 9 C.F.R. § 3.4(b); 9 C.F.R. § 3.6(a)(2)(x); and 9 C.F.R. § 3.6(a)(1).

However, the Complainant has shown that the Secretary has jurisdiction in this matter and that the Respondent was operating as a dealer, as defined in the Act, without having obtained a license in willful violation of section 4 of the Act and section 2.1 of the regulations. The Complainant seeks a sanction of $26,000.00 and a permanent disqualification of the Respondent from ever obtaining an Animal Welfare Act license. Although sanctions are imposed herein they are not of the magnitude requested by the Complainant.

Applicable Law and Regulations

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 3—STANDARDS

SUBPART A—-SPECIFICATIONS FOR THE HUMANE HANDLING, CARE, TREATMENT, AND TRANSPORTATION OF DOGS AND CATS

[Footnote omitted]

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.

. . .

(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 . . ..

§ 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 or 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;

. . .

(iv) Keep other animals from entering the enclosure;

. . .

(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. If the floor of the primary enclosure is constructed of wire, a solid resting surface or surfaces that, in the aggregate, are large enough to hold all the occupants of the primary enclosure at the same time comfortably must be provided; and

(xi) Provide sufficient space to allow each dog and cat to turn about freely, to stand, sit, and lie in a comfortable, normal position, and to walk in a normal manner.

Discussion

The Respondent is an individual during business as Cedarcrest Kennel and has an address of Route 2, Box 819, Ava, Missouri 65608. At all times material herein the Respondent was operating as a dealer as defined in the Act and the regulations in that, at all times material herein, she sold 284 [The Complaint alleges 284; on brief, Complainant asserts 274 and relies on its Exhibits CX 8 through 12.] dogs to a licensed dealer or dealers from on or about September 16, 1998 through March 15, 2000. She did not have a license to do so. Her principal argument of defense is that the charges against her by the United States Department of Agriculture are invalid because the Secretary lacks jurisdiction; and, that her activities are entirely intrastate and, therefore, not covered by the Act. Respondent contends the animals in question were not distributed nor shipped over State lines by her. It is maintained that because the sales of said animals occurred within the borders of the State of Missouri, such sales did not have a substantial affect upon interstate commerce. It is maintained that the Complainant must show an actual substantial affect or burden upon commerce. The Respondent sold a substantial amount of her animals to a Mr. McMahan an animal broker within the State of Missouri and who was licensed by the State of Missouri. It was he, who after purchase of the animals, sold the animals in interstate commerce. Accordingly, Respondent argues that it was Mr. McMahan who would be responsible for any effects or burdens upon said commerce.

The fact that all of the puppies were bred, born and sold in the State of Missouri and that while Respondent had title, the puppies did not leave Missouri but were sold to an individual within the State of Missouri who subsequently sold over State lines, and who paid for the puppies from a Missouri bank, does not preclude the jurisdiction of the Secretary of Agriculture.

Applying applicable legal principles it is concluded that the Secretary of Agriculture has jurisdiction in this matter and that the Respondent was acting illegally as a dealer without a license. *See, Lloyd A. Good, Jr.,* 49 Agric. Dec. 156 (1990); and, *Wickard v. Filburn*, 317 U.S. 111 (1942). Shortly after the enactment

of the 1976 amendments to the Act, the Secretary made an inquiry on the constitutionality of the Act, as amended, to the Attorney General of the United States regarding the issue of intrastate activities. (*See* _____ Op. of the Att'y Gen. _____ (Aug. 22nd, 1979) at n.2.

Referring to the Animal Welfare Act, the Attorney General opined that section 2132(c) applied to intrastate activities because

> If Congress had used the conjunction "and" between subparagraphs (1) and (2), it would be at least arguable that it would not have succeeded in carrying out its plain intent to expand coverage of the Act to purely intrastate activities that affect interstate commerce. Congress, however, did not use "and" to conjoin subparagraphs (1) and (2) but rather did not use a connective word.

A copy of that referred to opinion is attached to this decision as Attachment A. In continuing to sell animals without a license, the Respondent was in willful violation of a regulatory statute in that Respondent intentionally did an act which was prohibited, irrespective of evil motive or reliance on erroneous advice and she acted with careless disregard of statutory requirements. In re: *Arab Stock Yard, Inc.*, 582 F.2d 39 (5th Cir. 1978).

On June 26, 1998 a Decision and Order were issued which suspended the license of the Respondent as of September 16, 1998. From on or about September 16, 1998, through on or about March 15, 2000, the Respondent sold, in commerce, at least 274 dogs for resale in willful violation of section 4 of the Act (7 U.S.C. § 1234) and 2.1 of the regulations 9 C.F.R. § 2.1. The sale of each animal constitutes a separate violation. Said violations require the imposition of sanctions.

Because it is found, as a matter of law that the Secretary of Agriculture has jurisdiction, the Respondent's arguments relating to alleged constitutional infringements, including the Fourth and Fourteenth Amendments lack legal validity.

When the animal welfare inspectors inspected the Respondent's facility on July 21, 1999 and October 21, 1999, they alleged that they found violations of certain standards set forth in Part 3 of 9 C.F.R.

Said violations related to assertions that the housing facilities for dogs were not structurally sound and maintained in good repair so as to protect the animals from injury as required by 9 C.F.R. § 3.1(a); that the outdoor housing facilities were not provided with adequate protection from the elements, particularly shade, as required by 9 C.F.R. § 3.4(b); that the primary enclosures for dogs were not constructed so that the floors protected the animal's feet and legs from injury, but which allowed their feet to pass through openings in the floor in violation of section 3.6(a)(2)(x); and that the primary enclosures were not structurally sound in violation of section

3.6(a)(1) (9 C.F.R. § 3.6(a)(1)). There is not sufficient, substantial, reliable evidence to sustain the aforesaid allegations of the Complainant that said violations occurred. Accordingly, they are dismissed. The evidence and testimony of the animal care inspectors: Mr. Gauthier and Ms. Feldman, were insufficient to establish by a preponderance of the evidence that Respondent's facility was not in compliance with the requirements of the Act and regulations. There was indication in the record that the superior to these inspectors indicated that he wanted to get the Respondent and to make an example of her. In addition, said animal care inspectors indicated that they would interpret the regulatory provisions as they believed them to be and not as interpreted by others in the Department. The inspectors indicated that they would write the violations according to their own interpretations and that a Judge's interpretation could be incorrect and a misinterpretation.[1] The

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[1] [Inspector Gauthier, testified, among other things:

A I understand what is written here, but this is a misinterpretation of 3.4. Doghouses had never -- in the 12 years that I have been here, have never been allowed to have dirt floors in the doghouse. You have to have a floor in the doghouse.

Q Well, can you read this into the record then, for me, what this judge actually did say about the floors?

A He is saying that -- he is reading that the compact earth is -- the compact earth is all right in the outside runs. He misinterpreted the regs.

Q You really need to read that. You're just -- you're telling what your interpretation of the judge's interpretation.

A I'm telling you USDA's interpretation of the regs. Section 3.4. Is that -- this is where we're at. Right? The doghouse itself.

Q Right.

A "Shelters and outdoor facilities for dogs and cats must contain a roof, four sides, and a floor." However, Section 3.4(c) goes on to say that the floor of outdoor housing facility may be of compact earth. A view of this regulatory may -- "I find that Respondent did not violate the standards by using compacted earth as floor of the calf huts."

That was a misinterpretation.

JUDGE BAKER: Did the judicial officer agree with Judge Hunt on that?

(continued...)

application of the regulatory requirements is to a certain extent subjective.[2]

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[1](...continued)
MS. SHEPHERD: Yes, he did, (Tr. 30:7-25; 31:1-9).

[2]Inspector Feldman:

Q Does it say anywhere in the regulations on how a gate is to be secured?

A Not specifically how but that it must be secured.

Q But how? Does it say how?

A It doesn't specify how.

Q Then if it's not closed -- if it's closed and is serving its purpose, is it not closed --

A I don't see how it's serving a purpose if it's not secured.

Q Does the USDA have regulations on how gates --

A No, ma'am.

Q -- should be secured?

A We leave it up to the individual on how they do that.

Q So this gate is --

A But it does not -- but this gate is not --

Q This gate is closed, however.

A This gate is leaning up against the post and the other gate. In that sense, it is closed; however, it is not secured. (Tr. 62:10-25; 63:1-4).

A I do know that the entire gate, the entire opening there was not a secure gate unit. The left-hand side I can say for sure was not attached to the vertical upright post at all or to the other gate. I don't recall if the right-hand, larger side was physically attached to that wooden fence or not.

Q So it could have been attached from that side and hinged the other direction.

A Possibly. I don't recall. (Tr. 72:10-18).

(continued...)

[2](...continued)

THE WITNESS: "Two years after this letter, on May 6, 1997, USDA stated perimeter fences for dogs are not required by the Standard 62 Fed Reg 24611, 1997.

BY MS. SHEPHERD:

Q Then in -- if this is -- in that case, then those gates are not actually even required by law according to this regulation. Is that not correct?

A I can't speak to that exactly. No. I don't know.

Q They -- you did write them up as being perimeter gates or gates on the perimeter fence?

A Yes.

Q. So if I don't need a perimeter fence, then the gate is kind of a moot point anyway, is it not? (Tr. 74:22-25; 75:1-10).

Q .Okay, so the dog could get in and out of this pen, then, without hurting itself going through this opening?

A. It would seem to. Yes.

Q .But you still have this classified as a too large of an opening?

A. Yes.

Q Why?

A. Because it does not adequately prevent wind and rain from entering the housing unit.

Q. There -- can you see the windbreak around the opening of that?

A. There is a piece of wood framing the opening. It does not adequately prevent wind and rain from entering the housing unit.

Q. Can you tell us approximately what the size of that windbreak is?

A. No, I cannot.

Q Can you tell us what the actual requirements for number of inches that a wind- and rainbreak has to be to satisfy USDA regulations?

A. There are no specified written engineering standards on that.

(continued...)

Inspector Feldman was described as agitated and furious during one of her inspections. When such inspections are tainted with preconceived ideas, then the outcome cannot be considered a fair evaluation of the circumstances under which the inspections occurred. [Footnotes 1 and 2 are included as endnotes in the original case - Editor.]

_____

However, in addition to the shortcomings of the evidentiary proof or lack thereof by the Complainant, great weight has been given to the testimony of Dr. Schmidt, an extremely qualified and reliable witness (Tr. 154:5-25; 155; 156:1-2) who went over the alleged violations and showed that none occurred. He also offered his opinion that the Respondent's facility was in compliance and that she was maintaining proper regulatory procedures and requirements.

Dr. Schmidt was present during one of the inspections and his review of the situation has been accorded great weight. Clearly the Complainant has not shown by a preponderance of the evidence that the alleged facility violations occurred. The evidence seems clear that the inspectors were, for whatever reason, going out of their way to find violations. There is a lack of sufficiency of evidence on the part of the Complainant.

Findings of Fact

1. The Respondent is an individual during business as Cedarcrest Kennel whose address is Route 2, Box 819, Ava, Missouri 65608. The Respondent at all times material hereto was operating as a dealer as defined in the Act and the regulations without being licensed in willful violation of section 4 of the Act and section 2.1 of the regulations.

2. On June 26, 1998, a Decision and Order were issued which suspended the license of the Respondent as of September 16, 1998.

3. From on or about September 16, 1998 to on or about March 15, 2000, the Respondent sold in commerce at least 274 dogs for resale for use as pets without being licensed and in willful violation of he Act and the regulations.

4. The Complainant has not sustained its burden of proof with respect to the remaining allegations of the Complaint.

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[2](...continued)

Q. Then how did you determine that this was not sufficient?

A. It's a judgment call. I do not feel that this opening or this framing of wood would adequately prevent strong wind and rain or any wind and rain from entering the enclosure, or entering the housing unit. (Tr. 78:20-25; 79:1-22).

Sanctions

The Respondent is a small operation and has had previous violations of the Act. The record is devoid of any indication as to her ability to pay a monetary penalty.

The Complainant seeks a cease and desist order; the assessment of a civil penalty of $26,000.00; and a permanent disqualification from obtaining a license under the Animal and Welfare Act and the regulations issued under the Act. Said requested sanctions appear to be excessive and not required to carry out the purposes of the Act, namely, as a deterrent to the Respondent and to others. There is no evidence of any harm or inhumane treatment of Respondent's animals. It is recognized that 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 a day-to-day supervision of the regulated industry. In re: *Steven Bourk*, AWA Docket No. 01-0004, January 4, 2002. In the present case not all the charges were proven and accordingly the sanction should be related to the violations of operating without a license.

For the foregoing reasons it is believed that the following Order will achieve the purposes of the Act and is a fair disposition of the matter.

Order

1. Respondent, her agents and 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 issued thereunder, and in particular, shall cease and desist from engaging in any activity for which a license is required under the Animal Welfare Act and Regulations without being licensed as required.

2. Respondent is accessed a civil penalty of $5,000.00 (Five Thousand Dollars) which shall be paid by certified check or money order, made payable to the Treasurer of the United States, and forwarded to Brian T. Hill, Esq., Office of the General Counsel, United States Department of Agriculture, Room 2343, South Building, Washington, DC 20250-1417.

3. The cease and desist provisions of this Order shall become effective on the day after service of this Order on Respondent. Respondent is disqualified from obtaining an Animal Welfare Act license for thirty (30) days and continuing thereafter until she demonstrates to the Animal and Plant Health Inspection Service

that she is in full compliance with the Animal Welfare Act, the Regulations, the Standards, and this Order, including the payment of the civil penalty assessed in paragraph 2 of this Order. The disqualification provisions of this Order shall become effective on the day after service of this Order on Respondent.

4. This Decision and Order shall become final and effective thirty-five (35) days after service thereof upon the Respondent unless there is an appeal to the Judicial Officer within thirty (30) days pursuant to the Rules of Practice and Procedure, 7 C.F.R. § 1.145.

Copies hereof shall be served upon the parties.

Attachment A

August 22, 1979

79-61 MEMORANDUM OPINION FOR THE SECRETARY OF AGRICULTURE

Animal Welfare Act (7 U.S.C. § 2131 et seq.)—Commerce—Application to Intrastate Activity

This is in response to your request for the opinion of the Department of Justice on the scope of coverage of the Animal Welfare Act, 7 U.S.C. § 2131 et seq. Specifically, you inquire whether the Act applies to activities that are entirely intrastate. The occasion for your question is the recent refusal by the U.S. Attorneys for the Eastern District of Pennsylvania and the Eastern District of Illinois to prosecute cases referred to them by your Department on the ground that the Act extends only to interstate transactions. For reasons stated hereafter, we believe that Congress intended the Act to cover purely intrastate activities otherwise falling within its provisions.[3]

The Animal Welfare Act was enacted in 1966 as Pub. L. No. 89-544, 80 Stat. 350. As stated in its preamble, its purpose was "to prevent the sale or use of dogs

[3]Nothing in this opinion should be viewed as expressing our views on any question other than the narrow legal issue regarding the general application of the Animal Welfare Act to purely intrastate activities. [Note -This was footnote No. 1 in the original text - Editor]

and cats which have been stolen, and to insure that certain animals intended for use in research facilities are provided humane care and treatment," by regulating certain activities "in commerce." This term was defined in § 2(c) of the Act as follows:

> The term "commerce" means commerce between any State, territory, possession, or the District of Columbia, or the Commonwealth of Puerto Rico, and any place outside thereof; or between points within the same State, territory, or possession, or the District of Columbia, or the Commonwealth of Puerto Rico, but through any place outside thereof; or within any territory, possession, or the District of Columbia.

In 1970, the definitional section of the Act was amended. The definition of "commerce" in § 2(c) was expanded to include "trade traffic . . . [and] transportation," as well as "commerce." A new § 2(d) added a new definition for "affecting commerce:"

> The term "affecting commerce" means in commerce or burdening or obstructing or substantially affecting commerce or the free flow of commerce, or having led or tending to lead to the inhumane care of animals used or intended for use for purposes of research, experimentation, exhibition, or held for sale as pets by burdening or obstructing or substantially affecting commerce or the free flow of commerce.

According to the House report accompanying the 1970 bill, this addition was

> intended to broaden the authority under the Act to regulate persons who supply animals which are intended for use in research facilities, for exhibition, or as pets. [H. Rept. 1651, 91st Cong., 2d sess. 9 (1970).]

More important, subsequent sections of the Act regulating specific activities were revised to cover activities "affecting commerce," rather than simply those "in commerce." *See, e.g.,* § 4, 7 U.S.C. § 2134 (transportation of animals); § 11, 7 U.S.C. § 2140 (identification of animals for transportation). We believe these amendments reflect Congress' intention to expand the Act's coverage beyond those activities that are "in commerce" in the strict sense and to reach activities that merely "affect" interstate commerce. This expanded coverage in turn reflects Congress' determination that certain specified activities have a sufficient effect on commerce among the States to require regulation, even if they take place entirely within one State.

The 1976 Amendments to the Animal Welfare Act confirm Congress' intent that the Act should extend to intrastate activities. Its preamble, § 1(b), 7 U.S.C. § 2131(b), was revised to incorporate the specific congressional findings underlying the regulatory system imposed by the Act. It now reads in pertinent part as follows:

> The Congress finds that animals and activities which are regulated under this Act 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 Act is necessary to prevent and eliminate burdens upon such commerce and to effectively regulate such commerce . . . . [Emphasis added.]

If there had been any doubt of the coverage of the Act prior to 1976, the amended preamble makes clear that all activities regulated under the Act, including those confined to a single State, are governed by its provisions.

In further clarification of this point, the definition of "commerce" itself now found in 7 U.S.C. § 2132(c) was revised to consolidate former §§ 2(c) and 2(d), so that the term "commerce" as used in the Act includes both traffic between States and traffic that merely "affects" such interstate traffic generally:

> The term "commerce" means trade, traffic, transportation, or other commerce—
> (1) between a place in a State and any place outside of such State, or between points within the same State but through any place outside thereof, or within any territory, possession, or the District of Columbia;
> (2) which affects trade, traffic, transportation, or other commerce described in paragraph (1).

We believe that this provision, read in the context of the other provisions of the Act and its legislative history, must be construed to provide two distinct definitions of "commerce" for purposes of the Act's coverage.[4] Any other construction would make meaningless, or at best redundant, the 1970 and 1976 amendments to the Act.

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[4] If Congress had used the conjunction "and" between subparagraphs (1) and (2), it would be at least arguable that it would not have succeeded in carrying out its plain intent to expand coverage of the Act to purely intrastate activities that affect interstate commerce. Congress, however, did not use "and" to conjoin subparagraphs (1) and (2) but rather did not use a connective word. [Note - This was footnote No. 2 in the original text - Editor]

We are, therefore, of the opinion that the Animal Welfare Act applies to activities that take place entirely within one State, as well as to those that involve traffic across State lines.

LARRY L. SIMMS
Deputy Assistant Attorney General
Office of Legal Counsel

In re: HEARTLAND KENNELS, INC., A SOUTH DAKOTA CORPORATION; AND HALVOR SKAARHAUG, AN INDIVIDUAL.
AWA Docket No. 02-0004.
Decision and Order.
Filed October 8, 2002.

AWA – Failure to file answer – Failure to deny allegations – Waiver of right to hearing – Default – Dealer – Civil penalty – License revocation – Cease and desist order – Federal rules of civil procedure inapplicable – Federal rules of appellate procedure inapplicable – Prejudice to Complainant not relevant.

The Judicial Officer affirmed the Default Decision issued by Chief Administrative Law Judge James W. Hunt (Chief ALJ), revoking Respondent Skaarhaug's Animal Welfare Act license, assessing Respondents, jointly and severally, a $54,642.50 civil penalty, and ordering Respondents to cease and desist from violating the Animal Welfare Act and the Regulations and Standards issued under the Animal Welfare Act. The Judicial Officer deemed Respondents' failure to file a timely answer an admission of the allegations in the complaint and a waiver of hearing (7 C.F.R. §§ 1.136(c), .139). Respondents argued that their failure to file a timely answer was due to excusable neglect and under Rule 6(b) of the Federal Rules of Civil Procedure, the time for filing their answer should be enlarged. The Judicial Officer denied Respondents' request for enlargement stating that the Federal Rules of Civil Procedure are not applicable to administrative proceedings conducted before the Secretary of Agriculture under the Animal Welfare Act and the Rules of Practice. Relying on *Houston v. Lack*, 487 U.S. 266 (1988), Respondents argued that documents filed by Terry Wharff McGloghlon, a prisoner and a pro se respondent in this proceeding, must be deemed to be filed with the Hearing Clerk on the day the documents were delivered to prison authorities for forwarding to the Hearing Clerk. The Judicial Officer rejected Respondents' argument stating that Mr. McGloghlon was not a respondent in the proceeding and that *Houston v. Lack* was inapposite because it construed the Federal Rules of Appellate Procedure which are not applicable to administrative proceedings conducted before the Secretary of Agriculture under the Animal Welfare Act. Moreover, under the Rules of Practice applicable to the proceeding, a document required or authorized to be filed under the Rules of Practice is deemed to be filed at the time the document reaches the Hearing Clerk (7 C.F.R. § 1.147(g)). The Judicial Officer also rejected Respondents' argument that the proceeding should be remanded to the Chief ALJ for a hearing because a remand would not prejudice Complainant's ability to present his case. Finally, the Judicial Officer stated that, based on the limited record before him, he could not conclude that Respondents' maintenance of expired and ineffective drugs by itself was a failure to provide adequate veterinary care in violation of 9 C.F.R. § 2.40(b)(1), (b)(2), as alleged in the

complaint.

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

Bobby R. Acord, 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 October 3, 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 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 Heartland Kennels, Inc., and Halvor Skaarhaug [hereinafter Respondents] committed numerous willful violations of the Animal Welfare Act and the Regulations and Standards on March 24, 1998, October 21, 1998, February 9, 1999, October 19, 1999, and January 10, 2000 (Compl. ¶¶ 4-9).

The Hearing Clerk served Respondents with the Complaint, the Rules of Practice, and a service letter on October 15, 2001.[1] 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 December 4, 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.[2] On January 24, 2002, Respondents filed a late-filed answer to the Complaint, which does not deny or otherwise respond to the allegations in the Complaint.

On May 15, 2002, 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 Heartland Kennels, Inc., and Halvor Skaarhaug By Reason of Admission of Facts" [hereinafter Proposed Default Decision]. The Hearing Clerk

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[1]United States Postal Service Domestic Return Receipts for Article Number 7099 3400 0014 4584 8479 and Article Number 7099 3400 0014 4584 8462.

[2]Letter dated December 4, 2001, from Joyce A. Dawson, Hearing Clerk, to Respondent Halvor Skaarhaug.

served Respondents with Complainant's Motion for Default Decision, Complainant's Proposed Default Decision, and a service letter on May 24, 2002.[3]

On June 13, 2002, Respondents requested an extension of time within which to file objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision. Chief Administrative Law Judge James W. Hunt [hereinafter the Chief ALJ] granted Respondents' request by extending Respondents' time for filing objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision to July 1, 2002.[4] On July 3, 2002, Respondents requested a second extension of time to file objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision, which the Chief ALJ denied.[5]

On July 15, 2002, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the Chief ALJ issued a "Decision and Order as to Heartland Kennels, Inc., and Halvor Skaarhaug By Reason of Admission of Facts" [hereinafter Initial Decision and Order]: (1) concluding that Respondents willfully violated the Animal Welfare Act and the Regulations and Standards as alleged in the Complaint; (2) directing Respondents to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; (3) assessing Respondents jointly and severally a $54,642.50 civil penalty; and (4) revoking Respondent Halvor Skaarhaug's Animal Welfare Act license (Animal Welfare Act license number 46-B-0062).

On August 13, 2002, Respondents requested an extension of time within which to appeal the Chief ALJ's Initial Decision and Order to the Judicial Officer. On August 30, 2002, I granted Respondents' request for an extension of time by extending the time for Respondents' filing their appeal petition to September 30, 2002. On September 16, 2002, Respondents appealed to the Judicial Officer. On October 1, 2002, Complainant filed "Complainant's Response to Respondents' Motion to Set Aside Default Judgment." On October 3, 2002, 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 Chief ALJ's Initial Decision and Order, except for the Chief ALJ's conclusion that the allegations in paragraphs 4.*l*. and 4.m. of the Complaint constitute violations of the

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[3]United States Postal Service Domestic Return Receipts for Article Number 7099 3400 0014 4581 8212 and Article Number 7099 3400 0014 4584 7878.

[4]Order Extending Time to File Response filed June 14, 2002.

[5]Order Denying Extension of Time to File Objections to Complainant's Motion for Adoption of Proposed Decision filed July 5, 2002.

Regulations and the Chief ALJ's conclusion that Respondents willfully violated section 2.100(b) of the Regulations (9 C.F.R. § 2.100(b)). 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 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

§ 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[.]

. . . .

(j) The term "carrier" means the operator of any airline, railroad, motor carrier, shipping line, or other enterprise, which is engaged in the business of transporting any animals for hire[.]

§ 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. The Secretary shall inspect each research facility at least once each year and, in the case of deficiencies or deviations from the standards promulgated under this chapter, shall conduct such follow-up inspections as may be necessary until all deficiencies or deviations from such standards are corrected. The Secretary shall promulgate such rules and regulations as he deems necessary to permit inspectors to confiscate or destroy in a humane manner any animal found to be suffering as a result of a failure to comply with any provision of this chapter or any regulation or standard issued thereunder if (1) such animal is held by a dealer, (2) such animal is held by an exhibitor, (3) such

animal is held by a research facility and is no longer required by such research facility to carry out the research, test, or experiment for which such animal has been utilized, (4) such animal is held by an operator of an auction sale, or (5) such animal is held by an intermediate handler or a carrier.

§ 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(f), (j), 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 [Apr. 26, 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 [26 U.S.C. 1 et seq.], the Tariff Act of 1930 [19 U.S.C. 1202 et seq.], the Occupational Safety and Health Act of 1970 [29 U.S.C. 651 et seq.], or the Social Security Act [42 U.S.C. 301 et seq.], 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).

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; and knowing failure to obey a cease and desist order has a civil penalty of $1,650.

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.

. . . .

Carrier means the operator of any airline, railroad, motor carrier, shipping line, or other enterprise which is engaged in the business of transporting any animals for hire.

. . . .

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 D—ATTENDING VETERINARIAN AND ADEQUATE VETERINARY CARE

§ 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[.]

. . . .

(b) Each dealer or exhibitor shall establish and maintain programs of adequate veterinary care that include:

. . . .

(2) The use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and the availability of emergency, weekend, and holiday care;

(3) Daily observation of all animals to assess their health and well-being; *Provided, however,* That daily observation of animals may be accomplished by someone other than the attending veterinarian; and *Provided, further*, That a mechanism of direct and frequent communication is required so that timely and accurate information on problems of animal health, behavior, and well-being is conveyed to the attending veterinarian[.]

. . . .

SUBPART E—IDENTIFICATION OF ANIMALS

§ 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.

(2) Live puppies or kittens, less than 16 weeks of age, shall be identified by:

(i) An official tag as described in § 2.51;

(ii) A distinctive and legible tattoo marking approved by the Administrator; or

(iii) A plastic-type collar acceptable to the Administrator which has legibly placed thereon the information required for an official tag pursuant to § 2.51.

(b) A class "B" dealer shall identify all live dogs and cats under his or her control or on his or her premises as follows:

(1) When live dogs or cats are held, purchased, or otherwise acquired, they shall be immediately identified:

(i) By affixing to the animal's neck an official tag as set forth in § 2.51 by means of a collar made of material generally acceptable to pet owners as a means of identifying their pet dogs or cats; or

(ii) By a distinctive and legible tattoo marking approved by the Administrator.

(2) If any live dog or cat is already identified by an official tag or tattoo which has been applied by another dealer or exhibitor, the dealer or exhibitor who purchases or otherwise acquires the animal may continue identifying the dog or cat by the previous identification number, or may replace the previous tag with his own official tag or approved tattoo. In either case, the class B dealer or class C exhibitor shall correctly list all old and new official tag numbers or tattoos in his or her records of purchase which shall be maintained in accordance with §§ 2.75 and 2.77. Any new official tag or tattoo number shall be used on all records of any subsequent sales by the dealer or exhibitor, of any dog or cat.

(3) Live puppies or kittens less than 16 weeks of age, shall be identified by:

(i) An official tag as described in § 2.51;

(ii) A distinctive and legible tattoo marking approved by the Administrator; or

(iii) A plastic-type collar acceptable to the Administrator which has legibly placed thereon the information required for an official tag pursuant to § 2.51.

(4) When any dealer has made a reasonable effort to affix an official tag to a cat, as set forth in paragraphs (a) and (b) of this section, and has been unable to do so, or when the cat exhibits serious distress from the attachment of a collar and tag, the dealer shall attach the collar and tag to the door of the primary enclosure containing the cat and take measures adequate to maintain

the identity of the cat in relation to the tag. Each primary enclosure shall contain no more than one weaned cat without an affixed collar and official tag, unless the cats are identified by a distinctive and legible tattoo or plastic-type collar approved by the Administrator.

. . . .

SUBPART G—RECORDS

§ 2.75 Records: Dealers and exhibitors.

(a)(1) Each dealer, other than operators of auction sales and brokers to whom animals are consigned, and each 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 dealer or 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.

. . . .

SUBPART H—COMPLIANCE WITH STANDARDS AND HOLDING PERIOD

§ 2.100 Compliance with standards.

(a) Each dealer, exhibitor, operator of an auction sale, and intermediate handler shall comply in all respects with the regulations set forth in part 2 and the standards set forth in part 3 of this subchapter for the humane handling, care, treatment, housing, and transportation of animals.

(b) Each carrier shall comply in all respects with the regulations in part 2 and the standards in part 3 of this subchapter setting forth the conditions and requirements for the humane transportation of animals in commerce and their handling, care, and treatment in connections therewith.

§ 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 the standards in this subchapter; and

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

(b) The use of a room, table, or other facilities necessary for the proper examination of the records and inspection of the property or animals shall be extended to APHIS officials by the dealer, exhibitor, intermediate handler or carrier.

PART 3—STANDARDS

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.

(2) *Maintenance and replacement of surfaces.* All surfaces must be maintained on a regular basis. Surfaces of housing facilities—including houses, dens, and other furniture-type fixtures and objects within the facility—that cannot be readily cleaned and sanitized, must be replaced when worn or soiled.

(3) *Cleaning.* Hard surfaces with which the dogs or cats come in contact must be spot-cleaned daily and sanitized in accordance with § 3.11(b) of this subpart to prevent accumulation of excreta and reduce disease hazards. Floors made of dirt, absorbent bedding, sand, gravel, grass, or other similar material must be raked or spot-cleaned with sufficient frequency to ensure all animals the freedom to avoid contact with excreta. Contaminated material must be replaced whenever this raking and spot-

cleaning is not sufficient to prevent or eliminate odors, insects, pests, or vermin infestation. All other surfaces of housing facilities must be cleaned and sanitized when necessary to satisfy generally accepted husbandry standards and practices. Sanitization may be done using any of the methods provided in § 3.11(b)(3) for primary enclosures.

. . . .

(e) *Storage.* Supplies of food and bedding must be stored in a manner that protects the supplies from spoilage, contamination, and vermin infestation. The supplies must be stored off the floor and away from the walls, to allow cleaning underneath and around the supplies. Foods requiring refrigeration must be stored accordingly, and all food must be stored in a manner that prevents contamination and deterioration of its nutritive value. All open supplies of food and bedding must be kept in leakproof containers with tightly fitting lids to prevent contamination and spoilage. Only food and bedding that is currently being used may be kept in the animal areas. Substances that are toxic to the dogs or cats but are required for normal husbandry practices must not be stored in food storage and preparation areas, but may be stored in cabinets in the animal areas.

. . . .

§ 3.2 Indoor housing facilities.

(a) *Heating, cooling, and temperature.* Indoor housing facilities for dogs and cats must be sufficiently heated and cooled when necessary to protect the dogs and cats from temperature or humidity extremes and to provide for their health and well-being. When dogs or cats are present, the ambient temperature in the facility must not fall below 50 °F (10 °C) for dogs and cats not acclimated to lower temperatures, for those breeds that cannot tolerate lower temperatures without stress or discomfort (such as short-haired breeds), and for sick, aged, young, or infirm dogs and cats, except as approved by the attending veterinarian. Dry bedding, solid resting boards, or other methods of conserving body heat must be provided when temperatures are below 50 °F (10 °C). The ambient temperature must not fall below 45 °F (7.2 °C) for more than 4 consecutive hours when dogs or cats are present, and must not rise above 85 °F (29.5 °C) for more than 4 consecutive hours when dogs or cats are present. The preceding requirements are in addition to, not in place of, all other requirements pertaining to climatic conditions in parts 2 and 3 of this chapter.

(b) *Ventilation.* Indoor housing facilities for dogs and cats must be sufficiently ventilated at all times when dogs or cats are present to provide for their health and well-being, and to minimize odors, drafts, ammonia

levels, and moisture condensation. Ventilation must be provided by windows, vents, fans, or air conditioning. Auxiliary ventilation, such as fans, blowers, or air conditioning must be provided when the ambient temperature is 85 °F (29.5 °C) or higher. The relative humidity must be maintained at a level that ensures the health and well-being of the dogs or cats housed therein, in accordance with the directions of the attending veterinarian and generally accepted professional and husbandry practices.

(c) *Lighting*. Indoor housing facilities for dogs and cats must be lighted well enough to permit routine inspection and cleaning of the facility, and observation of the dogs and cats. Animal areas must be provided a regular diurnal lighting cycle of either natural or artificial light. Lighting must be uniformly diffused throughout animal facilities and provide sufficient illumination to aid in maintaining good housekeeping practices, adequate cleaning, adequate inspection of animals, and for the well-being of the animals. Primary enclosures must be placed so as to protect the dogs and cats from excessive light.

(d) *Interior surfaces*. The floors and walls of indoor housing facilities, and any other surfaces in contact with the animals, must be impervious to moisture. The ceilings of indoor housing facilities must be impervious to moisture or be replaceable (e.g., a suspended ceiling with replaceable panels).

3.4 Outdoor housing facilities.

(a) *Restrictions*. (1) The following categories of dogs or cats must not be kept in outdoor facilities, unless that practice is specifically approved by the attending veterinarian:

(i) Dogs or cats that are not acclimated to the temperatures prevalent in the area or region where they are maintained;

(ii) Breeds of dogs or cats that cannot tolerate the prevalent temperatures of the area without stress or discomfort (such as short-haired breeds in cold climates); and

(iii) Sick, infirm, aged or young dogs or cats.

(2) When their acclimation status is unknown, dogs and cats must not be kept in outdoor facilities when the ambient temperature is less than 50 °F (10 °C).

(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 or 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.

. . . .

(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.

(ii) Each bitch with nursing puppies must be provided with an additional amount of floor space, based on her breed and behavioral characteristics, and in accordance with generally accepted husbandry practices as determined by the attending veterinarian. If the additional amount of floor space for each nursing puppy is less than 5 percent of the minimum requirement for the bitch, such housing must be approved by the attending veterinarian in the case of a research facility, and, in the case of dealers and exhibitors, such housing must be approved by the Administrator.

(iii) The interior height of a primary enclosure must be at least 6 inches higher than the head of the tallest dog in the enclosure when it is in a normal standing position: *Provided* That, prior to February 15, 1994, each dog must be able to stand in a comfortable normal position.

(2) *Compatibility*. All dogs housed in the same primary enclosure must be compatible, as determined by observation. Not more than 12 adult nonconditioned dogs may be housed in the same primary enclosure. Bitches in heat may not be housed in the same primary enclosure with sexually mature males, except for breeding. Except when maintained in breeding colonies, bitches with litters may not be housed in the same primary enclosure with other adult dogs, and puppies under 4 months of age may not be housed in the same primary enclosure with adult dogs, other than the dam or foster dam. Dogs with a vicious or aggressive disposition must be housed separately.

(3) *Dogs in mobile or traveling shows or acts.* Dogs that are part of a mobile or traveling show or act may be kept, while the show or act is traveling from one temporary location to another, in transport containers that comply with all requirements of § 3.14 of this subpart other than the marking requirements in § 3.14(a)(6) of this subpart. When the show or act is not traveling, the dogs must be placed in primary enclosures that meet the minimum requirements of this section.

(4) *Prohibited means of primary enclosure*. Permanent tethering of dogs is prohibited for use as primary enclosure. Temporary tethering of dogs is prohibited for use as primary enclosure unless approval is obtained from APHIS.

ANIMAL HEALTH AND HUSBANDRY STANDARDS

§ 3.7 Compatible grouping.

Dogs and cats that are housed in the same primary enclosure must be compatible, with the following restrictions:

. . . .

(b) Any dog or cat exhibiting a vicious or overly aggressive disposition must be housed separately[.]

§ 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) of this subpart. Sanitization is achieved by using one of the methods described in § 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 to ensure that there is no molding, deterioration, and caking of feed.

§ 3.10 Watering.

If potable water is not continually available to the dogs and cats, it must be offered to the dogs and cats as often as necessary to ensure their health and well-being, but not less than twice daily for at least 1 hour each time, unless restricted by the attending veterinarian. Water receptacles must be kept clean and sanitized in accordance with § 3.11(b) of this subpart, and before being used to water a different dog or cat or social grouping of dogs or cats.

§ 3.11 Cleaning, sanitization, housekeeping, 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,

wetted, 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.

(b) *Sanitization of primary enclosures and food and water receptacles.* (1) Used primary enclosures and food and water receptacles must be cleaned and sanitized in accordance with this section before they can be used to house, feed, or water another dog or cat, or social grouping of dogs or cats.

(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.

(3) Hard surfaces of primary enclosures and food and water receptacles must be sanitized using one of the following methods:

(i) Live steam under pressure;

(ii) Washing with hot water (at least 180 °F (82.2 °C)) and soap or detergent, as with a mechanical cage washer; or

(iii) Washing all soiled surfaces with appropriate detergent solutions and disinfectants, or by using a combination detergent/disinfectant product that accomplishes the same purpose, with a thorough cleaning of the surfaces to remove organic material, so as to remove all organic material and mineral buildup, and to provide sanitization followed by a clean water rinse.

(4) Pens, runs, and outdoor housing areas using material that cannot be sanitized using the methods provided in paragraph (b)(3) of this section, such as gravel, sand, grass, earth, or absorbent bedding, must be sanitized by removing the contaminated material as necessary to prevent odors, diseases, pests, insects, and vermin infestation.

(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.

9 C.F.R. §§ 1.1; 2.40(a)(1), (b)(2)-(3), .50(a), (b), .75(a)(1), .100, .126; 3.1(a)-(c), (e), .2, .4, .6(a)(1), (c), .7(b), .9(b), .10, .11(a)-(c), .12 (footnotes omitted).

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

STATEMENT OF THE CASE

Introduction

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)). Further, Respondents' late-filed answer does not deny or otherwise respond to the allegations in the Complaint.[6] Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c))

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[6]Respondents filed a letter in response to the Complaint on January 24, 2002, 3 months 9 days after they were served with the Complaint. Respondents' response states in its entirety:

> To whom it may concern
>
> I was not aware of the original correspondence untill [sic] the Post Master asked me to sign the enclosed paper they were dropped off at my 89 year old mothers [sic] place and she forgot to give them to me. As far as response I have not sold a pup or dog since 1999 - I surrendered my license in Jan 2000 and surrendered the dogs in the Fall of 2000. USDA inspectors told me that would be the end of it all - am surprised to see this now.
>
> Halvor Skaarhaug

(continued...)

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)) and failure to deny or otherwise respond to an allegation of the Complaint 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. Halvor Skaarhaug is an individual whose mailing address is Rural Route 1, Box 27, Greenville, South Dakota 57239, and is a principal of Respondent Heartland Kennels, Inc. At all times mentioned in this Decision and Order, Respondent Halvor Skaarhaug operated as a dealer as that term is defined in the Animal Welfare Act. Between August 1999 and March 11, 2001, Respondent Halvor Skaarhaug operated under Animal Welfare Act license number 46-B-062, issued under the name "Halvor Skaarhaug dba: Heartland Kennels, Inc." In 1999, Respondent Halvor Skaarhaug grossed $34,500 from sales of 450 animals. Respondent Halvor Skaarhaug previously operated under Animal Welfare Act license numbers 46-B-0061 and 46-A-0198.

2. Respondent Heartland Kennels, Inc., is a South Dakota corporation whose business mailing address is Rural Route 1, Box 27, Greenville, South Dakota 57239. The registered agent for service of process of Respondent Heartland Kennels, Inc., is Respondent Halvor Skaarhaug, who is located at Rural Route 1, Box 27, Greenville, South Dakota 57239. At all times mentioned in this Decision and Order, Respondent Heartland Kennels, Inc., operated as a dealer as that term is defined in the Animal Welfare Act.

3. Animal and Plant Health Inspection Service personnel unsuccessfully attempted to inspect Respondents' facility, animals, and records on March 24, 1998. On May 27, 1998, October 21, 1998, February 9, 1999, April 12, 1999, July 12, 1999, October 19, 1999, and January 10, 2000, Animal and Plant Health Inspection Service personnel conducted inspections of Respondents' facility, animals, and records for the purpose of determining Respondents' compliance with the Animal Welfare Act and the Regulations and Standards.

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[6](...continued)

RR 1 Box 27
Greenville, SD
57239

a. On May 27, 1998, Respondents had 85 dogs (64 adult dogs and 21 puppies).

b. On October 21, 1998, Respondents had 102 dogs (59 adult dogs and 43 puppies).

c. On February 9, 1999, Respondents had 78 dogs (62 adult dogs and 16 puppies).

d. On April 12, 1999, Respondents had 82 dogs (54 adult dogs and 28 puppies).

e. On October 19, 1999, Respondents had no fewer than 65 dogs.

f. On January 10, 2000, Respondents had 100 dogs.

4. Respondents did not employ a full-time attending veterinarian. On three separate dates, Respondents failed to comply with the veterinary care requirements of the Regulations, as follows:

a. On October 21, 1998, Respondents failed to have a part-time or consulting attending veterinarian with whom Respondents maintained a formal arrangement, including an adequate written program of veterinary care, thereby depriving no fewer than 102 dogs of adequate veterinary care.

b. On October 21, 1998, Respondents failed to have an attending veterinarian provide adequate veterinary care to their animals, and specifically, Respondents failed to employ an attending veterinarian under formal arrangements, including regularly scheduled visits by the veterinarian to Respondents' premises, and Respondents had not had such a visit by a veterinarian to Respondents' premises for more than 1 year, thereby depriving no fewer than 102 animals of adequate veterinary care.

c. On October 21, 1998, Respondents failed to establish and maintain a program of adequate veterinary care that included the use of appropriate methods to prevent diseases, and specifically, Respondents failed to obtain timely veterinary care for no fewer than five dogs in need of preventive attention.

d. On February 9, 1999, Respondents failed to have a part-time or consulting attending veterinarian with whom Respondents maintained a formal arrangement, including an adequate written program of veterinary care, thereby depriving no fewer than 78 dogs of adequate veterinary care.

e. On February 9, 1999, Respondents failed to have an attending veterinarian provide adequate veterinary care to their animals, and specifically, Respondents failed to employ an attending veterinarian under formal arrangements, including regularly scheduled visits by the veterinarian to Respondents' premises, and Respondents had not had such a visit by a veterinarian to Respondents' premises for more than 1½ years, thereby depriving no fewer than 78 animals of adequate veterinary care.

f. On February 9, 1999, Respondents failed to establish and maintain a

program of adequate veterinary care that included the use of appropriate methods to prevent, control, diagnose, and treat diseases, and specifically, Respondents failed to obtain timely veterinary care for a female Siberian Husky dog that exhibited visible hair loss and numerous areas of red and scaly skin, and had not received veterinary medical treatment.

g. On January 10, 2000, Respondents failed to have an attending veterinarian provide adequate veterinary care to their animals, and specifically, Respondents failed to obtain timely veterinary care and treatment for a juvenile Basset Hound dog that exhibited visible evidence of bilateral "cherry eye."

h. On January 10, 2000, Respondents failed to have an attending veterinarian provide adequate veterinary care to their animals, and specifically, Respondents failed to obtain timely veterinary care and treatment for a juvenile Cocker Spaniel dog that exhibited visible evidence of bilateral "cherry eye."

i. On January 10, 2000, Respondents failed to have an attending veterinarian provide adequate veterinary care to their animals, and specifically, Respondents failed to obtain timely veterinary care and treatment for a white Siberian Husky dog (identified as number 196), whose right eye was visibly "sunken" and dry.

j. On January 10, 2000, Respondents failed to have an attending veterinarian provide adequate veterinary care to their animals, and specifically, Respondents failed to obtain timely veterinary care and treatment for a white Siberian Husky dog (identified as number D114), who bore a chain collar that was so tight that the animal's skin had grown around it, and the animal bore bloody wounds.

k. On January 10, 2000, Respondents failed to have an attending veterinarian provide adequate veterinary care to their animals, and specifically, Respondents failed to obtain timely veterinary care and treatment for 10 dogs housed in three enclosures in which there was bloody, mucous feces indicative of untreated disease.

l. On January 10, 2000, Respondents failed to establish and maintain programs of adequate veterinary care that included daily observation of all animals to assess their health and well-being, and specifically, Respondents housed 60 dogs outside in wet and cold conditions, without observing the animals, who were visibly cold, and without adequately assessing the animals' well-being, or communicating the animals' condition to Respondents' attending veterinarian.

5. In 86 instances on three separate dates, Respondents failed to comply with the Regulations regarding the identification of animals, as follows:

a. On February 9, 1999, Respondents failed to identify seven puppies, as required.

b. On October 19, 1999, Respondents failed to identify 54 puppies, as

required.

c. On January 10, 2000, Respondents failed to identify five puppies, as required.

d. On January 10, 2000, Respondents failed to identify 20 adult dogs, as required.

6. On two separate dates, Respondents failed to keep complete and accurate records, as follows:

a. On October 19, 1999, Respondents failed to maintain records that correctly disclosed required dates.

b. On October 19, 1999, Respondents failed to maintain records that fully disclosed all required information.

c. On October 19, 1999, Respondents failed to maintain records that identified each animal in Respondents' possession and the disposition of each animal.

d. On January 10, 2000, Respondents failed to maintain records that correctly disclosed the required description of all animals, and specifically, did not disclose the animals' sex.

e. On January 10, 2000, Respondents failed to maintain records that correctly disclosed the required description of all animals, and specifically, did not disclose each animal's date of birth or approximate age.

f. On January 10, 2000, Respondents failed to maintain records that correctly disclosed the required description of all animals, and specifically, did not disclose each animal's official USDA tag number or tattoo.

g. On January 10, 2000, Respondents failed to maintain records that correctly disclosed the addresses of the persons from whom animals were acquired or to whom animals were sold.

h. On January 10, 2000, Respondents failed to maintain records that correctly disclosed the required vehicle or drivers' license numbers of persons from whom Respondents acquired animals.

i. On January 10, 2000, Respondents failed to maintain records that correctly disclosed the date when each animal was acquired.

j. On January 10, 2000, Respondents failed to maintain records that correctly disclosed the date when each animal died, or was sold, donated, or euthanized.

k. On January 10, 2000, Respondents failed to maintain records that identified 20 dogs in Respondents' possession.

l. On January 10, 2000, Respondents failed to maintain records that identified any information regarding 20 puppies in Respondents' possession.

m. On January 10, 2000, Respondents failed to maintain records that fully disclosed all required information.

7. On March 24, 1998, Respondents failed to allow Animal and Plant Health Inspection Service personnel access to their facility, animals, and records.

8. In numerous instances on three occasions, Respondents failed to comply with the facilities and operations Standards, as follows:

a. Section 3.1 of the Standards (9 C.F.R. § 3.1).

i. On January 10, 2000, Respondents housed five dogs in an outdoor enclosure that was not in good repair and did not protect the animals from injury, and specifically, the dogs in the enclosure were exposed to broken wire with sharp points, loose wire, and sharp pieces of metal.

ii. On January 10, 2000, Respondents' exercise area for 10 dogs was not in good repair and did not protect the animals from injury, and specifically, the dogs in the exercise area were exposed to barbed wire.

iii. On January 10, 2000, Respondents' exercise area for 10 dogs was not structurally sound and in good repair, and did not contain the animals securely, and specifically, the wire used to enclose the area was loose, and there was an insufficient number of fence posts.

iv. On January 10, 2000, Respondents' whelping area (used by 58 dogs) was not designed and constructed so that it contained the animals securely, and specifically, animals have been able to leave the area.

v. On January 10, 2000, Respondents' whelping area (used by 58 dogs) was not free from accumulations of waste material and clutter, and specifically, the whelping area contained accumulations of compacted dried fecal matter.

vi. On January 10, 2000, Respondents stored open supplies of food, which allowed for spoilage, contamination, and vermin infestation.

vii. On January 10, 2000, Respondents stored empty feed sacks no longer in use throughout the food storage area.

b. Section 3.2 of the Standards (9 C.F.R. § 3.2).

i. On February 9, 1999, Respondents' south small dog building (housing 10 dogs) was not sufficiently ventilated to minimize ammonia levels.

ii. On January 10, 2000, Respondents' south small dog building (housing 15 dogs) was not sufficiently ventilated to minimize ammonia levels.

iii. On January 10, 2000, Respondents' whelping area (used by 58 dogs) was not lighted well enough to permit routine inspection and cleaning of the facility and observation of animals.

iv. On January 10, 2000, Respondents' puppy holding area (used by 18 dogs) was not lighted well enough to permit routine inspection and cleaning of the facility and observation of animals.

v. On January 10, 2000, the material used on the ceiling of Respondents' south small dog facility (used by 15 dogs) was not impervious to moisture, and specifically, the material was wet and soft.

vi. On January 10, 2000, the food and water receptacles and whelp boxes (used by 60 dogs) were not impervious to moisture, and specifically, the food and water receptacles and whelp boxes had been chewed.

vii. On January 10, 2000, the flooring of Respondents' transport vehicle was not impervious to moisture.

viii. On January 10, 2000, Respondents housed three Siberian Husky puppies in a whelp area without dry bedding when the ambient temperature was below 50 degrees Fahrenheit.

c. Section 3.4 of the Standards (9 C.F.R. § 3.4).

i. On February 9, 1999, Respondents housed no fewer than 20 dogs in outdoor enclosures with shelter structures that did not have a floor.

ii. On February 9, 1999, Respondents housed 41 dogs in outdoor enclosures with shelter structures that contained no bedding or insufficient bedding when the ambient temperature was below 50 degrees Fahrenheit.

iii. On February 9, 1999, Respondents housed no fewer than 10 dogs in outdoor enclosures with three shelter structures that did not have a wind break or a rain break at the entrance.

iv. On October 19, 1999, three of Respondents' outdoor shelters (housing seven large-breed puppies) that contained three small "pet taxis" as shelters, did not provide sufficient shelter for all of the puppies.

v. On October 19, 1999, one of Respondents' outdoor shelters (housing two adult large-breed dogs) contained a single 2' by 2½' shelter that did not provide sufficient shelter for all of the dogs.

vi. On October 19, 1999, one of Respondents' outdoor shelters (housing four adult Siberian Husky dogs) contained a single 2' by 2½' shelter that did not provide sufficient shelter for all of the dogs.

vii. On October 19, 1999, none of Respondents' outdoor shelters (housing 65 dogs) provided the dogs with adequate protection from the cold, and specifically, none of the outdoor shelters contained sufficient bedding material.

viii. On October 19, 1999, three of Respondents' outdoor shelters (housing eight dogs) did not have a floor.

ix. On October 19, 1999, three of Respondents' outdoor shelters (housing seven large-breed puppies) that contained "pet taxis" as shelters, did not provide shelter structures that provided the puppies with adequate protection from the cold, in that each of the "pet taxis" had holes allowing the entry of cold air, snow, wind, and rain.

x. On January 10, 2000, Respondents housed two adult large-breed dogs in enclosure No. 9 with a single shelter structure measuring 30 inches by 34 inches, which provided insufficient space for both of the dogs.

xi. On January 10, 2000, Respondents housed two adult large-breed dogs

in enclosure No. 9 with a single shelter structure that did not provide the dogs with adequate protection and shelter from the cold and heat.

xii. On January 10, 2000, Respondents housed two young Golden Retrievers in an enclosure with a single shelter structure that did not have a wind break and rain break at the entrance of the shelter.

xiii. On January 10, 2000, Respondents housed two adult Siberian Husky dogs in enclosure No. 8 with an outdoor shelter without a floor.

xiv. On January 10, 2000, Respondents housed two adult large-breed dogs in enclosure No. 9 with a shelter structure that contained no bedding when the ambient temperature was below 50 degrees Fahrenheit.

xv. On January 10, 2000, Respondents housed two adult Siberian Husky dogs in enclosure No. 8 with a shelter structure that contained no bedding when the ambient temperature was below 50 degrees Fahrenheit.

xvi. On January 10, 2000, Respondents housed two young Golden Retrievers in an enclosure with a shelter structure that contained no bedding when the ambient temperature was below 50 degrees Fahrenheit.

xvii. On January 10, 2000, Respondents housed 35 dogs outdoors in enclosures with shelter structures that contained no bedding when the ambient temperature was below 50 degrees Fahrenheit.

xviii. On January 10, 2000, Respondents housed three Beagle dogs outdoors in enclosures with shelter structures that contained no bedding when the ambient temperature was below 50 degrees Fahrenheit.

xix. On January 10, 2000, Respondents housed three Beagle dogs (which breed is short-haired and does not tolerate cold climates) outdoors when the ambient temperature was below 50 degrees Fahrenheit.

xx. On January 10, 2000, Respondents housed 40 dogs in outdoor enclosures with shelter structures that did not have any wind break and rain break at the entrance of the shelters or did not have an adequate wind break and rain break.

xxi. On January 10, 2000, one of Respondents' outdoor shelters (housing four adult Siberian Husky dogs) contained a single 2' by 2½' shelter that did not provide sufficient shelter for all of the dogs.

xxii. On January 10, 2000, Respondents housed 12 dogs in outdoor enclosures with four shelter structures, none of which had a floor.

xxiii. On January 10, 2000, Respondents housed 20 dogs in outdoor enclosures with shelter structures that did not provide the animals with adequate protection and shelter from the cold and heat, in that the shelter roof had holes that allowed snow and rain inside.

xxiv. On January 10, 2000, Respondents housed one young adult Collie dog and one young adult St. Bernard dog in an outdoor enclosure with a single

shelter structure measuring 30 inches by 34 inches, which did not provide sufficient shelter for both animals.

xxv. On January 10, 2000, Respondents housed one young adult Collie dog and one young adult St. Bernard dog in an outdoor enclosure with a single shelter structure that did not have any wind break and rain break at the entrance of the shelter.

xxvi. On January 10, 2000, Respondents housed one young adult Collie dog and one young adult St. Bernard dog in an outdoor enclosure with a single shelter structure that contained no bedding when the ambient temperature was below 50 degrees Fahrenheit.

xxvii. On January 10, 2000, Respondents used the cover for a truck bed as a shelter structure for five dogs.

xxviii. On January 10, 2000, Respondents housed two young Golden Retrievers in an enclosure with a single shelter structure measuring 22 inches by 27 inches, which provided insufficient space for both of the dogs.

xxix. On January 10, 2000, Respondents housed two young Golden Retrievers in an enclosure with a single shelter structure that did not provide the dogs with adequate protection and shelter from the cold and heat.

d. Section 3.6 of the Standards (9 C.F.R. § 3.6).

i. On October 19, 1999, Respondents housed five adult dogs (each of which required at least 4 square feet of floor space - for a total of 20 square feet) in a primary enclosure that measured 2 feet by 4 feet, providing a total of only 8 square feet of floor space for all five animals (which allotted each dog 1.6 square feet of floor space), which did not provide sufficient floor space for each animal, and specifically did not allow each animal to turn about freely, and to stand, sit, and lie in a comfortable position.

ii. On January 10, 2000, Respondents housed two adult Collie dogs (requiring 32 square feet of floor space) in a primary enclosure that only provided 25 square feet of floor space, which was insufficient floor space for each animal.

iii. On January 10, 2000, Respondents housed seven 23-inch Lhasa Apso dogs (requiring over 40 square feet of floor space) in a primary enclosure that only provided 30 square feet of floor space, which was insufficient floor space for each animal.

iv. On January 10, 2000, Respondents housed two 15-inch Pomeranian dogs (requiring over 6 square feet of floor space) in a primary enclosure that only provided 4 square feet of floor space, which was insufficient floor space for each animal.

v. On January 10, 2000, Respondents housed four 22-inch Corgi dogs (requiring over 21 square feet of floor space) in a primary enclosure that only provided 12 square feet of floor space, which was insufficient floor space for each

animal.

vi. On January 10, 2000, Respondents housed four 23-inch Bichon Frise dogs (requiring over 23 square feet of floor space) in a primary enclosure that only provided 12 square feet of floor space, which was insufficient floor space for each animal.

vii. On January 10, 2000, Respondents housed two French Poodle dogs and one Cocker Spaniel dog (requiring over 16 square feet of floor space) in a primary enclosure that only provided 12 square feet of floor space, which was insufficient floor space for each animal.

viii. On January 10, 2000, Respondents housed six puppies in a primary enclosure that only provided 3 square feet of floor space, which was insufficient floor space for each animal.

9. In numerous instances on three occasions, Respondents failed to comply with the animal health and husbandry Standards, as follows:

a. Section 3.7 of the Standards (9 C.F.R. § 3.7).

i. On January 10, 2000, Respondents housed seven incompatible dogs together, and specifically, one of the dogs exhibited an overly-aggressive disposition and dominance with respect to food.

b. Section 3.9 of the Standards (9 C.F.R. § 3.9).

i. On February 9, 1999, Respondents' food receptacles for 20 dogs were not disposable or made of a durable material that could be easily cleaned and sanitized.

ii. On February 9, 1999, Respondents' food receptacles for 20 dogs were not disposable and were not kept clean and sanitized in accordance with section 3.11(b) of the Standards (9 C.F.R. § 3.11(b)).

iii. On February 9, 1999, Respondents' self-feeders for 20 dogs were not protected from rain and snow, in that the tops were missing.

iv. On February 9, 1999, Respondents' self-feeders for 20 dogs were not protected from rain and snow, in that the tops were missing.

v. On January 10, 2000, Respondents' self-feeder for two dogs was not protected from rain and snow, in that the top was missing.

vi. On January 10, 2000, Respondents' self-feeder for three dogs was not protected from rain and snow, in that the top was stuck open.

vii. On January 10, 2000, Respondents' food receptacles for 10 dogs in three outdoor enclosures were not protected from rain and snow.

viii. On January 10, 2000, Respondents' food receptacles for 60 dogs were not disposable or made of a durable material that could be easily cleaned and sanitized.

ix. On January 10, 2000, Respondents' food receptacles for 60 dogs were not disposable and were not kept clean and sanitized in accordance with

section 3.11(b) of the Standards (9 C.F.R. § 3.11(b)).

c. Section 3.10 of the Standards (9 C.F.R. § 3.10).

i. On January 10, 2000, Respondents' water receptacles for 60 dogs were not kept clean and sanitized in accordance with section 3.11(b) of the Standards (9 C.F.R. § 3.11(b)).

d. Section 3.11 of the Standards (9 C.F.R. § 3.11).

i. On October 21, 1998, Respondents failed to control weeds and grass and to keep premises free of trash and discarded matter around animal enclosures housing 30 dogs.

ii. On October 19, 1999, Respondents failed to control weeds and grass and to keep premises free of trash and discarded matter around animal enclosures housing 64 dogs.

iii. On October 19, 1999, Respondents failed to remove excreta and waste from an enclosure housing two dogs.

iv. On February 9, 1999, Respondents' inside facilities for dogs were not kept clean to reduce and eliminate breeding areas for pests, and specifically, Respondents' inside facilities had large accumulations of cobwebs, indicative of lack of cleaning.

v. On February 9, 1999, Respondents failed to remove excreta from primary enclosures housing 78 dogs in the south small dog building.

vi. On January 10, 2000, Respondents' inside facilities for 58 dogs were not kept clean to reduce and eliminate breeding areas for pests, and specifically, Respondents' inside facilities had large accumulations of cobwebs, indicative of lack of cleaning.

vii. On January 10, 2000, Respondents failed to keep premises free of trash, junk, and discarded matter around animal enclosures housing 40 dogs.

viii. On January 10, 2000, Respondents failed to remove excreta in a primary enclosure housing one Malamute dog.

ix. On January 10, 2000, Respondents failed to remove accumulated excreta in primary enclosures housing 20 dogs.

x. On January 10, 2000, Respondents failed to remove accumulated excreta in primary enclosures (whelp pens) housing 40 dogs.

xi. On January 10, 2000, Respondents failed to remove accumulated excreta in a primary enclosure (transport vehicle).

xii. On January 10, 2000, Respondents failed to remove accumulated excreta in primary enclosures housing 60 dogs.

e. Section 3.12 of the Standards (9 C.F.R. § 3.12).

i. On January 10, 2000, Respondents did not have sufficient employees to carry out the required animal husbandry practices for 100 dogs.

10. The violations Respondents committed are very serious and represent a

failure by Respondents to comply with the Animal Welfare Act and the Regulations and Standards, and in some of the instances, represent neglect of and cruelty to the animals in Respondents' custody.

Conclusions of Law

By reason of the Findings of Fact set forth in this Decision and Order, *supra*, I conclude that Respondents willfully violated the Animal Welfare Act and the Regulations and Standards as set forth in these Conclusions of Law.

1. Respondents' willful violations of section 2.40 of the Regulations (9 C.F.R. § 2.40).

a. On October 21, 1998, Respondents failed to employ an attending veterinarian under formal arrangements in willful violation of section 2.40(a)(1) of the Regulations (9 C.F.R. § 2.40)(a)(1)).

b. On October 21, 1998, Respondents failed to establish and maintain a program of adequate veterinary care that included the use of appropriate methods to prevent diseases, and specifically, Respondents failed to obtain timely veterinary care for no fewer than five dogs in need of preventive attention in willful violation of section 2.40(b)(2) of the Regulations (9 C.F.R. § 2.40(b)(2)).

c. On February 9, 1999, Respondents failed to employ an attending veterinarian under formal arrangements in willful violation of section 2.40(a)(1) of the Regulations (9 C.F.R. § 2.40)(a)(1)).

d. On February 9, 1999, Respondents failed to establish and maintain a program of adequate veterinary care that included the use of appropriate methods to prevent, control, diagnose, and treat diseases, and specifically, Respondents failed to obtain timely veterinary care for a female Siberian Husky dog that exhibited visible hair loss and numerous areas of red and scaly skin, and had not received veterinary medical treatment in willful violation of section 2.40(b)(2) of the Regulations (9 C.F.R. § 2.40(b)(2)).

e. On January 10, 2000, Respondents failed to have an attending veterinarian provide adequate veterinary care to their animals, and specifically, Respondents failed to obtain timely veterinary care and treatment for: (i) a juvenile Basset Hound dog that exhibited visible evidence of bilateral "cherry eye"; (ii) a juvenile Cocker Spaniel dog that exhibited visible evidence of bilateral "cherry eye"; (iii) a white Siberian Husky dog (identified as number 196), whose right eye was visibly "sunken" and dry; (iv) a white Siberian Husky dog (identified as number D114), who bore a chain collar that was so tight that the animal's skin had grown around it, and the animal bore bloody wounds; and (v) 10 dogs housed in three enclosures in which there was bloody, mucous feces, indicative of untreated disease, in willful violation of section 2.40(b)(2) of the Regulations (9 C.F.R. § 2.40(b)(2)).

f. On January 10, 2000, Respondents failed to establish and maintain programs of adequate veterinary care that included daily observation of all animals to assess their health and well-being, and specifically, Respondents housed 60 dogs outside in wet and cold conditions, without observing the animals, who were visibly cold, and without adequately assessing the animals' well-being, or communicating the animals' condition to Respondents' attending veterinarian in willful violation of section 2.40(b)(3) of the Regulations (9 C.F.R. § 2.40(b)(3)).

2. Respondents' willful violations of section 2.50 of the Regulations (9 C.F.R. § 2.50).

a. On February 9, 1999, Respondents failed to identify seven puppies in willful violation of section 2.50(a) of the Regulations (9 C.F.R. § 2.50(a)).

b. On October 19, 1999, Respondents failed to identify 54 puppies in willful violation of section 2.50(b) of the Regulations (9 C.F.R. § 2.50(b)).

c. On January 10, 2000, Respondents failed to identify 20 adult dogs and five puppies in willful violation of section 2.50(b) of the Regulations (9 C.F.R. § 2.50(b)).

3. Respondents' willful violations of section 2.75 of the Regulations (9 C.F.R. § 2.75).

a. On October 19, 1999, Respondents, in willful violation of section 2.75(a)(1) of the Regulations (9 C.F.R. § 2.75(a)(1)), failed to maintain records that fully disclosed all required information, including: (i) required dates; (ii) the identification of each animal in Respondents' possession; and (iii) the disposition of each animal.

b. On January 10, 2000, Respondents, in willful violation of section 2.75(a)(1) of the Regulations (9 C.F.R. § 2.75(a)(1)), failed to maintain records that fully disclosed all required information, including: (i) a correct description of each animal in Respondents' possession; (ii) the addresses of persons from whom Respondents acquired animals and to whom Respondents sold animals; (iii) the vehicle license numbers or drivers' license numbers of the persons from whom Respondents acquired animals; and (iv) the dates when Respondents acquired and disposed of each animal.

4. On March 24, 1998, Respondents failed to allow Animal and Plant Health Inspection Service personnel access to their facility, animals, and records in willful violation of section 16(a) of the Animal Welfare Act (7 U.S.C. § 2146(a)) and section 2.126 of the Regulations (9 C.F.R. § 2.126).

5. Respondents' willful violations of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) by failing to comply with the facilities and operating Standards (9 C.F.R. §§ 3.1-.6).

a. Respondents' willful violations of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.1 of the Standards (9 C.F.R. § 3.1).

i. On January 10, 2000, Respondents housed five dogs in an outdoor enclosure that was not in good repair and did not protect the animals from injury, and specifically, the dogs in the enclosure were exposed to broken wire with sharp points, loose wire, and sharp pieces of metal in willful violation of section 3.1(a) and (c)(1)(ii) of the Standards (9 C.F.R. § 3.1(a), (c)(1)(ii)).

ii. On January 10, 2000, Respondents' exercise area for 10 dogs was not in good repair and did not protect the animals from injury, and specifically, the dogs in the exercise area were exposed to barbed wire in willful violation of section 3.1(a) and (c)(1)(ii) of the Standards (9 C.F.R. § 3.1(a), (c)(1)(ii)).

iii. On January 10, 2000, Respondents' exercise area for 10 dogs was not structurally sound and in good repair, and did not contain the animals securely, and specifically, the wire used to enclose the area was loose, and there was an insufficient number of fence posts in willful violation of section 3.1(a) of the Standards (9 C.F.R. § 3.1(a)).

iv. On January 10, 2000, Respondents' whelping area (used by 58 dogs) was not designed and constructed so that the whelping area contained the animals securely, and specifically, animals have been able to leave the area in willful violation of section 3.1(a) of the Standards (9 C.F.R. § 3.1(a)).

v. On January 10, 2000, Respondents' whelping area (used by 58 dogs) was not free from accumulations of waste material and clutter, and specifically, the whelping area contained accumulations of compacted dried fecal matter in willful violation of section 3.1(b) of the Standards (9 C.F.R. § 3.1(b)).

vi. On January 10, 2000, Respondents stored open supplies of food, which allowed for spoilage, contamination, and vermin infestation in willful violation of section 3.1(e) of the Standards (9 C.F.R. § 3.1(e)).

vii. On January 10, 2000, Respondents stored empty feed sacks no longer in use throughout the food storage area in willful violation of section 3.1(e) of the Standards (9 C.F.R. § 3.1(e)).

b. Respondents' willful violations of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.2 of the Standards (9 C.F.R. § 3.2).

i. On February 9, 1999, Respondents' south small dog building (housing 10 dogs) was not sufficiently ventilated to minimize ammonia levels in willful violation of section 3.2(b) of the Standards (9 C.F.R. § 3.2(b)).

ii. On January 10, 2000, Respondents' south small dog building (housing 15 dogs) was not sufficiently ventilated to minimize ammonia levels in willful violation of section 3.2(b) of the Standards (9 C.F.R. § 3.2(b)).

iii. On January 10, 2000, Respondents' whelping area (used by 58 dogs) was not lighted well enough to permit routine inspection and cleaning of the facility and observation of animals in willful violation of section 3.2(c) of the Standards (9 C.F.R. § 3.2(c)).

iv. On January 10, 2000, Respondents' puppy holding area (used by 18 dogs) was not lighted well enough to permit routine inspection and cleaning of the facility and observation of animals in willful violation of section 3.2(c) of the Standards (9 C.F.R. § 3.2(c)).

v. On January 10, 2000, the material used on the ceiling of Respondents' south small dog facility (used by 15 dogs) was not impervious to moisture, and specifically, the material was wet and soft in willful violation of section 3.2(d) of the Standards (9 C.F.R. § 3.2(d)).

vi. On January 10, 2000, the food and water receptacles and whelp boxes (used by 60 dogs) were not impervious to moisture in willful violation of section 3.2(d) of the Standards (9 C.F.R. § 3.2(d)).

vii. On January 10, 2000, the flooring of Respondents' transport vehicle was not impervious to moisture in willful violation of section 3.2(d) of the Standards (9 C.F.R. § 3.2(d)).

viii. On January 10, 2000, Respondents housed three Siberian Husky puppies in a whelp area without dry bedding when the ambient temperature was below 50 degrees Fahrenheit in willful violation of section 3.2(a) of the Standards (9 C.F.R. § 3.2(a)).

c. Respondents' willful violations of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.4 of the Standards (9 C.F.R. § 3.4).

i. On February 9, 1999, Respondents housed no fewer than 20 dogs in outdoor enclosures with shelter structures that did not have a floor in willful violation of section 3.4(b) of the Standards (9 C.F.R. § 3.4(b)).

ii. On February 9, 1999, Respondents housed 41 dogs in outdoor enclosures with shelter structures that contained no bedding or insufficient bedding when the ambient temperature was below 50 degrees Fahrenheit in willful violation of section 3.4(b)(4) of the Standards (9 C.F.R. § 3.4(b)(4)).

iii. On February 9, 1999, Respondents housed no fewer than 10 dogs in outdoor enclosures with three shelter structures that did not have a wind break or a rain break at the entrance in willful violation of section 3.4(b)(3) of the Standards (9 C.F.R. § 3.4(b)(3)).

iv. On October 19, 1999, three of Respondents' outdoor shelters (housing seven large-breed puppies) that contained three small "pet taxis" as shelters, did not provide sufficient shelter for all of the puppies in willful violation of section 3.4(b) of the Standards (9 C.F.R. § 3.4(b)).

v. On October 19, 1999, one of Respondents' outdoor shelters (housing two adult large-breed dogs) contained a single 2' by 2½' shelter that did not provide sufficient shelter for all of the dogs in willful violation of section 3.4(b) of the Standards (9 C.F.R. § 3.4(b)).

vi. On October 19, 1999, one of Respondents' outdoor shelters (housing

four adult Siberian Husky dogs) contained a single 2' by 2½' shelter that did not provide sufficient shelter for all of the dogs in willful violation of section 3.4(b) of the Standards (9 C.F.R. § 3.4(b)).

vii. On October 19, 1999, none of Respondents' outdoor shelters (housing 65 dogs) provided the dogs with adequate protection from the cold, and specifically, none of the outdoor shelters contained sufficient bedding material in willful violation of section 3.4(b)(1) and (b)(4) of the Standards (9 C.F.R. § 3.4(b)(1), (b)(4)).

viii. On October 19, 1999, three of Respondents' outdoor shelters (housing eight dogs) did not have a floor in willful violation of section 3.4(b) of the Standards (9 C.F.R. § 3.4(b)).

ix. On October 19, 1999, three of Respondents' outdoor shelters (housing seven large-breed puppies) that contained "pet taxis" as shelters, did not provide shelter structures that provided the puppies with adequate protection from the cold, in that each of the "pet taxis" had holes allowing the entry of cold air, snow, wind, and rain in willful violation of section 3.4(b)(1) and (b)(2) of the Standards (9 C.F.R. § 3.4(b)(1), (b)(2)).

x. On January 10, 2000, Respondents housed two adult large-breed dogs in enclosure No. 9 with a single shelter structure measuring 30 inches by 34 inches, which provided insufficient space for both of the dogs in willful violation of section 3.4(b) of the Standards (9 C.F.R. § 3.4(b)).

xi. On January 10, 2000, Respondents housed two adult large-breed dogs in enclosure No. 9 with a single shelter structure that did not provide the dogs with adequate protection and shelter from the cold and heat in willful violation of section 3.4(b)(1) of the Standards (9 C.F.R. § 3.4(b)(1)).

xii. On January 10, 2000, Respondents housed two young Golden Retrievers in an enclosure with a single shelter structure that did not have a wind break and rain break at the entrance of the shelter in willful violation of section 3.4(b)(3) of the Standards (9 C.F.R. § 3.4(b)(3)).

xiii. On January 10, 2000, Respondents housed two adult Siberian Husky dogs in enclosure No. 8 with an outdoor shelter without a floor in willful violation of section 3.4(b) of the Standards (9 C.F.R. § 3.4(b)).

xiv. On January 10, 2000, Respondents housed two adult large-breed dogs in enclosure No. 9 with a shelter structure that contained no bedding when the ambient temperature was below 50 degrees Fahrenheit in willful violation of section 3.4(b)(4) of the Standards (9 C.F.R. § 3.4(b)(4)).

xv. On January 10, 2000, Respondents housed two adult Siberian Husky dogs in enclosure No. 8 with a shelter structure that contained no bedding when the ambient temperature was below 50 degrees Fahrenheit in willful violation of section 3.4(b)(4) of the Standards (9 C.F.R. § 3.4(b)(4)).

xvi. On January 10, 2000, Respondents housed two young Golden Retrievers in an enclosure with a shelter structure that contained no bedding when the ambient temperature was below 50 degrees Fahrenheit in willful violation of section 3.4(b)(4) of the Standards (9 C.F.R. § 3.4(b)(4)).

xvii. On January 10, 2000, Respondents housed 35 dogs outdoors in enclosures with shelter structures that contained no bedding when the ambient temperature was below 50 degrees Fahrenheit in willful violation of section 3.4(b)(4) of the Standards (9 C.F.R. § 3.4(b)(4)).

xviii. On January 10, 2000, Respondents housed three Beagle dogs outdoors in enclosures with shelter structures that contained no bedding when the ambient temperature was below 50 degrees Fahrenheit in willful violation of section 3.4(b)(4) of the Standards (9 C.F.R. § 3.4(b)(4)).

xix. On January 10, 2000, Respondents housed three Beagle dogs (which breed is short-haired and does not tolerate cold climates) outdoors when the ambient temperature was below 50 degrees Fahrenheit in willful violation of section 3.4(a) of the Standards (9 C.F.R. § 3.4(a)).

xx. On January 10, 2000, Respondents housed 40 dogs in outdoor enclosures with shelter structures that did not have any wind break and rain break at the entrance of the shelters or did not have an adequate wind break and rain break in willful violation of section 3.4(b)(3) of the Standards (9 C.F.R. § 3.4(b)(3)).

xxi. On January 10, 2000, one of Respondents' outdoor shelters (housing four adult Siberian Husky dogs) contained a single 2' by 2½' shelter that did not provide sufficient shelter for all of the dogs in willful violation of section 3.4(b) of the Standards (9 C.F.R. § 3.4(b)).

xxii. On January 10, 2000, Respondents housed 12 dogs in outdoor enclosures with four shelter structures, none of which had a floor, in willful violation of section 3.4(b) of the Standards (9 C.F.R. § 3.4(b)).

xxiii. On January 10, 2000, Respondents housed 20 dogs in outdoor enclosures with shelter structures that did not provide the animals with adequate protection and shelter from the cold and heat, in that the shelter roof had holes that allowed snow and rain inside in willful violation of section 3.4(b)(1) and (b)(2) of the Standards (9 C.F.R. § 3.4(b)(1), (b)(2)).

xxiv. On January 10, 2000, Respondents housed one young adult Collie dog and one young adult St. Bernard dog in an outdoor enclosure with a single shelter structure measuring 30 inches by 34 inches which did not provide sufficient shelter for both animals in willful violation of section 3.4(b) of the Standards (9 C.F.R. § 3.4(b)).

xxv. On January 10, 2000, Respondents housed one young adult Collie dog and one young adult St. Bernard dog in an outdoor enclosure with a single shelter structure that did not have any wind break and rain break at the entrance of

the shelter in willful violation of section 3.4(b)(3) of the Standards (9 C.F.R. § 3.4(b)(3)).

xxvi. On January 10, 2000, Respondents housed one young adult Collie dog and one young adult St. Bernard dog in an outdoor enclosure with a single shelter structure that contained no bedding when the ambient temperature was below 50 degrees Fahrenheit in willful violation of section 3.4(b)(4) of the Standards (9 C.F.R. § 3.4(b)(4)).

xxvii. On January 10, 2000, Respondents used the cover for a truck bed as a shelter structure for five dogs in willful violation of section 3.4(c) of the Standards (9 C.F.R. § 3.4(c)).

xxviii. On January 10, 2000, Respondents housed two young Golden Retrievers in an enclosure with a single shelter structure measuring 22 inches by 27 inches, which provided insufficient space for both of the dogs in willful violation of section 3.4(b) of the Standards (9 C.F.R. § 3.4(b)).

xxix. On January 10, 2000, Respondents housed two young Golden Retrievers in an enclosure with a single shelter structure that did not provide the dogs with adequate protection and shelter from the cold and heat in willful violation of section 3.4(b)(1) of the Standards (9 C.F.R. § 3.4(b)(1)).

d. Respondents' willful violations of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.6 of the Standards (9 C.F.R. § 3.6).

i. On October 19, 1999, Respondents housed five adult dogs (each of which required at least 4 square feet of floor space - for a total of 20 square feet) in a primary enclosure that measured 2 feet by 4 feet, providing a total of only 8 square feet of floor space for all five animals (which allotted each dog 1.6 square feet of floor space), which did not provide sufficient floor space for each animal, and specifically, did not allow each animal to turn about freely, and to stand, sit, and lie in a comfortable position in willful violation of section 3.6(c)(1)(i) of the Standards (9 C.F.R. § 3.6(c)(1)(i)).

ii. On January 10, 2000, Respondents housed two adult Collie dogs (requiring 32 square feet of floor space) in a primary enclosure that only provided 25 square feet of floor space, which was insufficient floor space for each animal, in willful violation of section 3.6(c)(1)(i) of the Standards (9 C.F.R. § 3.6(c)(1)(i)).

iii. On January 10, 2000, Respondents housed seven 23-inch Lhasa Apso dogs (requiring over 40 square feet of floor space) in a primary enclosure that only provided 30 square feet of floor space, which was insufficient floor space for each animal, in willful violation of section 3.6(c)(1)(i) of the Standards (9 C.F.R. § 3.6(c)(1)(i)).

iv. On January 10, 2000, Respondents housed two 15-inch Pomeranian dogs (requiring over 6 square feet of floor space) in a primary enclosure that only provided 4 square feet of floor space, which was insufficient floor space for each

animal, in willful violation of section 3.6(c)(1)(i) of the Standards (9 C.F.R. § 3.6(c)(1)(i)).

v. On January 10, 2000, Respondents housed four 22-inch Corgi dogs (requiring over 21 square feet of floor space) in a primary enclosure that only provided 12 square feet of floor space, which was insufficient floor space for each animal, in willful violation of section 3.6(c)(1)(i) of the Standards (9 C.F.R. § 3.6(c)(1)(i)).

vi. On January 10, 2000, Respondents housed four 23-inch Bichon Frise dogs (requiring over 23 square feet of floor space) in a primary enclosure that only provided 12 square feet of floor space, which was insufficient floor space for each animal, in willful violation of section 3.6(c)(1)(i) of the Standards (9 C.F.R. § 3.6(c)(1)(i)).

vii. On January 10, 2000, Respondents housed two French Poodle dogs and one Cocker Spaniel dog (requiring over 16 square feet of floor space) in a primary enclosure that only provided 12 square feet of floor space, which was insufficient floor space for each animal, in willful violation of section 3.6(c)(1)(i) of the Standards (9 C.F.R. § 3.6(c)(1)(i)).

viii. On January 10, 2000, Respondents housed six puppies in a primary enclosure that only provided 3 square feet of floor space, which was insufficient floor space for each animal, in willful violation of section 3.6(c)(1)(i) of the Standards (9 C.F.R. § 3.6(c)(1)(i)).

6. Respondents' willful violations of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) by failing to comply with the animal health and husbandry Standards (9 C.F.R. §§ 3.7-.12).

a. Respondents' willful violation of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.7 of the Standards (9 C.F.R. § 3.7).

i. On January 10, 2000, Respondents housed seven incompatible dogs together, and specifically, one of the dogs exhibited an overly-aggressive disposition and dominance with respect to food in willful violation of section 3.7(b) of the Standards (9 C.F.R. § 3.7(b)).

b. Respondents' willful violations of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.9 of the Standards (9 C.F.R. § 3.9).

i. On February 9, 1999, Respondents' food receptacles for 20 dogs were not disposable or made of a durable material that could be easily cleaned and sanitized in willful violation of section 3.9(b) of the Standards (9 C.F.R. § 3.9(b)).

ii. On February 9, 1999, Respondents' food receptacles for 20 dogs were not disposable and were not kept clean and sanitized in accordance with section 3.11(b) of the Standards (9 C.F.R. § 3.11(b)) in willful violation of section 3.9(b) of the Standards (9 C.F.R. § 3.9(b)).

iii. On February 9, 1999, Respondents' self-feeders for 20 dogs were not

protected from rain and snow, in that the tops were missing, in willful violation of section 3.9(b) of the Standards (9 C.F.R. § 3.9(b)).

iv. On February 9, 1999, Respondents' self-feeders for 20 dogs were not protected from rain and snow, in that the tops were missing, in willful violation of section 3.9(b) of the Standards (9 C.F.R. § 3.9(b)).

v. On January 10, 2000, Respondents' self-feeder for two dogs was not protected from rain and snow, in that the top was missing, in willful violation of section 3.9(b) of the Standards (9 C.F.R. § 3.9(b)).

vi. On January 10, 2000, Respondents' self-feeder for three dogs was not protected from rain and snow, in that the top was stuck open, in willful violation of section 3.9(b) of the Standards (9 C.F.R. § 3.9(b)).

vii. On January 10, 2000, Respondents' food receptacles for 10 dogs in three outdoor enclosures were not protected from rain and snow in willful violation of section 3.9(b) of the Standards (9 C.F.R. § 3.9(b)).

viii. On January 10, 2000, Respondents' food receptacles for 60 dogs were not disposable or made of a durable material that could be easily cleaned and sanitized in willful violation of section 3.9(b) of the Standards (9 C.F.R. § 3.9(b)).

ix. On January 10, 2000, Respondents' food receptacles for 60 dogs were not disposable and were not kept clean and sanitized in accordance with section 3.11(b) of the Standards (9 C.F.R. § 3.11(b)) in willful violation of section 3.9(b) of the Standards (9 C.F.R. § 3.9(b)).

c. Respondents' willful violation of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.10 of the Standards (9 C.F.R. § 3.10).

i. On January 10, 2000, Respondents' water receptacles for 60 dogs were not kept clean and sanitized in accordance with section 3.11(b) of the Standards (9 C.F.R. § 3.11(b)) in willful violation of section 3.10 of the Standards (9 C.F.R. § 3.10).

d. Respondents' willful violations of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.11 of the Standards (9 C.F.R. § 3.11).

i. On October 21, 1998, Respondents failed to control weeds and grass and to keep premises free of trash and discarded matter around animal enclosures housing 30 dogs in willful violation of section 3.11(c) of the Standards (9 C.F.R. § 3.11(c)).

ii. On October 19, 1999, Respondents failed to control weeds and grass and to keep premises free of trash and discarded matter around animal enclosures housing 64 dogs in willful violation of section 3.11(c) of the Standards (9 C.F.R. § 3.11(c)).

iii. On October 19, 1999, Respondents failed to remove excreta and waste from an enclosure housing two dogs in willful violation of section 3.11(a) of the Standards (9 C.F.R. § 3.11(a)).

iv. On February 9, 1999, Respondents' inside facilities for dogs were not kept clean to reduce and eliminate breeding areas for pests, and specifically, Respondents' inside facilities had large accumulations of cobwebs, indicative of lack of cleaning, in willful violation of section 3.11(c) of the Standards (9 C.F.R. § 3.11(c)).

v. On February 9, 1999, Respondents failed to remove excreta from primary enclosures housing 78 dogs in the south small dog building in willful violation of section 3.11(a) of the Standards (9 C.F.R. § 3.11(a)).

vi. On January 10, 2000, Respondents' inside facilities for 58 dogs were not kept clean to reduce and eliminate breeding areas for pests, and specifically, Respondents' inside facilities had large accumulations of cobwebs, indicative of lack of cleaning, in willful violation of section 3.11(c) of the Standards (9 C.F.R. § 3.11(c)).

vii. On January 10, 2000, Respondents failed to keep premises free of trash, junk, and discarded matter around animal enclosures housing 40 dogs in willful violation of section 3.11(c) of the Standards (9 C.F.R. § 3.11(c)).

viii. On January 10, 2000, Respondents failed to remove excreta in a primary enclosure housing one Malamute dog in willful violation of section 3.11(a) of the Standards (9 C.F.R. § 3.11(a)).

ix. On January 10, 2000, Respondents failed to remove accumulated excreta in primary enclosures housing 20 dogs in willful violation of section 3.11(a) of the Standards (9 C.F.R. § 3.11(a)).

x. On January 10, 2000, Respondents failed to remove accumulated excreta in primary enclosures (whelp pens) housing 40 dogs in willful violation of section 3.11(a) of the Standards (9 C.F.R. § 3.11(a)).

xi. On January 10, 2000, Respondents failed to remove accumulated excreta in a primary enclosure (transport vehicle) in willful violation of section 3.11(a) of the Standards (9 C.F.R. § 3.11(a)).

xii. On January 10, 2000, Respondents failed to remove accumulated excreta in primary enclosures housing 60 dogs in willful violation of section 3.11(a) of the Standards (9 C.F.R. § 3.11(a)).

e. Respondents' willful violation of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.12 of the Standards (9 C.F.R. § 3.12).

i. On January 10, 2000, Respondents did not have sufficient employees to carry out the required husbandry practices for 100 dogs in willful violation of section 3.12 of the Standards (9 C.F.R. § 3.12).

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondents' Appeal Petition

Respondents raise four issues in their "Motion to [S]et [A]side Default Judgement" [hereinafter Appeal Petition]. First, Respondents contend their failure to file a timely answer is due to excusable neglect and under Rule 6(b) of the Federal Rules of Civil Procedure, the time for filing their answer should be enlarged (Appeal Pet. at 1).

Respondents' reliance on the Federal Rules of Civil Procedure is misplaced. Rule 1 of the Federal Rules of Civil Procedure provides that the Federal Rules of Civil Procedure govern procedure in the United States district courts, as follows:

> **Rule 1. Scope and Purpose of Rules**
>
> These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.

Fed. R. Civ. P. 1.

The Federal Rules of Civil Procedure are not applicable to administrative proceedings conducted before the Secretary of Agriculture under the Animal Welfare Act and the Rules of Practice.[7] Moreover, Respondents were required to

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[7] *In re Karl Mitchell*, 60 Agric. Dec. 91, 123 (2001), *aff'd*, 42 Fed. Appx. 991, 2002 WL 1941189 (9th Cir. Aug. 22, 2002); *In re Anna Mae Noell*, 58 Agric. Dec. 130, 147 (1999), *appeal dismissed sub nom. The Chimp Farm, Inc. v. United States Dep't of Agric.*, No. 00-10608-A (11th Cir. July 20, 2000). *See also Kelly v. EPA*, 203 F.3d 519, 523 (7th Cir. 2000) (stating the Federal Rules of Civil Procedure do not apply to administrative proceedings); *Morrow v. Department of Agric.*, 65 F.3d 168 (Table) (per curiam), 1995 WL 523336 (6th Cir. 1995), *printed in* 54 Agric. Dec. 870 (1995) (stating neither the Federal Rules of Civil Procedure nor the Federal Rules of Criminal Procedure apply to administrative hearings); *Mister Discount Stockbrokers, Inc. v. SEC*, 768 F.2d 875, 878 (7th Cir. 1985) (stating neither the Federal Rules of Civil Procedure nor the Federal Rules of Criminal Procedure apply to administrative hearings); *In re Fresh Prep, Inc.*, 58 Agric. Dec. 627, 636 (1999) (stating the Federal Rules of Civil Procedure are not applicable to proceedings conducted before the Secretary of Agriculture under the Perishable Agricultural Commodities Act, as amended, and the Rules of Practice); *In re Fresh Prep, Inc.*, 58 Agric. Dec. 683, 687 (1999) (Ruling on Certified Question) (stating the Federal Rules of Civil Procedure are not applicable to proceedings conducted before the Secretary of Agriculture under the Perishable Agricultural Commodities Act, as amended, and the Rules of Practice); *In re United Foods, Inc.*, 57 Agric. Dec. 329, 347-48 (1998) (stating the Federal Rules of Civil Procedure are not applicable to proceedings conducted before the Secretary of Agriculture under the Mushroom Promotion, Research, and Consumer Information Act of 1990, as amended, and the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Research, (continued...)

file their answer no later than November 4, 2001. Respondents' request for an extension of time within which to file their answer, filed September 16, 2002, comes far too late to be considered. Further still, on January 24, 2002, Respondents filed a late-filed answer in which they failed to deny or otherwise respond to the allegations of the Complaint. Respondents cite no basis for my allowing Respondents to file a second answer. Therefore, I deny Respondents' request that I enlarge the time for filing an answer.

Second, Respondents, relying on *Houston v. Lack*, 487 U.S. 266 (1988), contend the Chief ALJ's Initial Decision and Order should be set aside because Terry Wharff McGloghlon is a prisoner and a pro se respondent in this proceeding. Respondents argue, based on Terry Wharff McGloghlon's status as a prisoner, any documents Mr. McGloghlon filed in this proceeding must be deemed to have been filed on the day the documents were delivered to prison authorities for forwarding to the Hearing Clerk. (Appeal Pet. at 1.)

As an initial matter, Terry Wharff McGloghlon is not a respondent in this proceeding. The record before me indicates that there are only two Respondents, Heartland Kennels, Inc., and Halvor Skaarhaug. However, even if Terry Wharff

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[7](...continued)
Promotion and Education Programs), *aff'd*, Nos. 96-01252, 98-01082 (W.D. Tenn. Aug. 3, 1998), *rev'd on other grounds*, 197 F.3d 221 (6th Cir. 1999), *aff'd*, 533 U.S. 405 (2001); *In re Kreider Dairy Farms, Inc.*, 57 Agric. Dec. 413, 421-22 (1998) (Order Denying Pet. for Recons.) (stating the Federal Rules of Civil Procedure are not applicable to United States Department of Agriculture proceedings conducted before the Secretary of Agriculture under the Agricultural Marketing Agreement Act of 1937, as amended, and the Rules of Practice Governing Proceedings To Modify or To Be Exempted From Marketing Orders); *In re Dean Byard*, 56 Agric. Dec. 1543, 1559 (1997) (stating while respondent's reference to the "standard" Rules of Civil Procedure is unclear, no rules of civil procedure govern a proceeding instituted under the Horse Protection Act of 1970, as amended, and the Rules of Practice); *In re Far West Meats*, 55 Agric. Dec. 1045, 1055-56 (1996) (Clarification of Ruling on Certified Questions) (stating the Federal Rules of Civil Procedure are not applicable to United States Department of Agriculture proceedings conducted under the Rules of Practice); *In re Far West Meats*, 55 Agric. Dec. 1033, 1039-40 (1996) (Ruling on Certified Questions) (stating the Federal Rules of Civil Procedure are not applicable to United States Department of Agriculture proceedings conducted under the Rules of Practice); *In re James Joseph Hickey, Jr.*, 53 Agric. Dec. 1087, 1096-99 (1994) (stating the Federal Rules of Civil Procedure are not applicable to the United States Department of Agriculture's disciplinary proceedings conducted in accordance with the Rules of Practice), *aff'd*, 878 F.2d 385, 1989 WL 71462 (9th Cir. 1989) (not to be cited as precedent under 9th Circuit Rule 36-3), *printed in* 48 Agric. Dec. 107 (1989); *In re Shasta Livestock Auction Yard, Inc.*, 48 Agric. Dec. 491, 504 n.5 (1989) (holding the Federal Rules of Civil Procedure are not followed in proceedings before the United States Department of Agriculture); *In re James W. Hickey*, 47 Agric. Dec. 840, 850 (1988) (stating procedural and evidentiary rules applicable in court proceedings are not applicable in administrative proceedings and it is the United States Department of Agriculture's policy to make no effort to follow them), *aff'd*, 878 F.2d 385, 1989 WL 71462 (9th Cir. 1989) (not to be cited as precedent under 9th Circuit Rule 36-3), *printed in* 48 Agric. Dec. 107 (1989).

McGloghlon were a pro se respondent in this proceeding, I would not deem documents filed by him to be filed on the date that he delivered them to prison authorities for forwarding to the Hearing Clerk.

Houston v. Lack holds that under Federal Rule of Appellate Procedure 4(a)(1), a pro se prisoner's notice of appeal is filed at the moment of delivery to prison authorities for forwarding to the appropriate United States district court. Rule 1(a)(1) of the Federal Rules of Appellate Procedure provides that the Federal Rules of Appellate Procedure govern procedure in the United States courts of appeals, as follows:

> **Rule 1. Scope of Rules; Title**
>
> **(a) Scope of Rules.**
>
> (1) These rules govern procedure in the United States courts of appeals.

Fed. R. App. P. 1(a)(1).

The Federal Rules of Appellate Procedure are not applicable to administrative proceedings conducted before the Secretary of Agriculture under the Animal Welfare Act. Therefore, I find *Houston v. Lack*, which construes the Federal Rules of Appellate Procedure, inapposite.

Section 1.147(g) of the Rules of Practice, which is applicable to this proceeding, clearly provides that a document required or authorized to be filed under the Rules of Practice is deemed to be filed at the time the document reaches the Hearing Clerk, as follows:

> **§ 1.147 Filing; service; extensions of time; and computation of time.**
>
> . . . .
>
> (g) *Effective date of filing.* Any document or paper required or authorized under the rules in this part to be filed shall be deemed to be filed at the time when it reaches the Hearing Clerk; or, if authorized to be filed with another officer or employee of the Department it shall be deemed to be filed at the time when it reaches such officer or employee.

7 C.F.R. § 1.147(g).

An incarcerated pro se respondent's delivery of a document to prison authorities for forwarding to the Hearing Clerk does not constitute filing with the Hearing

Clerk under the Rules of Practice.[8] Therefore, I reject Respondents' contention that any documents Terry Wharff McGloghlon filed in this proceeding must be deemed to have been filed on the day the documents were delivered to prison authorities for forwarding to the Hearing Clerk.

Third, Respondents contend that setting aside the Chief ALJ's Initial Decision and Order and remanding the proceeding to the Chief ALJ for a hearing will not prejudice Complainant's ability to present his case (Appeal Pet. at 2).

Respondents are deemed, for the purposes of this proceeding, to have admitted the allegations of the Complaint. Under these circumstances, there are no issues of fact on which a meaningful hearing could be held in this proceeding. Therefore, even if I found that Complainant would not be prejudiced by my remanding the proceeding to the Chief ALJ for a hearing, that finding would not constitute a basis for setting aside the Chief ALJ's Initial Decision and Order and remanding the

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[8] *See generally In re Jack Stepp*, 59 Agric. Dec. 265, 268 (2000) (Ruling Denying Respondents' Pet. for Recons. of the Order Lifting Stay) (stating neither respondents' mailing the reply to motion to lift stay nor the United States Postal Service's delivering the reply to motion to lift stay to the United States Department of Agriculture, Mail & Reproduction Management Division, Mail Services Branch, constitutes filing with the Hearing Clerk); *In re Harold P. Kafka*, 58 Agric. Dec. 357, 365 (1999) (Order Denying Late Appeal) (stating the respondent's unsuccessful efforts to file his appeal petition with the Hearing Clerk do not constitute filing the appeal petition with the Hearing Clerk), *aff'd per curiam*, 259 F.3d 716 (3d Cir. 2001) (Table), *printed in* 60 Agric. Dec. 23 (2001); *In re Sweck's, Inc.*, 58 Agric. Dec. 212, 213 n.1 (1999) (stating appeal petitions must be filed with the Hearing Clerk; indicating the hearing officer erred when he instructed the litigants that appeal petitions must be filed with the Judicial Officer); *In re Daniel E. Murray*, 58 Agric. Dec. 77, 82 (1999) (Order Denying Pet. for Recons.) (stating the effective date of filing a document with the Hearing Clerk is the date the document reaches the Hearing Clerk, not the date the respondent mailed the document); *In re Anna Mae Noell*, 58 Agric. Dec. 130, 140 n.2 (1999) (stating the date typed on a pleading by a party filing the pleading does not constitute the date the pleading is filed with the Hearing Clerk; instead, the date a document is filed with the Hearing Clerk is the date the document reaches the Hearing Clerk), *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 Severin Peterson*, 57 Agric. Dec. 1304, 1310 n.3 (1998) (Order Denying Late Appeal) (stating neither the applicants' mailing their appeal petition to the Regional Director, National Appeals Division, nor the receipt of the applicants' appeal petition by the National Appeals Division, Eastern Regional Office, nor the National Appeals Division's delivering the applicants' appeal petition to the Office of the Judicial Officer, constitutes filing with the Hearing Clerk); *In re Gerald Funches*, 56 Agric. Dec. 517, 528 (1997) (stating attempts to reach the Hearing Clerk do not constitute filing an answer with the Hearing Clerk); *In re Billy Jacobs, Sr.*, 56 Agric. Dec. 504, 514 (1996) (stating even if the respondent's answer had been received by the complainant's counsel within the time for filing the answer, the answer would not be timely because the complainant's counsel's receipt of the respondent's answer does not constitute filing with the Hearing Clerk), *appeal dismissed*, No. 96-7124 (11th Cir. June 16, 1997).

proceeding to the Chief ALJ for a hearing.[9]

Fourth, Respondents deny the violations of the Animal Welfare Act and the Regulations and Standards alleged in the Complaint and found by the Chief ALJ in the Initial Decision and Order (Appeal Pet. at 2).

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 they failed to answer the Complaint within 20 days after the Hearing Clerk served them with the Complaint.

The Hearing Clerk served Respondents with the Complaint, the Rules of Practice, and the Hearing Clerk's October 4, 2001, service letter on October 15, 2001.[10] 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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> **§ 1.139 Procedure upon failure to file an answer or admission of facts.**

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[9] *See In re Anna Mae Noell*, 58 Agric. Dec. 130, 146 (1999) (stating even if complainant would not be prejudiced by allowing respondents to file a late answer, that finding would not constitute a basis for setting aside the default decision), *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 Dean Byard*, 56 Agric. Dec. 1543, 1561-62 (1997) (rejecting respondent's contention that complainant must allege or prove prejudice to complainant's ability to present its case before an administrative law judge may issue a default decision; stating the Rules of Practice do not require, as a prerequisite to the issuance of a default decision, that a respondent's failure to file a timely answer has prejudiced complainant's ability to present its case).

[10] *See* note 1.

> 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 19.

Similarly, the Hearing Clerk informed Respondents in the October 4, 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:

> October 4, 2001
>
> Halvor Skaarhaug

Heartland Kennels, Inc.
Rural Route 1, Box 27
Greenville, South Dakota 57239

Dear Sir:

Subject: In re: Heartland Kennels, Inc., a South Dakota corporation; and Halvor Skaarhaug, an individual - Respondents
AWA Docket No. 02-0004

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. We also need your present and future telephone number [sic].

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 December 4, 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.[11] On January 24, 2002, Respondents filed a letter in response to the Complaint. Respondents' late-filed response to the Complaint does not deny or otherwise respond to the allegations of the Complaint.[12]

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,[13] generally there is no basis for setting aside a

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[11]*See* note 2.

[12]*See* note 6.

[13]*See Dale Goodale*, 60 Agric. Dec. 670 (2001) (Remand Order) (setting aside the default decision because the administrative law judge adopted apparently inconsistent findings of a dispositive fact in the default decision, and the order in the default decision was not clear); *In re Deora Sewnanan*, 60 Agric. Dec. 688 (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 (continued...)

default decision that is based upon a respondent's failure to file a timely answer.[14]

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[13](...continued)
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).

[14]*See generally In re Steven Bourk* (Decision as to Steven Bourk and Carmella Bourk), 61 Agric. Dec. 25 (2002) (holding the default decision was properly issued where Respondent Steven Bourk's first and only filing was 10 months 9 days after he was served with the complaint and Respondent Carmella Bourk's first filing was 5 months 5 days after she was served with the complaint; stating both respondents are deemed, by their 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 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 5 days after they were served with the complaint and 5 months 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 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 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
(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 filed a timely answer. Moreover, when Respondents did file an answer, 3 months 9 days after being served with the Complaint, Respondents failed to deny or otherwise respond to the allegations of the Complaint. 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)). Respondents' failure to deny or otherwise respond to the allegations of the

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[14](...continued)
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 the answer 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 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).

Complaint 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.[15]

Paragraph 4.l. of the Complaint

Respondents are deemed to have admitted that on January 10, 2000, Respondents maintained expired or ineffective drugs for animal use, as alleged in paragraph 4.*l.* of the Complaint. Complainant alleges that Respondents' maintenance of these expired or ineffective drugs is a failure to provide a program of adequate veterinary care in accordance with section 2.40(b)(1) and (b)(2) of the Regulations (9 C.F.R. § 2.40(b)(1), (b)(2)) (Compl. ¶ 4.l.).

Section 2.40 of the Regulations (9 C.F.R. § 2.40) does not specifically prohibit the maintenance of expired or ineffective drugs. Based on the limited record before me, I do not conclude that Respondents' maintenance of expired and ineffective drugs by itself is a failure to provide adequate veterinary care in violation of section 2.40(b)(1) and (b)(2) of the Regulations (9 C.F.R. § 2.40(b)(1), (b)(2)).[16]

Paragraph 4.m. of the Complaint

Respondents are deemed to have admitted that on January 10, 2000,

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[15] *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 Constitution of the United States 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).

[16] *See generally In re Fred Hodgins*, 56 Agric. Dec. 1242, 1321-22 (1997), *remanded*, 238 F.3d 421 (Table), 2000 WL 1785733 (6th Cir. 2000) (citation limited under 6th Circuit Rule 28(g)), *printed in* 59 Agric. Dec. 534 (2000), *final decision on remand*, 60 Agric. Dec. 73 (2001), *aff'd*, 33 Fed. Appx. 784, 2002 WL 649102 (6th Cir. 2002) (unpublished).

Respondents housed 60 dogs outside in wet and cold conditions "without providing the animals without adequate means to stay warm and dry," as alleged in paragraph 4.m. of the Complaint. Complainant alleges that Respondents' housing the dogs outside in wet and cold conditions "without providing the animals without adequate means to stay warm and dry" constitutes a failure to establish and maintain programs of adequate veterinary care in violation of section 2.40(b)(2) of the Regulations (9 C.F.R. § 2.40(b)(2)) (Compl. ¶ 4.m.).

The meaning of "without providing the animals without adequate means to stay warm and dry" in paragraph 4.m. of the Complaint is not clear. Therefore, even though Respondents are deemed to have admitted the allegations in paragraph 4.m. of the Complaint, I do not conclude that Respondents violated section 2.40(b)(2) of the Regulations (9 C.F.R. § 2.40(b)(2)) based on their admission of the allegations in paragraph 4.m. of the Complaint.

Section 2.100(b) of the Regulations (9 C.F.R. § 2.100(b))

The Chief ALJ concluded that Respondents willfully violated section 2.100(b) of the Regulations (9 C.F.R. § 2.100(b)), a provision which relates to carriers (Initial Decision and Order at 21, 26). However, the facts alleged in the Complaint, which Respondents are deemed to have admitted, do not support the conclusion that Respondents were carriers. Instead, I conclude, based on the allegations in the Complainant, which Respondents are deemed to have admitted, that Respondents were dealers who willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)), a provision which relates to dealers.

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 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 $54,642.50 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 $54,642.50 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. 02-0004.

3. Respondent Halvor Skaarhaug's Animal Welfare Act license (Animal Welfare Act license number 46-B-0062) 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 Respondent Halvor Skaarhaug.

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 October 8, 2002.

In re: HEARTLAND KENNELS, INC., A SOUTH DAKOTA CORPORATION; AND HALVOR SKAARHAUG, AN INDIVIDUAL.
AWA Docket No. 02-0004.
Order Granting Respondents' Requests for Extension of Time and the Rules of Practice and Denying Respondents' Request for Evidence.
Filed August 30, 2002.

Colleen A. Carroll, for Complainant.
Respondents, Pro se.
Order issued by William G. Jenson, Judicial Officer.

On August 13, 2002, Heartland Kennels, Inc., and Halvor Skaarhaug [hereinafter Respondents] filed three requests. First, Respondents request an extension of time to appeal Chief Administrative Law Judge James W. Hunt's "Decision and Order as to Heartland Kennels, Inc., and Halvor Skaarhaug By Reason of Admission of Facts." Colleen A. Carroll, counsel for Bobby R. Acord, Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], informed me that Complainant does not object to Respondents' request for an extension of time to file

an appeal petition. I find good reason for granting Respondents' request for an extension of time to file an appeal petition.

Second, Respondents request a copy of the provisions of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes [hereinafter the Rules of Practice] (7 C.F.R. §§ 1.130-.151) which are applicable to filing an appeal petition.

The record before me establishes that the Hearing Clerk served Respondents with a copy of the Rules of Practice (7 C.F.R. § 1.130-.151) on October 15, 2001. Nonetheless, I hereby request that the Hearing Clerk send Respondents a copy of the Rules of Practice with this Oder. Further, in the unlikely event that the Hearing Clerk fails to send a copy of the Rules of Practice with this Order to Respondents, I set forth below the provisions of the Rules of Practice which are applicable to filing an appeal petition:

> **§ 1.145 Appeal to Judicial Officer.**
>
> (a) *Filing of petition.* Within 30 days after receiving service of the Judge's decision, a party who disagrees with the decision, or any part thereof, or any ruling by the Judge or any alleged deprivation of rights, may appeal such decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk. As provided in § 1.141(h)(2), objections regarding evidence or a limitation regarding examination or cross-examination or other ruling made before the Judge may be relied upon in an appeal. Each issue set forth in the petition, and the arguments thereon, shall be separately numbered; shall be plainly and concisely stated; and shall contain detailed citations of the record, statutes, regulations or authorities being relied upon in support thereof. A brief may be filed in support of the appeal simultaneously with the petition.

7 C.F.R. § 1.145(a).

Third, Respondents request a copy of the "evidence or proof" of the allegations in the Complaint. The record before me establishes that no hearing has been conducted in this proceeding in which evidence was received.

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

ORDER

The time for filing Respondents' appeal petition is extended to September 30, 2002. Respondents' request for a copy of section 1.145(a) of the Rules of Practice

(7 C.F.R. § 1.145(a)) is granted. Respondents' request for a copy of the evidence of the allegations in the Complaint is denied.

_____

In re: HEARTLAND KENNELS, INC., A SOUTH DAKOTA CORPORATION; AND HALVOR SKAARHAUG, AN INDIVIDUAL.
AWA Docket No. 02-0004.
Ruling Denying Motion to Postpone Proceedings.
Filed October 22, 2002.

AWA – Failure to file timely answer.

Respondent moved for a postponement until their witness was released from incarceration in one to three years. The JO ruled that the Respondent's failure to file a timely answer to the Complaint has resulted in an admission to the complaint under the rules and that no purpose would be served by waiting for the release of Respondent's witness.

Colleen A. Carroll, for Complainant.
Respondents, Pro se.
Ruling issued by William G. Jenson, Judicial Officer.

Heartland Kennels, Inc., and Halvor Skaarhaug [hereinafter Respondents] filed a "Motion to [P]ostpone [P]roceedings" on October 8, 2002, requesting that I postpone this proceeding until Terry McGloghlon is released from South Dakota State prison. Respondents state that Mr. McGloghlon is scheduled to be released from prison between March 2003 and March 2005. (Mot. to Postpone Proceedings at 1.) I provided Bobby R. Acord, Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], 8 days in which to respond to Respondents' Motion to Postpone Proceedings. Complainant failed to file a timely response to Respondents' Motion to Postpone Proceedings. On October 21, 2002, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Respondents' Motion to Postpone Proceedings.

Respondents contend this proceeding should be postponed because Respondents have a defense to the allegations of the Complaint, and Respondents cannot adequately prepare their defense while Mr. McGloghlon is incarcerated (Mot. to Postpone Proceedings at 1-2).

Respondents' request to postpone the proceeding in order to prepare a defense to the allegations of the Complaint comes too late to be granted. Complainant instituted this proceeding under 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]. Sections 1.136(a), 1.136(c), 1.139, and 1.141(a) of the Rules of Practice clearly state an answer to a complaint must be filed within 20 days after the Hearing Clerk serves it on a respondent 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.
>
> **§ 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).

The Hearing Clerk served Respondents with the Complaint on October 15, 2001.[1] Respondents failed to file an answer within 20 days after the Hearing Clerk served them with the Complaint. Moreover, when Respondents did file an answer on January 24, 2002, 3 months 9 days after being served with the Complaint, Respondents failed to deny or otherwise respond to the allegations of the Complaint.[2] Respondents' failure to file a timely answer is deemed, for purposes of this proceeding, an admission of the allegations of the Complaint and constitutes a waiver of hearing (7 C.F.R. §§ 1.136(c), .139, .141(a)). Respondents' failure to deny or otherwise respond to the allegations of the Complaint is deemed, for purposes of this proceeding, an admission of the allegations of the Complaint and constitutes a waiver of hearing (7 C.F.R. §§ 1.136(c), .139, .141(a)).

Accordingly, no purpose would be served by my postponing the proceeding until Mr. McGloghlon is released from South Dakota State prison so that Respondents can prepare a defense to allegations which they are deemed to have admitted.

Respondents also contend the postponement of this proceeding will not prejudice Complainant (Mot. to Postpone Proceedings at 1-2).

Respondents are deemed, for the purposes of this proceeding, to have admitted the allegations of the Complaint. Therefore, even if I found that Complainant would not be prejudiced by my postponing this proceeding, that finding would not constitute a basis for postponing the proceeding so that Respondents can prepare

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[1]United States Postal Service Domestic Return Receipts for Article Number 7099 3400 0014 4584 8479 and Article Number 7099 3400 0014 4584 8462.

[2]Respondents' January 24, 2002, filing states in its entirety:

> To whom it may concern
>
> I was not aware of the original correspondence untill [sic] the Post Master asked me to sign the enclosed paper they were dropped off at my 89 year old mothers [sic] place and she forgot to give them to me. As far as response I have not sold a pup or dog since 1999 - I surrendered my license in Jan 2000 and surrendered the dogs in the Fall of 2000. USDA inspectors told me that would be the end of it all - am surprised to see this now.
>
> Halvor Skaarhaug
> RR 1 Box 27
> Greenville, SD
> 57239

a defense to allegations which they are deemed to have admitted.[3]

For the foregoing reasons, I deny Respondents' Motion to Postpone Proceedings.

In re: HEARTLAND KENNELS, INC., A SOUTH DAKOTA CORPORATION; AND HALVOR SKAARHAUG, AN INDIVIDUAL.
AWA Docket No. 02-0004.
Order Denying Petition for Reconsideration.
Filed November 13, 2002.

AWA – Petition for reconsideration – Failure to deny allegations – Waiver of right to hearing – Default – Dealer – Civil penalty – License revocation – Cease and desist order.

The Judicial Officer denied Respondents' Petition for Reconsideration. The Judicial Officer rejected Respondents' late-filed request for an opportunity to defend against the allegations in the Complaint stating, by their failure to file a timely answer, Respondents had waived their right to a hearing and were deemed to have admitted the allegations in the Complaint (7 C.F.R. §§ 1.136(c), .139).

Colleen A. Carroll, for Complainant.
Respondents, Pro se.
Initial decision issued by James W. Hunt, Chief Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

Bobby R. Acord, 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 October 3, 2001. Complainant instituted the proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act];

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[3] *See In re Anna Mae Noell*, 58 Agric. Dec. 130, 146 (1999) (stating even if complainant would not be prejudiced by allowing respondents to file a late answer, that finding would not constitute a basis for setting aside the default decision), *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 Dean Byard*, 56 Agric. Dec. 1543, 1561-62 (1997) (rejecting respondent's contention that complainant must allege or prove prejudice to complainant's ability to present its case before an administrative law judge may issue a default decision; stating the Rules of Practice do not require, as a prerequisite to the issuance of a default decision, that a respondent's failure to file a timely answer has prejudiced complainant's ability to present its case).

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 Heartland Kennels, Inc., and Halvor Skaarhaug [hereinafter Respondents] committed numerous willful violations of the Animal Welfare Act and the Regulations and Standards on March 24, 1998, October 21, 1998, February 9, 1999, October 19, 1999, and January 10, 2000 (Compl. ¶¶ 4-9).

The Hearing Clerk served Respondents with the Complaint, the Rules of Practice, and a service letter on October 15, 2001.[1] 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 December 4, 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.[2] On January 24, 2002, Respondents filed a late-filed answer to the Complaint, which does not deny or otherwise respond to the allegations in the Complaint.

On May 15, 2002, 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 Heartland Kennels, Inc., and Halvor Skaarhaug By Reason of Admission of Facts" [hereinafter Proposed Default Decision]. The Hearing Clerk served Respondents with Complainant's Motion for Default Decision, Complainant's Proposed Default Decision, and a service letter on May 24, 2002.[3]

On June 13, 2002, Respondents requested an extension of time within which to file objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision. Chief Administrative Law Judge James W. Hunt [hereinafter the Chief ALJ] granted Respondents' request by extending Respondents' time for filing objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision to July 1, 2002.[4] On July 3, 2002, Respondents requested a second extension of time to file objections

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[1]United States Postal Service Domestic Return Receipts for Article Number 7099 3400 0014 4584 8479 and Article Number 7099 3400 0014 4584 8462.

[2]Letter dated December 4, 2001, from Joyce A. Dawson, Hearing Clerk, to Respondent Halvor Skaarhaug.

[3]United States Postal Service Domestic Return Receipts for Article Number 7099 3400 0014 4581 8212 and Article Number 7099 3400 0014 4584 7878.

[4]Order Extending Time to File Response filed June 14, 2002.

to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision, which the Chief ALJ denied.[5]

On July 15, 2002, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the Chief ALJ issued a "Decision and Order as to Heartland Kennels, Inc., and Halvor Skaarhaug By Reason of Admission of Facts" [hereinafter Initial Decision and Order]: (1) concluding that Respondents willfully violated the Animal Welfare Act and the Regulations and Standards as alleged in the Complaint; (2) directing Respondents to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; (3) assessing Respondents jointly and severally a $54,642.50 civil penalty; and (4) revoking Respondent Halvor Skaarhaug's Animal Welfare Act license (Animal Welfare Act license number 46-B-0062).

On September 16, 2002, Respondents appealed to the Judicial Officer. On October 1, 2002, Complainant filed "Complainant's Response to Respondents' Motion to Set Aside Default Judgment." On October 3, 2002, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision. On October 8, 2002, I issued a Decision and Order in which I adopted, with minor modifications, the Chief ALJ's Initial Decision and Order as the final Decision and Order. *In re Heartland Kennels, Inc.*, 61 Agric. Dec. ___ (Oct. 8, 2002).

On October 29, 2002, Respondents filed a "Petition for Reconsideration of Judicial Officer's Decision." On November 7, 2002, Complainant filed "Complainant's Response to Respondents' Petition for Reconsideration of Judicial Officer's Decision." On November 7, 2002, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for reconsideration of the October 8, 2002, Decision and Order.

CONCLUSIONS BY THE JUDICIAL OFFICER ON RECONSIDERATION

Respondents request that they be given an opportunity defend against the allegations in the Complaint (Respondents' Petition for Reconsideration of Judicial Officer's Decision).

Respondents are deemed, for purposes of this proceeding, to have admitted the allegations in the Complaint because they failed to answer the Complaint within 20 days after the Hearing Clerk served them with the Complaint. Respondents' request to defend against the allegations in the Complaint comes far too late to be granted.

The Hearing Clerk served Respondents with the Complaint, the Rules of

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[5]Order Denying Extension of Time to File Objections to Complainant's Motion for Adoption of Proposed Decision filed July 5, 2002.

Practice, and the Hearing Clerk's October 4, 2001, service letter on October 15, 2001.[6] 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.

§ 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.

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[6] *See* note 1.

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 19.

Similarly, the Hearing Clerk informed Respondents in the October 4, 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:

> October 4, 2001
>
> Halvor Skaarhaug
> Heartland Kennels, Inc.
> Rural Route 1, Box 27
> Greenville, South Dakota 57239
>
> Dear Sir:
>
> Subject: In re: Heartland Kennels, Inc., a South Dakota corporation; and Halvor Skaarhaug, an individual - Respondents
> AWA Docket No. 02-0004
>
> 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. We also need your present and future telephone number [sic].

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 December 4, 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.[7] On January 24, 2002, Respondents filed a letter in response to the Complaint. Respondents' late-filed response to the Complaint

[7] *See* note 2.

does not deny or otherwise respond to the allegations of the Complaint.[8]

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,[9] generally there is no basis for setting aside a

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[8]Respondents filed a letter in response to the Complaint on January 24, 2002, 3 months 9 days after they were served with the Complaint. Respondents' response states in its entirety:

> To whom it may concern
>
> I was not aware of the original correspondence untill [sic] the Post Master asked me to sign the enclosed paper they were dropped off at my 89 year old mothers [sic] place and she forgot to give them to me. As far as response I have not sold a pup or dog since 1999 - I surrendered my license in Jan 2000 and surrendered the dogs in the Fall of 2000. USDA inspectors told me that would be the end of it all - am surprised to see this now.
>
> Halvor Skaarhaug
> RR 1 Box 27
> Greenville, SD
> 57239

[9]*See Dale Goodale*, 60 Agric. Dec. 670 (2001) (Remand Order) (setting aside the default decision because the administrative law judge adopted apparently inconsistent findings of a dispositive fact in the default decision, and the order in the default decision was not clear); *In re Deora Sewnanan*, 60 Agric. Dec. 688 (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).

default decision that is based upon a respondent's failure to file a timely answer.[10]

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[10]*See generally In re Steven Bourk* (Decision as to Steven Bourk and Carmella Bourk), 61 Agric. Dec. 25 (2002) (holding the default decision was properly issued where Respondent Steven Bourk's first and only filing was 10 months 9 days after he was served with the complaint and Respondent Carmella Bourk's first filing was 5 months 5 days after she was served with the complaint; stating both respondents are deemed, by their 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 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 5 days after they were served with the complaint and 5 months 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 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 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

(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 filed a timely answer. Moreover, when Respondents did file an answer, 3 months 9 days after being served with the Complaint, Respondents failed to deny or otherwise respond to the allegations of the Complaint. 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)). Respondents' failure to deny or otherwise respond to the allegations of the Complaint 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

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[10](...continued)
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 the answer 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 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).

Amendment to the Constitution of the United States.[11]

For the foregoing reasons and the reasons set forth in *In re Heartland Kennels, Inc.*, 61 Agric. Dec. ___ (Oct. 8, 2002), Respondents' Petition for Reconsideration of Judicial Officer's Decision is denied.

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] Respondents' Petition for Reconsideration of Judicial Officer's Decision was timely filed and automatically stayed the October 8, 2002, Decision and Order. Therefore, since Respondents' Petition for Reconsideration of Judicial Officer's Decision is denied, I hereby lift the automatic stay, and the Order in *In re Heartland Kennels, Inc.*, 61 Agric. Dec. ___ (Oct. 8, 2002), is reinstated; except that the effective date of the Order is the date indicated in the Order in this Order Denying Petition for Reconsideration.

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 and Standards.

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[11] *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 Constitution of the United States 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).

[12] *In re Karl Mitchell*, 60 Agric. Dec. 647, 667 (2001) (Order Granting Complainant's Pet. for Recons.); *In re Reginald Dwight Parr*, 59 Agric. Dec. 629, 647 (2000) (Order Denying Respondent's Pet. for Recons.); *In re James E. Stephens*, 58 Agric. Dec. 201, 209 (1999) (Order Denying Pet. for Recons.); *In re Judie Hansen*, 58 Agric. Dec. 369, 387 (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 Peter A. Lang*, 57 Agric. Dec. 91, 110 (1998) (Order Denying Pet. for Recons.); *In re Samuel Zimmerman*, 56 Agric. Dec. 1458, 1467 (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.).

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 $54,642.50 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 $54,642.50 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. 02-0004.

3. Respondent Halvor Skaarhaug's Animal Welfare Act license (Animal Welfare Act license number 46-B-0062) 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 Respondent Halvor Skaarhaug.

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 November 13, 2002.

In re: HEARTLAND KENNELS, INC., A SOUTH DAKOTA CORPORATION; AND HALVOR SKAARHAUG, AN INDIVIDUAL.
AWA Docket No. 02-0004.
Order Denying Second Petition for Reconsideration.
Filed December 17, 2002.

AWA – Petition for reconsideration – Late filed petition for reconsideration – Second petition for reconsideration.

The Judicial Officer denied Respondents' Second Petition for Reconsideration because it was not filed within 10 days after the date the Hearing Clerk served Respondents with the Decision and Order, as

required by 7 C.F.R. § 1.146(a)(3), and because, under the Rules of Practice, a party may not file more than one petition for reconsideration of a decision of the Judicial Officer.

Colleen A. Carroll, for Complainant.
Respondents, Pro se.
Initial decision issued by James W. Hunt, Chief Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

Bobby R. Acord, 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 October 3, 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 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 Heartland Kennels, Inc., and Halvor Skaarhaug [hereinafter Respondents] committed numerous willful violations of the Animal Welfare Act and the Regulations and Standards on March 24, 1998, October 21, 1998, February 9, 1999, October 19, 1999, and January 10, 2000 (Compl. ¶¶ 4-9).

The Hearing Clerk served Respondents with the Complaint, the Rules of Practice, and a service letter on October 15, 2001.[1] 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 December 4, 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.[2] On January 24, 2002, Respondents filed a late-filed answer to the Complaint, which does not deny or otherwise respond to the allegations in the Complaint.

On May 15, 2002, 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 Heartland Kennels, Inc., and Halvor Skaarhaug By Reason of Admission of Facts" [hereinafter Proposed Default Decision]. The Hearing Clerk

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[1]United States Postal Service Domestic Return Receipts for Article Number 7099 3400 0014 4584 8479 and Article Number 7099 3400 0014 4584 8462.

[2]Letter dated December 4, 2001, from Joyce A. Dawson, Hearing Clerk, to Respondent Halvor Skaarhaug.

served Respondents with Complainant's Motion for Default Decision, Complainant's Proposed Default Decision, and a service letter on May 24, 2002.[3]

On June 13, 2002, Respondents requested an extension of time within which to file objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision. Chief Administrative Law Judge James W. Hunt [hereinafter the Chief ALJ] granted Respondents' request by extending Respondents' time for filing objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision to July 1, 2002.[4] On July 3, 2002, Respondents requested a second extension of time to file objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision, which the Chief ALJ denied.[5]

On July 15, 2002, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the Chief ALJ issued a "Decision and Order as to Heartland Kennels, Inc., and Halvor Skaarhaug By Reason of Admission of Facts" [hereinafter Initial Decision and Order]: (1) concluding that Respondents willfully violated the Animal Welfare Act and the Regulations and Standards as alleged in the Complaint; (2) directing Respondents to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; (3) assessing Respondents jointly and severally a $54,642.50 civil penalty; and (4) revoking Respondent Halvor Skaarhaug's Animal Welfare Act license (Animal Welfare Act license number 46-B-0062).

On September 16, 2002, Respondents appealed to the Judicial Officer. On October 1, 2002, Complainant filed "Complainant's Response to Respondents' Motion to Set Aside Default Judgment." On October 3, 2002, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision. On October 8, 2002, I issued a Decision and Order in which I adopted, with minor modifications, the Chief ALJ's Initial Decision and Order as the final Decision and Order. *In re Heartland Kennels, Inc.*, 61 Agric. Dec. ___ (Oct. 8, 2002).

On October 15, 2002, the Hearing Clerk served Respondents with the Decision

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[3]United States Postal Service Domestic Return Receipts for Article Number 7099 3400 0014 4581 8212 and Article Number 7099 3400 0014 4584 7878.

[4]Order Extending Time to File Response filed June 14, 2002.

[5]Order Denying Extension of Time to File Objections to Complainant's Motion for Adoption of Proposed Decision filed July 5, 2002.

and Order.[6] On October 29, 2002, Respondents filed a "Petition for Reconsideration of Judicial Officer's Decision." On November 7, 2002, Complainant filed "Complainant's Response to Respondents' Petition for Reconsideration of Judicial Officer's Decision." On November 7, 2002, the Hearing Clerk transmitted the record to the Judicial Officer for reconsideration of the October 8, 2002, Decision and Order. On November 13, 2002, I issued an Order Denying Petition for Reconsideration in which I denied Respondents' Petition for Reconsideration of Judicial Officer's Decision. *In re Heartland Kennels, Inc.*, 61 Agric. Dec. ___ (Nov. 13, 2002) (Order Denying Pet. for Recons.).

On December 4, 2002, Respondents filed a second "Petition for Reconsideration of Judicial Officer's Decision" [hereinafter Second Petition for Reconsideration]. On December 12, 2002, Complainant filed "Complainant's Response to Respondents' Second Petition for Reconsideration of Judicial Officer's Decision." On December 12, 2002, the Hearing Clerk transmitted the record to the Judicial Officer for a second reconsideration of the October 8, 2002, Decision and Order.

CONCLUSIONS BY THE JUDICIAL OFFICER ON SECOND PETITION FOR RECONSIDERATION

Section 1.146(a)(3) of the Rules of Practice provides that a petition for reconsideration of the Judicial Officer's decision must be filed within 10 days after service of the decision, 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.* . . .
>
> . . . .
>
> (3) *Petition to rehear or reargue proceeding, or to reconsider the decision of the Judicial Officer.* A petition to rehear or reargue the proceeding or to reconsider the decision of the Judicial Officer shall be filed within 10 days after the date of service of such decision upon the party filing the petition. Every petition must state specifically the matters claimed to have been erroneously decided and alleged errors must be briefly stated.

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[6]United States Postal Service Domestic Return Receipt for Article Number 7000 1670 0011 8982 7487.

7 C.F.R. § 1.146(a)(3).

Respondents' Second Petition for Reconsideration, which Respondents filed 50 days after the date the Hearing Clerk served the Decision and Order on Respondents, was filed too late, and, accordingly, Respondents' Second Petition for Reconsideration must be denied.[7]

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[7]*See In re David Finch*, 61 Agric. Dec. ___ (Dec. 16, 2002) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 15 days after the Hearing Clerk served the respondent with the decision and order); *In re JSG Trading Corp.*, 61 Agric. Dec. 409 (2002) (Rulings as to JSG Trading Corp. Denying: (1) Motion to Vacate; (2) Motion to Reopen; (3) Motion for Stay; and (4) Request for Pardon or Lesser Sanction) (denying, as late-filed, a petition for reconsideration filed 2 years 2 months 26 days after the date the Hearing Clerk served the respondent with the decision and order on remand); *In re Jerry Goetz*, 61 Agric. Dec. 282 (2002) (Order Lifting Stay) (denying, as late-filed, a petition for reconsideration filed 4 years 2 months 4 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Beth Lutz*, 60 Agric. Dec. 68 (2001) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 2 months 2 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Mary Meyers*, 58 Agric. Dec. 861 (1999) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 2 years 5 months 20 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Anna Mae Noell*, 58 Agric. Dec. 855 (1999) (Order Denying the Chimp Farm Inc.'s Motion to Vacate) (denying, as late-filed, a petition for reconsideration filed 6 months 11 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Paul W. Thomas*, 58 Agric. Dec. 875 (1999) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 19 days after the date the Hearing Clerk served the applicants with the decision and order); *In re Nkiambi Jean Lema*, 58 Agric. Dec. 302 (1999) (Order Denying Pet. for Recons. and Mot. to Transfer Venue) (denying, as late-filed, a petition for reconsideration filed 35 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Kevin Ackerman*, 58 Agric. Dec. 349 (1999) (Order Denying Pet. for Recons. as to Kevin Ackerman) (denying, as late-filed, a petition for reconsideration filed 17 days after the date the Hearing Clerk served the respondent with the order denying late appeal as to Kevin Ackerman); *In re Marilyn Shepherd*, 57 Agric. Dec. 1280 (1998) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 11 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Jack Stepp*, 57 Agric. Dec. 323 (1998) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 16 days after the date the Hearing Clerk served the respondents with the decision and order); *In re Billy Jacobs, Sr.*, 55 Agric. Dec. 1057 (1996) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 13 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Jim Fobber*, 55 Agric. Dec. 74 (1996) (Order Denying Respondent Jim Fobber's Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 12 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Robert L. Heywood*, 53 Agric. Dec. 541 (1994) (Order Dismissing Pet. for Recons.) (dismissing, as late-filed, a petition for reconsideration filed approximately 2 months after the date the Hearing Clerk served the respondent with the decision and order); *In re Christian King*, 52 Agric. Dec. 1348 (1993) (Order Denying Pet. for Recons.) (dismissing, as late-filed, a petition for reconsideration, since it was not filed within 10 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Charles Crook Wholesale Produce & Grocery Co.*, 48

(continued...)

Moreover, under the Rules of Practice, a party may not file more than one petition for reconsideration of a decision of the Judicial Officer.[8] On October 29, 2002, Respondents filed a Petition for Reconsideration of Judicial Officer's Decision, and on November 13, 2002, I issued an order denying Respondents' Petition for Reconsideration of Judicial Officer's Decision. *In re Heartland Kennels, Inc.*, 61 Agric. Dec. ___ (Nov. 13, 2002) (Order Denying Pet. for Recons.). Accordingly, Respondents' Second Petition for Reconsideration, filed December 4, 2002, must be denied.

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

ORDER

Respondents' Second Petition for Reconsideration is denied.

In re: DAVID FINCH, d/b/a WILD IOWA.
AWA Docket No. 02-0014.
Decision and Order.
Filed October 23, 2002.

AWA – **Failure to file timely answer – Default – Exhibitor – Civil penalty – License disqualification – Cease and desist order.**

The Judicial Officer affirmed the Default Decision issued by Chief Administrative Law Judge James W. Hunt (Chief ALJ), finding that the Respondent violated the Animal Welfare Act and the Regulations and Standards issued under the Animal Welfare Act as alleged in the Complaint, disqualifying the Respondent from obtaining an Animal Welfare Act license, assessing the Respondent a $4,000 civil penalty, and ordering the Respondent to cease and desist from violating the Animal Welfare Act and

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[7](...continued)
Agric. Dec. 1123 (1989) (Order Dismissing Untimely Pet. for Recons.) (dismissing, as late-filed, a petition for reconsideration filed more than 4 months after the date the Hearing Clerk served the respondent with the decision and order); *In re Toscony Provision Co.*, 45 Agric. Dec. 583 (1986) (Order Denying Pet. for Recons. and Extension of Time) (dismissing a petition for reconsideration because it was not filed within 10 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Charles Brink*, 41 Agric. Dec. 2147 (1982) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 17 days after the date the Hearing Clerk served the respondent with the decision and order).

[8]*In re Jerry Goetz, d/b/a Jerry Goetz and Sons*, 61 Agric. Dec. 282, 286 (2002) (Order Lifting Stay); *Cf. In re Fitchett Bros., Inc.*, 29 Agric. Dec. 2, 3 (1970) (Dismissal of Pet. for Recons.) (dismissing a second petition for reconsideration on the basis that the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Marketing Orders do not provide for more than one petition for reconsideration of a final decision and order).

the Regulations and Standards issued under the Animal Welfare Act. The Judicial Officer deemed the Respondent's failure to file a timely answer an admission of the allegations in the Complaint and a waiver of hearing (7 C.F.R. §§ 1.136(c), .139).

Donald A. Tracy, for Complainant.
Respondent, 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

William R. DeHaven, 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 April 12, 2002. 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: (1) on August 8 and 9, 2000, David Finch, d/b/a Wild Iowa [hereinafter Respondent], willfully violated section 10 of the Animal Welfare Act (7 U.S.C. § 2140) and sections 2.40 and 2.75(b)(1) of the Regulations (9 C.F.R. §§ 2.40, .75(b)(1)); and (2) on August 31, 1998, Respondent willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and sections 3.125(a), 3.127(c), 3.129(a), 3.130, and 3.131(a) and (c) of the Standards (9 C.F.R. §§ 3.125(a), .127(c), .129(a), .130, .131(a), (c)) (Compl. ¶ II).

The Hearing Clerk served Respondent with the Complaint, the Rules of Practice, and a service letter on April 19, 2002.[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 May 20, 2002, the Hearing Clerk sent Respondent a letter informing him that his answer to the Complaint had not been received within the time required in the Rules of Practice.[2]

On July 1, 2002, 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

[1]United States Postal Service Domestic Return Receipt for Article Number 7099 3400 0014 4584 7922.

[2]Letter dated May 20, 2002, from Joyce A. Dawson, Hearing Clerk, to Respondent.

Order Upon Admission of Facts By Reason of Default" [hereinafter Proposed Default Decision]. The Hearing Clerk served Respondent with Complainant's Motion for Default Decision, Complainant's Proposed Default Decision, and a service letter on July 11, 2002.[3] On August 6, 2002, Respondent filed an "Answer" in which he denied the allegations in paragraph II of the Complaint.

On August 9, 2002, 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 Upon Admission of Facts By Reason of Default" [hereinafter Initial Decision and Order]: (1) concluding that Respondent willfully violated the Animal Welfare Act and the Regulations and Standards as alleged in the Complaint; (2) directing Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; (3) assessing Respondent a $4,000 civil penalty; and (4) permanently disqualifying Respondent from obtaining an Animal Welfare Act license.

The Hearing Clerk served Respondent with the Initial Decision and Order on August 17, 2002.[4] On September 17, 2002, Respondent appealed to the Judicial Officer. Complainant failed to file a response to Respondent's appeal petition within 20 days after service, as required by section 1.145(b) of the Rules of Practice (7 C.F.R. § 1.145(b)). On October 15, 2002, 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 Chief 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 Initial Decision and Order as the final Decision and Order. Additional conclusions by the Judicial Officer follow the Chief ALJ's Conclusions, 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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[3]United States Postal Service Domestic Return Receipt for Article Number 7000 1670 0011 8982 8309.

[4]United States Postal Service Domestic Return Receipt for Article Number 7000 1670 0011 8982 8194.

§ 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 which 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.

§ 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 [Apr. 26, 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 [26 U.S.C. 1 et seq.], the Tariff Act of 1930 [19 U.S.C. 1202 et seq.], the Occupational Safety and Health Act of 1970 [29 U.S.C. 651 et seq.], or the Social Security Act [42 U.S.C. 301 et seq.], 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).

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; and knowing failure to obey a cease and desist order has a civil penalty of $1,650.

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.

. . . .

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 D—ATTENDING VETERINARIAN AND ADEQUATE VETERINARY CARE

§ 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.

(b) Each dealer or exhibitor shall establish and maintain programs of adequate veterinary care that include:

(1) The availability of appropriate facilities, personnel, equipment, and services to comply with the provisions of this subchapter;

(2) The use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and the availability of emergency, weekend, and holiday care;

(3) Daily observation of all animals to assess their health and well-being; *Provided, however,* That daily observation of animals may be accomplished by someone other than the attending veterinarian; and *Provided, further*, That a mechanism of direct and frequent communication is required so that timely and accurate information on problems of animal health, behavior, and well-being is conveyed to the attending veterinarian;

(4) Adequate guidance to personnel involved in the care and use of animals regarding handling, immobilization, anesthesia, analgesia, tranquilization, and euthanasia; and

(5) Adequate pre-procedural and post-procedural care in accordance with established veterinary medical and nursing procedures.

SUBPART G—RECORDS

§ 2.75 Records: Dealers and exhibitors.

. . . .

(b)(1) Every dealer other than operators of auction sales and brokers to whom animals are consigned, and exhibitor shall make, keep, and maintain records or forms which fully and correctly disclose the following information concerning animals other than dogs and cats, purchased or otherwise acquired, owned, held, leased, or otherwise in his or her possession or under his or her control, or which is transported, sold, euthanized, or otherwise disposed of by that dealer or 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 the animals were purchased or otherwise acquired;

(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 the animal was sold or given;

(v) The date of purchase, acquisition, sale, or disposal of the animal(s);

(vi) The species of the animal(s); and

(vii) The number of the animals in the shipment.

SUBPART H—COMPLIANCE WITH STANDARDS AND HOLDING PERIOD

§ 2.100 Compliance with standards.

(a) Each dealer, exhibitor, operator of an auction sale, and intermediate handler shall comply in all respects with the regulations set forth in part 2 and the standards set forth in part 3 of this subchapter for the humane handling, care, treatment, housing, and transportation of animals.

PART 3—STANDARDS

. . . .

SUBPART F—SPECIFICATIONS FOR THE HUMANE HANDLING, CARE, TREATMENT, AND TRANSPORTATION OF WARMBLOODED ANIMALS OTHER THAN DOGS, CATS, RABBITS, HAMSTERS, GUINEA PIGS, NONHUMAN PRIMATES, AND MARINE MAMMALS

FACILITIES AND OPERATING STANDARDS

§ 3.125 Facilities, general.

(a) *Structural strength.* The facility must be constructed of such material and of such strength as appropriate for the animals involved. The indoor and outdoor housing facilities shall be structurally sound and shall be maintained in good repair to protect the animals from injury and to contain the animals.

§ 3.127 Facilities, outdoor.

. . . .

(c) *Drainage.* A suitable method shall be provided to rapidly eliminate excess water. The method of drainage shall comply with applicable Federal, State, and local laws and regulations relating to pollution control or the protection of the environment.

ANIMAL HEALTH AND HUSBANDRY STANDARDS

§ 3.129 Feeding.

(a) The food shall be wholesome, palatable, and free from contamination and of sufficient quantity and nutritive value to maintain all animals in good health. The diet shall be prepared with consideration for the age, species, condition, size, and type of the animal. Animals shall be fed at least once a day except as dictated by hibernation, veterinary treatment, normal fasts, or other professionally accepted practices.

§ 3.130 Watering.

If potable water is not accessible to the animals at all times, it must be provided as often as necessary for the health and comfort of the animal. Frequency of watering shall consider age, species, condition, size, and type of the animal. All water receptacles shall be kept clean and sanitary.

§ 3.131 Sanitation.

(a) *Cleaning of enclosures.* Excreta shall be removed from primary enclosures as often as necessary to prevent contamination of the animals contained therein and to minimize disease hazards and to reduce odors. When enclosures are cleaned by hosing or flushing, adequate measures shall be taken to protect the animals confined in such enclosures from being directly sprayed with the stream of water or wetted involuntarily.

. . . .

(c) *Housekeeping.* Premises (buildings and grounds) shall be kept clean and in good repair in order to protect the animals from injury and to facilitate the prescribed husbandry practices set forth in this subpart. Accumulations of trash shall be placed in designated areas and cleared as necessary to protect the health of the animals.

9 C.F.R. §§ 1.1; 2.40, .75(b)(1), .100(a); 3.125(a) .127(c), .129(a), .130, .131(a), (c).

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

Preliminary Statement

Complainant instituted this proceeding under the Animal Welfare Act by filing a Complaint alleging that Respondent willfully violated the Animal Welfare Act and the Regulations and Standards. The Hearing Clerk served a copy of the Complaint and the Rules of Practice on Respondent by certified mail. Respondent signed for the certified mailing on April 19, 2002. The mailing informed Respondent that he must file an answer pursuant to the Rules of Practice and that failure to answer any allegation in the Complaint would constitute an admission of that allegation.

Respondent failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the Complaint, which are deemed to be admitted by Respondent's failure to file a timely answer, are adopted and set forth in this Decision and Order 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 doing business as Wild Iowa whose mailing address is 720 E. Elm, Sigourney, Iowa 52591.

B. Respondent, at all times material to this proceeding, was licensed and operating as an exhibitor as defined in the Animal Welfare Act and the Regulations.

II

A. On August 8 and 9, 2000, the Animal and Plant Health Inspection Service inspected Respondent's premises and 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).

B. On August 8 and 9, 2000, the Animal and Plant Health Inspection Service inspected Respondent's premises and records and found Respondent had failed to maintain complete records showing the acquisition, disposition, and identification of animals, in willful violation of section 10 of the Animal Welfare Act (7 U.S.C. § 2140) and section 2.75(b)(1) of the Regulations (9 C.F.R. § 2.75(b)(1)).

C. On August 31, 1998, the Animal and Plant Health Inspection Service inspected Respondent's facility and found the following willful violations of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and the Standards:

1. Respondent failed to provide facilities for Respondent's animals that were structurally sound so as to protect the animals from injury, to contain the animals, and to restrict the entrance of other animals, because the facility was not constructed in a manner appropriate for the animals involved, in that the facility lacked a suitable perimeter fence or equivalent safeguards necessary for the safe containment of dangerous, carnivorous wild animals, in willful violation of section 3.125(a) of the Standards (9 C.F.R. § 3.125(a));

2. Respondent failed to provide a suitable method to rapidly eliminate excess water from outdoor housing facilities for animals, in willful violation of section 3.127(c) of the Standards (9 C.F.R. § 3.127(c));

3. Respondent failed to provide animals with wholesome and uncontaminated food, in willful violation of section 3.129(a) of the Standards (9 C.F.R. § 3.129(a));

4. Respondent failed to keep water receptacles clean and sanitary, in willful violation of section 3.130 of the Standards (9 C.F.R. § 3.130);

5. Respondent failed to keep primary enclosures clean, in willful violation of section 3.131(a) of the Standards (9 C.F.R. § 3.131(a)); and

6. Respondent failed to keep the premises clean and in good repair and free of accumulations of trash, in willful violation of section 3.131(c) of the Standards

(9 C.F.R. § 3.131(c)).

Conclusions

1. The Secretary of Agriculture has jurisdiction in this matter.
2. The Order issued in this Decision and Order, *infra*, is authorized by the Animal Welfare Act and warranted under the circumstances.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

The Hearing Clerk served Respondent with the Initial Decision and Order on August 17, 2002.[5] On September 17, 2002, 31 days after service, Respondent filed an appeal petition. Section 1.145(a) of the Rules of Practice provides that an appeal must be filed within 30 days after service of 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 Judicial Officer by filing an appeal petition with the Hearing Clerk.

7 C.F.R. § 1.145(a).

Respondent's late-filed appeal could be denied. However, section 1.139 of the Rules of Practice provides that an administrative law judge's default decision becomes final 35 days after service of the default decision, as follows:

> **§ 1.139 Procedure upon failure to file an answer or admission of facts.**
>
> . . . Where the decision as proposed by complainant is entered, such decision shall become final and effective without further proceedings 35 days after the date of service thereof upon the respondent, unless there is an appeal to the Judicial Officer by a party to the proceeding pursuant to § 1.145.

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[5] *See* note 4.

7 C.F.R. § 1.139.

Thus, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), a default decision does not become final and effective until 5 days after the 30-day appeal time has elapsed. This provision was placed in the Rules of Practice so that if an appeal is inadvertently filed up to 4 days late, *e.g.,* because of a delay in the mail system, an extension of time could be granted by the Judicial Officer for the filing of a late appeal.[6] The Judicial Officer has jurisdiction to hear an appeal petition filed after the 30-day appeal time has elapsed but before the administrative law judge's decision becomes final.

The Chief ALJ's Initial Decision and Order had not become final on September 17, 2002, when Respondent filed his appeal petition. The postmark on the envelope containing Respondent's appeal petition indicates that Respondent mailed the appeal petition from Sigourney, Iowa, on September 10, 2002. Under these circumstances, I grant Respondent a 1-day extension of time for filing his appeal.[7] Thus, I deem Respondent's appeal petition filed September 17, 2002, to

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[6]*In re Scamcorp, Inc.*, 55 Agric. Dec. 1395, 1405-06 (1996) (Ruling on Respondent's Motion to Reconsider Ruling Denying Motion to Dismiss Appeal); *In re Sandra L. Reid*, 55 Agric. Dec. 996, 999-1000 (1996); *In re Rinella's Wholesale, Inc.*, 44 Agric. Dec. 1234, 1236 (1985) (Order Denying Pet. for Recons.); *In re William T. Powell*, 44 Agric. Dec. 1220, 1222 (1985) (Order Denying Late Appeal); *In re Palmer G. Hulings*, 44 Agric. Dec. 298, 300-01 (1985) (Order Denying Late Appeal), *appeal dismissed*, No. 85-1220 (10th Cir. Aug. 16, 1985); *In re Toscony Provision Co.*, 43 Agric. Dec. 1106, 1108 (1984) (Order Denying Late Appeal), *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 Henry S. Shatkin*, 34 Agric. Dec. 296, 315 (1975) (Order Granting Motion to Withdraw Appeal).

[7]Had the Chief ALJ's Initial Decision and Order become final prior to Respondent's filing an appeal, the Judicial Officer would not have had jurisdiction to consider Respondent's appeal. *See In re Samuel K. Angel*, 61 Agric. Dec. 275 (2002) (dismissing the respondent's appeal petition filed 3 days after the initial decision and order became final); *In re Paul Eugenio*, 60 Agric. Dec. 676 (2001) (dismissing the respondent's appeal petition filed 1 day after the initial decision and order became final); *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 (continued...)

have been timely filed.

Respondent denies the violations of the Animal Welfare Act and the Regulations and Standards alleged in the Complaint and found by the Chief ALJ in the Initial

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[7](...continued)
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 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).

Decision and Order (Appeal Pet.).

Respondent's denials come too late to be considered. Respondent is deemed, for purposes of this proceeding, to have admitted the allegations in the Complaint because he failed to answer the Complaint within 20 days after the Hearing Clerk served him with the Complaint.

The Hearing Clerk served Respondent with the Complaint, the Rules of Practice, and the Hearing Clerk's April 12, 2002, service letter on April 19, 2002.[8] 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.

§ 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.

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[8] *See* note 1.

> (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 Respondent of the consequences of failing to file a timely answer, as follows:

> The respondent shall file an answer with the Hearing Clerk, United States Department of Agriculture, Washington, D.C. 20250-9200, in accordance with the Rules of Practice governing proceedings under the Act (7 C.F.R. § 1.130 et seq.). Failure to file an answer shall constitute an admission of all the material allegations of this complaint.

Compl. at 3.

Similarly, the Hearing Clerk informed Respondent in the April 12, 2002, 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:

> April 12, 2002
>
> Mr. David Finch d/b/a
> Wild Iowa
> 720 E. Elm
> Sigourney, Iowa 52591
>
> Dear Mr. Finch:
>
> Subject: In re: David Finch d/b/a Wild Iowa - Respondent
> AWA Docket No. 02-0014
>
> 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. We also need your present and future telephone number [sic].

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 May 20, 2002, 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.[9] On July 1, 2002, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed Complainant's Motion for Default Decision and Complainant's Proposed Default Decision. The Hearing Clerk served Respondent with Complainant's Motion for Default Decision, Complainant's Proposed Default Decision, and a service letter on July 11, 2002.[10] On August 6, 2002, Respondent filed an Answer in which he denied the allegations in paragraph II of the Complaint.

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,[11] generally there is no basis for setting aside a default decision that is based upon a respondent's failure to file a timely answer.[12]

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[9]*See* note 2.

[10]*See* note 3.

[11]*See In re Dale Goodale*, 60 Agric. Dec. 670 (2001) (Remand Order) (setting aside the default decision because the administrative law judge adopted apparently inconsistent findings of a dispositive fact in the default decision, and the order in the default decision was not clear); *In re Deora Sewnanan*, 60 Agric. Dec. 688 (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).

[12]*See generally In re Heartland Kennels, Inc.,* 61 Agric. Dec. ___ (Oct. 8, 2002) (holding the default decision was properly issued where the respondents filed an answer 3 months 9 days after they

(continued...)

[12](...continued)
were served with the complaint; stating 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 Steven Bourk* (Decision as to Steven Bourk and Carmella Bourk), 61 Agric. Dec. 25 (2002) (holding the default decision was properly issued where Respondent Steven Bourk's first and only filing was 10 months 9 days after he was served with the complaint and Respondent Carmella Bourk's first filing was 5 months 5 days after she was served with the complaint; stating both respondents are deemed, by their 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 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 5 days after they were served with the complaint and 5 months 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 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 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)
(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)). Respondent's first filing in this proceeding was August 6, 2002, 3 months 18 days after the Hearing Clerk served Respondent with the Complaint. Respondent's 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 Respondent of his rights under the due process clause of the Fifth

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[12](...continued)
(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 the answer 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 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).

Amendment to the Constitution of the United States.[13]

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

ORDER

1. Respondent, his agents, employees, successors, and assigns, directly or through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards, and in particular, shall cease and desist from:

(a) Failing to store supplies of food so as to adequately protect them against contamination;

(b) Failing to provide animals with adequate potable water;

(c) Failing to construct and maintain housing facilities for animals so that the housing facilities are structurally sound and in good repair in order to protect the animals from injury, contain them securely, and restrict other animals from entering;

(d) Failing to keep the premises clean and in good repair and free of accumulations of trash, junk, waste, and discarded matter, and to control weeds, grasses, and bushes;

(e) Failing to maintain records of the acquisition, disposition, description, and identification of animals, as required; and

(f) Failing to establish and maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine.

The cease and desist provisions of this Order shall become effective on the day after service of this Order on Respondent.

2. Respondent is assessed a $4,000 civil penalty. The civil penalty shall be paid by a certified check or money order made payable to the Treasurer of the United States and sent to:

Donald A. Tracy

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[13] *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).

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

Respondent's payment of the $4,000 civil penalty shall be sent to, and received by, Donald A. Tracy 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 AWA Docket No. 02-0014.

3. Respondent is permanently disqualified from obtaining an Animal Welfare Act license.

The Animal Welfare Act license disqualification provision of this Order shall become effective on the day after service of this Order on Respondent.

4. Respondent has 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. Respondent 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 October 23, 2002.

_____

In re: DAVID FINCH, d/b/a WILD IOWA.
AWA Docket No. 02-0014.
Order Denying Petition for Reconsideration.
Filed December 16, 2002.

AWA – Petition for reconsideration – Late-filed petition for reconsideration.

The Judicial Officer denied Respondent's Petition for Reconsideration because it was not filed within 10 days after the date the Hearing Clerk served Respondent with the Decision and Order, as required by 7 C.F.R. § 1.146(a)(3).

Donald A. Tracy, for Complainant.
Respondent, Pro se.
Initial decision issued by James W. Hunt, Chief Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

William R. DeHaven, 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 April 12, 2002. 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: (1) on August 8 and 9, 2000, David Finch, d/b/a Wild Iowa [hereinafter Respondent], willfully violated section 10 of the Animal Welfare Act (7 U.S.C. § 2140) and sections 2.40 and 2.75(b)(1) of the Regulations (9 C.F.R. §§ 2.40, .75(b)(1)); and (2) on August 31, 1998, Respondent willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and sections 3.125(a), 3.127(c), 3.129(a), 3.130, and 3.131(a) and (c) of the Standards (9 C.F.R. §§ 3.125(a), .127(c), .129(a), .130, .131(a), (c)) (Compl. ¶ II).

The Hearing Clerk served Respondent with the Complaint, the Rules of Practice, and a service letter on April 19, 2002.[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 May 20, 2002, the Hearing Clerk sent Respondent a letter informing him that his answer to the Complaint had not been received within

[1]United States Postal Service Domestic Return Receipt for Article Number 7099 3400 0014 4584 7922.

the time required in the Rules of Practice.[2]

On July 1, 2002, 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]. The Hearing Clerk served Respondent with Complainant's Motion for Default Decision, Complainant's Proposed Default Decision, and a service letter on July 11, 2002.[3] On August 6, 2002, Respondent filed an "Answer" in which he denied the allegations in paragraph II of the Complaint.

On August 9, 2002, 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 Upon Admission of Facts By Reason of Default" [hereinafter Initial Decision and Order]: (1) concluding that Respondent willfully violated the Animal Welfare Act and the Regulations and Standards as alleged in the Complaint; (2) directing Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; (3) assessing Respondent a $4,000 civil penalty; and (4) permanently disqualifying Respondent from obtaining an Animal Welfare Act license.

The Hearing Clerk served Respondent with the Initial Decision and Order on August 17, 2002.[4] On September 17, 2002, Respondent appealed to the Judicial Officer. The Hearing Clerk served Complainant with Respondent's appeal petition on September 19, 2002. Complainant failed to file a response to Respondent's appeal petition within 20 days after service, as required by section 1.145(b) of the Rules of Practice (7 C.F.R. § 1.145(b)). On October 15, 2002, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision. On October 23, 2002, I issued a Decision and Order in which I adopted the Chief ALJ's Initial Decision and Order as the final Decision and Order. *In re David Finch*, 61 Agric. Dec. ___ (Oct. 23, 2002).

On October 28, 2002, the Hearing Clerk served Respondent with the Decision

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[2]Letter dated May 20, 2002, from Joyce A. Dawson, Hearing Clerk, to Respondent.

[3]United States Postal Service Domestic Return Receipt for Article Number 7000 1670 0011 8982 8309.

[4]United States Postal Service Domestic Return Receipt for Article Number 7000 1670 0011 8982 8194.

and Order.[5] On November 13, 2002, Respondent filed "Petition for Reconsideration of AWA Docket No. 02-0014" [hereinafter Petition for Reconsideration]. The Hearing Clerk served Complainant with Respondent's Petition for Reconsideration on November 14, 2002. Complainant failed to file a reply to Respondent's Petition for Reconsideration within 20 days after service, as required by section 1.146(b) of the Rules of Practice (7 C.F.R. § 1.146(b)). On December 11, 2002, the Hearing Clerk transmitted the record to the Judicial Officer for reconsideration of the October 23, 2002, Decision and Order.

CONCLUSIONS BY THE JUDICIAL OFFICER ON RECONSIDERATION

Section 1.146(a)(3) of the Rules of Practice provides that a petition for reconsideration of the Judicial Officer's decision must be filed within 10 days after service of the decision, 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*. . . .
>
> . . . .
>
> (3) *Petition to rehear or reargue proceeding, or to reconsider the decision of the Judicial Officer*. A petition to rehear or reargue the proceeding or to reconsider the decision of the Judicial Officer shall be filed within 10 days after the date of service of such decision upon the party filing the petition. Every petition must state specifically the matters claimed to have been erroneously decided and alleged errors must be briefly stated.

7 C.F.R. § 1.146(a)(3).

Respondent's Petition for Reconsideration, which Respondent filed 15 days after the date the Hearing Clerk served the Decision and Order on Respondent, was filed too late, and, accordingly, Respondent's Petition for Reconsideration must be

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[5]United States Postal Service Domestic Return Receipt for Article Number 7000 1670 0011 8982 7746.

denied.[6]

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[6]*See In re JSG Trading Corp.*, 61 Agric. Dec. 409 (2002) (Rulings as to JSG Trading Corp. Denying: (1) Motion to Vacate; (2) Motion to Reopen; (3) Motion for Stay; and (4) Request for Pardon or Lesser Sanction) (denying, as late-filed, a petition for reconsideration filed 2 years 2 months 26 days after the date the Hearing Clerk served the respondent with the decision and order on remand); *In re Jerry Goetz*, 61 Agric. Dec. 282 (2002) (Order Lifting Stay) (denying, as late-filed, a petition for reconsideration filed 4 years 2 months 4 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Beth Lutz*, 60 Agric. Dec. 68 (2001) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 2 months 2 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Mary Meyers*, 58 Agric. Dec. 861 (1999) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 2 years 5 months 20 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Anna Mae Noell*, 58 Agric. Dec. 855 (1999) (Order Denying the Chimp Farm Inc.'s Motion to Vacate) (denying, as late-filed, a petition for reconsideration filed 6 months 11 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Paul W. Thomas*, 58 Agric. Dec. 875 (1999) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 19 days after the date the Hearing Clerk served the applicants with the decision and order); *In re Nkiambi Jean Lema*, 58 Agric. Dec. 302 (1999) (Order Denying Pet. for Recons. and Mot. to Transfer Venue) (denying, as late-filed, a petition for reconsideration filed 35 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Kevin Ackerman*, 58 Agric. Dec. 349 (1999) (Order Denying Pet. for Recons. as to Kevin Ackerman) (denying, as late-filed, a petition for reconsideration filed 17 days after the date the Hearing Clerk served the respondent with the order denying late appeal as to Kevin Ackerman); *In re Marilyn Shepherd*, 57 Agric. Dec. 1280 (1998) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 11 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Jack Stepp*, 57 Agric. Dec. 323 (1998) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 16 days after the date the Hearing Clerk served the respondents with the decision and order); *In re Billy Jacobs, Sr.*, 55 Agric. Dec. 1057 (1996) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 13 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Jim Fobber*, 55 Agric. Dec. 74 (1996) (Order Denying Respondent Jim Fobber's Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 12 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Robert L. Heywood*, 53 Agric. Dec. 541 (1994) (Order Dismissing Pet. for Recons.) (dismissing, as late-filed, a petition for reconsideration filed approximately 2 months after the date the Hearing Clerk served the respondent with the decision and order); *In re Christian King*, 52 Agric. Dec. 1348 (1993) (Order Denying Pet. for Recons.) (dismissing, as late-filed, a petition for reconsideration, since it was not filed within 10 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Charles Crook Wholesale Produce & Grocery Co.*, 48 Agric. Dec. 1123 (1989) (Order Dismissing Untimely Pet. for Recons.) (dismissing, as late-filed, a petition for reconsideration filed more than 4 months after the date the Hearing Clerk served the respondent with the decision and order); *In re Toscony Provision Co.*, 45 Agric. Dec. 583 (1986) (Order Denying Pet. for Recons. and Extension of Time) (dismissing a petition for reconsideration because it was not filed within 10 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Charles Brink*, 41 Agric. Dec. 2147 (1982) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 17 days after the date the Hearing Clerk served the respondent with the decision and order).

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

ORDER

Respondent's Petition for Reconsideration is denied.

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BEEF PROMOTION AND RESEARCH ACT

COURT DECISION

JEANNE CHARTER AND STEVE CHARTER, PETITIONERS, AND DARRELL ABBOTT, et al., INTERVENORS v. USDA.
Cause No. CV 00-198-BLG-RFC.
Filed November 1, 2002.

(Cite as: 230 F. Supp. 2d 1121)

BPRA – Checkoffs – Compelled speech/association – First amendment - Government Speech – Commercial Speech – Fine, arbitrary and capricious.

Respondents objected to the BPRA advertisement that did not differentiate between their cattle which were raised grass-fed, hormone-free, additive-free, antibiotic-free versus the other beef producers. The Respondents disagreed with the compelled association with the other beef producers and withheld the BPRA checkoff of $1/head of cattle sold under the BPRA marketing program. The court discussed the two-part test of first amendment challenges of prior agriculture marketing program cases in *Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 and *United Foods, Inc.* 533 U.S. 405. The court found that the BPRA advertisement was government speech and therefore was not required to be content neutral despite the citizen disagreement with the message.
The court found that BPRA advertisements were constitutional and favorably cited *Sante Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 by reasoning that the BPRA advertisement program had sufficient characteristics to bring it under the category of government speech. i.e. (1) the government dictates or controls the speech content of private individuals, (2) the speech must be attributed to the government, (3) the speech activities fall within government purposes, (4) does not promote or establish religion.
After the constitutionality of the BPRA advertisement was upheld by this decision, the court then determined that the imposition of a $12,000 fine by the Administrative Law Judge and Judicial Officer was arbitrary and capricious and dismissed the fine.

United States District Court, D. Montana,
Billings Division.

ORDER

RICHARD F. CEBULL, District Judge.

FACTS

This case arose when the Petitioners refused to pay beef checkoff assessments pursuant to The Beef Promotion and Research Act. The Petitioners produce grass-fed beef that is free of hormones, subtheraputic antibiotics, chemical additives, extra water, and irradiation. (Pet. Statement of Uncontroverted Facts ¶ 6).

They object to the checkoff-funded program because they are compelled to fund advertisements which do not differentiate between their product and other beef products. On April 26, 2000 Administrative Law Judge Dorthea A. Baker ordered the Petitioners to pay $417.79 in assessments and late fees. Judge Baker also imposed a $12,000 fine. On September 22, 2000 Judicial Officer William G. Jensen denied the Petitioners' petition to reopen the administrative hearing, and he upheld the Administrative Law Judge's decision. The Petitioners and the Intervenor/Petitioners seek judicial review of the administrative decision. They present an argument here that the Petitioners presented at the administrative level: the beef checkoff program constitutes compelled speech and compelled association, both in violation of the First Amendment. The government and the Intervenor/Respondents argue that the beef checkoff program is constitutional because 1) the checkoff-funded program constitutes government speech and 2) even if the program is not government speech, it withstands constitutional scrutiny.

PROCEDURE

The Petitioners initiated this action, seeking a preliminary injunction barring the United States from enforcing the order of the administrative court. Subsequently, the Petitioners moved for judicial review of the administrative decision. Pursuant to Fed.R.Civ.P. 65(a), the Court consolidated the motion for a preliminary injunction with the motion for judicial review. The Court also allowed Parties to intervene in favor of both the Petitioners and the USDA.

Each party moved for summary judgment. The Court heard the motions on April 13, 2002. On August 6, 2002 the Court denied the motions because disputed issues of material fact precluded summary judgment. Specifically, the parties disagree on the amount of control the government exercises over the beef checkoff program. The August 6, 2002 Order scheduled the case for trial; the parties, however, were given the opportunity to stipulate that the case would be submitted for decision, including factual determinations, on the record in this case and the trial transcript in *Livestock Mktg. Assoc. v United States Dep't of Agric.,* CIV 00-1032 at 13 (D.S.D.2002). The parties so stipulated, and the Court is prepared to render its decision. This Order adjudicates the merits of the case and renders the motion for a preliminary injunction moot.

STANDARD OF REVIEW

To set aside the Secretary of Agriculture's decision to enforce the Beef Promotion and Research Act against the Petitioners, the Court must find the

decision to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or determine that the Secretary failed to meet statutory, procedural, or constitutional requirements. *Anchustegui v. United States Dep't of Agric.,* 257 F.3d 1124, 1128 (9th Cir.2001) (*citing Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 414, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971). The issues presented are constitutional in nature, so a determination that the Act and the Order violate the Constitution is sufficient to overturn the administrative decision.

BEEF CHECKOFF PROGRAM

The Beef Promotion and Research Act (the Act) can be found at 7 U . S.C. §§ 2901-11. The regulations promulgated under it are found at 7 C.F.R. § 1260. Together, the Act and regulations are known as the beef checkoff program. The program imposes on cattle producers and importers an assessment of $1.00 per head of cattle purchased or imported. 7 C.F.R. § 1260.172. Assessment proceeds fund a nationwide beef promotion and research campaign. 7 U.S.C. § 2901(b). The campaign is administered by the Cattlemen's Beef Promotion and Research Board (the Beef Board), 7 U.S.C. § 2904(2)(A), under the supervision of the Secretary of Agriculture (the Secretary). The most notable output of the checkoff-funded program is the "Beef. It's what's for dinner" slogan.

Pursuant to the Act, the Secretary was required to promulgate a set of regulations, referred to as the Order, necessary to effectuate the Act. 7 U.S.C. § 2904. Within 22 months after issuing the Order, the Secretary was required to conduct a referendum among cattle producers and importers. 7 U.S.C. § 2906(a). The Order was to be terminated if it was not approved by a majority of those voting in the referendum. *Id.* The Order was approved and remains in effect.

The Act and Order establish the Beef Board. 7 U.S.C. § 2904(1); 7 C.F.R. § 1260.141-151. Members of the Beef Board are appointed by the Secretary after being nominated by a certified state organization. 7 U.S.C. § 2904(1); LMA Trans. at 289 [1] . In the Act, Congress defines which state organizations the Secretary may certify. 7 U.S.C. § 2905(b). The secretary must allow an organization to nominate Beef Board members only after determining the organization meets Congress's criteria. 7 U.S.C. § 2905(a). It is undisputed that the Secretary has rejected applications of organizations that do not meet the statutory criteria. (Resp't

[1]This citation refers to the trial transcript from *Livestock Mktg. Assoc. v United States Dep't of Agric.,* CIV 00-1032 at 13 (D . S.D.2002), which the parties submitted for the Court's consideration. [Note: Reprinted in 61 Agric. Dec. 121 (2002) – Editor.]

Statement of Uncontroverted Facts ¶ 10; Intervenor Rein's Statement of Uncontroverted Facts ¶ 4; Carpenter Decl. ¶ 63; Reese Decl. ¶ 5). It is also undisputed that the Secretary has decertified at least one organization that previously had been certified. (Intervenor Rein's Statement of Uncontroverted Facts ¶ 4; Carpenter Decl. ¶ 63; LMA Trans. at 290-91).

Once certified state organizations nominate persons for membership in the Beef Board, the Secretary appoints members from the list of nominees. 7 C.F.R. § 1260.145; Carpenter Decl. ¶ 65; Reese Decl. ¶ 4. In the past, the Secretary has removed a member of the Beef Board by seeking and accepting that person's resignation. (Resp't Statement of Uncontroverted Facts ¶ 14; Intervenor Rein Statement of Uncontroverted Facts ¶ 6; Carpenter Decl. ¶ 66; Reese Decl. ¶ 4).

From its membership, the Beef Board elects 10 members to serve on the Beef Promotion and Operating Committee (the Operating Committee). 7 U.S.C. § 2904(4)(A). The Operating Committee is comprised of those ten members and 10 beef producers elected by a federation of Qualified State Beef Councils. *Id.* The Secretary must certify that the producers elected by the federation are directors of a Qualified State Beef Council. *Id.* The federation of Qualified State Beef Councils elects members of the Operating Committee, but only councils that meet USDA approval may participate in the election.

The Operating Committee is charged by statute and the Order with a number of duties. It develops projects for the promotion and advertising, research, consumer information, and industry information of beef. 7 U.S.C. § 2904(4)(B). It submits those projects to the Secretary for approval. 7 C.F.R. § 1260.169. The projects it effectuates must be designed to strengthen the beef industry's position in the marketplace and to maintain and expand domestic and foreign beef markets. 7 C.F.R. § 1260.169(a), (b). The Operating Committee must review its projects periodically, and if it finds that any project does not further the purposes of the Beef Promotion and Research Act, it must terminate the project. 7 C .F.R. § 1260.169(c). In its advertisements, the Operating Committee may not reference brand names without the approval of the Beef Board and the Secretary. 7 C.F.R. § 1260.169(d).

The members of the Beef Board also elect a group of members to serve on the Executive Committee which reviews the actions the Operating Committee has taken. (LMA Trans. at 195). It decides whether or not to ratify Operating Committee decisions. *Id.* at 201-02.

The Beef Board, Operating Committee, and Executive Committee constitute

part of the nationwide portion of the beef checkoff program. In addition to the nationwide program, the Act and Order allow for state programs. These programs are administered by Qualified State Beef Councils, and each state may have only one such council. The USDA has defined a Qualified State Beef Council as "a beef promotion entity that is authorized by State statute or a beef promotion entity organized and operating within a State that receives voluntary assessments or contributions; conducts beef promotion, research, and consumer and industry information programs; and that is certified by the [Beef] Board pursuant to this subpart as the beef promotion entity in such State." 7 C.F.R. § 1260.115. (Pet'r Statement of Uncontroverted Facts ¶ 5).

Forty-five of the fifty states have a Qualified State Beef Council. In each of those states, the Qualified State Beef Council collects assessments from producers. The state organization is required to pay 50 cents of each dollar collected to the Beef Board. It may spend the remaining 50 cents on programs in its state, so long as those checkoff-funded programs are consistent with the Act and the Order. The state programs are subject to the same USDA oversight as the Beef Board programs. (LMA Trans. at 313-16). Many Qualified State Beef Councils choose to pay more than 50 cents of each dollar to the Beef Board. *Id.* at 204, 208, 228-29.

In the five states that do not have a Qualified State Beef Council, the Beef Board is responsible for collecting the assessments, which are entirely retained by the Beef Board. *Id.* at 217. In addition, the Beef Board receives all assessments `collected from beef importers. *Id.* at 18.

The process by which a checkoff-funded project or advertisement is approved is a complicated one. Twice a year, the Operating Committee solicits ideas from organizations and individual producers. It sends these organizations and producers a series of letters explaining the types of projects that can be funded with beef checkoff dollars, the priorities the Operating Committee considers important, and the long range plan the Beef Board has approved. The ideas received are referred to advisory committees. The advisory committees are comprised of members of the Beef Board, Qualified State Beef Councils, and other industry organizations. If an advisory committee or an organization that qualifies under the Act desires, they may submit an authorization request, which is a formal request for project funding, to the Operating Committee. *Id.* at 199-200.

The Operating Committee studies the authorization request, considering what the project will accomplish and how much it will cost. Operating Committee meetings always are followed by Executive Committee meetings. If the Operating

Committee approves a project, the project is a subject at the Executive Committee meeting, at which the Executive Committee chooses whether or not to ratify the Operating Committee's approval. *Id.* at 201-02.

If the Executive Committee ratifies approval of a project, the project is submitted to the USDA for approval. *Id.* at 202. In addition, any checkoff- funded project developed by a Qualified State Beef Council must meet USDA approval. *Id.* at 295. If the USDA approves the project, the Beef Board or Qualified State Beef Council may fund it with beef checkoff funds. All USDA- approved, checkoff-funded advertising, is owned by the federal government; any patents, copyrights, inventions, or publications developed through the use of beef checkoff funds are the property of the "U.S. Government as represented by the [Beef] Board." 7 C.F.R. § 1260.215.

Pursuant to the Order, projects are submitted to the Secretary for approval. 7 C.F.R. § 1260.169. The Secretary has delegated this responsibility to Barry Carpenter, who is the Deputy Administrator of the Livestock and Feed Administration, an agency within the USDA. One of his job duties is to oversee the checkoff-funded program. *Id.* at 288. Carpenter has one full-time staff member assigned to the project development process, as well as other staff members when they are needed. *Id.* at 292.

No project or advertisement generated by the Beef Board becomes public without Carpenter's approval. *Id.* at 292-93, 295. By statute, this approval comes after the advertisement is created. In reality, USDA representatives are present at every Beef Board meeting, Operating Committee Meeting, and Executive Committee Meeting. *Id.* at 205, 215, 297, 315. However, these formal contacts between Beef Board members and USDA representatives are a minimal portion of the actual interaction that takes place. *Id.* at 294. The representatives provide input to the Operating Committee at the early stages of the project development process. *Id.* at 215, 293-99. Some proposed projects are not developed because the Operating Committee predicts that the Secretary will not approve them. Therefore, most ideas that do not comport with USDA objectives are quelled in their early stages. *Id.* at 142. Nevertheless, the Secretary has refused advertisements generated by the Beef Board. (Summ. J. Trans. at 48; Resp't Statement of Uncontroverted Facts ¶ 61, Ex. A; Carpenter Decl. ¶ 23; LMA Trans. at 307-08).

USDA interaction with the Qualified State Beef Councils is similar. Carpenter receives calls from Qualified State Beef Councils that have an idea for a project, and thereafter advises them whether or not they may fund the project with beef

checkoff assessments. This prevents the state organizations from wasting time on projects that he ultimately will reject. *Id.* at 294-95.

Occasionally, the USDA creates an initiative to use checkoff funds to convey a certain message and urges Qualified State Beef Councils to participate. One such initiative concerned minority farmers and minority livestock producers. At Carpenter's urging, the Qualified State Beef Councils participated in the initiative. *Id.* at 295-96.

DISCUSSION

I. *Does the Beef Checkoff Program Invoke the First Amendment?*

[1] Two Supreme Court cases have addressed whether agricultural marketing programs invoke First Amendment scrutiny: *Glickman v. Wileman Brothers & Elliott, Inc.,* 521 U.S. 457, 117 S.Ct. 2130, 138 L.Ed.2d 585 (1997) and *United States v. United Foods, Inc.,* 533 U.S. 405, 121 S.Ct. 2334, 150 L.Ed.2d 438 (2001). However, two earlier Supreme Court cases, *Abood v. Detroit Bd. of Education,* 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977), and *Keller v. State Bar of Cal.,* 496 U.S. 1, 110 S.Ct. 2228, 110 L.Ed.2d 1 (1990), lay the groundwork for the agricultural marketing cases. Therefore, a discussion of *Abood* and *Keller* must precede the discussion of *Wileman Brothers* and *United Foods.*

A. *Abood* and *Keller*

In *Abood,* the State of Michigan enacted legislation authorizing a system for union representation of local government employees. The union passed a rule requiring employees represented by the union, even though they were not members of the union, to pay a service fee equal to union dues. *Abood,* 431 U.S. at 211. Failure to pay the service fee was grounds for discharge. Employees who objected to the union activities did not pay the fee, and they challenged the constitutionality of the program.

The employees' legal theory was that the union engaged in economic, political, professional, scientific, and religious activities not related to collective bargaining, and non-member service fees helped pay for those activities. The Supreme Court's decision did not prohibit the union from engaging in activities not germane to collective bargaining. Instead, it required the union to separate member dues from funds provided by non-members, and decided that non- member funds could not be used to fund activities that are not germane to collective bargaining. *Id.* at 235-36.

A main theme in *Abood* was that regulation of labor relations with state and local employees fell within the power of states under the National Labor Relations Act. *See Id.* at 223. The Court deferred to the Michigan Legislature, which determined that a union was the proper way to protect the employment rights of state employees. Since collective bargaining was the purpose of the legislation, and the union's political activities were not germane to the purpose behind the legislation, employees who disagreed with the political activities could not be compelled to support them.

When the Supreme Court decided *Keller,* it reiterated the rule set forth in *Abood.* In *Keller,* members of the California State Bar sued the Bar, claiming use of their dues to fund ideological and political activities violated the First Amendment. 496 U.S. at 4. The California Bar is created by California law, and its legislative purpose is to promote the improvement of the administration of justice. California statute sets out the functions the Bar performs, including examining applicants for admission, formulating rules of professional conduct, disciplining members, preventing unlawful practice, and recommending changes in procedural law and the administration of justice. The Bar-member plaintiffs disputed activities such as lobbying the legislature and other government agencies, filing amicus curiae briefs in pending cases, holding an annual conference where current issues were discussed, passing resolutions regarding those current issues, and engaging in a variety of education programs. *Id.* at 4-5. In short, the Bar was taking positions on controversial, political and ideological issues. *See Id.* at 6 n. 2.

In *Keller,* the Supreme Court followed *Abood* and held that the Bar may compel association only for the purposes provided by the California Legislature. Further, it may fund only activities that are germane to the statutory purposes. *Id.* at 13-14.

B. *Wileman Brothers* and *United Foods*

Wileman Brothers and *United Foods* both addressed the constitutionality of agricultural marketing programs, and in both cases, the Supreme Court relied on *Abood* and *Keller.* Specifically, the Court derived a two-part test which determines whether an agricultural marketing program invokes scrutiny under the First Amendment. To avoid such scrutiny, the program must compel speech that is 1) non-ideological and 2) germane to a larger regulatory scheme.

In *Wileman Brothers & Elliott, Inc.,* California fruit farmers were subject to a series of agricultural orders promulgated by the USDA. 521 U.S. at 460. Among other mandates, the agricultural orders exempted the fruit growers from antitrust

laws, collectivized fruit sales, set prices, set rules for marketing, and required fruit farmers to contribute funds used for cooperative advertising. *Id.* at 469. The Court determined that the agricultural orders reflected a policy of displacing unrestrained competition with government- supervised cooperative marketing. *Id.* at 475. The basic policy decision underlying the statutory scheme was that, considering the volatile markets for agricultural commodities, the public is best served by compelled cooperation among producers. *Id.* In evaluating the constitutionality of compelled support for advertising, the Supreme Court utilized the two-step analysis employed in *Abood* and *Keller*. The Court found the compelled support for advertising did not raise a First Amendment claim because 1) the generic advertizing of California tree fruit was unquestionably germane to the purposes of the marketing orders which collectivized the industry and 2) the assessments were not used to fund ideological activities. *Id.* at 473. It wrote:

> The mere fact that objectors believe their money is not being well spent 'does not mean [that] they have a First Amendment complaint.'

Id. at 472 (*quoting Ellis v. Railway Clerks,* 466 U.S. 435, 104 S.Ct. 1883, 80 L.Ed.2d 428 (1984)).

Four years after *Wileman Brothers,* the Supreme Court decided *United States v. United Foods, Inc.,* 533 U.S. 405, 121 S.Ct. 2334, 150 L.Ed.2d 438 (2001). In that case, the Court reviewed the Mushroom Promotion, Research, and Consumer Information Act of 1990, 7 U.S.C. § 6101 *et seq*. Unlike the compelled support for speech in *Wileman Brothers,* the compelled support for mushroom advertising was not part of a larger regulatory scheme. *United Foods,* 533 U.S. at 412-13. Mushroom producers were not bound together and required to market their products according to cooperative rules. *Id.* at 412. Instead, the central purpose of the Mushroom Promotion, Research, and Consumer Information Act was generic advertising. Again the Court utilized the two-step approach from *Abood* and *Keller*. Differentiating the case from *Wileman Brothers,* the Supreme Court wrote:

> The opinion and analysis of the [*Wileman Brothers*] Court proceeded upon the premise that the producers were bound together and required by the statute to market their products according to cooperative rules. To that extent, their mandated participation in an advertizing program with a particular message was the logical concomitant of a valid scheme of economic regulation.
>
> . . .
>
> The features of the marketing scheme found in [*Wileman Brothers*] are not present in the case now before us. As respondent notes, and as the Government does not contest [citation omitted], almost all the funds collected under the mandatory assessments are for one purpose: generic advertising. Beyond the collection and disbursement of advertising funds, there are no marketing orders that regulate how

mushrooms may be produced and sold, no exemption from antitrust laws, and nothing preventing individual producers from making their own marketing decisions. *Id.*

The Court decided that, because mushroom advertising was not germane to a larger regulatory scheme, compelled support for mushroom marketing invoked the protections afforded by the First Amendment. *Id.* at 414-16. Because the government did not provide a viable First Amendment argument to support the checkoff-funded mushroom advertizing, the Court determined the Mushroom Promotion, Research, and Consumer Information Act was unconstitutional.

C. Application of *Wileman Brothers* and *United Foods*

Wileman Brothers and *United Foods* set forth a two-part test to determine whether an agricultural marketing program is subject to First Amendment scrutiny. The Beef Promotion and Research Act is subject to scrutiny if 1) it compels ideological speech or 2) it is not germane to a larger regulatory scheme. Since the Act compels support for beef advertising only, no claim has been made, and no credible claim could be made, that the checkoff-funded program compels ideological speech. Therefore, the inquiry must focus on whether beef checkoff advertising is germain to a larger regulatory purpose.

As written, the Beef Act and Order are quite similar to the Mushroom Act and Order. Nothing in the briefs indicates that the programs are substantially different, and at the hearing on this matter, no differences were demonstrated. Evidence on this issue is notably absent from the record, and the Court is unable to properly compare the beef and mushroom promotion programs.

Nevertheless, the purpose of the Beef Act is the promotion and advertising, research, consumer information, and industry information of beef. 7 U.S.C. § 2904(4)(B). Though the Court has been presented with varying figures, the beef checkoff assessments generate approximately $80-87 million per year. In its brief in opposition to the motion for preliminary injunction, the USDA stated that $32 million has been spent on research since the inception of the program. Thirty-two million dollars amounts to a fraction of one percent of the total assessments that have been collected. Like the mushroom promotion program, the great percentage of the funds collected under the assessments are utilized for generic advertising. Beef producers are not exempted from antitrust laws, and nothing in the program prevents individual beef producers from making their own marketing decisions. Therefore, the beef checkoff program is not germane to a larger regulatory scheme,

and it is subject to First Amendment constraints. The checkoff-funded program is constitutional only if it passes First Amendment scrutiny.

II. *Government Speech*

[2] Having decided that the Petitioners and Intervenor/Petitioners have raised a First Amendment Claim, the Court must decide whether the beef checkoff program violates the rights of free speech or free association. The main argument asserted by the USDA and the Intervenor/Respondents is that the checkoff-funded program is constitutional government speech.

A. The Government Speech Doctrine

There is no doubt that the government speech doctrine is recognized by the Supreme Court and the Ninth Circuit. A government agency may use revenue, whether derived from taxes, dues, fees, tolls, tuition, donations, or other sources for any purposes within its authority. To effectively govern, it must take substantive positions and decide disputed issues. So long as it bases its actions on legitimate goals, the government may speak despite citizen disagreement with the content of the message. *Keller v. State Bar of Cal.,* 496 U.S. 1, 10, 110 S.Ct. 2228, 110 L.Ed.2d 1 (1990).

The government is not required to be content-neutral. *Id.* "When the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position." *Board of Regents of the University of Wisconsin System v. Southworth,* 529 U.S. 217, 235, 120 S.Ct. 1346, 146 L.Ed.2d 193 (2000). The government may fund viewpoint-based speech when the government itself is the speaker. *Legal Servs. Corp. v. Velazquez,* 531 U.S. 533, 541, 121 S.Ct. 1043, 149 L.Ed.2d 63 (2001). It also may use private speakers to disseminate specific messages pertaining to government programs. *Id. ; Rosenberger v. Rector and Visitors of the Univ. of Vir.,* 515 U.S. 819, 833, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995).

B. *United Foods* and *Wileman Brothers* did not consider government speech.

Before addressing whether the beef checkoff program is government speech, it should be noted that, in both *Wileman Brothers* and *United Foods,* the Supreme

Court declined to consider government speech arguments because such arguments either were not properly raised or were not raised at all. In *Wileman Brothers,* the government did not argue that the advertising at issue amounted to government speech. 521 U.S. at 483 (J. Souter *concurring*). In *United Foods,* the government attempted to raise the issue of government speech, for the first time, on appeal to the Supreme Court. The Court declined to address the question because it had not been raised before the lower courts. *United Foods,* 533 U.S. at 416-17. It is obvious that both *Wileman Brothers* and *United Foods* were decided without considering whether the agricultural marketing programs amounted to government speech.

C. Cases Addressing the Beef Checkoff and Government Speech

In 1989 the Third Circuit Court of Appeals concluded that the advertising compelled by the Beef Promotion and Research Act did not constitute government speech. *United States v. Frame,* 885 F.2d 1119, 1133 (3rd Cir.1989). *Frame* was decided years before *Wileman Brothers* or *United Foods.*

In *Frame,* the Third Circuit acknowledged that the issue of whether the beef checkoff program compelled government, rather than private, speech was a close one. *Id.* at 1132. The court concluded that the amount of government oversight in the checkoff-funded program was considerable, and that the Beef Board was subject to the Secretary's pervasive surveillance and authority. *Id.* at 1128. The court further noted that members of the Beef Board are appointed by the Secretary. 7 U.S.C. § 2904(1); 7 C.F.R. § 1260.141(b). The Secretary also has the power to remove members of the Beef Board. 7 C.F.R. §§ 126.211(b)(1), 213. The Beef Board must give notice of its meetings to the Secretary so that the Secretary or his representative may attend the meetings. 7 C.F.R. §§ 1260.150(m). The Beef Board is required to submit to the Secretary for each fiscal period an audit of its activities. 7 C.F.R. 1260.150(a). All budgets, plans, projects, and contracts approved by the Beef Board become effective only upon approval by the Secretary. 7 U.S.C. § 2904(4)(C), (6)(A), (6)(B); 7 C.F.R. §§ 1260.150(f), (g); 7 C.F.R. § 1260.168(e), (f). Congress has set the beef checkoff assessments, and the Secretary decides how the funds will be spent. *Frame,* 885 F.2d at 1129.

In acknowledging that the argument for classifying the beef checkoff program as government speech was based on sound reasoning, the Third Circuit noted that the nexus between the Beef Board and the USDA was a close one. *Id.* at 1131-32. The Frame court recognized that, when the Beef Board spoke, it did so on behalf of the Secretary of Agriculture and the government of the United States. *Id.* at 1132. Despite each of these findings, the *Frame* panel arrived at the strained

conclusion that the Beef Promotion and Research Act did not constitute government speech. *Id.*

The Third Circuit relied heavily on footnote 13 of Justice Powell's *Abood* concurrence, which states:

> Compelled support of a private association is fundamentally different from compelled support of government. Clearly, a school board does not need to demonstrate a compelling state interest every time it spends a taxpayer's money in ways the taxpayer finds abhorrent. But the reason for permitting the government to compel the payment of taxes and to spend money on controversial projects is that the government is representative of the people. The same cannot be said of a union, which is representative of only one segment of the population, with certain common interests. The withholding of financial support is fully protected as speech in this context.

Abood, 431 U.S. at 259 n. 13 (J. Powell concurring); *see Frame* 885 F.2d at 1132-33.

The *Frame* court found that the Beef Board is representative of one segment of the population, with certain common interests.[2] In addition, members of the Beef Board, although appointed by the Secretary, are private individuals nominated by beef industry organizations. *Frame,* 885 F.2d at 1133. Finding a close nexus between the individuals who fund the checkoff advertising and the message dispersed in the advertisements, the court labeled the beef checkoff program a self-help program, rather than government speech. *Id.* at 1132-33.

The Third Circuit's extensive reliance on Justice Powell's footnote was misplaced for at least two reasons. First, Justice Powell's concurring opinion is not binding law. His opinion actually is a dissent, rather than a concurrence, because he obviously disagrees with the majority opinion. The *Abood* majority held that the union could not fund political or ideological expression with assessments collected from non-member employees. *Abood,* 431 U.S. at 235-36; *Abood,* 431 U.S. at 245 (J. Powell concuring). Justice Powell, on the other hand, would have decided that all collective bargaining is political expression. *Abood,* 431 U.S. at 257 (J. Powell concurring). In his view, any coerced funding for collective bargaining violated the

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[2]This finding comes in direct conflict with other findings in the *Frame* opinion. A number of those findings can be found in the following passage: "In this case, the national interest in maintaining and expanding beef markets proves similarly compelling. Widespread losses and severe drops in the value of inventory have driven many cattlemen to bankruptcy, as well as to the abandonment of ranching altogether. A continuation of this trend would endanger not only the country's meat supply, but the entire economy." *Frame,* 885 F.2d at 1134 (citations omitted). This language indicates that beef advertising benefits the nation as a whole, not only beef producers.

First Amendment. *Id.* at 259.

Second, relying heavily on footnote 13 was unsound because *Abood* is not a government speech case. The lesson *Abood* teaches is that, when individuals are coerced to fund an association that represents them, the association's speech does not violate the First Amendment, so long as the speech falls within the statutory purpose for which the association was created. In *Abood,* the protected activities were political and ideological activities not germane to the union's statutory purpose. The speech the *Frame* court addressed, generic beef advertising, clearly falls within the purpose of the Beef Promotion and Research Act. 29 U.S.C. § 2901(b). The Third Circuit should have analyzed *Frame* under the majority opinion in *Abood,* rather than a footnote in a concurring opinion.

The only substantive issue on which the *Abood* majority and Justice Powell agree is the disposition of the case. For starkly different reasons, both opinions conclude that the allegations in the complaint, if proven, would establish a constitutional violation. *Abood,* 431 U.S. at 237; *Abood* 431 U.S. at 244 (J. Powell concurring). When the *Frame* court relied on footnote 13 of the concurring opinion, rather than the majority ruling, it ignored binding Supreme Court precedent.

However, it should be emphasized that, even though the Third Circuit concluded the beef checkoff program did not constitute government speech, it upheld the constitutionality of the program. The court determined that beef checkoff advertising was commercial speech, subject to the less stringent standard set forth in *Central Hudson.*[3] Nevertheless, compelled association had also been raised, so the court analyzed the checkoff program under the heightened standard of scrutiny employed in *Roberts v. United States Jaycees,* 468 U.S. 609, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984). Government interference with association rights must be "justified by compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Frame,* 885 F.2d at 1134 (*quoting Roberts,* 468 U.S. at 623.)

First, in its analysis under *Roberts,* the *Frame* court found the governmental interest in advertising beef was compelling for the following reasons: 1) it prevents

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[3]In commercial speech cases, courts apply a four-element analysis. First, the expression must be protected by the First Amendment. Second, the asserted governmental interest must be substantial. If elements one and two are satisfied, a court applies a third and fourth. Third, the regulation must directly advance the governmental interest asserted. Fourth, the regulation must not be more extensive than is necessary to serve that interest. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n,* 447 U.S. 557, 556 (1980).

further decay of an already deteriorating beef industry; 2) its primarily economic interest does not diminish its importance; 3) its establishment of industrial harmony--although an economic interest--is sufficiently important to justify significant intrusions on the producers' right to associate; 4) it promotes the national interest in maintaining and expanding beef markets; 5) widespread losses and severe drops in the value of beef have driven many cattlemen to bankruptcy, as well as to the abandonment of ranching altogether; 6) a continuation of the abandonment of ranching endangers not only the country's meat supply, but the entire economy; and 7) maintenance of the beef industry ensures preservation of the American cattlemen's traditional way of life. *Id.* at 1134-35. Second, the court found that the Beef Promotion and Research Act is ideologically neutral. *Id.* at 1135. Third, the court determined that the Act's interference with First Amendment rights is slight. The Beef Board is authorized only to engage in commercial speech on behalf of beef producers, and may not engage in ideological or political expression. *Id.* at 1136.

Based on its findings, the *Frame* court concluded that the slight interference resulting from the Beef Promotion and Research Act does not violate cattle producers' right of free association. *Id.* at 1137. Because the Act passes the stricter *Roberts* test, it also survives the less stringent commercial speech test. *Id.* at 1134 n. 12.

In recent years, two district courts have followed the *Frame* analysis and decided advertising funded with beef checkoff dollars is not government speech: *Goetz v. Glickman,* 920 F.Supp. 1173 (D.Ks.1996) and *Livestock Mktg. Assoc. v United States Dep't of Agric.,* CIV 00-1032 (D.S.D.2002) (unpublished) [4]. It is not necessary for this Court to discuss each case in detail because both followed the analysis in *Frame. Goetz,* 149 F.3d 1131, 1134 (10th Cir.1998); *Livestock Mktg. Assoc.* at 18. In *Goetz,* the Tenth Circuit affirmed the district court's decision that the Beef Promotion and Research Act was constitutional. Though the district court found the Act was constitutional under the *Frame* analysis, the Court of Appeals did not follow the district court's analysis. Instead, it passed on the government speech

[4]The Court cites *Livestock Mktg. Assoc.* to demonstrate a conflict among dispositions. *See* 9th Cir. R. 36-3(b).

issue and relied on *Wileman Brothers.*[5] *Goetz,* 149 F.3d at 1139. In *Livestock Marketing Association,* the Southern District of South Dakota relied on *Frame* and decided the checkoff-funded program is not government speech. It concluded the program is unconstitutional under *United Foods. Livestock Mktg. Assoc.* at 12.

Each of the courts that determined the Beef Board does not deliver a government message relied on *Frame.* The reasons noted in this Order that the *Frame* court's decision is not persuasive apply to those courts' decisions as well. A third reason those courts' decisions are unpersuasive is undoubtedly the most convincing. Both courts failed to follow the government speech cases the Supreme Court issued after *Keller.* It was not until the 1990's that the Supreme Court established a body of case law defining government speech. *Frame,* a Third Circuit opinion decided in 1989, can not serve as the sole basis for a government speech analysis.

D. Private Individuals Disseminating Government Speech

Although when *Frame* was decided in 1989 the government speech issue may have been a close call, it is no longer so. The most recent Supreme Court and Ninth Circuit decisions discussing government speech indicate that the checkoff-funded programs do constitute government speech. The Act creates programs where the government utilizes private cattlemen to disseminate a single message, a message prescribed by Congress and the USDA. The extent of control Congress and the USDA exercise over the beef checkoff program is extensive, as is previously discussed herein. Coerced promotion of beef would not exist had Congress not mandated it. "Beef. It's what's for dinner" would not be a recognizable slogan but for the approval of the Secretary. The federal government created and controls the beef checkoff program, and the Supreme Court has held that when private individuals deliver a government message, the message may be attributed to the government.

In 1991, after both *Frame* and *Keller* were issued, the Supreme Court decided *Rust v. Sullivan,* 500 U.S. 173, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991). In *Rust,* Congress and the Department of Health and Human Services created a program that funded family planning. The legislation required that funds not be distributed to programs where abortion was used as a method of family planning. 42 U.S.C. § 300a-6. Family planning programs and doctors sued Health and Human Services on

[5]The Tenth Circuit's issued *Goetz* after *Wileman Brothers,* but before *United Foods.*

First Amendment grounds. *Rust,* 500 U.S. at 177-79.

The family planning programs and the doctors contended that withholding funding from programs that discussed abortion was unconstitutional because it discriminated against a particular viewpoint. However, the Court relied on *Regan v. Taxation with Representation,* 461 U.S. 540, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983), which held that the government has no obligation to subsidize speech rights. The government is permitted to make a value judgment regarding policy, and may implement that judgment by allocating public funds. The family planning program did not discriminate on the basis of viewpoint. Instead, the government chose to fund one type of activity over another, and it utilized private speakers to promote the activity.

Although *Rust* does not address the exact issue presented here, its reasoning supports the constitutionality of the beef checkoff program. *Rust* addresses alleged government suppression of speech by withholding funds. Basically, the Court decided that choosing not to fund speech does not constitute suppression of that speech. Here, to the contrary, the government is accused of compelling cattle producers and importers to speak. In *Rust,* the Court wrote, "[t]here is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." 500 U.S. at 193 (*quoting Maher v. Roe,* 432 U.S. 464, 475, 97 S.Ct. 2376, 53 L.Ed.2d 484 (1977)). In that case, the government was funding private speech that encouraged full-term childbirth. In this case, the government compels funding for speech encouraging the sale and purchase of beef. The sale and purchase of beef is consonant with legislative policy. 7 U.S.C. § 2901.

The Supreme Court did not explicitly decide *Rust* on government speech grounds. However, later Supreme Court cases have explained *Rust* in a government speech context. *Legal Servs. Corp. v. Velazquez,* 531 U.S. 533, 541, 121 S.Ct. 1043, 149 L.Ed.2d 63 (2001). Viewpoint-based funding decisions can be upheld when the government uses private speakers to transmit specific information pertaining to government programs. *Id. ; Rosenberger v. Rector and Visitors of the Univ. of Vir.,* 515 U.S. 819, 833, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995).

In 2000, the Supreme Court considered facts analogous to those in this case and decided the speech involved was government speech. *Santa Fe Indep. Sch. Dist. v. Doe,* 530 U.S. 290, 302-03, 120 S.Ct. 2266, 147 L.Ed.2d 295 (2000). Prior to 1995, a student delivered a prayer before every Santa Fe High School home football game. The families of two students sued based on the Establishment Clause. During

the litigation, the high school adopted a policy that permitted, but did not require, a student-led prayer before home football games. The district court entered an order modifying the policy to permit only nonsectarian, nonproselytizing prayer. It required the students to choose the text of the prayer, and prohibited school officials from interfering with the text. The Fifth Circuit held that the policy, even as modified, violated the Establishment Clause.

One issue before the Supreme Court was whether the prayer was government or private speech. The school district relied on *Rosenberger,* arguing that a government-created forum is not government speech. The Court rejected the argument because the pre-game prayer was not the type of forum discussed in *Rosenberger* . It wrote:

> In this case the District first argues that [the government speech] principle is inapplicable to its October policy because the messages are private student speech, not public speech. It reminds us that "there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Board of Ed. of Westside Community Schools (Dist.66) v. Mergens,* 496 U.S. 226, 250, 110 S.Ct. 2356, 110 L.Ed.2d 191 (1990) (opinion of O'CONNOR, J.).
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> We certainly agree with that distinction, but we are not persuaded that the program invocations should be regarded as "private speech."

These invocations are authorized by a government policy and take place on government property at government-sponsored school-related events. Of course, not every message delivered under such circumstances is the government's own. We have held, for example, that an individual's contribution to a government- created forum was not government speech. *See Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995). Although the District relies heavily on *Rosenberger* and similar cases involving such forums, it is clear that the pregame ceremony is not the type of forum discussed in those cases. The Santa Fe school officials simply do not "evince either 'by policy or by practice,' any intent to open the [pregame ceremony] to 'indiscriminate use,' . . . by the student body generally." *Hazelwood School Dist. v. Kuhlmeier,* 484 U.S. 260, 270, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988) (*quoting Perry Ed. Assn. v. Perry Local Educators' Assn.,* 460 U.S. 37, 47, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983)). Rather, the school allows only one student, the same student for the entire season, to give the invocation. The statement or invocation, moreover, is subject to particular regulations that confine the content and topic of the student's message. This level of state involvement rendered the prayer government speech. *Id.*

Prior to the decision, the school district had attempted to disentangle itself from the prayer through the adoption of a two-step election process. In the first election, the student body voted in favor of a prayer to precede football games; in the second, they chose two students to deliver the prayers. *Id.* at 296.

The Court held that the election process was not sufficient to create a forum where students engaged in private speech. The elections took place only because the school district policy permitted students to deliver a brief invocation and/or message. In addition, the school district required the elections. The Court analyzed the words of the policy and decided, though the word "prayer" was not used, the policy indicated that the message should be religious. *Id.* at 305-07.

The beef checkoff program is similar to the prayer in *Santa Fe Indep. Sch. Dist.* The USDA is analogous to the school district. The Beef Board, along with the cattle producers and importers who support the checkoff-funded program, are analogous to the majority of students who supported the prayers. The Beef Board and Qualified State Beef Councils play the same role as the student elected to recite the prayer. The Petitioners are analogous to the students who opposed the prayers.

In *Santa Fe Indep. Sch. Dist.,* the school district dictated the type of speech the students would engage in, even though the students chose the actual text. This is similar to Congress's and the USDA's relationship with the Beef Board and the Qualified State Beef Councils. In addition, beef checkoff funds are not opened up to indiscriminate use by cattle producers of all points of view. *Santa Fe Indep. Sch. Dist.* demonstrates that the beef checkoff program is government speech. If the pre-game prayer was government speech, then "Beef. It's what's for dinner" must be.

The parties that object to the checkoff-funded program have argued that the referendum process found in the Act renders the program a private, rather than government-initiated, program. In light of *Santa Fe Indep. Sch. Dist.,* this argument fails. Within 22 months after the issuance of the Order, the Secretary was required to conduct a referendum among cattle producers and importers. 7 U.S.C. § 2906(a). If the Order was not approved by a majority of those voting in the referendum, the Secretary was required to terminate both the collection of assessments and the Order. *Id.* When the Secretary conducted the referendum, the Order was approved by a large majority of voters, and the checkoff-funded program remained in place.

The referendum was nearly identical to the student vote in *Santa Fe Indep. Sch. Dist.* Just as the school district required a vote on whether a pre-game message

would be delivered, Congress required that the referendum be conducted to determine if the Order would remain effective. Further, the school district indicated that the pre-game message should be religious. In this case, Congress mandated that beef checkoff funds should be used to strengthen, maintain, and expand beef markets. The election process in *Santa Fe Indep. Sch. Dist.* was not enough to convert government speech into private speech. The same is true of the referendum process found in the Act.

The parties objecting to the beef checkoff also argue that the process allowing for an additional referendum gives control of the checkoff program to producers. The Act states that, after the initial referendum, the Secretary may conduct an additional referendum if a group comprising 10 percent of cattle producers requests one. 7 U.S.C. § 2906(b). If the Secretary conducts such a referendum, and a majority of voting producers favor termination or suspension of the Order, the Secretary must terminate or suspend the Order. *Id.* Based on this portion of the Act, the objecting parties assert that producers and importers retain the ability to conduct a referendum. *(See for example* Petitioners' Statement of Genuine Issues ¶ 3). The assertion is based on a misreading of the statute. 7 U.S.C. § 2906(b) states that the Secretary, not producers, has the ability to conduct an additional referendum. If less than 10 percent of producers request a referendum, the Secretary may not conduct one. If 10 percent or more request a referendum, the Secretary may, but is not required, to conduct one. Clearly, the additional referendum process provides producers with less control over the checkoff-funded program than the initial referendum process. It also grants less control to private parties than the election process in *Santa Fe Indep. Sch. Dist.*

Santa Fe Indep. Sch. Dist. is a Supreme Court, government-speech case that was decided in 2000. The case is factually similar to this one, and is binding on this Court. There is no reason to return to the *Frame* analysis, which was suspect in 1989 and is inconsistent with more recent Supreme Court case law.

Following *Frame* also would be inconsistent with the Ninth Circuit's treatment of government speech. The Court of Appeals decided *Downs v. Los Angeles Unified Sch. Dist.* in 2000. 228 F.3d 1003 (9th Cir.2000). The case arose after the Los Angeles Unified School District issued a memorandum designating June as Gay and Lesbian Awareness Month. The memorandum informed schools within the district that certain outside organizations would provide posters and materials in support

of Gay and Lesbian Awareness Month[6]. In June of each year, school staff members created a bulletin board, on which faculty and staff could post materials related to Gay and Lesbian Awareness Month. Staff were not required to obtain approval before posting on the bulletin boards, but the school principals had ultimate authority to control the contents of the boards. The school principals who oversaw the bulletin boards were accountable to the school district. *Id.* at 1005-06.

The staff at Leichman High School posted material on their bulletin board that was pro-diversity and tolerant of gays and lesbians. A teacher at the high school who opposed Gay and Lesbian Awareness Month created his own bulletin board, titled "Testing Tolerance" in June of 1997. In June of 1998, he created a bulletin board titled "Redefining the Family," on which he posted the Declaration of Independence, newspaper articles, school district memoranda, surveys, and biblical quotes. Obviously, the teacher's bulletin boards did not support Gay and Lesbian Awareness Month. The principal ordered the teacher's materials to be removed because they did not promote tolerance or diversity, and the teacher sued on First Amendment grounds. *Id.* at 1006-07.

The Ninth Circuit Court of Appeals held that the Gay and Lesbian Awareness bulletin boards disseminated government speech. *Id.* at 1012. Outside organizations provided the materials on the board, and faculty and staff posted them. Postings were subject to the oversight of the principals. The school district was directly responsible for recognition of Gay and Lesbian Awareness Month and the content of the bulletin board. Since the bulletin board was government speech, not a public forum supporting private speech, the school district was not required to be viewpoint neutral. The Constitution did not require the school district to allow the teacher to maintain his own bulletin board.

Downs is directly on point. The school district required that the materials posted on the bulletin boards transmitted a particular government message: tolerance for gays and lesbians. Congress was equally unambiguous when it limited the use of beef checkoff funds to the promotion of beef. In *Downs,* the school principals maintained authority over the contents of the bulletin boards, but materials did not need to be approved before being posted. *Id.* at 1006. Therefore, the principals

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[6]The outside organizations were the Office of Intergroup Relations and Multicultural Unit, Division of Instructional Services, and the Gay and Lesbian Education Commission. Before the materials provided by these organizations were posted, groups such as the Parent Community Services Branch reviewed them. *Downs,* 228 F.3d 1003. The opinion does not indicate whether these organizations were divisions of government or private groups. *See Id.* at 1007 n. 1.

were less involved in generating gay and lesbian tolerant speech than the Secretary is involved in generating beef advertizing.

The checkoff-funded program allows the private cattlemen who comprise the Beef Board to generate the promotion and research. That fact notwithstanding, the Secretary has the final authority to approve or reject the contents of a Beef Board project. LMA Trans. at 141-42. The Secretary exercises pervasive surveillance and authority over the Beef Board. *Frame,* 885 F.2d at 1128. The Secretary appoints members of the Beef Board. 7 U.S.C. § 2904(1); 7 C.F.R. § 1260.141(b). He also retains the power to remove members from the Beef Board. 7 C.F.R. §§ 126.211(b)(1), 213. The Beef Board is required to give notice of its meetings to the Secretary, so that the Secretary or a representative may attend the meetings. 7 C.F.R. §§ 1260.150(m). A USDA representative does, in fact, attend every Beef Board, Operating Committee, and Executive Committee meeting. LMA Trans. at 205, 215. The Beef Board is required to submit to the Secretary for each fiscal period an audit of its activities. 7 C.F.R. 1260.150(a). All budgets, plans, projects, and contracts approved by the Beef Board become effective only upon approval by the Secretary. 7 U.S.C. § 2904(4)(C), (6)(A), (6)(B); 7 C.F.R. §§ 1260.150(f), (g); 7 C.F.R. § 1260.168(e), (f). If the Secretary determines that a checkoff-funded project does not serve the purpose of the Act, he denies funding for the project. LMA Trans. at 192, 312-13. The government mandates the beef checkoff assessments, and the Secretary of Agriculture maintains control over how the assessments are spent.

As one example of the control over speech the Beef Board generates, the Secretary has rejected an advertisement proposed by the Operating Committee. (Summ. J. Trans. at 48; Resp't Statement of Uncontroverted Facts ¶ 61, Ex. A; Carpenter Decl. ¶ 23). That advertisement was a statement to the effect of, "Did you ever notice that when a person offers you a strange food, it tastes like chicken?" (Summ. J. Trans. at 48). The USDA refused this proposed advertisement because it has an interest in promoting, not disparaging, poultry. (Resp't Statement of Uncontroverted Facts ¶ 61, Ex. A; Carpenter Decl. ¶ 23).

By no means is the government's control over the checkoff-funded program *pro forma*. USDA representatives interact and advise the Beef Board throughout the project development process. LMA Trans. at 215, 293-99. The representatives are present at every Beef Board meeting, Operating Committee Meeting, and Executive Committee Meeting. *Id.* at 205, 215, 297, 315. But presence at these formal meetings represents only a small portion of the contacts the USDA has with Beef Board members. *Id.* at 294. As a result of the USDA's continuing presence, most

Beef Board projects that Carpenter would not have approved are abandoned in their early stages. Projects being developed by Qualified State Beef Councils often meet the same fate.

The Secretary of Agriculture, by way of his staff, controls the checkoff- funded speech. Therefore, the speech must be attributed to the government. In fact, any patents, copyrights, inventions, or publications developed through the use of beef checkoff funds are the property of the "U.S. Government as represented by the [Beef] Board." 7 C.F.R. § 1260.215. This regulation demonstrates two important points. First, the federal government owns the projects and advertisements generated with beef checkoff funds. Second, the Beef Board is a representative of the government.

Congress created the Beef Promotion and Research Act for the express purpose of "maintenance and expansion of existing markets for beef." 7 U.S.C. § 2901(a)(4). It intended to "maintain and expand domestic an foreign markets and uses for beef and beef products." 7 U.S.C. § 2901(b). Congress determined that financing a "program of promotion and research designed to strengthen the beef industry's position in the marketplace" serves the public interest. *Id.* Unlike the activities challenged in *Abood* and *Keller,* the Beef Board's activities fall squarely within these legislative mandates. Through the Act, Congress and the USDA use private speakers to disseminate a government message. This is a recognized form of government speech. *Rust,* 500 U.S. 173, 111 S.Ct. 1759, 114 L.Ed.2d 233; *Legal Servs. Corp.,* 531 U.S. at 541.

E. Public Forums

[3] The Petitioners contend that the beef checkoff program is not government speech, but instead, is a public forum which allows for private speech. (*See for example* Summ. J. Trans. at 26, 85). The public forum cases do not support the Petitioners' position. In 1995 the Supreme Court decided *Capitol Square Review and Advisory Bd. v. Pinette,* 515 U.S. 753, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995). In that case, an Ohio law made an area known as Capitol Square a forum for public questions and activities. The Ku Klux Klan completed a required application, seeking to place a cross in the square during the Christmas season. The Capitol Square Review and Advisory Board denied the application on Establishment grounds. The Supreme Court decided that allowing the cross would not violate the Establishment Clause because the government was merely providing a forum. Ohio was not engaging in government speech by providing a public forum.

The decision that Ohio was not engaging in government speech clearly is distinguishable from the checkoff-funded program. In *Capitol Square,* the Court considered an Ohio statue which set aside a public square as a public forum. The statute made the square available "for use by the public ... for free discussion of public questions, or for activities of a broad public purpose." Ohio Admin. Code Ann. § 128-4-01(A) (1994). After obtaining a permit, people in Ohio who possessed all types of political and religious views could voice their opinions in the square.

In contrast, the Beef Board was created for one specific congressional purpose--to promote the sale of beef. It would be disingenuous to suggest that the Ku Klux Klan could use beef checkoff funds to display Christian symbols during the Christmas season. It is equally ridiculous to assume that animal rights activists could access the beef checkoff fund in an attempt to discourage the slaughter of cattle. Beef assessments may not be used to promote the sale of cotton, dairy, eggs, fluid milk, honey, mushrooms, peanuts, popcorn, pork, potatoes, soybeans, or watermelons--other agricultural products Congress has chosen to promote. *See Livestock Mktg. Ass'n v. United States Dep't of Agric.,* 132 F.Supp.2d 817, 820 (D.S.D.2001). Without doubt, the Secretary would prohibit the Beef Board from replacing "Beef. It's what's for dinner" with "Beef will make you fat and raise your cholesterol level." The checkoff-funded program bears little resemblance to a public forum. Instead, the government has chosen to promote government policy. The government disseminates its chosen message by way of private speakers.

Likewise, *Rosenberger v. Rector and Visitors of the Univ. of Virginia,* 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995), and *Board of Regents of the University of Wisconsin System v. Southworth,* 529 U.S. 217, 235, 120 S.Ct. 1346, 146 L.Ed.2d 193 (2000), do not apply here. In both of those cases, universities created opportunities for students with varying viewpoints to express those views. Clearly, the public forums in *Rosenberger* and *Southworth* can be distinguished from the beef checkoff program. When Congress created the checkoff-funded program, it chose which individuals may speak and decided what they may say. Because the beef checkoff does not create a public forum, forum analysis and viewpoint neutrality do not apply to this case.

F. Beef Checkoff Funding

The Petitioners and Intervenor/Petitioners argue that *Keller* controls this case because, like the California Bar, the beef checkoff program is funded with revenues collected from one segment of the general population. (*See for example* Intervenor Abbott's Brief in Opposition to Respondent's Motion for Summary Judgment at

7-9). In *Keller,* however, the government speech issue was a different issue than the Court is faced with here.

In reaching its decision in *Keller,* the Supreme Court decided the challenged activities were not government speech. It did so, however, after finding that the State Bar of California was not a traditional government agency. *Id.* In essence, it concluded that the Bar did not engage in government speech because it was an association of individuals.

In light of subsequent Supreme Court case law, the *Keller* analysis does not control whether the Beef Board engages in government speech.[7] It is now clear that the government may use private individuals to disseminate a government message. *Rust v. Sullivan,* 500 U.S. 173, 193, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991); *Rosenberger v. Rector and Visitors of the Univ. of Vir.,* 515 U.S. 819, 833, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995); *Legal Servs. Corp. v. Velazquez,* 531 U.S. 533, 541, 121 S.Ct. 1043, 149 L.Ed.2d 63 (2001).

In *Keller,* the legislation which created the Bar did not provide for any outside control over the Bar's speech; instead, the Bar maintained final authority over its own activities. Because no other government agency exercised control over the Bar's speech, the speech could be characterized as government speech only if the Bar itself was a government agency. Both the Supreme Court of California and the Supreme Court of the United States addressed the issue of whether the Bar was a government agency. *Keller,* 496 U.S. at 4, 10-11.

In the instant case, the government speech issue to be decided is whether Congress and the USDA exercise sufficient control over private speakers to render the speech that of the government. *Keller* does not discuss this issue so it, as well as its discussion of how government agencies are funded, does not control.

III. Constitutionality

A. Government Speech

Because the Beef Board and the Qualified State Beef Councils are groups of

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[7]This is not to say that the Bar's coerced support for political and ideological speech was constitutional. Under *Abood, Wileman Brothers,* and *United Foods,* the speech was unconstitutional either because it was political and ideological, or because it was not germane to the Bar's statutory purpose.

private speakers the government utilizes to transmit a specific government message, the beef checkoff funded advertising is attributable to Congress and the USDA. The question remaining is whether the program is constitutionally- sound government speech.

[4] So long as government speech does not prohibit or establish religion, the United States Supreme Court recognizes that the government may deliver a content-oriented message. In *Rosenberger,* the Court wrote, "[w]e have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message." 515 U.S. at 833 (*citing Rust*). Viewpoint-based funding decisions can be sustained in instances in which the government itself is the speaker. *Legal Servs. Corp.,* 531 U.S. at 541.

[5] The Ninth Circuit employs the same doctrine. In *Downs,* the court explained the extent to which the government may control its own speech. The opinion demonstrates that there are few restrictions on government speech. The court wrote:

> We conclude that when a high school is the speaker, its control of its own speech is not subject to the constraints of constitutional safeguards and forum analysis, but instead is measured by practical considerations applicable to any individual's choice of how to convey oneself: among other things, content, timing, and purpose. Simply because the government opens its mouth to speak does not give every outside individual or group a First Amendment right to play ventriloquist.

Id. at 1013. The court continued:

> An arm of local government--such as a school board--may decide not only to talk about gay and lesbian awareness and tolerance in general, but also to advocate such tolerance if it so decides, and restrict the contrary speech of one of its representatives. *Id.* at 1014.

Both the Supreme Court and the Ninth Circuit grant government bodies latitude to engage in content-oriented speech. The Beef Promotion and Research Act is non-ideological, content-oriented government speech which does not violate free speech or free association.

B. *Central Hudson* Commercial Speech Test

[6] The Court has been presented with the argument that the commercial speech test set forth in *Central Hudson* controls this case. After reviewing the case law, the Court concludes that *Central Hudson* does not apply. *See Goetz,* 149 F.3d at 1139 (it is error to apply the *Central Hudson* test to the Beef Promotion and Research Act). However, assuming the commercial speech test

does control this case, the checkoff-funded program passes constitutional muster.

In commercial speech cases, courts apply a four-element analysis. First, the expression must be protected by the First Amendment. Second, the asserted governmental interest must be substantial. If elements one and two are satisfied, a court must apply a third and fourth. Third, the regulation must directly advance the governmental interest asserted. Fourth, the regulation must not be more extensive than is necessary to serve that interest. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n,* 447 U.S. 557, 556 (1980).

First, the beef checkoff advertising program is not unlawful or misleading, so it comes within the protection of the First Amendment. Second, the asserted governmental interest is substantial. Congress has found that beef production plays a significant role in our nation's economy, and that the maintenance and expansion of existing beef markets is vital to the welfare of beef producers. 7 U.S.C. § 2901(a)(2) and (a)(4). Third, beef checkoff advertising directly advances beef production, as well as the maintenance and expansion of existing beef markets. Fourth, the checkoff program is not more extensive than it needs to be. The Act limits the Beef Board's activities to beef promotion and beef research. The USDA oversees the Beef Board's activities to ensure the activities comply with the Act. In addition, cattle producers and importers are not prohibited from promoting beef independent from the checkoff program. Therefore, the Act passes scrutiny under *Central Hudson. See Frame,* 885 F.2d at 1134 n. 12 (the government's interest in preventing the collapse of the American beef industry is a compelling one, and the Beef Promotion and Research Act is carefully designed to serve that interest).

C. 7 U.S.C. § 2904(4)(B)(ii)

Further support for the USDA's position can be found in the Act. The Act requires that the Operating Committee develop projects which ensure that segments of the beef industry that enjoy a unique consumer identity receive equitable and fair treatment. 7 U.S.C. § 2904(4)(B)(ii). Apparently, Congress foresaw situations such as the one the Petitioners complain of here. The Petitioners produce grass-fed beef that is free of hormones, subtheraputic antibiotics, chemical additives, extra water, and irradiation. (Pet. Statement of Uncontroverted Facts ¶ 6). At one point, the Petitioners submitted a proposal to the Montana Beef Council. The proposal requested $1,000 in checkoff funds to sponsor a Whole Foods Fair, including a lecture on nutrition. The Montana Beef Council rejected the proposal on the basis that no brand or trade name may be

referenced in a checkoff-funded project without approval from the Beef Board and the Secretary. *See* 7 C.F.R. § 1260.169(d).

During the administrative proceedings, the Petitioners alleged that the Montana Beef Council, and ultimately the USDA, had not complied with 7 U.S.C. § 2904(4)(B)(ii). (Answer to Complaint, Admin. R. at 000015; Hearing Memorandum, Admin R. at 000056-57; Memorandum in Support of Proposed Findings of Fact, Conclusions of Law and Order, Admin. R. at 198-200). The Administrative Law Judge did not discuss the issue in detail, but did determine that a failure to properly administrate the Order would not justify refusal to pay assessments. (Decision and Order, Admin. R. at 000241). Likewise, the Judicial Officer that heard the administrative appeal concluded that a violation of 7 U.S.C. § 2904(4)(B)(ii) is not a defense to failure to pay assessments. (Decision and Order, Admin. R. at 000395).

The Administrative Law Judge and the Judicial Officer were correct. If the USDA, the Beef Board, or a Qualified State Beef Council administers the checkoff program in violation of the Act, the Petitioners may be entitled to some form of redress.[8] But such a violation is not a defense to refusal to pay assessments. Regardless, 7 U.S.C. § 2904(4)(B)(ii) is relevant to this suit. The statute supports the constitutionality of the beef checkoff program. When drafting the Act, Congress envisioned that certain niche beef products may not be promoted by checkoff funds and therefore provided protection for producers who find themselves in the Petitioners' exact situation.

CONCLUSION

The support for speech compelled by the Beef Promotion and Research Act constitutes support for government speech. Because the government may utilize private speakers to disseminate content-oriented speech, the Act does not violate the rights of free speech or association. The Court bases its decision on different reasoning than that employed by the Administrative Judge or the Judicial Officer. (*See* Decision and Order, Admin. R. at 000237-47; *see* Decision and Order, Admin. R. at 000355-97). Nevertheless, because the Administrative Judge and the Judicial Officer decided the beef checkoff program does not violate the First Amendment, the Court affirms the order to pay the assessments and late fees.

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[8]This issue was not briefed, argued, or even raised before this Court. The Court expresses no opinion on whether 7 U.S.C. § 2904(4)(B)(ii) creates the right to bring a private suit, or whether the statute has been violated.

Although the Court rules against the Petitioners, they should not be penalized for asserting what they believed was a constitutional right. Considering the merits of the Petitioners' claim, imposition of a $12,000 fine was arbitrary and capricious, and must be reversed.

Accordingly, **IT IS ORDERED THAT:**

1) Petitioner's Motion for a Preliminary Injunction is moot and is dismissed with prejudice;

2) The Court declares the Beef Promotion and Research Act constitutional;

3) Judgment be entered in favor of Respondent United States Department of Agriculture against Petitioner Charters, requiring payment of the administrative assessment of Four Hundred Seventeen and 79/100ths Dollars ($417.79); and

4) Judgment be entered in favor of Petitioner Charters dismissing the administrative fine of Twelve Thousand and No/l00ths Dollars($12,000.00).

The Clerk of Court is directed to enter judgment in accordance with this Order, and notify the parties of the making of this Order.

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DEBARMENT AND SUSPENSION (NON-PROCUREMENT)

DEPARTMENTAL DECISION

In re: SUN MOUNTAIN LOGGING, L.L.C., SHERMAN G. ANDERSON, AND BONNIE ANDERSON.
DNS-FS Docket No. 02-0001.
Decision and Order.
Filed November 14, 2002.

DNS – Suspension (without debarment), causes of.

The Administrative Law Judge (ALJ) vacated the suspension orders against Respondents after finding that the U.S. Forest Service failed to accurately count "additional volume" timber reported by the Respondents, with the result that the Forest Service billed the purchaser of the timber inadequately.

Lori Polin-Jones, for Complainant.
Douglas D. Harris, Missoula, Montana, for Respondent.
Decision and Order issued by Jill S. Clifton, Administrative Law Judge.

Decision Summary

This Decision and Order concerns the Mudd-York Salvage Timber Sale, on the Beaverhead-Deerlodge National Forest, Wise River Ranger District, in Montana. I determine that the U. S. Forest Service Suspending Official, given the knowledge within the U. S. Forest Service, did not have the authority to suspend Sun Mountain Logging, L.L.C., Sherman G. Anderson, or Bonnie Anderson.

Applicable Regulations

The Governmentwide Debarment and Suspension (Nonprocurement) regulations are found in Title 7 Part 3017 of the Code of Federal Regulations. Three sections, 7 C.F.R. §§ 3017.400, 3017.405, and 3017.305, are included here in their entirety:

Subpart D--Suspension

§ 3017.400 General.

(a) The suspending official may suspend a person from any of the causes in § 3017.405 using procedures established in §§ 3017.410 through 3017.413.

(b) Suspension is a serious action to be imposed only when:

(1) There exists adequate evidence of one or more of the causes set out in § 3017.405, and

(2) Immediate action is necessary to protect the public interest.

(c) In assessing the adequacy of the evidence, the agency should consider how much information is available, how credible it is given the circumstances, whether or not important allegations are corroborated, and what inferences can reasonably be drawn as a result. This assessment should include an examination of basic documents such as grants, cooperative agreements, loan authorizations, and contracts.

§ 3017.405 Causes for suspension.

(a) Suspension may be imposed in accordance with the provisions of §§ 3017.400 through 3017.413 upon adequate evidence:

(1) To suspect the commission of an offense listed in § 3017.305(a); or

(2) That a cause for debarment under § 3017.305 may exist.

(b) Indictment shall constitute adequate evidence for purposes of suspension actions.

Subpart C--Debarment

§ 3017.305 Causes for debarment.

Debarment may be imposed in accordance with the provisions of §§ 3017.300 through § 3017.314 for:

(a) Conviction of or civil judgment for:

(1) Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement or transaction;

(2) Violation of Federal or State antitrust statutes, including those proscribing price fixing between competitors, allocation of customers between competitors, and bid rigging;

(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, making false claims, or obstruction of justice; or

(4) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a person.

(b) Violation of the terms of a public agreement or transaction so

serious as to affect the integrity of an agency program, such as:

(1) A willful failure to perform in accordance with the terms of one or more public agreements or transactions;

(2) A history of failure to perform or of unsatisfactory performance of one or more public agreements or transactions; or

(3) A willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction.

(c) Any of the following causes:

(1) A nonprocurement debarment by any Federal agency taken before March 1, 1989, the effective date of these regulations or a procurement debarment by any Federal agency taken pursuant to 48 CFR Subpart 9.4;

(2) Knowingly doing business with a debarred, suspended, ineligible, or voluntarily excluded person, in connection with a covered transaction, except as permitted in § 3017.215 or § 3017.220;

(3) Failure to pay a single substantial debt, or a number of outstanding debts (including disallowed costs and overpayments, but not including sums owed the Federal Government under the Internal Revenue Code) owed to any Federal agency or instrumentality, provided the debt is uncontested by the debtor or, if contested, provided that the debtor's legal and administrative remedies have been exhausted;

(4) Violation of a material provision of a voluntary exclusion agreement entered into under § 3017.315 or of any settlement of a debarment or suspension action; or

(5) Violation of any requirement of Subpart F of this part, relating to providing a drug-free workplace, as set forth in § 3017.615 of this part.

(d) Any other cause of so serious or compelling a nature that it affects the present responsibility of a person.

[54 FR 4731, Jan. 30, 1989, as amended at 54 FR 4952, Jan. 31, 1989].

Procedural History

The U. S. Forest Service suspended Sun Mountain Logging, L.L.C., Sherman G. Anderson, and Bonnie Anderson, effective July 9, 2001; then extended the suspensions, effective August 13, 2001; and, after a hearing, terminated the suspensions effective June 26, 2002, but failed to vacate them.

The U. S. Forest Service decisions to suspend can be vacated only if I determine that they are (1) Not in accordance with law; (2) Not based on the applicable standard of evidence; or (3) Arbitrary and capricious and an abuse of discretion. *See*, § 3017.515 Appeal of debarment or suspension decisions.

The Administrative Record is contained in three separate binders: a white three-ring binder, containing Administrative Record Exhibits 1-37; a brown hard-back binder, containing Administrative Record Exhibits 1-11; and a blue two-pocket paper folder containing eight U. S. Forest Service documents bearing dates from July 9, 2001 through July 9, 2002.

Following a thorough review of that Administrative Record, I find that the preponderance of the evidence shows that the U. S. Forest Service decisions to suspend were not based on the applicable standard of evidence and shall be vacated.

Findings of Fact

1. The U. S. Forest Service was not paid adequately by Darby Lumber, Inc. for the "additional volume" timber Respondents' workers were responsible for removing, because the U. S. Forest Service failed to bill adequately for the "additional volume" logs.

2. The U. S. Forest Service Timber Sale Administrator requested that Respondents' workers keep hand-counter tallies of harvested "additional volume" logs and report them to the Timber Sale Administrator, which Respondents' workers did.

3. The Timber Sale Administrator failed to do anything with the hand-counter tallies reported to him by Respondents' workers.

4. The U. S. Forest Service controlled the billing, and failed to bill for the full amount of the "additional volume" timber removed, in large part because the Timber Sale Administrator failed to do anything with the hand-counter tallies.

5. Respondents and their workers complied with the Timber Sale Administrator's instructions and the contract requirements and procedures as they understood them.

Discussion

The Mudd-York Salvage Timber Sale was contracted to Darby Lumber, Inc., which contracted with two logging subcontractors. The Respondents' entity was one of the logging subcontractors; the other logging subcontractor is not a party to this case.

The Respondents' workers were removing more "additional volume" timber, also called "undesignated" timber, than was being billed by the U. S. Forest Service. The Mudd-York Salvage Timber Sale was not a clear-cut project, so the two logging subcontractors for Darby Lumber, Inc. were expected to cut additional timber for "skid roads, landings, and just to get through the woods." The "additional volume" logs were to be billed to Darby Lumber, Inc. by the U. S. Forest Service.

The U. S. Forest Service failed to bill Darby Lumber, Inc. adequately for the "additional volume" logs, and the fault lay in large part with the failure of U. S. Forest Service personnel to relay accurate counts of "additional volume" timber to the resource clerk for billing. Respondents had no responsibility and no opportunity to review the information being submitted to the resource clerk, which was done electronically by computer within the U. S. Forest Service.

This case does not turn on issues of credibility. Following a two-day in-person hearing, the fact-finding Suspending Official who terminated the suspensions made no credibility findings but found that both the U. S. Forest Service and Respondent Sun Mountain Logging, L.L.C., were responsible for the lack of clear communication and failure to ensure that the government was paid for the amount of additional timber removed.

It may have initially appeared that there was "adequate evidence" of a "cause of so serious or compelling a nature that it affect(ed) the present responsibility" of one or more of Respondents, but that initial appearance was false, as proved by evidence within the knowledge of the U. S. Forest Service. While both the U. S. Forest Service and Respondent Sun Mountain Logging, L.L.C., may have contributed to the problem, it was the U. S. Forest Service that had the opportunity to remedy the problem early on.

Originally, the method of handling the "additional volume" logs was that they would be decked separately to await the Timber Sale Administrator's inspection(s) each week to count them and mark them with paint, prior to their being hauled away. That method of handling the "additional volume" logs was soon modified, however, with the requirement that Respondents' workers keep a hand-counter tally of the additional logs cut, clearing the counter each time the tally was reported to the Timber Sale Administrator.

Whether the modification relieved Respondents' workers from complying with the original method is in dispute. In any event, the Timber Sale Administrator failed to compare the data gathered from counting and painting separately decked logs, with the data provided by Respondents' workers' hand-counter tallies. He failed to report any of the "additional volume" logs revealed by the hand-counter tallies to the resource clerk for billing. He failed to do anything with the hand-counter tallies.

The preponderance of the evidence shows that Respondents' workers accurately kept hand-counter tallies of harvested "additional volume" logs and reported them to the U. S. Forest Service, as requested. The U. S. Forest Service requested those hand-counter tallies and then failed to do anything with them. Since the hand-counter tallies reported by Respondents' workers were part of the evidence known to the U. S. Forest Service, the U. S. Forest Service did not have "adequate evidence" of a "cause of so serious or compelling a nature that it affect(ed) the

present responsibility" of one or more of Respondents.

Conclusions of Law

1. Under these circumstances, even if Respondents in some way contributed to the failure to ensure clear communication and understanding of the contract requirements and procedures, that failure would not constitute a "cause of so serious or compelling a nature" that it ever affected "the present responsibility" of Respondents.

2. Given the knowledge within the U. S. Forest Service, the U. S. Forest Service did not have the authority to suspend Respondents, because there was never "adequate evidence" of a "cause of so serious or compelling a nature that it affect(ed) the present responsibility" of any of Respondents. 7 C.F.R. §§ 3017.400, 3017.405, and 3017.305(d).

Order

1. The suspension of Sun Mountain Logging, L.L.C. is hereby vacated.
2. The suspension of Sherman G. Anderson is hereby vacated.
3. The suspension of Bonnie Anderson is hereby vacated.
4. This decision is final and is not appealable within the United States Department of Agriculture. 7 C.F.R. § 3017.515.

EQUAL ACCESS TO JUSTICE ACT

COURT DECISION

EDWARD A. BRANSTAD AND MONROE BRANSTAD v. USDA.
No. C 00-3072-MWB, C 01-3030-MWB.
Filed November 5, 2002.

(Cite as 232 F.Supp.2d 945).

EAJA – Consolidation, reason for – Prevailing party status – Financial criteria – Arbitrary and capricious – Substantially justified.

The court consolidated two closely related cases involving identical claims relation to the EAJA. In the underlying cases, Petitioners contend that they were due reimbursement for legal fees incurred in a long struggle with the Secretary resulting from defending allegations of violation of the "swamp buster" act. The Secretary contended that (1) claimants did not meet financial criteria, (2) did not meet "prevailing status" criteria. Petitioners won determinations that the Secretary's was arbitrary and capricious during multiple denials of the procedural steps leading up to a hearing on the merits. Although the Petitioners had requested the lower court to make a determination that the Secretary's actions were not "substantially justified," the lower court declined because the EAJA applications had not yet been filed. The court determined that any legal fees award under EAJA was still not ripe since they have not satisfied the criteria for "prevailing party" status. Although the Petitioners had been successful in a protracted procedural battle with the Secretary, the court held that in order to satisfy the "prevailing party" status "[there needs to be] actual relief on the merits of the claim that materially alters the legal relationship between the parties by modifying the [other party's] behavior that directly benefits the [moving] party" citing. *Farrar v. Hobby*, 506 U.S. 103.

United States District Court,
N.D. Iowa,
Central Division.

MEMORANDUM OPINION AND ORDER REGARDING PLAINTIFFS' APPLICATIONS FOR ATTORNEY FEES AND EXPENSES

BENNETT, Chief J.

These separate actions for judicial review of agency action of the United States Department of Agriculture (USDA) come back before the court on the plaintiffs' application in each case for attorney fees and expenses pursuant to the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412. Although these two cases have never been

formally consolidated, the court finds that, as with trial on the merits, a consolidated ruling on the fee applications is appropriate. This is so, because the Secretary resists any fee award at all or, in the alternative, resists an award in the amount requested, on essentially the same grounds in both cases.

I. INTRODUCTION

A. The Actions For Judicial Review

1. Background

These actions involved review of agency determinations that the plaintiffs violated the "Swampbuster" Act, 16 U.S.C. §§ 3821-24, when they purportedly "converted" "wetlands" by repairing an existing tile drainage system on their farmland. The actions involved two adjacent tracts of farmland, which are located in Winnebago County, Iowa. Tract # 2024, which plaintiff Monroe Branstad purchased in 1995, is the subject of Case No. C 00-3072-MWB, and Tract # 1475, which plaintiff Edward Branstad, Monroe's father, also purchased in 1995, is the subject of Case No. C 01-3030-MWB. Monroe and Edward Branstad are both "operators" of both tracts for purposes of the pertinent statute and USDA regulations. The factual background to these cases was discussed extensively in the court's prior rulings granting the plaintiffs' motions for preliminary injunctions on enforcement actions, *see Branstad v. Glickman,* 118 F.Supp.2d 925 (N.D.Iowa 2000) (*Branstad I*) (preliminary injunction on enforcement action in Case No. C 00-3072-MWB); *Branstad v. Veneman,* 145 F.Supp.2d 1011 (N.D.Iowa 2001) (*Branstad II*) (preliminary injunction on enforcement action in Case No. C 01-3030-MWB), and trial on the merits on written submissions. *See Branstad v. Veneman,* 212 F.Supp.2d 976 (N.D.Iowa 2002) (*Branstad III*).

2. The court's ruling

After trial on the merits, the court concluded that the "final" agency determinations in the two cases could not stand upon judicial review. In Case No. C 00-3072-MWB, concerning Tract # 2024, the court concluded that the Acting Director's conclusion, on Director Review, that the Branstads' administrative appeal was "mooted" by their entry into a Wetland Restoration Agreement for Tract # 2024 was arbitrary and capricious, an abuse of discretion, and contrary to law, in that it failed to recognize that the agency had acknowledged the Branstads' right to pursue their administrative appeal notwithstanding entry into the restoration agreement, the restoration agreement did *not* contain any concessions that there were "wetlands"

on the tract or that they had been "converted," and a "good faith" exemption from denial of benefits on the basis of restoration would not expunge the "wetlands" violation, did not resolve the underlying issues, which are whether or not the agency's "wetlands" and "conversion" determinations were correct, or allow the Branstads' repairs of the drainage system to stand. Similarly, the court concluded that the Acting Director's conclusion that prior wetland determinations in 1987 and 1991 were "unappealable" was arbitrary and capricious, an abuse of discretion, and contrary to law. The record evidence, the court found, was that the 1991 determination superseded the 1987 determination. Moreover, under the statutory and regulatory regime applicable to the parties, the 1991 determination was "valid" only until a person affected by the certification requested review of the certification by the Secretary, and the Branstads were such "persons." The court also concluded that the Acting Director's determinations were contrary to the statutory provisions requiring consideration of whether the wetlands had been converted prior to December 23, 1985, and prohibiting the denial of benefits based on such a prior conversion or repairs to such a prior conversion, where the return of "wetlands" characteristics are the result of a lack of maintenance to such a prior conversion.

Similarly, in Case No. C 01-3030-MWB, involving Tract # 1475, the court concluded that the "final" agency decision denying consideration of the Branstads' administrative appeal on the ground that the appeal was untimely was arbitrary and capricious, an abuse of discretion, and contrary to law. The court found that the Director inexplicably changed the standard from whether there were "extenuating circumstances" for failure to file a timely administrative appeal to whether there was "good cause" for the failure, then failed to address properly whether such "good cause" or "extenuating circumstances" had been shown on the record presented. To the extent that the Director could be construed to have relied on the failure of the Branstads' counsel to mail the appeal request to the correct address, the court concluded that such a clerical error, standing alone, was not sufficient basis for denying the appeal, and the uncontroverted record demonstrated that the Branstads' counsel pursued with reasonable diligence both the original appeal and efforts to obtain consideration of that appeal once it had been found untimely.

As to relief, in Case No. C 00-3072-MWB, the court found and declared (1) that the Branstads' administrative appeal was not mooted by the Wetland Restoration Agreement for Tract # 2024, and the agency's final determination to the contrary was arbitrary and capricious, an abuse of discretion, and contrary to law; and (2) that the 1987 and 1991 wetland determinations were subject to "appeal" in the administrative proceedings, and the agency's final determination to the contrary was arbitrary and capricious, an abuse of discretion, and contrary to law. The court also

vacated in its entirety the Director Review Determination as to Tract # 2024 and remanded the case for agency action in conformity with the court's judgment. Finally, the court enjoined any and all enforcement actions of the USDA with regard to any wetland violation on Tract # 2024. In Case No. C 01-3030-MWB, the court also vacated the Director's February 13, 2001, decision denying the Branstads' request for consideration of their untimely administrative appeal regarding Tract # 1475 on the basis of "extenuating circumstances" or "good cause" and that case was remanded to the NAD for consideration of the Branstads' administrative appeal of the "wetlands" and "conversion" determinations regarding Tract # 1475 on the merits. The court also enjoined any and all enforcement actions of the USDA with regard to any wetland violation on Tract # 1475 until the conclusion of the administrative appeal. Judgment in both cases entered accordingly.

In its opinion after trial on the merits, the court noted that it had not lost sight of the fact that the Branstads had prayed for a finding that the USDA's position was not "substantially justified" in either case and that they are, therefore, entitled to an award of attorney fees and costs. However, at that time, the court stated its belief that both the necessary findings if any fees are to be awarded under the EAJA, and the amount of such fees, if they are to be awarded, should be reserved for consideration upon an application for attorney fees pursuant to N.D. IA. L.R. 54.2. Such a fee application in each case is now before the court.

B. The Fee Applications

The Branstads filed an Application for Attorney Fees and Expenses as Well as Costs in each case on July 29, 2002. After an extension of time to do so, the Secretary filed a Combined Resistance to the two applications on August 23, 2002. The Branstads filed an identical Reply Brief in each case on August 30, 2002, in further support of their applications, including in each case an Amendment to Application for Attorney Fees, claiming additional fees for preparing the Reply Brief.

1. The Branstads' applications

a. Financial eligibility

The Branstads argue that they are eligible for an award of fees and expenses in each case, because Edward Branstad's net worth did not exceed $2,000,000, and the net worth of Monroe Branstad's unincorporated business did not exceed $7,000,000, nor did that business employ over 500 employees, at the time that the actions were

filed. They also contend that they are entitled to an award of fees and expenses, because the Secretary's position in the two cases was not substantially justified. In support of this contention, they rely primarily on the court's conclusions in the rulings on their requests for preliminary injunctions and trial on the merits. They also contend that the Secretary's summary judgment motions in each case "served no purpose," because they were based on the same record as the court's final decision on trial on the merits and were heard by the same judge.

b. Enhanced hourly rate

As to the amount of fees claimed, the Branstads argue that enhancement above the statutory hourly rate of $125 is justified, because of increases in the cost of living, as shown by the consumer price index since the last amendment of 28 U.S.C. § 2412. Specifically, they contend that the cost of living adjustment in the hourly rate would be $128.63 for 1996; $131.59 for 1997; $133.70 for 1998; $136.64 for 1999; $141.29 for 2000; $145.25 for 2001; and $146 .99 for 2002. They contend, further, that their counsel possessed distinct knowledge necessary to plead their cases, because his area of concentration for his law practice is agricultural law, as indicated by various memberships in legal organizations, subscriptions to legal publications, and his client base. Thus, they seek attorney fees for one of their attorneys at his full regular hourly rate of $175 per hour, and for a second attorney, in Case No. C 00-3072- MWB only, at $150 per hour for legal work and $65 per hour for administrative tasks.

c. Fees claimed

In Case No. C 00-3072-MWB, the Branstads claim for their lead attorney 126.75 hours at $175 per hour, for a total fee claim of $22,181.25, *see* Case No. C 00- 3072-MWB, Application for Attorney Fees and Expenses, Attachment C, and for their second attorney, they claim 41.4 hours at $150 per hour ($6,210), and 4.4 hours at $65 per hour ($286), for a total fee claim of $6,470.50.[1] *See id.,* Attachment F. The time expended by the lead attorney is also broken down into various categories of tasks in Attachment D to the fee application in that case. In addition, the Branstads claim attorney expenses for their lead attorney, including filing fees, postage, fees for service of process, Lexis- Nexis research fees, and a surety bond for the preliminary injunction, totalling $1,300.34, *see id.,* Attachment

[1] One item claimed by the second attorney is a telephone call on March 21, 2000, for .3 hours at $150 per hour, which would be a charge of $45, but the item was charged as $19.50, which would be .3 hours at $65 per hour.

E, and expenses for their second attorney totalling $145.78. *See id.,* Attachment F. In Case No. C 01-3030- MWB, the Branstads claim 19.82 hours at $175 per hour for their attorney for a total fee claim of $3,468.50. *See* Case No. C 01-3030-MWB, Application for Attorney Fees and Expenses, Attachment C. In addition, the Branstads claim attorney expenses in that case in the amount of $169.40. *See id.,* Attachment E.

2. The Secretary's Combined Resistance

In her Combined Resistance, the Secretary acknowledges that the Branstads' fee claim is timely, in that it was filed within the period after judgment was entered identified in the statute. However, she nevertheless disputes the Branstads' eligibility for or entitlement to fees pursuant to the EAJA on a number of grounds. First, the Secretary argues that it is not clear that Monroe Branstad meets the financial guidelines under 28 U.S.C. § 2412(d)(2)(B) for an award of fees, because the application includes financial information pertaining to Edward Branstad and Branstad Farms, but the named plaintiffs are Edward and Monroe Branstad. The Secretary argues that, in the absence of evidence establishing that Monroe Branstad meets the financial eligibility requirements, his request for fees should be denied. Next, the Secretary argues that the Branstads are not "prevailing parties," as required for an award of fees under The EAJA, because merely obtaining a remand to the agency does not generally make someone a "prevailing party," citing *Sullivan v. Hudson,* 490 U.S. 877, 886-87 (1989). Instead, the Secretary argues that the Branstads will only be "prevailing parties" if they obtain a favorable determination on the ultimate question of whether they improperly converted wetlands on the two tracts in question. Moreover, even if the Branstads meet the financial eligibility and "prevailing party" requirements, the Secretary argues that her position was "substantially justified," and so no fees should be awarded. The Secretary argues that this court's rulings contrary to the Secretary's position on various issues do not necessarily establish that her position was not "substantially justified." Rather, the Secretary asserts that, even if her position was wrong on various issues--which the Secretary does not concede--her position was substantially justified by both the law pertaining to review of final agency action and by the facts of this case, notwithstanding this court's disagreements. However, if the court determines that the Branstads are eligible for and entitled to fees, the Secretary also challenges the amount of the fees they claim. Specifically, the Secretary argues (1) that the Branstads improperly claim fees for time spent by counsel during the administrative proceedings, or at least improperly claim fees incurred prior to the NAD appeal for Tract # 2024; (2) that they claim fees for both counsel for conversations between co-counsel, which is unfairly duplicative; and (3) that they claim fees at an hourly

rate in excess of the statutory rate without establishing that *both* counsel had necessary expertise or that there was a lack of qualified attorneys in Iowa for the proceedings involved here, even if they have adequate evidence of an increase in the cost of living and the expertise of lead counsel. Therefore, the Secretary contends that any fee award should be based on the statutory rate of $125 per hour.

3. *The Branstads' Reply*

In their Reply, the Branstads respond to what they assert were unanticipated arguments by the Secretary. First, they contend that financial information for Monroe Branstad *has* been provided, because all of the information concerning "Branstad Farms" was signed by Monroe Branstad and it should have been clear from the information provided and the Secretary's own administrative record that Monroe Branstad "does business as" Branstad Farms, which is a sole proprietorship farming business. Next, as to the Secretary's contention that the Branstads are not "prevailing parties," because they only obtained remand of their actions to the agency, the Branstads argue that the *Sullivan v. Hudson* case on which the Secretary relies plainly applies only to a remand to the Social Security Administration, not a remand to the USDA. They point out that there is no statutory provision allowing the court to retain jurisdiction over the remands to the USDA in these two cases as there is in Social Security cases; rather, they will have to initiate new actions to seek further judicial review of any agency determination on remand, if required. Finally, they argue that fees incurred during the administrative proceedings should be awarded from the time that the administrative proceedings became an "adversary adjudication," which they argue was the situation from the point at which the USDA made an agency determination that the plaintiffs had "converted" wetlands. Consequently, they argue that all of the time included in the fee application should be allowed.

II. LEGAL ANALYSIS

As the Eighth Circuit Court of Appeals has explained,

> EAJA allows most parties who prevail against the United States in civil litigation to recover costs. *See* 28 U.S.C. § 2412(a) (1994). EAJA also allows those parties to recover attorney fees and some litigation expenses if the Government fails to prove that its position in the litigation "was substantially justified or that special circumstances make an award unjust." *Id.* § 2412(d)(1)(A); *see also Friends of the Boundary Waters Wilderness v. Thomas,* 53 F.3d 881, 885 (8th Cir.1995) (stating the Government bears the burden of proving its position was substantially justified).

Herman v. Schwent, 177 F.3d 1063, 1065 (8th Cir.1999).

More specifically, the statute states the following:

> *Except as otherwise provided by statute,* a court *shall* award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, *unless* the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412(d)(1)(A) (emphasis added); *see also Yarbrough v.. Cuomo,* 209 F.3d 700, 703 (8th Cir.2000) ("The EAJA directs courts to award fees and other expenses to prevailing parties unless the United States' position was substantially justified or special circumstances would make an award unjust. *See* 28 U.S.C. § 2412(d)(1)(A).").

Although the statute is written in terms of entitlement to fees *except* when certain conditions are met, the Secretary challenges the award of attorney fees and expenses to the plaintiffs in these cases on numerous grounds. Therefore, the court must consider those challenges in turn, unless one of those challenges proves to be an insuperable bar to an award of attorney fees and expenses in these cases.

A. Eligibility For An Award Of Fees And Expenses

The court will consider first the Secretary's challenges to the Branstads' eligibility for an award of fees and expenses under The EAJA. As noted above, the Secretary challenges the Branstads' eligibility on two grounds: financial eligibility and "prevailing party" status.

1. Financial eligibility

Some time ago, the Eighth Circuit Court of Appeals recognized that, in addition to any other requirements, "[t]he EAJA also requires 'parties' to meet certain financial requirements in order to invoke its provisions, but these financial requirements are extremely generous." *United States v. 341.45 Acres of Land,* 751 F.2d 924, 931 n. 6 (8th Cir.1984) (citing 28 U.S.C. § 2412(d)(2)(B) (Supp. V 1981)). These financial requirements remain "generous," notwithstanding that they have been amended since the court so described them. *See* 28 U.S.C. § 2412(d)(2)(B) (as amended in 1985 to increase the net worth limitations). At present, with certain exceptions not applicable here, the financial eligibility

requirements are defined as follows:

> " '[P]arty' means (i) an individual whose net worth did not exceed $2,000,000 at the time the civil action was filed, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the civil action was filed, and which had not more than 500 employees at the time the civil action was filed.

28 U.S.C. § 2412(d)(2)(B).

While the Secretary apparently concedes that Edward Branstad has established that he met the financial requirements for an "individual," she contends that Monroe Branstad, the other named party, has not provided any financial eligibility information, because he has submitted only financial and employment information concerning "Branstad Farms." The Branstads argue that "Branstad Farms" is the unincorporated sole proprietorship farming business of Monroe Branstad, and that the USDA knows it, as demonstrated by the administrative record in this case, so that Monroe Branstad has provided an accurate record of his net financial worth.

The court agrees with the Branstads that adequate financial records have been provided by both plaintiffs to demonstrate that they meet the "generous" financial eligibility requirements of the EAJA. The financial records submitted by Edward Branstad demonstrate that he is an "individual" meeting the financial requirements of 28 U.S.C. § 2412(d)(2)(B)(i). Similarly, the administrative record in these cases and the specific financial records submitted in support of the fee claim demonstrate that Monroe Branstad is an "owner of an unincorporated business" meeting the requirements of 28 U.S.C. § 2412(d)(2)(B)(ii). There is no realistic confusion about the identity of Monroe Branstad as the plaintiff in this action and "Branstad Farms," which is his sole proprietorship farming business, not some unknown or unrelated entity. The Secretary's challenge to Monroe Branstad's financial eligibility for a fee award pursuant to the EAJA is without merit.

2. "Prevailing party" status

Next, the government contends that the Branstads are not "prevailing parties" within the meaning of the EAJA, because they only obtained a remand to the agency for further action on the merits in each case, which is merely a procedural victory, not some final, favorable disposition. This asserted bar to the Branstads' eligibility for an EAJA award presents a closer question than the Secretary's argument about financial eligibility.

a. Sullivan v. Hudson

The Secretary states that *Sullivan v. Hudson,* 490 U.S. 877, 886-887 (1989), stands for the proposition that "[i]t is well settled that a remand for further agency action, as has occurred in both of the present cases, is insufficient to establish one's status as a prevailing party for purposes of requesting attorney fees and costs under EAJA." However, the precise language used by the Supreme Court in *Hudson* was more restrictive: "We think it clear that under these principles *a Social Security claimant* would not, as a general matter, be a prevailing party within the meaning of the EAJA merely because a court had remanded the action to the agency for further proceedings." *Hudson,* 490 U.S. at 887 (emphasis added). Thus, in *Hudson,* the Supreme Court specifically referred to "a Social Security claimant," not to any person who obtains a remand to any federal agency upon judicial review of an agency determination. The cases now before this court do not involve judicial review of denial of Social Security benefits.

Moreover, based on its rationale, the portion of *Hudson* on which the Secretary relies is not instructive outside of the Social Security context. First, the "principles" that led the Court to the conclusion relied upon by the Secretary here were *also* unique to the Social Security context. The Court explained, first, that "[a]pplication of this provision [28 U.S.C. § 2412(d)(1)(A)] to respondent's situation here requires brief consideration of the structure of administrative proceedings and judicial review *under the Social Security Act.*" *Hudson,* 490 U.S. at 884 (emphasis added). The Court then noted that, "[a]s provisions for judicial review of agency action go, [42 U.S.C.] § 405(g) [the provision for judicial review of Social Security determinations] is somewhat unusual," because "[t]he detailed provisions for the transfer of proceedings from the courts to the Secretary and for the filing of the Secretary's subsequent findings with the court suggest a degree of direct interaction between a federal court and an administrative agency alien to traditional review of agency action under the Administrative Procedure Act." *Id.* at 885. The Court concluded that "[t]wo points important to the application of the EAJA emerge from the interaction of the mechanisms for judicial review of Social Security benefits and determinations and the EAJA." *Id.* at 886. The first was that, *in Social Security cases,* "where a court's remand to the agency for further administrative proceedings does not necessarily dictate the receipt of benefits, the claimant will not normally attain 'prevailing party' status within the meaning of § 2412(d)(1)(A) until after the result of the administrative proceedings is known." *Id.* The second was that, "in order to be considered a prevailing party, a plaintiff must achieve some of the benefit sought in bringing the action." *Id.* at 887. Thus, it was these two principles that made it clear that *a Social Security claimant* was not, as a general matter, a "prevailing party" within the meaning of the EAJA, where he or she obtained only a remand of the action to the agency for further proceedings. *Id.* Nothing in

Hudson suggests that the Court intended to state a general rule outside of the Social Security context. In the present actions, judicial review was not pursuant to the "unusual" and "detailed" provisions of the Social Security Act, but was instead pursuant to the more general provisions of the Administrative Procedure Act, which the Court in *Hudson* specifically distinguished. Thus, the "degree of direct interaction between a federal court and an administrative agency" at issue in *Hudson* is "alien" to the judicial review at issue here. *Hudson,* 490 U.S. at 885. Therefore, the language from *Hudson* upon which the Secretary here relies appears to be inapposite.

Furthermore, in *Shalala v. Schaefer,* 509 U.S. 292 (1993), the Supreme Court concluded that the language in *Hudson* upon which the Secretary here relies was not only *dicta,* but was not supported by the cases that the Court had cited in support of it. As the Supreme Court explained,

> Dicta in *Hudson* stated that "a Social Security claimant would not, as a general matter, be a prevailing party within the meaning of the EAJA merely because a court had remanded the action to the agency for further proceedings." 490 U.S., at 887, 109 S. Ct ., at 2255. But that statement (like the holding of the case) simply failed to recognize the distinction between a sentence-four remand, which terminates the litigation with victory for the plaintiff, and a sentence-six remand, which does not. The sharp distinction between the two types of remand had not been made in the lower court opinions in *Hudson, see Hudson v. Secretary of Health and Human Services,* 839 F.2d 1453 (CA11 1988); App. to Pet. for Cert. in *Sullivan v. Hudson,* O.T.1988, No. 616, pp. 17a-20a (setting forth unpublished District Court opinion), was not included in the question presented for decision, and was mentioned for the first time in the closing pages of the Secretary's reply brief, see Reply Brief for Petitioner in *Sullivan v. Hudson,* O.T.1988, No. 616, pp. 14-17. It is only decisions after *Hudson*--specifically *[Sullivan v.] Finkelstein,* [496 U.S. 617 (1990),] and *Melkonyan [v. Sullivan,* 501 U.S. 89 (1991)]--which establish that the sentence-four, sentence-six distinction is crucial to the structure of judicial review established under § 405(g). *See Finkelstein,* 496 U.S., at 626, 110 S.Ct., at 2664; *Melkonyan,* 501 U.S., at 97-98, 111 S.Ct., at 2162-2163.
>
> *Hudson* 's dicta that remand does not generally confer prevailing-party status relied on three cases, none of which supports that proposition as applied to sentence-four remands. *Hanrahan v. Hampton,* 446 U.S. 754, 758- 759, 100 S.Ct. 1987, 1990, 64 L.Ed.2d 670 (1980), rejected an assertion of prevailing-party status, not by virtue of having secured a remand, but by virtue of having obtained a favorable procedural ruling (the reversal on appeal of a directed verdict) during the course of the judicial proceedings. *Hewitt v. Helms,*

> 482 U.S. 755, 107 S.Ct. 2672, 96 L.Ed.2d 654 (1987), held that a plaintiff does not become a prevailing party merely by obtaining "a favorable judicial statement of law in the course of litigation that results in judgment against the plaintiff," *id.,* at 763, 107 S.Ct., at 2677 (emphasis added). (A sentence-four remand, of course, is a judgment for the plaintiff.) And the third case cited in *Hudson, Texas State Teachers Assn. v. Garland Independent School Dist.,* 489 U.S. 782, 109 S.Ct. 1486, 103 L.Ed.2d 866 (1989), affirmatively supports the proposition that a party who wins a sentence-four remand order is a prevailing party. *Garland* held that status to have been obtained "[i]f the plaintiff has succeeded on any significant issue in litigation which achieve[d] some of the benefit ... sought in bringing suit." *Id. ,* at 791-792, 109 S.Ct., at 1493 (citation and internal quotation marks omitted). Obtaining a sentence-four judgment reversing the Secretary's denial of benefits certainly meets this description. *See also Farrar v. Hobby,* 506 U.S. 103, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992).

Schaefer, 509 U.S. at 300-302 (footnote omitted).

Thus, *Hudson* is not even controlling on the proposition for which it is cited in Social Security cases, and certainly is not so outside of that context.

b. The nature of the claims and the relief obtained

(i). The effect of a remand. The Supreme Court's decision in *Schaefer* made clear that it is not the fact of remand, standing alone, that deprives parties like the Branstads of "prevailing party" status, as the Secretary seems to argue here, notwithstanding apparent support for that broad proposition in *Hudson. See Schaefer,* 509 U.S. at 301-02 (citing *Hanrahan v. Hampton,* 446 U.S. 754, 758-759 (1980), as involving rejection of an assertion of prevailing-party status, "not by virtue of having secured a remand, but by virtue of having obtained a favorable procedural ruling (the reversal on appeal of a directed verdict) during the course of the judicial proceedings").[2] Nevertheless, the Secretary also challenges the

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[2] The court recognizes that at least one post-*Schaefer* decision of the Sixth Circuit Court of Appeals appears to adhere to *Hudson*--and to do so outside of the Social Security context--on the basis of a pre-*Schaefer* decision. In *E.W. Grobbel Sons, Inc. v. NLRB,* 176 F.3d 875 (6th Cir.1999), the court reiterated its prior holding "that '[r]emand is not the final judgment for EAJA purposes." '*E.W. Grobbel Sons, Inc.,* 176 F.3d at 877 1999) (quoting *Buck v. Secretary,,* 923 F.2d 1200, 1204 (6th Cir.1991)). However, the court's rationale for concluding that the remand order was not a "final decision" and did not make the plaintiff a "prevailing party" is not as inconsistent with *Schaefer* as the language quoted just above sounds. Rather, the court concluded that its "remand order contemplated further administrative proceedings; we did not affirm, modify, or reverse the Board's findings and conclusions

(continued...)

Branstads' eligibility for fees on the ground that the Branstads will only be "prevailing parties" if they obtain a favorable determination on the ultimate question of whether they improperly converted wetlands on the two tracts in question. Thus, the Secretary's "eligibility" challenge also raises the question of whether or not the Branstads are "prevailing parties" within the meaning of The EAJA, in light of *the nature of the claims asserted on judicial review* and *the remand of these actions to the agency for consideration of the merits of their administrative appeals of the "wetlands conversion" determinations* .

(*ii). Determination of "prevailing party" status.* "Prevailing party" status involves mixed questions of law and fact, but the ultimate question of whether or not a litigant is a "prevailing party" is one of law. *See Yarbrough v. Cuomo,* 209 F.3d 700, 703 (8th Cir.2000). ("We review for clear error the court's factual findings underlying its determination of prevailing party status, but we consider de novo the legal question whether those facts suffice to render the plaintiff a prevailing party.") (citing *Jenkins v. Missouri,* 127 F.3d 709, 713 (8th Cir.1997)); *Jenkins,* 127 F.3d at 713 ("[W]hile abuse of discretion governs in reviewing fee awards, the question of prevailing party status, a statutory term, presents a legal issue for decision, which we review de novo.")

The Eighth Circuit Court of Appeals has explained that a plaintiff is considered a "prevailing party" for purposes of EAJA fee awards "when he obtains 'actual relief on the merits of his claim [that] materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff" ' at the time of a settlement or judgment. *Yarbrough,* 209 F.3d at 703 (quoting this standard from *Farrar v. Hobby,* 506 U.S. 103, 111-12 (1992), in a case that had resulted in settlement); *see also Farrar,* 506 U.S. at 111 (stating this standard as applicable in cases resulting in judgment or settlement). Somewhat more expansively, the Supreme Court has explained the applicable standard in the context of a civil rights case as follows:

> [T]o qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim. The plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought, *Hewitt [v. Helms,* 482 U.S. 755,] 760 [(1987)], or comparable relief

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[2](...continued)
on the two important issues remanded." *Id.* Instead, the court "retained jurisdiction and on these issues did not establish Grobbel a prevailing party under EAJA." *Id.* at 877-78. Thus, the court's determination of whether or not the plaintiff was a "prevailing party" did not turn solely on the question of whether or not the action was remanded, but *on the nature of the issues remanded,* which the court had never addressed *on the merits.*

through a consent decree or settlement, *Maher v. Gagne,* 448 U.S. 122, 129 (1980).

Whatever relief the plaintiff secures must directly benefit him at the time of the judgment or settlement. *See Hewitt, supra,* at 764. Otherwise the judgment or settlement cannot be said to "affec[t] the behavior of the defendant toward the plaintiff." *Rhodes [v. Stewart,* 488 U.S. 1,] 4 [(1988) (*per curiam*)]. Only under these circumstances can civil rights litigation effect "the material alteration of the legal relationship of the parties" and thereby transform the plaintiff into a prevailing party. *[Texas State Teachers Ass'n v.] Garland,* [489 U.S. 782,] 792-93 [(1989)]. *Farrar,* 506 U.S. at 111.

Although *Farrar* involved civil rights claims and fee-shifting pursuant to 42 U.S.C. § 1988(b), and the present case involves fee-shifting pursuant to the EAJA, 28 U.S.C. § 2412(d), "the standards for analyzing such claims are generally applicable to all claims arising under prevailing party fee-recovery statutes." *Yarbrough,* 209 F.3d at 703 n. 3 (citing *Hensley v. Eckerhart,* 461 U.S. 424, 433 n. 7 (1983), and *Jenkins,* 127 F.3d at 712-13, noting that the latter case "equat[ed] standards for reviewing § 1988(b) claims and EAJA claims").

(iii). Procedural victories. The Branstads are correct in their assertions (1) that there is no statutory provision like "sentence six" of § 405(g) for Social Security cases that would allow the court to retain jurisdiction over the remand of their actions to the USDA; (2) that they will have to initiate new actions to seek further judicial review of any agency determination on the merits, if it goes against them on remand; and (3) that they obtained all of the relief that they sought in the present actions for judicial review. Nevertheless, the court concludes that these facts do not make them "prevailing parties" within the meaning of The EAJA.

Again, "to qualify as a prevailing party, a . . . plaintiff must obtain at least some relief on the *merits* of his claim." *Farrar,* 506 U.S. at 111 (emphasis added). However, the claims before the court so far in these cases have never gone to the merits of the agency's "wetlands" and "conversion" determinations. Specifically, Case No. C 00-3072-MWB, concerning Tract # 2024, involved only the questions of whether two determinations by the Acting Director were arbitrary and capricious, an abuse of discretion, or contrary to law: the determination that the Branstads' administrative appeal was "mooted" by their entry into a Wetland Restoration Agreement for Tract # 2024 and the determination that prior wetland determinations in 1987 and 1991 were "unappealable." Indeed, part of the court's rationale for its decision favorable to the Branstads on the first question was precisely that a "good faith" exemption from denial of benefits on the basis of restoration would not

expunge the "wetlands" violation, did not resolve the underlying issues, which are whether or not the agency's "wetlands" and "conversion" determinations were correct, or allow the Branstads' repairs of the drainage system to stand. Similarly, in Case No. C 01-3030-MWB, concerning Tract # 1475, the question presented was whether the "final" agency decision denying consideration of the Branstads' administrative appeal on the ground that the appeal was untimely was arbitrary and capricious, an abuse of discretion, and contrary to law. In both cases, the court remanded to the agency *for consideration of the merits of the Branstads' appeals of the agency's "wetlands" and "conversion" determinations.* Thus, what has been at issue on judicial review so far is *a procedural battle* concerning whether the agency had jurisdiction to reach the merits of the Branstads' administrative appeals, not the merits of the agency's "wetlands" and "conversion" determinations themselves.

In *Huey v. Sullivan,* 971 F.2d 1362 (8th Cir.1992), *cert. denied sub nom. Huey v. Shalala,* 511 U.S. 1068 (1994), the Eighth Circuit Court of Appeals considered whether the plaintiff met the "prevailing party" requirement of Title VII for an award of attorney fees incurred after the district court granted the plaintiff summary judgment on the question of liability, based on the court's finding that it had jurisdiction to hear the lawsuit and retention of jurisdiction to oversee the agency's execution of the judgment. *See Huey,* 971 F.2d at 1367. As to the plaintiff's contention that he was a "prevailing party" within the meaning of the fee-shifting provision as to litigation of the jurisdictional question, the Eighth Circuit Court of Appeals reasoned as follows:

> The Supreme Court has stated that "respect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim beforehe can be said to prevail." *Hewitt v. Helms,* 482 U.S. 755, 760, 107 S.Ct. 2672, 2675, 96 L.Ed.2d 654 (1987). "[A]t a minimum, to be considered a prevailing party ... the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant." *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.,* 489 U.S. 782, 792, 109 S.Ct. 1486, 1488, 103 L.Ed.2d 866 (1989). *We agree with the district court that Huey did not prevail on any issue going to the merits of his claim after February 8, 1989* . The district court found against Huey on his claim for additional relief, and we affirm. *Huey's argument that he is a prevailing party because the district court found that it had jurisdiction to hear the lawsuit and retained jurisdiction to oversee the Agency's execution of the judgment is entirely without merit. Establishing jurisdiction is a procedural victory that does not justify fee shifting. See Hanrahan v. Hampton,* 446 U.S. 754, 759, 100

> S.Ct. 1987, 1990, 64 L.Ed.2d 670 (1980) (per curiam) (procedural and evidentiary rulings may affect the disposition on the merits, but are themselves not matters on which a party can "prevail" for purposes of shifting counsel fees).

Huey, 971 F.2d at 1367 (emphasis added).

Similarly, here, the court's rulings on judicial review so far have only established that the agency has jurisdiction to hear the Branstads' administrative appeals of the merits of the agency's "wetlands" and "conversion" determinations, not withstanding purported "mootness" and the bar of purportedly "unappealable" prior wetlands determinations in one action, and the purported untimeliness of their administrative appeal in the other. However, the Branstads "did not prevail on any issue going to the merits of [their] claim[s]" that the agency's "wetlands" and "conversion" determinations are simply wrong. *Id.* As in *Huey,* the court's disposition on judicial review in each case is merely "a procedural victory that does not justify fee shifting." *Id.* To put it another way, the Branstads have certainly obtained " 'a favorable judicial statement of law in the course of litigation," ' but the question of whether the litigation will ultimately result in judgment for or against them remains open, so that fee- shifting is not warranted at this point. *See Schaefer,* 509 U.S. at 301-02 (quoting *Hewitt v. Helms,* 482 U.S. 755, 763 (1987))

The court recognizes that there may be a split in authority on the question of whether a party has "prevailed" where the plaintiff "wins" on the issues presented on judicial review, where the *only* questions presented to the court on judicial review are "procedural" or "jurisdictional." The Ninth Circuit Court of Appeals appeared to reach a conclusion contrary to that in *Huey* in *United States v. Marolf,* 277 F.3d 1156 (9th Cir.2002). In *Marolf,* the court reasoned,

> [T]he EAJA plainly states [that] we look "to the action or failure to act by the agency *upon which the civil action is based*." 28 U.S.C. § 2412(d)(1)(B) (emphasis added). When a party challenges a government action on procedural or due process grounds alone, the merits of the underlying [agency action] are not proper subjects for our review. [Citations omitted.] This is so because a government'sprocedural abuses can be as troubling as its substantive ones.

Marolf, 277 F.3d at 1161.

Based on these principles, the court concluded that it could award fees based on a determination of whether the government's position on procedural questions was "substantially justified," without regard to "whether the forfeiture could have succeeded on the merits if the government had complied with due process." *Id.* at 1161-62. This court observes that a "due process" violation *is* a substantive

violation of the plaintiff's rights, thus, victory on a "due process" claim is necessarily a determination "on the merits," but a victory on a "procedural question" is not a "substantive" victory or victory *on the merits* of the action before the agency.

On the other hand, the decision of the Eighth Circuit Court of Appeals in *Huey* does not stand alone for the proposition that merely "procedural victories" do not warrant an award of attorney fees and expenses under the EAJA. *See, e.g., Sims v. Apfel,* 238 F.3d 597, 600-02 (5th Cir.2001) (relying, in part, on *Huey, Hanrahan,* and *Hewitt* to conclude that a plaintiff who "did not obtain anything from Appellee on the merits of her claims," but achieved only a procedural victory as "relief," was not a "prevailing party" entitled to fees under the EAJA); *A. Hirsh, Inc. v. United States,* 948 F.2d 1240, 1244-46 (Fed.Cir.1991) (also distinguishing between "victory" in a "procedural battle" and prevailing "on the merits" in the determination of whether or not a party is a "prevailing party" for purposes of an award of attorney fees and expenses under the EAJA). In any event, this court is bound to follow precedent of the Eighth Circuit Court of Appeals, and so *Huey,* which appears to this court to be on point, is controlling here.

Moreover, the court is wary of a purported analogy between a "sentence four" remand in a Social Security case, which involves the entry of judgment by the reviewing court, no retention of jurisdiction, and the possibility of an award of fees pursuant to the EAJA, and the present actions for judicial review, which likewise involved the entry of judgments without any retention of jurisdiction to review the agency's further determination on the merits. *See Rueda-Menicucci v. INS,* 132 F.3d 493 (9th Cir.1997) (invoking such an analogy to award fees pursuant to the EAJA on remand of a deportation action to the Board of Immigration Appeals (BIA)). A "sentence four" remand ordinarily involves the reviewing court's determination of the *merits* of the Social Security Administration's disability determination to the extent that the court concludes that the agency's decision on the merits is not supported by substantial evidence on the record. *See, e.g., Pottsmith v. Barnhart,* 306 F.3d 526, 528 (8th Cir.2002). Here, the court could not properly reach the merits of the agency's "wetlands" and "conversion" determinations *to any extent,* and remanded on a "purely" procedural ground. Thus, the nature of the review here is different from the nature of the review leading to a "sentence four" remand in a Social Security disability benefits case.

Because the Branstads have thus far achieved only procedural victories, requiring the USDA to hear their administrative appeals, but no favorable determination on the merits of their contentions that the USDA's "wetlands" and

"conversion" determinations are wrong, the Branstads are *not* eligible for fees and expenses under the EAJA at this time.

B. Other Challenges

As mentioned above, in addition to "eligibility" challenges, the Secretary challenges the fee claims in these actions on a variety of grounds. Those grounds include the Secretary's contentions that her position on the issues presented was "substantially justified," so that the Branstads simply are not entitled to an award of fees and expenses, even if they are otherwise "eligible" for such an award, and her contentions regarding the amount of any fees to be awarded, if the Branstads are both eligible for and entitled to a fee award, on the basis that they have not demonstrated that any enhancement of the statutory hourly rate for attorney fees is appropriate in these cases, some of the hours claimed were duplicative, and that the Branstads are not entitled to any award of fees for time spent on administrative proceedings. However, in light of the court's conclusion that the Branstads are *not* "eligible" for any award of fees and expenses under the EAJA at this time, the court finds it unnecessary to reach the Secretary's additional challenges to the Branstads' entitlement to or the amount of any fees at any particular hourly rate.

III. CONCLUSION

Although the Secretary made numerous challenges to an award of fees and expenses pursuant to the EAJA in these cases, the court finds that one issue is dispositive of the fee claims. The Branstads are not eligible for an award of fees and expenses pursuant to the EAJA in either case, because they are not "prevailing parties" within the meaning of the statute. Consequently, the Branstads' application for attorney fees and costs in each case is denied without prejudice to reassertion when and if they obtain relief on the merits of their claims.

IT IS SO ORDERED.

FEDERAL MEAT INSPECTION ACT

COURT DECISION

FARM SANCTUARY, INC. AND MICHAEL BAUR v. USDA.
No. 01 Civ. 9877(NRB).
Filed July 30, 2002.

(Cite as: 212 F.Supp.2d 280).

FMIA – Standing to sue – Adulterated meat – Declamatory relief – Zone of interest test – Convergence of interests, inevitable.

Plaintiffs, an individual and a non-profit organization, brought suit to require the USDA to make changes in rules of slaughter of non-ambulatory animals known as "downed livestock." Plaintiffs wanted tighter inspections rules to be certain that downed livestock were not due to "mad cow disease" and that downed livestock would be labeled as "adulterated." The case was dismissed on procedural grounds of lack of standing under the Federal rules of summary judgement. The individual plaintiff contended he was a regular meat buying customer and he was at risk of buying adulterated meat. Plaintiff was unable to show that: (1) he had an injury in fact, (2) the government's action caused the injury, (3) the remedy sought can redress the injury. He had not shown that "mad cow disease" had been detected in this country or actually sold in commerce. An injury can not be based upon a series of hypotheticals. The non-profit organization alleged that its members suffered mental injury upon viewing the slaughter of downed livestock. They were unable to show that they were in the "zone of interests" which were meant to be protected by the FMIA statute. The purpose of the FMIA statute is to insure a safe supply of meat. The mental or psychological harm suffered by witnesses to the slaughter of downed livestock is beyond the "zone of interests' meant to protected by the statute. The test is not whether there was an overlap of interests, but whether there was a "inevitable convergence of interests."

United States District Court,
S.D. New York.

MEMORANDUM AND ORDER

BUCHWALD, District Judge.

Plaintiffs Farm Sanctuary, Inc. ("Farm Sanctuary") and Michael Baur ("Baur") filed this action seeking a declaratory judgment holding that the Secretary of Agriculture Ann Veneman and the United States Department of Agriculture ("USDA" or "Government") must classify all downed livestock as adulterated pursuant to 21 U.S.C. § 342(a) and an injunction prohibiting the USDA from allowing non-ambulatory animals to be used for human consumption. Defendants have moved to dismiss the complaint, inter alia, on the grounds that plaintiffs lack

standing to sue. For the reasons discussed below, the Government's motion is granted.

BACKGROUND

Plaintiffs filed this complaint on November 7, 2001, seeking to require the Government to address issues arising out of the slaughter of non-ambulatory animals, also known as "downed livestock." Complaint ¶ 13. Among the illnesses that can cause animals to collapse are transmissible spongiform encephalopathies. The form that affects cattle, Bovine Spongiform Encephalopathy ("BSE"), is commonly referred to as "mad cow disease." Humans who eat BSE-infected beef may be at risk of contracting variant Creutzfeldt- Jakob disease ("vCJD"), a fatal degenerative brain disorder. *Id.* ¶ 14. Plaintiffs allege that downed livestock are only briefly inspected before slaughter and that in that short period, "it is simply impossible to determine with certainty whether a downed animal is infected with BSE." *Id.* ¶ 15. The complaint also alleged that the downed animals are often neglected and taken to slaughterhouses in an inhumane manner. *Id.* ¶ 13.

Baur claims that, as a regular consumer of meat products, he is at risk of contracting vCJD whenever he eats meat. He contends that, in light of the deaths from vCJD in Great Britain, he is apprehensive about the safety of the meat he consumes. *Id.* ¶¶ 28-30. Farm Sanctuary is a non-profit corporation with approximately 90,000 members nationwide that promotes humane animal treatment. *Id.* ¶ 7. It has lobbied state and federal governments on issues relating to downed animals, and its staff members visit livestock facilities to investigate allegations of downed animal cruelty. It alleges that its staff members suffer "clear and direct aesthetic injury" while conducting these activities. *Id.* ¶¶ 31-33.

On March 4, 1998, plaintiffs filed a petition requesting that the Food and Drug Administration and the USDA label all downed cattle as adulterated under 21 U.S.C. § 342(a), the Federal Food, Drug, and Cosmetic Act ("FFDCA"). Compl. Ex. B. The USDA denied the petition on March 25, 1999, on the grounds that the USDA does not apply the FFDCA definition of "adulterated" but instead uses the definition set out in the Federal Meat Inspection Act ("FMIA"). After plaintiffs filed the complaint, the Government moved to dismiss the complaint on the grounds that the plaintiffs lack standing to sue, that plaintiffs failed to state a claim upon which relief can be granted because the USDA has no authority to enforce or interpret the FFDCA, and that the USDA's decision was not arbitrary or capricious.

DISCUSSION

I. Required Elements of Standing

In order for a plaintiff to have standing to sue the government, a plaintiff must show: 1) that is has suffered an injury in fact; 2) that the government's action caused that injury; and 3) that the remedy sought can redress the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). "The injury alleged must be, for example, distinct and palpable, and not abstract or conjectural or hypothetical." *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984) (internal quotation omitted). In addition, the case law has established prudential limitations on the right to sue, in particular the "zone of interests" test, which requires the plaintiff to show that the law under which a plaintiff was actually intended to protect the plaintiff against its claimed injury. *Id.*

The burden is on the plaintiffs to establish that they have standing. *Jaghory v. New York State Dep't of Educ.*, 131 F.3d 326, 329-30 (2d Cir.1997). On a motion to dismiss under Fed.R.Civ.P. 12(b)(6), we accept all of plaintiffs' material allegations as true and construe the complaint in the light most favorable to the non-moving party. *Warth v. Seldin*, 422 U.S. 490, 501, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)

II. Baur's Standing

[1] Baur claims that his injury is based on the fact that, as a meat eater, he is concerned about the possibility of eating meat of a BSE-infected cow and contracting vCJD. The Government contends that this injury is "mere speculation" based on a series of hypothetical events: that BSE might be brought to the United States; that it will not be detected; and that Baur will consume the meat from an infected animal. Gov't Mem. at 11.

Plaintiffs contend that Baur need not suffer a physical injury in order to have standing. *See Animal Legal Defense Fund v. Glickman*, 154 F.3d 426, 437 (D.C.Cir.1998) (stating that a species or environmental feature need not be eradicated in order for a plaintiff to have standing). The plaintiff must, however, show that the threat is imminent. *See Babbitt v. United Farm Workers National Union,* 442 U.S. 289, 298, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979) (holding that plaintiff must show a realistic danger of direct injury in order to have standing); *Navegar, Inc. v. United States*, 103 F.3d 994, 999- 1002 (D.C.Cir.1997) (holding that threat of prosecution of plaintiff was imminent when statute expressly

prohibited guns made by plaintiff and federal officials made clear to plaintiff that they intended to enforce the statute).

Plaintiffs argue that the increased risk to the food supply created by the threat of BSE contamination is an adequate injury. *See Kenney v. Glickman*, 96 F.3d 1118, 1120 (8th Cir.1996) (affirming finding that plaintiffs had standing to sue USDA over its failure to institute a zero tolerance policy for contaminated poultry carcasses). Similarly, in *Public Citizen v. Foreman*, the court found standing because plaintiffs could not purchase nitrite-free bacon at a reasonable price. 631 F.2d 969, 974 n. 12 (D.C.Cir.1980). *See also Cutler v. Kennedy*, 475 F.Supp. 838, 850 (D.D.C.1979) (finding that standing existed where plaintiff based his injury on his fear that he would be exposed to product ingredients that had not been tested by the FDA and that plaintiffs could not track which products contained these ingredients). These cases are all distinguishable as the contaminated or untested product was actually on the market. In contrast, here plaintiffs have provided no evidence that BSE has been detected in the United States, let alone that any BSE-infected meat has actually been sold. Thus, Baur's injury is not as direct as those suffered by the plaintiffs in the cases discussed above.

Baur's harm is more appropriately classified as hypothetical rather than imminent. The following cases are illustrative. In *Northwest Airlines, Inc. v. Federal Aviation Admin.*, 795 F.2d 195 (D.C.Cir.1986), the D.C. Circuit faced the issue of a plaintiff claiming injury based on a chain of events. The airline sued to prevent the FAA from granting a special issuance of a medical certificate for a pilot whom Northwest had fired for flying while intoxicated. The certificate would have permitted the pilot to resume flying if he followed certain conditions. *Id.* at 198-99. The court held that the airline lacked standing to challenge the issuance because it had not established that the pilot would be recertified to fly or that it would be harmed even if the FAA did permit him to fly again because there was no certainty that he would fly anywhere near a Northwest aircraft. Therefore, the court ruled, the airline's injury was hypothetical. *Id.* at 202.

The Supreme Court took a similar approach to the imminent harm requirement in *City of Los Angeles v. Lyons*, 461 U.S. 95, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983). The Court held that, even though the plaintiff had been previously held in a chokehold by Los Angeles Police officers, there was not a sufficient likelihood that the plaintiff would again be placed in a similar position to warrant a finding that plaintiff faced an imminent, rather than a hypothetical, future injury. *Id.* at 102, 103 S.Ct. 1660. The Court went on to state that the plaintiff's subjective apprehensions about being injured in another chokehold were insufficient to warrant

a finding of standing. *Id.* at 107 n. 8, 103 S.Ct. 1660.

Moreover, Baur's purported injury is too remote to warrant standing. The record provides no evidence of BSE in the United States, and the mere fact that the plaintiffs want the federal government to pursue a particular regulatory action does not satisfy the standing requirement. *See Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 483, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982) (holding that the "assertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning."). The USDA has not inflicted a cognizable injury on Baur; his proper recourse is to the legislative branch, not the judicial branch.

Finally, if we were to find that Baur's fear of contracting vCJD constituted a direct injury, then any citizen would have standing to sue to direct the federal government to take an action to improve health, occupational, or environmental safety. The standing requirement would no longer be a genuine test. *See Allen v. Wright*, 468 U.S. at 751, 104 S.Ct. 3315 (stating that the tests for standing "cannot be defined so as to make application of the constitutional standing requirement a mechanical exercise."). A plaintiff's injury cannot be abstract or based on a series of hypotheticals. We find that Baur's purported injury is simply too speculative to meet the requirement of injury-in-fact under the standing doctrine. Accordingly, Baur lacks standing to sue the USDA.

III. Farm Sanctuary's Standing

[2] Farm Sanctuary bases its standing to sue on the factthat its members suffer mental injury when they travel to slaughterhouses to observe the treatment of cattle. The Government does not dispute Farm Sanctuary's injury- in-fact. *See Animal Legal Defense Fund*, 154 F.3d at 428 (plaintiff relying on Animal Welfare Act had standing based on injury suffered by plaintiff in seeing animals mistreated).

The Government challenges Farm Sanctuary's standing on the grounds that it falls outside of the "zone of interests" protected by the statute. The zone of interests test is a prudential requirement considered when determining whether a plaintiff has standing. *National Credit Union Admin. v. First Nat. Bank & Trust Co.*, 522 U.S. 479, 488, 118 S.Ct. 927, 140 L.Ed.2d 1 (1998). *See also Air Courier Conference of America v. American Postal Workers Union,* 498 U.S. 517, 523-24, 111 S.Ct. 913, 112 L.Ed.2d 1125 (1991) (holding that courts should not conflate the zone of interests test with a determination of injury-in- fact).

[3] Plaintiffs argue that the zone of interests test is not intended to be demanding, and standing should be found for parties who are arguably within the zone of interests. *National Credit Union Admin.*, 522 U.S. at 493, 118 S.Ct. 927 (holding that a plaintiff is within the zone of interest if its injury is one that is "arguably to be protected" by the statute) (internal quotation omitted). There must, however, be evidence that Congress intended to protect a plaintiff's interest under the statute. *Clarke v. Securities Ind. Ass'n,* 479 U.S. 388, 399, 107 S.Ct. 750, 93 L.Ed.2d 757 (1987) (stating that standing should not be granted "if the plaintiff's interests are so marginally related to or inconsistent with the purposes of the statute that it cannot be reasonably be assumed that Congress intended to permit the suit.")

Farm Sanctuary has sued under the FMIA, which was designed to ensure a safe meat supply. 21 U.S.C. § 602. Farm Sanctuary's injury, that its members are harmed when they observe the treatment of animals at slaughterhouses, is beyond the scope of the FMIA. Plaintiffs argue that they are asserting a similar interest to the plaintiff in Animal Legal Defense Fund, namely, ensuring the humane treatment of animals. However, the Animal Legal Defense Fund sued under the Animal Welfare Act, the express purpose of which was to ensure "a physical environment adequate to promote the psychological well-being of primates." 7 U.S.C. § 2143(a). Here, Farm Sanctuary is suing under the FMIA, which was enacted to protect the food supply. The humane treatment of stockyard animals is addressed separately, in the Humane Methods of Slaughter Act. 21 U.S.C. §§ 603(b), 610(b).

Undeterred, plaintiffs argue that the zone of interests test extends to parties "who in practice can be expected to police the interests that the statute protects." *Mova Pharmaceutical Corp. v. Shalala*, 140 F.3d 1060, 1075 (D.C.Cir.1998). But the D.C. Circuit's suitable challenger test requires that a plaintiff show an "inevitable congruence" between its interest and the interest the statute was intended to protect. *Id.* (citing *National Credit Union Admin.*, 522 U.S. at 492-93, 118 S.Ct. 927). Plaintiffs argue that Farm Sanctuary is "furthering its goals while doing something for the common good." Pl. Opp. at 12. The fact that Farm Sanctuary is acting on behalf of the common good does not mean that its injury is the harm that Congress intended to protect under the statute. While Farm Sanctuary's goals and those of the statute are not mutually exclusive, the fact that they may overlap does not mean that there is an inevitable congruence between them. If Farm Sanctuary's claim was held to be within the zone of interests protected by the FMIA, then any plaintiff claiming to sue in the public interest would have standing, thus depriving the zone of interests test of its meaning. *See Air Courier Conference*, 498 U.S. at 530, 111 S.Ct. 913.

The language of the FMIA clearly does not contemplate protecting against injuries based on the inhumane treatment of animals. Accordingly, Farm Sanctuary's claim does not fall within the zone of interests contemplated by the statute, and it lacks standing to bring this suit.

CONCLUSION

For the reasons stated above, we find that neither plaintiff has standing to sue. Accordingly, the Government's motion to dismiss the complaint is granted. The Clerk of the Court is respectfully requested to close this case.

IT IS SO ORDERED.

FRED L. DAILEY, DIRECTOR OF THE OHIO DEPARTMENT OF AGRICULTURE v. USDA.
No. 01-3146.
Filed December 3, 2002.

(Cite as: 2002 WL 31780191 (6th Cir.(Ohio))).

FMIA – PPIA – Fifth Amendment – Tenth Amendment – Commerce Clause –Arbitrary and capricious, when not – Agency regulations, deference given to.

The court dismissed the State of Ohio's challenge of the Secretary's authority regarding the Poultry Products Inspection Act (PPIA) [and Federal Meat Inspection Act (FMIA)] on several constitutional grounds. The Secretary's regulations imposed strict limitations on meat processing operations with solely intrastate activities such that with the "at least equal to" state inspections requirements, they were effectively forced out of business. Ohio argued that under Fifth Amendment grounds, the Secretary's regulations were arbitrary and capricious because they were not grounded with a rational purpose. Ohio argued that under Tenth Amendment grounds, the Secretary's regulations impermissibly intruded into state's rights by forcing Ohio to either set up a State inspection program which must satisfy Federal regulations or abandon any efforts to have a state program and authorize Federal inspectors to directly inspect poultry operations with the result that many small state operators would be unable to meet Federal standards and be forced out of business. Ohio argues that since State inspected poultry can not be shipped interstate that by definition there is no interstate commerce under which the Secretary derived authority for enforcement of the Act.

United States Court of Appeals, Sixth Circuit.*

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*Sixth Circuit Rule 28(g) limits citation to specific situations. Please see Rule 28(g) before citing in a proceeding in a court in the Sixth Circuit.

On Appeal from the United States District Court for the Southern District of Ohio.

Before GUY and BATCHELDER, Circuit Judges; and QUIST, District Judge.[1]

BATCHELDER, Circuit Judge.

The Ohio Department of Agriculture ("Ohio Department") and its Director, Fred L. Dailey, appeal the district court's order granting the motion of the United States Department of Agriculture ("USDA") and its Secretary, Ann M. Veneman ("Secretary") to dismiss the plaintiffs' complaint under Fed.R.Civ.P. 12(b)(6). The plaintiffs brought this action seeking declaratory and injunctive relief, arguing that the Federal Meat Inspection Act ("FMIA"), 21 U.S.C. §§ 601-80, the Poultry Products Inspection Act ("PPIA"), 21 U.S.C. §§ 451-70 (collectively, the "Meat and Poultry Acts"), and their implementing regulations. 9 C.F.R. 301, et seq., and 9 C.F.R. 381, et seq., respectively, are unconstitutional because they violate the plaintiff's rights under the equal protection component of the Fifth Amendment's Due Process Clause; because they exceed Congress's power under the Commerce Clause; and because they unconstitutionally commandeer Ohio's legislative process, in violation of the Tenth Amendment. The plaintiffs also argue that specific regulations that implement the Meat and Poultry Acts, namely 9 C.F.R. §§ 318.1 and 381.145, exceed the defendants' regulatory authority. Because we conclude that the plaintiffs, while raising concerns of federalism to which we are sympathetic, nonetheless cannot demonstrate that the federal statutes and regulations they challenge here are unconstitutional, we will affirm the judgment of the district court.

Statement of Facts

The FMIA governs the slaughtering of livestock and the processing and distribution of meat products in the United States; the PPIA governs the slaughtering, processing, and distribution of poultry products. In accordance with §§ 603 and 621 of the FMIA and § 463 of the PPIA, among other provisions, the Secretary is authorized to make rules and regulations setting national standards for meat and poultry inspection. To that end, the Secretary has promulgated 9 C.F .R. Subchapter A. Part 301. et seq., which regulates meat inspection, and 9 C.F.R. Subchapter C, Part 381, et seq., which regulates poultry inspection. Under the FMIA and PPIA and their corresponding regulations there are three different types of meat and poultry establishments or plants: (1) federally inspected plants; (2)

[1] The Honorable Gordon J. Quist, United States District Judge for the Western District of Michigan, sitting by designation.

foreign-inspected plants, whose meat and poultry is federally inspected when it enters the United States; and (3) state-inspected plants.

For federally inspected plants, the Meat and Poultry Acts charge the Secretary with a number of responsibilities, including ante- and post-mortem inspection of the livestock and carcasses, sanitation inspection in the establishments, enforcement of record-keeping requirements, and the training and supplying of inspectors to carry out these responsibilities. *See* 21 U.S.C. §§ 602-06; id. §§ 455-57, 463. The Secretary in turn has established standards, including facilities requirements, inspection requirements, sanitation requirements, and record-keeping requirements. 9 C.F.R. §§ 301- 35, 381. Meat produced in a federally inspected plant may be sold in any state.

Foreign-inspected plants operate their own inspection systems under the general supervision of the USDA. 21 U.S.C. §§ 620, 466. To be allowed to export to the United States, a foreign country must show that its system of inspection is "equivalent to" the federal inspection system. 9 C.F.R. § 327.2(a)(1). The USDA conducts its own inspection of foreign-inspected meat and poultry, though the level of the USDA's scrutiny depends on the inspection history of the particular country and plant. Under normal inspection, a sample from each lot is taken for inspection and the rest is immediately shipped to the United States. For plants with better compliance histories only one in four lots is inspected, and for the best plants only one in twelve. For plants with poor compliance every lot is inspected, and no product is shipped until the inspection is complete. USDA-approved meat and poultry from foreign plants may be sold in any state.

The Meat and Poultry Acts grant the Secretary authority to authorize each state to develop its own inspection program. 21 U.S.C. §§ 661, 454. To obtain this authorization, a state must have "enacted a State meat inspection law that imposes mandatory ante mortem and post mortem inspection, reinspection and sanitation requirements that are at least equal to those under [the Meat and Poultry Acts]," 21 U.S.C. §§ 661(a)(1), 454(a)(1), and its inspection system must contain "authorities at least equal to those provided in [the Meat and Poultry Acts]." *Id.* §§ 661(a)(2), 454(a)(2). To demonstrate that it meets the "at least equal to" requirement, a state submits a "State Performance Plan" to the USDA's Food Safety and Inspection Service ("FSIS"). A benefit of the "at least equal to" requirement is that it allows state inspection programs to exceed the federal requirements if they wish- something which Ohio, for example, has done.

Once the Secretary has authorized a state's inspection program, the USDA

monitors the state's compliance via annual certification and comprehensive reviews. In annual certification the USDA reviews each participating state's performance plan and determines whether the state has met the "at least equal to" requirements at the end of each fiscal year. In comprehensive reviews the USDA randomly selects state plants, reviews their records, and conducts in- plant inspections. Comprehensive reviews are conducted in a given state every one to five years, depending on which of the four FSIS ratings the state receives: acceptable, acceptable with minor variations, acceptable with significant variations, and unacceptable. In 1996 the FSIS comprehensively reviewed Ohio's meat and poultry inspection program, finding that Ohio met the "at least equal to" requirements, and rating the program "acceptable with minor variations." In 1997 six states received ratings of acceptable, fourteen were rated acceptable with minor variations, six were rated acceptable with significant variations, and no state program was deemed unacceptable.[2]

Meat and poultry produced at state-inspected plants may be sold intrastate only, and may not be sold interstate. Nor may state-inspected meat or poultry be sold to a federally inspected plant for reprocessing. 21 U.S.C. §§ 610(c), 458(a)(2). This restriction is burdensome for state- inspected plants. Though individual state-inspected plants may petition the FSIS to be inspected instead under the federal system, many small plants cannot afford the renovations that would be required to meet federal standards. The consequence, as alleged by the Plaintiffs, is that many small and mid-size plants have gone out of business, unable to compete with the larger plants because they cannot send their meat or poultry out of the state.

Analysis

We review de novo a district court's dismissal of a complaint under Fed. R. Civ. Proc. 12(b)(6). Bird v. Parsons, 289 F.3d 865, 871 (6th Cir.2002). Like the district court, we assume that all of the Plaintiffs' factual allegations are true, and we may affirm the dismissal only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* (quoting Buchanan v. Apfel, 249 F.3d 485, 488 (6th Cir.2001)).

I. Fifth Amendment Equal Protection

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[2]The meat and poultry plants in all other states were under federal supervision. When a state abandons its inspection program, the state's inspection facilities immediately fall under the supervision of the federal inspection system. Plants under state inspection are also returned to federal control if a previously authorized state fails to meet the Secretary's requirements. 21 U.S.C. §§ 661(c), 454(c).

[1] The Fifth Amendment prohibits Congress from depriving persons of life, liberty, or property without due process of law. Federal courts have discerned an equal protection component to this provision, and consequently "the Fifth Amendment's Due Process Clause prohibits the Federal Government from engaging in discrimination that is 'so unjustifiable as to be violative of due process." ' *Schlesinger v. Ballard*, 419 U.S. 498, 500 n. 3, 95 S.Ct. 572, 42 L.Ed.2d 610 (1975) (quoting *Bolling v. Sharpe,* 347 U.S. 497, 499, 74 S.Ct. 693, 98 L.Ed. 884 (1954)). Where, as here, Congress's differential treatment implicates neither a suspect classification nor a fundamental right, federal courts should uphold the legislation if it is rationally related to a legitimate legislative interest-which is to say that the unequal treatment may not be arbitrary, irrational, or capricious. Hadix v. Johnson, 230 F.3d 840, 843 (6th Cir.2000); *Hampton v. Hobbs*, 106 F.3d 1281, 1286 (6th Cir.1997). Hence Ohio bears a heavy burden-to negate "every conceivable basis which might support [the legislation], . . . whether or not the basis has a foundation in the record," *Heller v. Doe*, 509 U.S. 312, 320, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993) (quotation marks and citation omitted)-and the Defendants need not produce any evidence to substantiate their replies, nor are they required to reply at all. Hadix, 230 F.3d at 843.

[2] Ohio argues that because, for purposes of the Defendants' 12(b)(6) motion, the district court had to accept as true Ohio's allegation that state- inspected meat and poultry is as safe as federally inspected and foreign- inspected meat and poultry, the Meat and Poultry Acts lack a rational basis for treating state-inspected meat and poultry differently from that produced in federally inspected and foreign plants. Nevertheless, assuming that it is true that state-inspected meat and poultry was and presently is as safe as that subject to the other types of inspections, the district court (and the government in enacting and perpetuating the Meat and Poultry Acts and their regulations) was not required to assume that this will always be the case in the future. Though the USDA does keep an eye on state inspection programs, it keeps yet a closer eye on its own plants and on meat and poultry entering the country, and it is possible that a state program could deteriorate for a time without the USDA's knowledge. This possibility provides a rational basis for Congress to restrict the interstate transport of state-inspected meat. Another rational basis for the discrimination is Congress's interest in uniformity: because state inspection programs can impose additional or different requirements as they comply with the "at least equal to" requirement, and because states can establish their own labeling systems, Congress may have wanted to avoid confusion by establishing a uniform standard for meat and poultry products shipped interstate. For these reasons, we find that the district court did not err in holding that the plaintiffs fail to state a claim under the Fifth Amendment's Due Process Clause.

II. Commerce Clause

Under the Commerce Clause, Congress may regulate three broad categories of activity: (1) "the channels of interstate commerce"; (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities"; and (3) activities with a substantial relation to interstate commerce- activities, that is, "that substantially affect interstate commerce." *United States v. Morrison*, 529 U.S. 598, 609, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000) (quotation marks and citation omitted). We must reject a Commerce Clause challenge if Congress rationally could have concluded that the regulated activity fit into one of these categories, and if Congress acted rationally in adopting that regulatory scheme. *Hodel v. Va. Surface Mining & Reclamation Ass'n,* 452 U.S. 264, 276, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981).

[3] The plaintiffs' quarrel here is not with whether meat and poultry sold intrastate substantially affects interstate commerce, or whether Congress has a rational basis for regulating meat and poultry that remains within a state. Rather, they argue that Congress, by forbidding state-inspected meat and poultry from crossing state lines, has voluntarily stripped itself of authority to regulate state-inspected plants engaged in what is now a solely intrastate activity. Yet the plaintiffs cite no cases supporting this novel (though not illogical) proposition, nor are we aware of any. Congress's power to regulate things in interstate commerce surely includes the power to ensure that a commodity does not become a thing in interstate commerce; and meat and poultry products that are solely in intrastate commerce, when considered in the aggregate, have a substantial affect on interstate commerce. *See United States v. Lopez*, 514 U.S. 549, 560, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995) (discussing the Court's finding in *Wickard v. Filburn*, 317 U.S. 111, 128, 63 S.Ct. 82, 87 L.Ed. 122 (1942) that home-grown wheat, even if it is never sold but is simply consumed at home, substantially affects interstate commerce because it competes with wheat that is sold in commerce). Federal regulation of those products in intrastate commerce, then, is not beyond Congress's power under the Commerce Clause.

III. Tenth Amendment

[4] Ohio contends that the Meat and Poultry Acts impermissibly commandeer Ohio's legislature and compel it to enforce the federal inspection laws, in violation of a principle derived from the Tenth Amendment and reiterated in *New York v. United States*, 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992): "The Federal Government may not compel the States to enact or administer a federal regulatory

program." *Id.* at 188. In New York, the states were offered a choice between regulating low-level radioactive waste according to the instructions of Congress or taking title to that waste. Neither of those, standing alone, was within the authority of Congress, the Court held, and "[a] choice between two unconstitutionally coercive regulatory techniques is no choice at all," and therefore " 'the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program,' an outcome that has never been understood to lie within the authority conferred upon Congress by the Constitution." *Id.* at 176 (quoting *Hodel*, 452 U.S. at 288).

The plaintiffs argue that the Meat and Poultry Acts present Ohio with similarly unsavory alternatives: the state must either continue to operate its own inspection program or face the prospect of being subjected to federal inspection, and the considerable expenses of converting to the latter would drive many small meat and poultry plants out of business. We disagree. Ohio's choice is either to conduct its own program or allow the federal government to take over, *see* 21 U.S.C. §§ 661(c), 454(c), and the Supreme Court has held that such choices do not amount to compulsion. *See New York*, 505 U.S. at 167 ("[W]here Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress's power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation."). Nor is the harm threatened here of the kind that the principle reiterated in New York is intended to prevent: the prospect of having small businesses fail due to conversion costs, though disagreeable, nevertheless affects Ohio only indirectly. *See*, e.g., *id.* at 168 ("[W]here the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished."). We conclude that the Plaintiffs' arguments fail.

IV. The Scope of the Secretary's Regulatory Authority

[5] We must uphold the Secretary's regulations unless they are "arbitrary, capricious, an abuse of discretion, [ ] otherwise not in accordance with law," or are "unsupported by substantial evidence." 5 U.S.C. § 706. When reviewing an agency's interpretation of a statute which that agency administers, we look to *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Chevron established that where Congress has spoken to the precise question at issue, the court asks whether the interpretation of an agency that administers the statute is based on a permissible construction of the statute, and if it is then the court must defer to the agency's construction. *Id.* at 842-43. In the present case, the question is whether the Secretary had authority to

order that state-inspected meat and poultry can enter federally inspected plants only if it is kept separately for storage and distribution, and that state-inspected poultry cannot be repackaged, relabeled, or processed in a federally inspected plant.

Specifically, Ohio challenges the regulations the Secretary promulgated under Section 605 of the FMIA and Section 465 of the PPIA. See 9 C.F.R. §§ 318.1(a), 318.1(h)(2), 381.145(a). Section 605 of the FMIA provides that

> [t]he Secretary may limit the entry of carcasses, parts of carcasses, meat and meat food products, and other materials into any [federally inspected] establishment . . ., under such conditions as he may prescribe to assure that allowing the entry of such articles into such inspected establishments will be consistent with the purposes of this [Act].

21 U.S.C. § 605; see also id. § 465 ("The Secretary may limit the entry of poultry products and other materials into any [federally inspected] establishment, under such conditions as he may prescribe to assure that allowing the entry of such articles into such inspected establishments will be consistent with the purposes of this [Act].").

We conclude that Congress did not speak to the precise question at issue, leaving it instead to the Secretary to set out "such conditions as he may prescribe . . . [that] will be consistent with the purposes of this [Act]." 21 U.S.C. §§ 605, 465; see also 21 U.S.C. §§ 602, 452 (establishing that the purposes of the Meat and Poultry Acts are to ensure that meat and poultry is safe and healthy). Our inquiry, then, must be whether the Secretary's regulation is a permissible construction of the statute. We find that it is, for the reason noted above: the USDA does not scrutinize state-inspected plants as frequently as it does federally inspected plants or federally inspected foreign meat and poultry, and hence there is the possibility that state-inspected meat and poultry would not be as safe.

Conclusion

For the foregoing reasons, we AFFIRM the judgment of the district court dismissing the Plaintiffs' case.

FOOD STAMP PROGRAM ACT

COURT DECISIONS

AMEIRA CORPORATION, d/b/a JOHN'S CURB MARKET, v. USDA, et al.
No. 1:01CV00673.
Filed July 30, 2002.

(Cite as: 2002 WL 1791906 (M.D.N.C.)).

United States District Court,
M.D. North Carolina.

FSP – Fifth Amendment – TRO – Injunction – Administrative remedies, failure to exhaust, when not required.

A neighborhood grocery store merchant who had participated in the Food Stamp Program (FSP) for several years was summarily deprived of the right to continue FSP participation based upon an allegation by a "unnamed accuser" that the merchant was illegally trafficking in food stamps. The court found that the past participation in the FSP merged into a "propoerty right" from which the merchant could not deprived except by due process of law. The court also held that since the challenge was on pure constitutional grounds there was no need to first exhaust his administrative remedies.

MEMORANDUM OPINION AND ORDER

OSTEEN, J.

This matter arises from the decision of the United States Department of Agriculture ("USDA") to permanently disqualify Plaintiff Ameira Corporation ("Ameira"), d/b/a John's Curb Market, from participation in the Food Stamp Program ("FSP") for allegedly trafficking in food stamps in violation of 7 U.S.C. § 2021(b)(3)(B) and 7 C.F.R. §§ 270-282. Plaintiff instituted this case in state court, alleging that Defendants' actions deprived it of property without due process of law and constituted a taking, both in violation of the Fifth Amendment. Plaintiff moved for a temporary restraining order and preliminary as well as permanent injunction. Following Defendants' removal of the case to federal court, Plaintiff's motion for a temporary restraining order and injunction was denied. *See Ameira Corp. v. Veneman,* 169 F.Supp.2d 432 (2001).

The matter is now pending on Defendants' motion to dismiss Plaintiff's complaint. For the reasons set forth herein, Defendants' motion will be denied.

I. FACTUAL BACKGROUND

The facts of this case are set forth in the court's memorandum opinion denying Plaintiff's motion for a temporary restraining order and injunction and are incorporated by reference here. *See Ameira,* 169 F.Supp.2d at 434-35.

II. DISCUSSION

A. Lack of Jurisdiction--Federal Rule of Civil Procedure 12(b)(1)

Defendants' first argument in furtherance of their motion to dismiss is that the court lacks jurisdiction over Plaintiff's complaint because Plaintiff has not exhausted its administrative remedies under the federal laws governing the FSP. *See* 7 U.S.C. § 2023(a). Under the FSP, a retail food store that has been disqualified from participation in the FSP is entitled to certain procedural protections. First, the store is entitled to notice of disqualification via certified mail or personal service. *See* § 2023(a)(1)- (2). Following disqualification, the store may, within 10 days of receipt of the notice, request an opportunity to submit information in support of its position. *See* § 2023(a)(3). Administrative review of the decision follows, and at the conclusion of this review, the agency issues its final notice of determination, effective 30 days after receipt. *See* § 2023(a)(5). If still aggrieved by the agency's decision, the store may then seek judicial review in a United States district court, where the validity of the determination will be resolved by trial *de novo. See* § 2023(a)(13), (15).

[1][2] Defendants' assertion that this court lacks jurisdiction would be correct if Plaintiff had requested judicial review of its disqualification. As all parties have noted, administrative review of Plaintiff's disqualification is still pending, (Defs.' Mem. Supp. Mot. Dismiss at 4; Pl.'s Br. Opp'n Defs.' Mot. Dismiss at 5), and before that review becomes final, Plaintiff's claim is not ripe for judicial scrutiny. *See* § 2023(a)(13). However, as Plaintiff's complaint makes clear, Plaintiff's claims are solely constitutional in nature, and thus collateral to the disqualification determination.[1] As Plaintiff correctly points out, the federal courts have jurisdiction over constitutional challenges to FSP procedures regardless of whether those procedures have been exhausted. *See Mohamed v. United States,* 1999 WL 1939991, at *3 (E.D.N.C.1999) (citing *Bowen v. City of New York,* 476 U.S. 467, 483, 106 S.Ct. 2022, 2031, 90 L.Ed.2d 462 (1986)) (noting lack of jurisdiction in

[1] Plaintiff may seek *de novo* judicial review following receipt of a final notice of determination. The instant case does not raise nor preserve such a claim.

the absence of a constitutional challenge); *Nguyen v. United States,* 1997 WL 124138, at *3 (E.D.La.1997) (relying on *Bowen,* recognizing exception to exhaustion requirement where plaintiff challenges constitutional validity of administrative process). Therefore, the court has jurisdiction over Plaintiff's constitutional claims, and Defendants' motion to dismiss pursuant to Rule 12(b)(1) is without merit.

B. Failure to State a Claim--Federal Rule of Civil Procedure 12(b)(6)

Defendants also argue that Plaintiff's complaint should be dismissed for failure to state a claim under Rule 12(b)(6). The Fourth Circuit has long adhered to the view that a motion to dismiss for failure to state a claim should be granted only under very limited circumstances. *See Rogers v. Jefferson-Pilot Life Ins. Co.,* 883 F.2d 324, 325 (4th Cir.1989). The motion should be granted only when " 'it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim." ' *Rogers,* 883 F.2d at 325 (quoting *Johnson v. Mueller,* 415 F.2d 354, 355 (4th Cir.1969)).

[3] To prevail on a due process claim, Plaintiff must demonstrate that 1) it had a property interest in the FSP, and 2) it received inadequate process. *See Ameira,* 169 F.Supp.2d at 438. Therefore, to survive a Rule 12(b)(6) motion, Plaintiff must allege facts supporting each of these elements. This circuit has long recognized that the right to participate in the FSP is a property interest. *See Cross v. United States,* 512 F.2d 1212, 1217 (4th Cir.1975). Plaintiff's complaint states that Plaintiff was authorized by the USDA to participate in the FSP on October 15, 1996; therefore, Plaintiff has alleged a property interest entitling it to due process.

Furthermore, Plaintiff's complaint clearly alleges that it received inadequate process under the laws and regulations governing the program. Plaintiff asserts, *inter alia,* that Defendants failed to respond to its request for more information concerning Defendants' accusations; that the "facts" contained in Defendants' investigative report which formed the basis of Plaintiff's disqualification were false in several respects; that Defendants relied on an "unnamed accuser" in their report thereby denying Plaintiff's right to confront its accusers; and that Plaintiff was denied any meaningful opportunity to demonstrate the falsity of the report; all in violation of Plaintiff's Fifth Amendment rights.

Additionally, Plaintiff alleges that because a stay of disqualification pending review is unavailable under the statutory and regulatory scheme governing the FSP, Plaintiff's due process rights were violated when it was not afforded a

pre-disqualification hearing. Plaintiff further alleges that the lack of a pre-disqualification hearing violated due process because the financial deprivation it will suffer as a result of disqualification is irreversible. *See* 7 U.S.C. § 2023(a)(18) (prohibiting recoupment of lost sales even where disqualification is later found to have been invalid).

Given these allegations, the court cannot find at this juncture that there exists no state of facts which could be proved in support of Plaintiff's claim. *See Rogers,* 883 F.2d at 325. Defendants' argument improperly focuses on the merits of Plaintiff's claim, i.e., whether, in fact, the process afforded to Plaintiff was constitutionally adequate. This is inappropriate at this stage in the proceedings. Plaintiff has clearly stated a claim for a constitutional violation, and Defendants' motion to dismiss under Rule 12(b)(6) will therefore be denied.

C. Insufficiency of Process--Federal Rule of Civil Procedure 12(b)(5)

Defendants' final objection is that Plaintiff has failed to perfect service upon the U.S. Attorney, the Attorney General, and an employee of the federal agency. The court notes that both parties represent that Defendants' counsel has agreed to accept service on behalf of Defendants pursuant to Rule 4(d)(3). The court further notes that Plaintiff, in its response brief, indicates that the documents have been forwarded to Defendants' counsel and that service would be perfected upon Defendants' counsel's return of those forms to Plaintiff's counsel. In light of this apparent agreement between the parties, the court will deny Defendants' motion on this basis without prejudice to the Defendants to reassert this issue if Plaintiff has not perfected service.

D. CONCLUSION

Defendants have failed to provide any grounds on which the court may properly dismiss Plaintiff's complaint. Therefore,

IT IS ORDERED that Defendants' Motion to Dismiss [4] is denied.

FIRAS SALMO, SALMO, INC., d/b/a VALUE KING SUPERMARKET v. USDA.
Civ. 02CV348(AJB).
Filed October 7, 2002.
(Cite as No. 226 F. Supp. 2d. 1234).

FSP – Judicial review, presumption of, exception to – Jurisdiction, lack of – Prior disqualification, state WIC program.

A neighborhood grocery store merchant had been previously disqualified by a state of California from participating the Women, Infants and Children's (WIC) program. The merchant was then summarily disqualified from participation in the Food Stamp Program (FSP) and the merchant appealed for a judicial review of the FSP denial by the Food & Nutrition Service (FNS). Although there is a strong presumption that Congress intended judicial review of FNS administrative action, that presumption can be rebutted that Congress intended to prohibit such judicial review. FNS argued that under 7 C.F.R. § 2101(g)(2)(C), judicial review is expressly denied to merchants denied continued participation in the FSP if there has been prior disqualification in the WIC program.

United States District Court,
S.D. California.

Order Granting Defendant's Motion to Dismiss [Doc No. 8]

BATTAGLIA, United States Magistrate Judge.

The Government moves to dismiss Plaintiffs' complaint pursuant to Fed.R.Civ.P. 12(b)(1) for lack of federal subject matter jurisdiction. The Plaintiffs have filed a Notice of Non-Opposition, stating that they do not oppose dismissal of this action without prejudice as they anticipate filing a complaint in state court regarding the same subject matter. Plaintiffs have filed no substantive opposition to the Government's motion. The parties have consented in writing to the hearing and disposition of all matters in this case by Magistrate Judge Battaglia.

The argument presented by Defendant in this case, that 7 U.S.C. § 2021(g)(2)(C) deprives this Court of federal subject matter jurisdiction, is novel--no other court has addressed this issue. Nonetheless, this Court concludes that the Government is correct, and that this Court lacks jurisdiction to review the decision of the Food and Nutrition Service of the United States Department of Agriculture, disqualifying the Plaintiff store from participating in the Federal Food Stamp Program. Thus, for the reasons set forth herein, the Government's motion is GRANTED.

Standard of Review for Defendant's Motion

"Federal courts are courts of limited jurisdiction . . .. It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994) (citations omitted). On a motion to dismiss under Rule 12(b)(1) for lack of subject

matter jurisdiction, the moving party may rely upon affidavits or other evidence properly before the court. *Ass'n of Am. Med. Colleges v. United States*, 217 F.3d 770, 778 (9th Cir.2000). The court may consider these extra-pleading materials and resolve factual disputes, if necessary. *Id.* If the moving party produces evidence in support of its motion, the opposing party must then present its own affidavits or other evidence "to satisfy its burden of establishing that the court, in fact, possesses subject matter jurisdiction." *Id.* (quoting *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir.1989)).

The Statutory Basis of Jurisdiction

The United States and its agencies are immune from suit absent a waiver of sovereign immunity. *Hodge v. Dalton*, 107 F.3d 705, 707 (9th Cir.1997). "The terms of the United States' consent to be sued in any court define that court's jurisdiction to entertain the suit." *Id.* The scope of this Court's subject matter jurisdiction to review the decision of the Food and Nutrition Service ("FNS") of the United States Department of Agriculture is defined by the statutes providing for judicial review of such decisions. *Gallo Cattle Company v. United States Dept. of Agriculture*, 159 F.3d 1194, 1197 (9th Cir.1998) (statute providing for judicial review of USDA's Dairy Promotion Program defines scope of federal court's subject matter jurisdiction over such actions). Plaintiffs filed this action pursuant to 7 U.S.C. § 2023, seeking judicial review of the December 12, 2001, notice by the FNS disqualifying the store from participating in the Federal Food Stamp Program ("FSP") for three years pursuant to 7 U.S.C. § 2021(g). Section 2023, upon which Plaintiffs rely for jurisdiction in this case, provides in pertinent part as follows:

> (a)(1) Whenever ... a retail food store or wholesale food concern is disqualified or subjected to a civil money penalty under the provisions of section 2021 of this title ... notice of such administrative action shall be issued to the retail food store, wholesale food concern, or State agency involved.
>
> (2) Such notice shall be delivered by certified mail or personal service.
>
> (3) If such store, concern, or State agency is aggrieved by such action, it may, in accordance with regulations promulgated under this chapter, within ten days of the date of delivery of such notice, file a written request for an opportunity to submit information in support of its position to such person or persons as the regulations may designate.
>
> (4) If such a request is not made or if such store, concern, or State agency fails to submit information in support of its position after filing a request, the administrative determination shall be final.
>
> (5) If such request is made by such store, concern, or State agency, such information as may be submitted by the store, concern, or State agency, as well

as such other information as may be available, shall be reviewed by the person or persons designated by the Secretary, who shall, subject to the right of judicial review hereinafter provided, make a determination which shall be final and which shall take effect thirty days after the date of the delivery or service of such final notice of determination.

. . . .

(13) If the store, concern, or State agency feels aggrieved by such final determination, it may obtain judicial review thereof by filing a complaint against the United States in the United States court for the district in which it resides or is engaged in business, or, in the case of a retail food store or wholesale food concern, in any court of record of the State having competent jurisdiction, within thirty days after the date of delivery or service of the final notice of determination upon it, requesting the court to set aside such determination.

. . .

(15) The suit in the United States district court or State court shall be a trial de novo by the court in which the court shall determine the validity of the questioned administrative action in issue . . . .

7 U.S.C. § 2023(a).

This section generally provides the basis for federal subject matter jurisdiction over an action challenging disqualification from the FSP under 7 U.S.C. § 2021, as well as a conditional waiver of the United States' sovereign immunity. *Shoulders v. United States Department of Agriculture*, 878 F.2d 141, 143 (4th Cir.1989).

The Government argues, however, that 7 U.S.C. § 2021(g), under which the Plaintiff store was disqualified, explicitly prohibits the exercise of jurisdiction in a case such as this where the FSP disqualification was based upon a prior determination that the store was disqualified from participating in a state program providing supplemental nutrition benefits for women, infants, and children. In this case, the FNS disqualified the Plaintiff store from participation in the FSP based upon its prior disqualification, on October 6, 2001, from participating in the California Women, Infants, and Children Supplemental Nutrition Program ("WIC") for three years. In addition to providing that a store previously disqualified from participating in a state WIC must also be disqualified from participating in the FSP program, 7 U.S.C. § 2021 further provides that "notwithstanding section 2023 of this title," a disqualification from the FSP based upon a prior WIC disqualification "shall not be subject to judicial or administrative review." 7 U.S.C. § 2021(g)(2)(C) (emphasis added); *see also* 7 C.F.R. § 278.6(e)(8)(iii)(C) (providing that such disqualifications "[s]hall not be subject to administrative or judicial review under the Food Stamp Program.").

There is a "strong presumption that Congress intends judicial review of administrative action." *State of Oregon v. Bowen*, 854 F.2d 346, 350 (9th Cir.1988) (quoting *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670, 106 S.Ct. 2133, 90 L.Ed.2d 623 (1986)). "This presumption can only be rebutted if the agency can show that Congress intended to prohibit all judicial review." *Id.* Although § 2021(g) was added to Title 7 by amendment in 1996, there are no cases interpreting its provisions, including the provision precluding judicial review. The plain language of § 2021(g), however, supports the Government's jurisdictional argument, and supports the conclusion that Congress intended to prohibit judicial review of decisions by the FNS to disqualify stores from participating in the FSP based upon a prior WIC disqualification.

Section 2021(g) plainly states that a disqualification from the FSP based upon a prior WIC disqualification "shall not be subject to judicial or administrative review." 7 U.S.C. § 2021(g)(2)(C). The prohibition in § 2021(g)(2)(C) is qualified by the statement that the bar on judicial review is imposed "notwithstanding section 2023 of this title." In common usage, however, the term "notwithstanding" means "without prevention or obstruction from or by" or "in spite of." Webster's Third New International Dictionary Unabridged 1545 (1993). Thus, § 2021(g)(2)(C)'s prohibition on judicial or administrative review is made "in spite of" the ordinary review process available under 7 U.S.C. § 2023. The explicit statement in § 2021(g)(2)(C), narrowing the scope of judicial review available under § 2023, thus serves to narrow the scope of the government's waiver of sovereign immunity and this Court's exercise of subject matter jurisdiction.

Congress has unambiguously stated that decisions by the FNS disqualifying a store from participating in the FSP as a result of a prior WIC disqualification are not subject to administrative or judicial review. This limitation upon the court's jurisdiction is not unreasonable. Before the store can be disqualified from participating in the state's WIC program, it must be given the opportunity to challenge the basis for that action before the state administrative agency. See 7 C.F.R. § 246.12. In this case, for example, the California Department of Health Services twice warned the Plaintiff store by letters dated January 19, 2000 and May 17, 2000 that vendor violations had occurred [Administrative Record ("AR") 34-37]. The California Department of Health Services then notified the Plaintiff store by letter on December 1, 2000 that it was being disqualified from participation in the California WIC program because of continued vendor violations [AR 30-33]. The Plaintiff store requested and obtained an Informal Hearing to protest the WIC disqualification, and on August 10, 2001 the California Department of Health Services mailed a written report of its findings sustaining the disqualification [AR

21-29]. Although the Department advised the Plaintiff store that it had 30 days thereafter to request a formal hearing [AR 21], it apparently did not do so. The California Department of Health Services notified the Plaintiff store by letter on September 20, 2001 that its disqualification decision would take effect on October 7, 2001 [AR 20]. Thus, the Plaintiff had a full and fair opportunity to challenge its disqualification from the California WIC program. Pursuant to U.S.C. § 2021(g)(2)(C), the Plaintiff store is not entitled to further review of the FNS's subsequent decision disqualifying it from participating in the FSP, and this Court lacks jurisdiction over Plaintiffs' complaint.

Conclusion

This Court lacks subject matter jurisdiction over the Plaintiffs' complaint for review of the decision of the Food and Nutrition Service of the United States Department of Agriculture disqualifying the Plaintiff store from participating in the Federal Food Stamp Program pursuant to 7 U.S.C. § 2021(g). Therefore, the Government's motion to dismiss is GRANTED, and Plaintiffs' complaint is hereby DISMISSED.

IT IS SO ORDERED.

HORSE PROTECTION ACT

COURT DECISIONS

AMERICAN HORSE PROTECTION ASSOCIATION, INC. v. USDA. (and SHOW HORSE SUPPORT FUND - INTERVENOR)
No. CIV.A.01-28(HHK/JMF).
Filed May 14, 2001.

(Cite as: 200 F.R.D. 153).

HPA – Standing to sue – Interest affected – Action may impair interest – Representative interest, lack of.

The Show Horse Support Fund (Fund), a Nonprofit organization, a consortium of Horse Industry Organizations, seeks to intervene in the Horse Protection Act (HPA) rule making process to uphold the implementation of a revised plan to enforce the plan known as the "2001 Plan." In a liberal interpretation, the court permitted intervention as a matter of right under FRCP 24(a)(2) holding that the Petitioner-intervenor had an interest in the agency action, the agency action (or failure to implement action) would impair that interest, and there is no other litigant adequately representing the intervenor's interest. While Plaintiff Non-profit organization sought to enjoin agency enforcement of the "2001 Plan", the intervenor sought to enforce the agency's "2001 Plan."

United States District Court,
District of Columbia.

MEMORANDUM OPINION

FACCIOLA, United States Magistrate Judge.

This case has been referred to me for resolution of Show Horse Support Fund, Inc.'s (the "Fund") Motion to Intervene. For the reasons discussed below, the Motion to Intervene is granted.

I. BACKGROUND

This suit involves a challenge by a nonprofit organization to the legality of a particular Department of Agriculture program known as the "Horse Protection Operating Plan" ("Operating Plan"). The Operating Plan relates to the implementation and enforcement of the Horse Protection Act ("HPA"), 15 U.S.C.A. § 1821 et seq., (1998) for show horse seasons 2001-2003. The HPA was enacted to prevent the practice of "soring" gaited horses, which is the process of inflicting pain on the lower areas of the show horse's front legs in order to produce a

high-stepping gait. See American Horse Protection Assn., Inc. v. Yeutter, 917 F.2d 594, 595 (D.C.Cir.1990). The USDA established procedures through which Horse Industry Organizations ("HIOs") train and license individuals known as Designated Qualified Persons ("DQPs") to inspect "sore" horses. 9 C.F.R. § 11.1 et seq. (2001).

The Operating Plan that is the subject of this lawsuit is the third of such plans issued by the USDA in the hopes of improving the enforcement of the HPA regarding the detection of sore horses. Defendants' Memo in Support of Motion to Dismiss ("Def.Memo") at 2. According to the USDA, the Operating Plan at issue "establishes [the] duties and responsibilities of Horse Industry Organizations . . ." for the 2001-2003 show seasons. Def. Memo at 1. The Plan is the product of meetings between the Animal and Plant Health Inspection Service ("APHIS"), the service charged with administering and enforcing the HPA, and representatives of the HIOs. Upon conducting these sessions, the agency generated a Draft Operating Plan, which was circulated for comment by the HIOs. After additional negotiations with the HIOS, a final Plan was distributed for signature by the HIOs. According to plaintiff's complaint, the Plan at issue is effective upon signature by an authorized HIO representative and will remain in effect until December 31, 2003.

Plaintiff argues that the Operating Plan is an unlawful delegation of the Department's enforcement authority under the HPA in part because it relies on the HIO's assessment of penalties pursuant to private disciplinary rules, rather than enforcement according to the terms of the Act. Plaintiff's Opposition to Motion to Intervene ("Pl.Opp.") at 9. Further, plaintiff argues, defendants' Plan contravenes the Act because it provides that defendants will not institute Federal enforcement actions for violations of the Act if an HIO has already assessed a penalty. Pl. Opp. at 10. Plaintiff therefore seeks a court order (1) setting aside the defendants' decision to implement the Operating Plan, and (2) enjoining the defendants from taking any action to implement the Operating Plan. Pl. Opp. at 12.

II. DISCUSSION

The Fund has moved for leave to intervene as of right and permissively pursuant to Rule 24 of the Federal Rules of Civil Procedure. Because I conclude that movant is entitled to intervene as of right, it is not necessary to reach their permissive intervention claim.

Upon timely application, Rule 24(a)(2) provides for an intervention of right:

> when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Fed.R.Civ.P. 24(a)(2).

The plaintiff does not dispute that movant's application is timely. Therefore, in assessing whether the movant is entitled to intervene as of right, the court must consider the Fund's standing, and 1) whether the movant has an interest in the transaction; 2) whether the action potentially impairs that interest; and 3) whether the alleged interest is adequately represented by existing parties to the action. *See Building and Const. Trades Dep't., AFL-CIO v. Reich*, 40 F.3d 1275, 1282 (D.C.Cir.1994); *Nuesse v. Camp*, 385 F.2d 694, 699 (D.C.Cir.1967); *Natural Resources Defense Council v. EPA,* 99 F.R.D. 607, 609 (D.D.C.1983) (*"Natural Resources* ").

A. Standing

In this circuit, a party seeking to intervene must establish the same constitutional standing it would have to establish had it commenced the lawsuit in the first place. *Building and Const. Trades*, 40 F.3d at 1282. A party seeking to intervene as a party in a case challenging agency action must establish injury in fact from the agency's action, that the injury was caused by the agency's action, and that the injury will be redressed by the court setting aside the agency's action. *Castro County v. Crespin*, 101 F.3d 121, 126 (D.C.Cir.1996). It would follow that, when a party seeks to intervene as a defendant to uphold what the government has done, it would have to establish that it will be injured in fact by the setting aside of the government's action it seeks to defend, that this injury will have been caused by that invalidation, and the injury would be prevented if the government action is upheld.

The Fund meets these requirements. The Fund consists of four member organizations: the Walking Horse Trainer's Association, the Tennessee Walking Horse Breeders & Exhibitors' Association, the Friends of the Show Horse and the Tennessee Walking Horse National Celebration. Motion to Intervene ("Mot. Intervene"), ¶ 8. Members of the fund therefore train the horse, breed them, and enter them in horse shows and exhibitions. Mot. Intervene, ¶ 9. Some of the Fund's members are also HIOs who operate the DQP programs, programs that are the subject of the Operating Plans. Mot. Intervene at 6. The Operating Plan for detecting and preventing soring directly affects how members of the Fund train the horses, the procedures that will be used to detect soring, and the disqualification of

horses found to be sored. This Plan is, after all, the central document which regulates how they conduct the training of the horses they exhibit and how violations of that regulatory scheme will be detected and punished. The invalidation of the Plan will render nugatory all the efforts the Fund's members have made to date in assisting its creation and will lead to a period of uncertainty during which a new regulatory scheme is created. The Fund's members' training, breeding, and showing of horses will be jeopardized during this regulatory interregnum. Finally, there is a significant potential that the invalidation of the Operating Plan will lead to the promulgation of new regulations which will be more demanding of the Fund's members than the current Operating Plan. In law, as is life, the devil you know is better than the devil you don't. It is not fair for plaintiff to insist that the latter consideration is hypothetical; surely, plaintiff did not bring this lawsuit to lessen the demands on the Fund's members.

I therefore conclude that the Fund has standing to intervene.

B. Interest in the Lawsuit

In *Building and Construction Trades*, the Court of Appeals discussed the requirements for intervention of right under Fed.R.Civ.P. 24(a)(2) and followed that discussion with the indication that the intervenor must establish standing. 40 F.3d at 1282. It would seem, therefore, at first glance that an intervenor must establish standing and the "interest in the litigation" which Fed.R.Civ.P. 24(a)(2) requires. But, it is impossible to conjure a case in which an intervenor would have constitutional standing to intervene but not have a sufficient "interest in the litigation" to justify intervention under Fed.R.Civ.P. 24(a)(2). Indeed, it is interesting how the standing inquiry mirrors the Rule 24 inquiry. For example, it is equally difficult to understand how a party could show that agency action caused or will cause injury, the standing inquiry, and not prove that the interest in the transaction will be impaired by agency action, the Rule 24 inquiry. Perhaps in a jurisdiction which requires the intervenor to show standing, the standing inquiry subsumes the Rule 24 inquiry. It is not, however, necessary to tarry over that problem because this Circuit determines whether a party has a sufficient "interest in the litigation" to justify intervention by the most pragmatic test possible:

> We know of no concise yet comprehensive definition of what constitutes a litigable 'interest' for purposes of standing and intervention under Rule 24(a). One court has recently reverted to the narrow formulation that 'interest' means 'a specific legal or equitable interest in the chose'. *Toles v. United States*, 371 F.2d 784 (10th Cir.1967). We think a more instructive approach is to let our

> construction be guided by the policies behind the 'interest' requirement. We know from the recent amendments to the civil rules that in the intervention area the 'interest' test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.

Nuesse v. Camp, 385 F.2d at 700.

Building on that foundation, the Court of Appeals stated in *Smuck v. Hobson*, 408 F.2d 175, 179-180 (D.C.Cir.1969) that, while the nature of the intervenor's interest in the litigation cannot be ignored, it is more profitable to place primary emphasis on the other provisions of Fed.R.Civ.P. 24(a)(2) which deal with impairment of the interest claimed and the adequacy of the representation of that interest by the existing parties.

By that liberal and forgiving standard, I can easily find that the Fund's participation in the litigation would not harm its efficient proceeding to a final resolution. In my view, the Fund's joining in the briefing of the parties' cross motions for summary judgment will have little or no impact on the time it will take to take to adjudicate those motions. Finally, the participation of the persons most directly affected by the Operating Plan is utterly consistent with the notice and opportunity to be heard concerns that lie at the heart of the due process clause.

C. Impairment of Ability to Protect Interest

In determining whether a movant's interests will be impaired by an action, courts in this circuit look to the "practical consequences" to movant of denying intervention. *See Natural Resources Defense Council v. Costle*, 561 F.2d 904, 909 (D.C.Cir.1977) ("*Costle* "); *Natural Resources Defense Council v. EPA*, 99 F.R.D. 607; Huron Environmental Activist League v. EPA, 917 F.Supp. 34 (D.D.C.1996). Moreover, particularly in suits involving administrative law, courts in this circuit assess, along with impairment, the convenience to the movant of permitting intervention in the present suit as opposed to denying intervention merely because future challenges to agency action remain available. *See Costle* at 909-10 (permitting intervention by rubber and chemical companies seeking participation in settlement agreement even though future avenues of litigation remained open because their involvement "lessend[ed] the need for future litigation to protect their interests."); *Nuesse v. Camp*, 385 F.2d at 700.

Plaintiff argues that the Fund should not be permitted to intervene because this suit does not challenge the USDA's procedures for inspection of sore horses or its authority to improve enforcement with more consistent standards, which might

arguably impair movant's interests. Pl. Opp. at 4. Rather, plaintiff contends, the suit challenges the USDA's "specific decision to continue to employ a defective plan" which plaintiff says has no legal impact on movant. Pl. Opp. at 6. While plaintiff attempts to characterize this suit as merely an issue of delegation, the practical consequences of plaintiff's obtaining the relief they seek is to set aside the Operating Plan proposed for 2001-03. As a result, movant's interest would be practically impaired because it could no longer rely on the current plan, and would have to participate once again in the discussion and comment process used to create an alternative plan.

In this respect, this case is similar to *Natural Resources,* 99 F.R.D. 607, a suit challenging the validity of the EPA's Regulatory Reform Measures, which permitted industry representatives to actively participate in EPA decision making through private conferences. These conferences allegedly influenced the EPA's Registration decisions regarding whether the registration of pesticides should be curtailed or suspended. Intervenors were industry representatives and pesticide manufacturers who participated in the decisional meetings that generated the registration guidelines and therefore had an interest in the procedures plaintiff's hoped to have set aside. The court concluded that movants had a cognizable interest in the litigation, since "[p]laintiff's complaint challenges procedures pursuant to which EPA reached preliminary decisions that the intervenors' pesticide products merited continued registration." 99 F.R.D. at 609.

Like the industry groups in *Natural Resources*, the Funds' members participated in the decision making process and are subject to the resultant agency program that directly impacts the obligations of the Fund's members with respect to the detection of sore horses. As in *Natural Resources*, a resolution favorable to plaintiff's would result in setting aside the program, a result which would eviscerate the HIO's efforts in creating the Plan at issue. As the court in *Natural Resources* indicated, ". . . the intervenor's interest would be practically impaired because they would have to start over again demonstrating to EPA the safety of their pesticide products." *Id.* at 609. The possibility that the USDA program relating to the HIO's duties and responsibilities regarding DQPs would be set aside satisfies the practical impairment element under Rule 24(a). See id.

Furthermore, while an outcome favorable to plaintiff would not impair the Fund's ability to challenge future Operating Plans or alternative guidelines used to set forth HIO duties, the participation of intervenors in this lawsuit who represent the interests of the Walking Horse and Show Horse industries might minimize the

need for future litigation as to these Plans. *See Costle* at 911. This interest in convenience, in addition to intervenor's demonstrated impairment, supports the Fund's intervention.

D. Adequacy of Representation

Under Rule 24(a)(2), a movant who meets the requisite impairment of interests test may intervene unless his interests are "adequately represented" by existing parties. The Supreme Court has held that this burden is "minimal" and an applicant need only show that "representation of his interest 'may be' inadequate." *See Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n. 10, 92 S.Ct. 630, 30 L.Ed.2d 686 (1972); *see also Natural Resources*, 99 F.R.D. at 610.

Plaintiff argues that the Fund's interests are adequately represented by the USDA and APHIS because they have identical interests in asserting that the Operating Plan is lawful. Pl.'s Opp. at 7. However, merely because parties share a general interest in the legality of a program or regulation does not mean their particular interests coincide so that representation by the agency alone is justified. *See Costle* at 912. In defending the Operating Plan, the USDA and APHIS represent a broad spectrum of interests, which includes the general public, groups aimed primarily at animal welfare, and organizations focused on the show horse industry. The intervenors, by contrast, have a more narrow interests and concerns related exclusively to the obligations of those who train and breed horses for show. *Id.* Therefore, while the USDA may have a general interest in defending the Operating Plan at issue, its obligations to interests other than those represented by the Fund may necessarily render its representation of the show horse groups inadequate.

Additionally, budgetary and manpower demands may drive how much time the USDA can devote to this litigation and whether it can settle this case with plaintiffs. The Fund obviously should be a party to those discussions and the expertise of its members may prove most useful and necessary to any such discussions.

III. CONCLUSION

The movant, Show Horse Fund, Inc., has satisfied its burden under Rule 24(a)(2) and shall therefore be permitted to intervene as of right in this action. An order granting their motion will accompanying this Memorandum Opinion.

SO ORDERED.

WILLIAM J. REINHART v. USDA.
No. 01-3283.
2002 WL 1492097 (6th Cir.).
Filed July 10, 2002.

(Cite as: 39 Fed. Appx. 954).

HPA – Late filing – Tolling statutes not reviewable by court.

Petitioner failed to file an appeal to Judicial Officer's (JO) decision in a timely manner under the agency procedures. Although ministerial errors of the clerk's office may have contributed to Petitioner's late appeal filing, the Appeal court does not have authority under F.R. App. P. 26(b)(2) to enlarge or extend administrative rules relating to time for filing requirements even under compelling equitable grounds.

United States Court of Appeals,
Sixth Circuit.

Before CLAY and GILMAN, Circuit Judges; HAYNES, District Judge.*

OPINION

PER CURIAM.

William J. Reinhart appeals from an order entered by the Secretary of the United States Department of Agriculture (USDA) that imposes civil penalties against him for violating the Horse Protection Act (HPA). After concluding that Reinhart violated the HPA by "soring" his Tennessee Walking Horse in order to enhance the horse's performance at an exhibition, the Secretary fined Reinhart $2,000 and barred him from participating in any horse exhibition for a period of five years. The Secretary subsequently denied Reinhart's petition for reconsideration of the decision. Reinhart now appeals, contending that the Secretary's decision is not supported by substantial evidence and that the HPA is unconstitutional. For the reasons set forth below, we DISMISS this appeal as untimely filed.

A party has the right to judicial review of a final administrative order imposing civil penalties pursuant to the HPA. 15 U.S.C. § 1825(b)(2). To exercise this right, the party must file a notice of appeal in the United States Court of Appeals for the circuit in which he resides or has his place of business within 30 days from the date

*District Judge William J. Haynes, Jr., United States District Court for the Middle District of Tennessee, sitting by designation.

on which the final administrative order was issued. *Id.* ; *United States Dep't of Agric. v. Kelly*, 38 F.3d 999, 1002 (8th Cir.1994) (holding that the time limit for appealing a HPA penalty begins on the date that the final order is issued and docketed).

In the present case, the Secretary issued a final order imposing penalties against Reinhart under the HPA on January 23, 2001, the date on which Reinhart's petition for reconsideration was denied. The 30-day period for filing a notice of appeal therefore began to run on that date. 7 C.F.R.§ 1.146(b) (providing that "the time for judicial review shall begin to run upon the filing of such final action on the petition [for rehearing]"). Reinhart filed his notice of appeal with this court on March 23, 2001, nearly 60 days after the final order was issued. His notice of appeal was thus untimely.

The USDA, however, concedes that a clerical error on its part contributed to Reinhart's delay in filing his notice of appeal. Specifically, the USDA's Office of the Hearing Clerk mistakenly sent Reinhart a decision from a totally unrelated case rather than the order denying his petition for reconsideration. The record does not indicate when Reinhart received this decision, but the USDA acknowledges that Reinhart notified it of the mistake and that the decision from his case was then sent out to him on February 15, 2001. Reinhart did not receive this order until February 26, 2001, 34 days after the order was issued and 4 days after the time period for appealing that order had expired.

Despite the equities that might otherwise allow Reinhart to pursue his appeal, a statutory provision that sets the time limit for seeking review of an administrative order is "mandatory and jurisdictional" and "not subject to equitable tolling." *Stone v. I.N.S.*, 514 U.S. 386, 405, 115 S.Ct. 1537, 131 L.Ed.2d 465 (1995) (internal quotations omitted) (holding that the time period for appealing a deportation order is not tolled by the filing of a motion for reconsideration); Fed. R.App. P. 26(b)(2) (providing that a federal court of appeals "may not extend the time to file . . . a notice of appeal from or a petition to . . . otherwise review an order of an administrative agency . . ."). Such a time limit must be enforced with "strict fidelity" to its terms. *Stone*, 514 U.S. at 405; *Kelly*, 38 F.3d at 1003 (recognizing that the time limit for seeking review of an order imposing penalties pursuant to the HPA "is a jurisdictional requirement that cannot be modified or waived . . ."). An appeal filed beyond the applicable time limit must therefore be dismissed even "in the face of apparent injustice or an administrative agency's obvious misapplication or violation of substantive law." *Brown v. Dir., Office of Workers' Comp. Programs*, 864 F.2d 120, 124 (11th Cir.1989) (holding that the time period for filing an appeal

of an administrative order under the Black Lung Benefits Act is not subject to equitable tolling).

The only exception that allows this court to enlarge the time limit for filing a notice of appeal is the "unique circumstances" doctrine, a doctrine which applies "where a party has performed an act which, if properly done, would postpone the deadline for filing his appeal and has received specific assurances by a judicial officer that this act has been properly done." *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 179, 109 S.Ct. 987, 103 L.Ed.2d 146 (1989) (holding that the unique-circumstances doctrine did not apply where the party that had filed a late notice of appeal never claimed that a judicial officer made any representations regarding the tolling of the applicable time period). Because Reinhart never received any assurance from a judicial officer that the time limit for filing his notice of appeal had been tolled, the unique-circumstances doctrine does not apply to the present case.

Moreover, the mailing error on the part of the USDA does not completely excuse Reinhart's untimely notice of appeal, because

> [p]arties have an affirmative duty to monitor the dockets to inform themselves of the entry of orders they may wish to appeal . . .. Therefore, the failure of a court clerk to give notice of entry of an order is not a ground, by itself, to warrant finding an otherwise untimely appeal to be timely.

In re *Delaney*, 29 F.3d 516, 518 (9th Cir.1994) (internal quotation marks and citation omitted); *Polylok Corp. v. Manning*, 793 F.2d 1318, 1320 (D.C.Cir.1986) (holding that the time period for filing an notice of appeal under Rule 4 of the Federal Rules of Appellate Procedure "may not be extended on account of the appellant's lack of notice") (citing Fed.R.Civ.P. 77(d)). Indeed, Reinhart received a decision in the unrelated case that was mailed to him in error well before the period for filing his notice of appeal had expired. His receipt of this decision gave him at least some indication that action might have been taken in his case. Nevertheless, Reinhart neither checked the docket nor called the clerk to see if the Secretary had ruled on his petition for reconsideration.

We therefore must conclude that Reinhart's failure to file a timely notice of appeal prevents us from exercising jurisdiction to resolve this case on the merits. Reinhart maintains, however, that we should vacate the Secretary's order even if we decline to exercise jurisdiction, because the USDA's mailing error allegedly deprived him of due process. He also requests that we award him damages in excess of $100,000 based upon the alleged constitutional violation. But when this court is presented with an untimely notice of appeal, " 'the only function remaining

to the court is that of announcing the fact and dismissing the cause.' " *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) (recognizing that a court without jurisdiction lacks authority to issue any judicial decision) (quoting *Ex Parte McCardle,* 74 U.S. (7 Wall.) 506, 514, 19 L.Ed. 264 (1868)).

We are mindful that, in light of the USDA's mailing error, the dismissal of Reinhart's appeal as untimely appears to be a rather harsh result. Whether equitable considerations should be taken into account when determining the timeliness of a notice of appeal, however, is beyond our power to decide. Only the Supreme Court or Congress can alter the current rule that prohibits equitable tolling under the circumstances of this case.

Finally, if it is of any consolation to Reinhart, we would not have been inclined to set aside the Secretary's order even if we had jurisdiction to hear his appeal. The Secretary's finding that Reinhart violated the HPA appears to be supported by substantial evidence, particularly in light of the fact that this court has specifically held that a finding of soreness for the purposes of the HPA may be based solely upon the results of palpation. *Bobo v. U.S. Dep't of Agric.*, 52 F.3d 1406, 1413 (6th Cir.1995). Reinhart also challenges the constitutionality of the HPA, but existing precedent would have left us hard-pressed to conclude that Congress exceeded the scope of its power under the Commerce Clause in enacting the HPA. In any event, the merits of his case are not properly before us in light of the untimely appeal.

Based on all of the above, we DISMISS this appeal for lack of jurisdiction.

AMERICAN HORSE PROTECTION ASSOCIATION, INC. v. USDA.
Civil Action 01-00028 (HHK).
Filed July 9, 2002.

United States District Court
District of Columbia

Henry H. Kennedy, Jr.
United States District Judge

HPA –Sub-delegation – Unlawful delegation – Rule making – Arbitrary and capricious, when not.

Petitioner, a non-profit organization, brought a suit for injunction and declaratory relief to prohibit the implementation of the “2001 Plan” concerning the Horse Protection Act (HPA). The court found

that the agency had not unlawfully sub-delegated its statutory authority to a private organization, the Horse Industry Organization (HIO), in the enforcement of the HPA regulations since the agency had expressly maintained its right to oversee, intervene and pursue an federal independent action if the HIO did not properly inspect or enforce the HPA. The court found that the agency had not acted in an arbitrary and capricious manner when it adopted the "2001 Plan" even though it was specifically aware of the shortcomings of the plan because the agency had articulated the facts it considered and the choices it made - all in furtherance of enforcing the congressional objectives.

MEMORANDUM OPINION

Plaintiff, the American Horse Protection Association, brings this action seeking declaratory and injunctive relief pursuant to the Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq.* Plaintiff challenges the decision of the United States Department of Agriculture ("Department" or "Agency") to enter into an arrangement with private parties wherein those parties participate in the enforcement of the Horse Protection Act ("HPA" or "Act"), 15 U.S.C. §§ 1821-1831[1] Plaintiff asserts that the Agency's decision to allow private parties to exercise initial enforcement authority under the Act constitutes an unlawful subdelegation of the Agency's statutory responsibility.[2] Plaintiff also contends that the Agency's decision to enter into this arrangement despite specific knowledge of its shortcomings is arbitrary, capricious and an abuse of discretion. Before the court are the parties' cross-motions for summary judgment. Upon consideration of the parties' motions and the respective oppositions thereto, the court concludes that defendants' motion must be granted and plaintiff s motion must be denied.

I. FACTUAL AND STATUTORY BACKGROUND

Many individuals breed and train horses, including a particular a type of horse known as the Tennessee Walking Horse, for the purpose of entering them in various horse shows. One of the criteria upon which a show horse is judged is the nature of its gait. The high-stepped, animated gait known as the "big lick" is highly prized because it often receives high ratings. There are two main ways to encourage horses to walk with a "big lick." One is through a careful and conscientious process of training and care for the horse over a long period of time. The other is by inflicting

[1]The Show Horse Support Fund, a group representing organizations whose members train and breed horses for the purpose of entering them into horse shows, was permitted to intervene and align as a defendant.

[2]The parties refer to this issue as one of unlawful delegation. Delegation typically refers to Congress's grant of authority to an agency. An agency's decision to further transfer that power to an outside body is known as subdelegation. For convenience, the court will refer to both transfers of authority as "delegation."

severe and prolonged pain to a horse's lower forelegs. The intense pain in the forelegs forces the horse to exaggerate its gait by shifting its weight to its hind legs and lengthening its stride. This practice is referred to as "horse soring."

Horse soring was considered so cruel, and became so prevalent within the walking horse community, that Congress outlawed the practice in 1970 by enacting the Horse Protection Act. *See* Horse Protection Act, 84 Stat. 1404 (1970) (codified at 15 U.S.C. §§ 1821-1831).[3] In the HPA, Congress declared that the "soring of horses is cruel and inhumane." *See* 15 U.S.C. § 1822. Those guilty of soring horses are subject to civil sanctions of fines and suspensions from future horse shows, as well as criminal penalties including fines and imprisonment of up to one year. *See* 15 U.S.C. § 1825.

The act establishes a multi-tiered structure to combat soring. First, it places liability on the individuals who sore horses by outlawing the showing, exhibition, sale or transport of such horses. *See* 15 U.S.C. § 1824(1-2). Second, it places liability on horse owners for any soring done to their horses. *See* 15 U.S.C. § 1824(2)(D). Third, the statute places responsibility on the managers of horse shows to ensure that participants do not enter sore horses. The Act requires managers to disqualify any sore horses from being shown or exhibited, and requires them to prohibit their sale or auction. *See* 15 U.S.C. § 1823(a-b). If managers fail to disqualify sore horses, they too are liable under the Act. *See* 15 U.S.C. § 1824(3-6).

Congress envisioned that both public and private horse inspectors would monitor compliance with the Act. The Act authorizes "Veterinary Medical Officers" (VMOs), who are Department inspectors, to inspect show horses for evidence of soring. *See* 15 U.S.C. § 1823(e). In addition, as part of the 1976 Amendments to the HPA, *see* Horse Protection Act Amendments of 1976, 90 Stat. 915 (1976), Congress allowed horse show management to hire private inspectors, known as "Designated Qualified Persons" (DQPs), to evaluate horses at their shows. While the Act does not require horse show managers to hire DQPs, it directs the Agency to promulgate regulations governing their licensing and hiring. *See* 15 U.S.C. § 1823(c); 9 C.F.R. § 11.7 (establishing standards for DQPs). Management organizations utilizing DQPs are not liable for sore horses entered in their shows if the DQPs fail to detect that they are sore, while those who do not hire DQPs are liable. *See* 15 U.S.C. § 1824(4-6). Once violations are reported, either by VMOs or DQPs, the Agency may bring civil enforcement proceedings to punish violators of the Act. *See* 15 U.S.C. § 1825(b). Additionally, the Secretary of Agriculture can, at her discretion, refer cases to the Department of Justice for criminal prosecution. *See 15 U.S.C.* § 1826.

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[3]Six years later, Congress realized that the original Act had not succeeded in eliminating the practice of horse soring and strengthened the act through a series of amendments. *See* Horse Protection Act Amendments of 1976, 90 Stat. 915(1976).

More than twenty years after Congress strengthened the Act through the 1976 Amendments, the Department determined that soring continued to be a problem and issued the Horse Protection Strategic Plan in 1997 ("Strategic Plan"). *See* 62 Fed. Reg. 63,510 (Dec. 1, 1997) in an effort to increase public-private cooperation in eliminating the practice. Following promulgation of the Strategic Plan, the Agency released an operating plan for calendar year 1999 designed to fulfill the Strategic Plan's goals. The 1999 plan was signed by the eight major Horse Industry Organizations (HIOs), which oversee a significant proportion of the nation's horse shows. In exchange for the HIOs agreeing to abide by the standards set forth in the 1999 plan, the Agency gave the HlOs initial enforcement responsibility under the Act. Under the 1999 plan, if a DQP discovered a violation, and if the HIO imposed the proper punishment for the violation as laid out in the plan, then the Agency agreed not to institute an enforcement proceeding. The punishments detailed in the plan were less severe than the maximum punishments allowed under the statute. *See* Operating Plan for the 1999 Horse Show Season [hereinafter 1999 Plan], at 22 (providing a schedule of punishments for various violations). In cases where a VMO and a DQP disagreed over whether a horse was sore, the plan established a conflict resolution procedure. Under that procedure, if both sides ultimately agreed that the horse was sore and the HIO imposed the proper punishment as defined in the plan, the agency agreed not to institute enforcement proceedings. If the DQP and the VMO failed to resolve their dispute, however, the Agency reserved the right to undertake an enforcement action.

In calendar year 2000, the Department proposed a new plan that altered the conflict resolution procedures and limited the enforcement authority of HlOs visa-vis the Agency. While some HIOs signed this plan, others balked at the changes and refused to sign. As a result, the Agency eventually gave those that refused to sign the option of signing a "2000-B Plan" that was the practical equivalent of the 1999 plan.

At the end of 2000, the Department proposed a three year plan that would extend through 2003. *See* APHIS Horse Protection Operating Plan 2001-2003 [hereinafter 2001 Plan]. All eight major HIOs signed onto this plan. The 2001 plan is very similar to the 1999 plan. Specifically, the plan again gives the HIO signatories "initial enforcement responsibility" under the Act. *See id.,* at 2. In addition, in situations where both a DQP and a VMO agree that a violation has occurred, the Agency agrees to "close its files on the case" once it determines that the HIO applied and enforced the proper penalty under the plan. Id at 26 n.27. In situations where a DQP and a VMO disagree about whether a violation occurred, the Agency consents to hold its investigation in abeyance while it and the HIO attempt to work out any differences through informal conflict resolution procedures. *See id.* at 25 n.25. If the two sides ultimately reach agreement and the HIO imposes

the proper penalty, then the Agency will not take further action. Thus, under the 2001 plan, the only circumstances in which the Agency will bring a civil enforcement action are (1) when the VMO and the DQP agree that there is a violation, but the HIO fails to apply or enforce the appropriate punishment described in the plan, (2) when the VMO and the HIO continue to dispute whether or not a violation has occurred even after submitting to conflict resolution procedures, or (3) when the Agency determines that an HIO is either not abiding by the terms of the plan or not fulfilling the purposes of the HPA.

Plaintiff opposed the 2001 Plan, and during the drafting process, communicated its position that the Agency should not cede so much authority to private entities. Once the plan became effective in January, 2001, plaintiff filed suit in this court seeking to bar its implementation.

II. ANALYSIS

Plaintiff challenges the validity of the Agency's 2001 Plan on two grounds. First, plaintiff argues that assignment of "initial enforcement responsibility" to private HlOs, whereby the Agency consents not to bring an enforcement action against a violator if the HIO imposes an appropriate punishment, constitutes an unlawful delegation of enforcement authority to a private party. Second, plaintiff argues that the Agency's decision to adopt the same flawed conflict resolution procedures in 2001 that it used. in 1999 and 2000 was arbitrary, capricious and an abuse of discretion. Each argument is addressed in turn.[4]

A. Unlawful Delegation

Plaintiff argues that the 2001 Plan, by giving "initial enforcement responsibility" to private HlOs, unlawfully delegates power from the Agency to HIOs in contravention of the Horse Protection Act. Plaintiff maintains that the Agency's agreement not to bring an enforcement action when an HIO finds a violation and imposes punishment enables private parties to bring enforcement actions in place of the government. Nowhere, plaintiff argues, does the statute authorize private parties to enforce the Act instead of the Agency. Plaintiff also argues that the plan unlawfully delegates authority to HIOs by allowing them to mete out punishments that can be dispensed only by the Agency. The Agency rejoins that the plan does not unlawfully delegate authority because the Agency retains ultimate oversight over

[4]The Agency also contests the justiciability of this action. The Agency argues that plaintiff lacks standing and that its claim is not ripe for review. The Agency also contends that this action is not subject to judicial review because enforcement decisions are committed to agency discretion by law. The Agency's justiciability arguments are without merit.

any enforcement action taken by HlOs. The court agrees with the Agency.

Plaintiff first contends that delegations to private parties are invalid unless explicitly authorized in the statute. Because the HPA does not explicitly mention delegation to private entities, plaintiff argues that the plain language of the Act prohibits the delegations allowed under the 2001 plan. Plaintiff is mistaken. "The relevant inquiry in any subdelegation challenge is whether Congress intended to permit the delegatee to subdelegate the authority conferred by Congress." *United States v. Widdowson,* 916 F.2d 587, 592 (10th Cir. 1990). The general rule, however, is that delegations need not be expressly authorized by statute in order to be lawful. *See, e.g., Tabor v. Joint Bd for the Enrollment of Actuaries,* 566 F.2d 705, 708 n.5 (D.C. Cir. 1977); *see also Fleming v. Mohawk Wrecking & Lumber Co.,* 331 U.S. 111, 121 (1947) (finding delegation appropriate in the absence of express authorization).

The cases upon which plaintiff relies in support of its position that Congress must explicitly authorize delegations to private parties, *Halverson v. Slater,* 129 F.3d 180 (D.C. Cir. 1997), and *Shook v. District of Columbia,* 132 F-3d 775 (1998), are inapposite. In *Halverson,* the court determined that because the text of the Great Lakes Pilotage Act authorized the Secretary of the Navy to delegate authority to the Coast Guard, it precluded delegation to anyone else. *See Halverson,* 129 F.3d at 185-86. Similarly, the statute at issue in *Shook,* the D.C. Home Rule Act, authorized the D.C. Board of Education to delegate authority to the School Superintendent. *See Shook,* 132 F.3d at 782. The court held that the plain language of the Act prohibited delegation to anyone other than the superintendent. *See id* Thus, in both cases, the courts relied on the canon of *expressio unius* in finding the delegations unlawful.

Here, however, the canon of *expressio unius* does not apply because the HPA does not expressly authorize delegation to specific entities. Thus, there is no implication that Congress intended to prohibit delegation to anyone not mentioned in the statute. *See, e.g., United States v. Mango,* 199 F.3d 85, 90 (2d Cir. 1999) (declining to apply *expressio unius* to an agency delegation when the statute did not expressly address mention delegation); *cf Shook,* 132 F.3d at 782 (warning that *expressio unius* should be applied cautiously because its relevance is entirely context-dependent).[5] Thus, the text of the HPA does not forbid Agency delegations..

Plaintiff next argues that even if the plain language of the statue does not prohibit delegation to a private party, the law generally prohibits private delegations

[5]Plaintiff s reliance on *American Fed'n of Gov't Employees (AFGE) v.Glickman is* equally inappropriate. In *AFGE,* the D.C. Circuit found the Department of Agriculture's delegation of inspection authority to a private party unlawful because the statute expressly required that inspections be carried out by government employees. *See American Fed'n of Gov't Employees v. Glickman,* 215 F.3d 7, 10 (D.C. Cir. 2000). The Horse Protection Act, by contrast, contains no such directive.

of the type contained in the 2001 Plan. This argument also is not persuasive. To be sure, plaintiff is correct that the law generally frowns on delegations from agencies to private actors. *See, e.g., Perot v. Federal Election Comm'n,* 97 F.3d 553, 559 (D.C. Cir. 1996) ("We agree with the general proposition that when Congress has specifically vested an agency with the authority to administer a statute, it may not shift that responsibility to a private actor . . . "); *National Ass'n of Regulatory Util. Comm'rs v.* FCC, 737 F.2d 1095, 1143 & n..41 (D.C. Cir. 1984). Moreover, delegations to a private party are particularly suspect when the private actor's objectivity may be questioned due to a conflict of interest. *See, e.g., Sierra Club v. Sigler,* 695 F.2d 957, 963 n.3 (5th Cir. 1983); *National Park and Conservation Assn v. Stanton,* 54 F. Supp. 2d 7, 18 (D.D.C. 1999). Still, an agency has not engaged in unlawful delegation if it retains "final reviewing authority" over the private party's actions. *Stanton,* 54 F. Supp. 2d at 19 (citing *United Black Fund, Inc. v. Hampton,* 352 F. Supp. 898, 904 (D.D.C. 1972); *see also Assiniboine and Sioux Tribes v. Bd of Oil & Gas Conservation,* 782 F.2d 782, 795 (9th Cir. 1986) (holding that the agency must engage in "meaningful independent review" of private action).

Because the Agency preserves final authority over the actions of HIOs, the 2001 Plan does not constitute an unlawful delegation. Although the plan specifies that the Agency "will close its files on the case" once an HIO imposes an appropriate punishment under the plan, it will only do so "[i]f and when the Department determines that the HIO has properly applied and enforced the penalties under this Operating Plan." 2001 Plan at 26 n.27. Each time an HIO imposes punishment, the Department must engage in a meaningful review to ensure that the HIO has both chosen and imposed the proper punishment. Thus, the Agency preserves final authority over both the documentation of violations by HlOs and over the punishments they impose. Additionally, the plan indicates that the Department "intends to monitor closely the identification of violations, and the assessment of penalties by HlOs, and to take appropriate steps to address cases of HIO noncompliance." *See id* at 4 n.8.[6] Thus, according to the plan, if at any time the Agency determines that the HIO is not taking steps to detect and penalize violations, it reserves the right to institute its own enforcement proceedings.

[6]The court does not address the situation in which an agency reserves for itself final reviewing authority over a delegated party, but in reality merely rubber stamps approval of private action without engaging in any meaningful review. The court notes that other courts have expressed skepticism over an agency giving wholesale approval of private action without exercising actual oversight. *See, e.g., Sigler,* 695 F.2d at 957 n.3 (noting that "rubberstamping of a consultant prepared" Environmental Impact Statement does not constitute acceptable oversight); *Assiniboine,* 792 F.2d at 794-95 (holding that proof that an agency did not independently review the actions of a delegated party would demonstrate unlawful delegation). Because plaintiff lodges a facial challenge to the 2001Plan, there is no evidence in the record regarding whether the Agency has engaged in meaningful review.

The Agency also retains final authority in cases submitted for conflict resolution. A footnote to the plan discussing conflict resolution procedures states that if there turns out to be no real conflict between the DQP and the VMO, then the Agency may institute enforcement actions if the HIO fails to impose the proper punishment. *See id* at 25 n.25. Thus, if HIOs are manufacturing conflicts for the purpose of delaying punishment, the Agency can bypass the conflict resolution process and move forward with its own enforcement proceeding. The plan further indicates that the Agency "has the inherent authority to pursue a federal case whenever it determines the purposes of the HPA have not been fulfilled." *See id.; see also* id at 4 n.8 ("The Department retains the authority to initiate enforcement proceedings against any violator when it feels such action is necessary to fulfill the purposes of the HPA."). Finally, the plan states explicitly that it does not limit the Agency's enforcement authority in any way. *See id. at 2* n. I ("It is not the purpose or intent of this Operating Plan to limit in any way the Secretary's authority. . . . This authority can only be curtailed or removed by an act of Congress, and not by this Plan."). Because the Agency has preserved the power to evaluate the actions of HIOs under the terms of the plan, it has not unlawfully delegated power to private parties.

B. Whether the Agency's Adoption of the 2001 Plan is Arbitrary and Capricious

Plaintiff asserts that the Agency knew that the 1999 plan and 2000-B plans were flawed but failed to correct those flaws. Instead it crafted a Plan, the 2001 plan, that was virtually identical to its deficient predecessors. This, plaintiff asserts, was arbitrary and capricious. Plaintiff s position is without merit.

Under the APA, a reviewing court shall set aside agency action it finds to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). An agency rule is arbitrary and capricious if [-]

> the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfts. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

While the court's scope of review is narrow, as it "is not empowered to

substitute its judgment for that of the agency," the court should still conduct "a thorough, probing, in-depth review" of the agency's decision. *Citizens to Preserve Overton Park,* 401 U.S. at 415-16. Agency actions are presumed to be valid. *See Ethyl Corp. v. EPA,* 541 F.2d 1, 31 (D.C. Cir.) *(en banc), cert. denied,* 426 U.S. 941 (1976). As long as the agency considers the relevant factors and can articulate a rational connection between the facts found and the choices made, then its decision will be upheld. *See State Farm,* 463 U.S. at 43; *Marsh v. Oregon Natural Res. Council,* 460 U.S. 360, 378 (1989) (holding that agency action will not be reversed absent a clear error of judgment).

Plaintiff first argues that the Agency was aware that HI0s used the conflict resolution process as a delay tactic to avoid imposing punishments, or Agency enforcement actions, but that the Agency decided not to change it. It is true that the Agency realized that the conflict process was misused. In the Administrative Record, the Agency notes that HlOs often created artificial conflicts over minor issues in situations where the DQP and the VMO both agreed that a violation existed. Plaintiff asserts that the HI0s created delay by invoking the conflict resolution process, because no punishment would be imposed until the process had run through to completion.

Although plaintiff understandably is concerned about abuse of the conflict resolution process, the 2001 plan appears to reasonably addresses that concern. The plan provides that "[i]f during the Conflict Resolution process, it becomes apparent that the findings of the VMO and DQP are the same or similar and result in the same HPA violation, the process will cease." 2001 plan, at 25 n.25. The plan also goes on to state that after the process ceases, if the HIO fails to apply the proper punishment, the Agency will pursue a federal case. *See id* Thus, under the 2001 Plan, the Agency can combat the HIO's delay tactics by instituting its own enforcement proceedings.

Plaintiff next argues that the Agency's decision to close its files on certain cases will allow violators of the Act to escape punishment. During 1999 and 2000, HlOs would agree to impose punishments as outlined in the operating plans when violations were documented. Upon doing so, the Agency would close its file on the case. Plaintiff asserts that HlOs then would typically overturn their self-imposed punishments through their own internal appeal processes. As a result, in many cases no punishment was imposed by either the HIO or the Agency because by the time the punishments were overturned by the HIO, the Agency had already closed its file. Plaintiff argues that the 2001 plan will result in under-punishment of violators for the same reasons.

Plaintiff s contention cannot be sustained because the 2001 Plan again appears to appropriately respond to plaintiff s criticisms. Under the plan, the Agency will not close its files on any case until it determines that the HIO has both "applied *and*

enforced" the penalties under the plan. 2001 Plan, at 26 n.27 (emphasis added). Thus, if the HIO overturns a DQP's finding of a violation, then according to the plan, the Agency will not close its files on the case.

Plaintiff argues finally that the Agency should not have stuck with its flawed enforcement strategy in light of its knowledge that many HlOs were not abiding by the terms of the operating plans. For example, plaintiff points out that during 1999 and 2000, the Agency was aware that HlOs were not detecting and documenting violations of the Act, were not properly applying the Agency's standards as to what constitutes a violation of the Act, and were not imposing the proper penalty when they did find a violation. Given the HlOs' failure to abide by the plan, plaintiff alleges that the Agency should not have continued to delegate authority to them.

Although plaintiff's allegations regarding the HIO's competence and effectiveness in detecting and documenting violations may be true, they do not demonstrate any particular fault of the plan. They show only that HlOs are not complying with the plan's terms. As the plan makes painfully clear, the Agency need not accede to private enforcement actions when the HIOs are not following the plan or are not fulfilling the purposes of the statute. The Agency would still be able to launch its own enforcement proceedings against violators when HI0s do not follow the plan's requirements. Plaintiff s dispute here is not with the terms of the plan, but with whether or not the Agency and the HI0s are actually following the plan. This argument does not implicate whether the plan itself is flawed.

In rejecting plaintiff s argument that the 2001 Plan is arbitrary and capricious, the court is guided by the Supreme Court's decision in *Heckler v. Chaney*, 470 U.S. 821, 832 (1985). In *Chaney,* the Supreme Court held that agency enforcement decisions are presumptively unreviewable because an Agency's decision whether or not to initiate an enforcement proceeding requires it to balance a number of factors - the chance of success, consistency with agency policy, and the allocation of scarce resources - which are matters of Agency expertise. *See Chaney*, 470 U.S. at 831-32. Although *Chaney,* which addressed whether courts have jurisdiction over agency non-enforcement decisions, does not preclude judicial review in this case, "for the purposes of determining the reasonableness of [agency action], the policies underlying *Chaney* retain persuasive force." *Shell Oil Co. v. EPA,* 950 F.2d 741, 764 (D.C. Cir. 1991).

In deciding whether to adopt the 2001 plan and in deciding how to best enforce the HPA, the Agency must establish the same enforcement priorities that the *Chaney* Court concluded should not be subject to judicial scrutiny. *See Chaney,* 470 U.S. at 831-32. As the Agency points out, after carefully reviewing the Act for several years, it concluded that given its budgetary constraints and the inability of

government inspectors to attend the vast majority of horse shows,[7] cooperation with private HI0s was the best way to maximize enforcement of the Act. According to the Agency, if the HI0s did not agree to a plan, the overall number of violations might increase, because HI0s might be less inclined to utilize DQPs, and because HI0s would not be bound to impose penalties as severe as those contained in the 2001 plan. Given the refusal of several HI0s to sign onto proposed plans that deviated from the 2001 plan, the Agency ultimately determined that a less-than-perfect plan was better than no plan at all. Additionally, the Agency calculated that giving HI0s initial enforcement authority would allow it to devote its limited resources toward increasing its inspections at shows that are not affiliated with an HIO. Because an Agency's determination of its enforcement priorities "often involves a complicated balancing of a number of factors which are peculiarly within [the agency's] expertise," *Chaney,* 470 U.S. at 83 1, the court cannot say that the Agency's decision to adopt the enforcement scheme laid out in the 2001 Plan is unreasonable.

III. CONCLUSION

For the foregoing reasons, defendants' motion for summary judgment must be granted and plaintiff s motion for summary judgment must be denied.

IV. ORDER*

Pursuant to Fed R. Civ. P. 58 and for the reasons stated by the court in its memorandum opinion docketed this same day, it is this 9th day of July, 2002, hereby

ORDERED that JUDGEMENT be entered in favor of defendants; and its is further

ORDERED that the complaint in this case is DISMISSED.

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[7]In 1999, Agency inspectors only attended 12.5% of all shows, sales, auctions and exhibitions where DQPs were also present and only inspected 20% of the horses inspected by DQPs. In addition, the Agency only attended eight "unaffiliated" shows, which are shows not operated by one of the eight major HI0s.

*The Court's Order was issued as a separate Document but is included here as Part IV here for clarity and continuity – EDITOR

PLANT PROTECTION ACT

COURT DECISIONS

INTERCITRUS, IBERTRADE COMMERCIAL CORP. AND LGS SPECIALITY SALES, LTD., v. USDA.
No. CIV.A. 02-1061.
Filed August 13, 2002.

(Cite as: 2002 WL 1870467 (E.D.Pa.)).

PPA – Preliminary injunction – Preclearance inspection – Arbitrary and capricious, when not – APA – Equal protection – Breach of contract, not actionable alone – Least drastic action.

Plaintiff seeks a preliminary injunction to vacate the order suspending the importation of Clementines from Spain. APHIS inspectors had detected the presence of live Medfly larva even after the prescribed refrigerated oceanic shipment and withdrew its pre-clearance inspectors in derogation of a written importation agreement with Spain. Court assessed four criteria to be evaluated to determine success of a request for preliminary injunction and cited *Nutrasweet Co. v. Vita-Mar Enterprises, Inc.* 176 F. 3rd 151. Faced with a potential of an agriculture disaster of unintended release of adult Medflies from imported Spanish Clementines, the Secretary took the "least drastic" action to reroute Spanish Clementines which were already offloaded to northern states where a local Medfly infestation would not be expected to result. After a sharp increase in Medfly sitings in Spanish Clementines, the Secretary banned further importation of Spanish Clementines and withdrew her inspectors from the preclearance program in Spain. The petitioners proposed "less drastic" measures of lengthening of the time the fruit would be held in refrigerator ship's holds. The secretary's experts did not agree that increasing the duration of the refrigeration would be a total solution to the infestation. The Secretary was not required to gamble with vitality of American agriculture and was not required to expend time and resources to conduct an analysis of the costs of mitigating with the risks associated with each possible option. An agency's decision is entitled to presumption of regularity. A court may not substitute its own judgement or weigh the contrary views of experts to access which may be more persuasive. An agency is entitled to select any reasonable methodology and to resolve conflicts in expert opinion using best reasoned judgement based on evidence before it. Petitioner was not denied equal protection with others similarly situated, since Petitioner's comparison of less favorable treatment than South American Clementine shippers with infestations of the less destructive Mexican fruit fly (Mexfly) was not soundly reasoned. Even in the case of other middle eastern shippers, there was no evidence of a Medfly infestation in their produce.

United States District Court, E.D. Pennsylvania.

MEMORANDUM

WALDMAN, J.

I. *Introduction*

Plaintiffs are involved in the business of exporting clementines from Spain to the United States for distribution throughout the country. They contend that defendant's order of December 5, 2001, reaffirmed on December 26, 2001, suspending importation of Spanish clementines after the reported detection of live Medfly larvae in clementines shipped from Spain was arbitrary, capricious and contrary to law, particularly the Plant Protection Act ("PPA"), 7 U.S.C. § 7701 *et seq*.

Plaintiffs seek an order vacating the decision to suspend importation under the Administrative Procedures Act ("APA"). They seek declaratory relief and a preliminary injunction against enforcement of the suspension order to permit the importation and distribution of Spanish clementines within 33 states. They also assert a claim for breach of contract for defendant's withdrawal of inspectors from Spain following the suspension which plaintiffs allege was in derogation of the Spain Citrus Preclearance Program Work Plan to which defendant and plaintiff Ibertrade were signatories.

The administrative record has been produced. The parties have filed cross-motions for summary judgment.

II. *Applicable Legal Standards*

In addressing a request for a preliminary injunction, a court assesses whether there is a reasonable probability the movant will succeed on the merits; whether denial of relief will result in irreparable harm to the movant; whether granting relief will result in greater harm to the non-movant; and, whether granting relief would be in the public interest. *See ACLU v. Reno,* 217 F.3d 162, 172 (3d Cir.2000). The movant bears the burden of demonstrating each of these elements. *See Adams v. Freedom Forge Corp.,* 204 F.3d 475, 486 (3d Cir.2000). All four factors should favor a preliminary injunction before such exceptional relief is granted. *See Nutrasweet Co. v. Vit-Mar Enterprises, Inc.,* 176 F.3d 151, 153 (3d Cir.1999).

As a practical matter, a determination regarding likelihood of success in the context of an APA claim will often effectively resolve the merits of the underlying claim as well. This is because an APA claim is resolved on a review of the administrative record, *see* 5 U.S.C. § 706, and the court must generally review that record to resolve conscientiously the request for injunctive relief. Thus, when the request for injunctive relief can be resolved, the case will generally be ready for

disposition on the merits.[1]

There are generally no genuine issues of material fact in an APA case. *See Clairton Sportsmen's Club v. Pennsylvania Turnpike Comm'n,* 882 F.Supp. 455, 463 (W.D.Pa.1995). As a practical matter, "when a plaintiff who has no right to a trial de novo brings an action to review an administrative record which is before the reviewing court, the case is ripe for summary disposition, for whether the order is supported by sufficient evidence, under the applicable statutory standard, or is otherwise legally assailable, involve matters of law." *Bank of Commerce of Laredo v. City Nat'l Bank of Laredo,* 484 F.2d 284, 289 (5th Cir.1973).

Under the APA, "[t]he reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). An agency decision "is entitled to a presumption of regularity." *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 415, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971). " [T]he court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id.* at 416. A choice of action made by an agency upon consideration of the relevant factors and rationally related to the facts found is not arbitrary or capricious. *See Baltimore Gas and Elec. Co. v. National Res. Def. Council, Inc.,* 462 U.S. 87, 105, 103 S.Ct. 2246, 76 L.Ed.2d 437 (1983).

While the "inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one." *Id.* A court may not substitute its own judgment for that of the agency. *See Fertilizer Inst. v. Browner,* 163 F.3d 774, 777 (3d Cir.1998).

The court's review is limited to the whole administrative record before the relevant agency at the time of its decision. *See* 5 U.S.C. § 706; *Overton Park,* 401 U.S. at 420; *Higgins v. Kelly,* 574 F.2d 789, 792-94 (3d Cir.1978); *Twiggs v. U.S. Small Bus. Admin.,* 541 F.2d 150, 152-53 (3d Cir.1976). However, "[a] document need not literally pass before the eyes of the final agency decisionmaker to be considered part of the administrative record." *Clairton Sportsmen's Club,* 882 F.Supp. at 465. Pertinent information upon which administrative decisionmakers may have relied may be considered although not included in the record as filed. *See Higgins,* 574 F.2d at 792-93.

In making an administrative decision, an agency may rely on its own experts and counter expert opinions or suppositions about the mental processes of the decisionmakers are not cognizable absent "a strong showing of bad faith or other

[1]There is no showing or claim of imminent harm at this juncture. Any loss resulting from the suspension order in the most current season has been incurred. Plaintiffs acknowledge that their primary concern is the potential loss which may occur next season if current regulatory proceedings aimed at providing new long-term safeguards are not concluded by the fall.

improper behavior by the agency. *See Overton Park,* 401 U.S. at 420; *Society Hill Towers Owners' Ass'n v. Rendell,* 20 F.Supp.2d 855, 863 (E.D.Pa.1998). A party may not undermine an agency decision even with an affidavit of unquestioned integrity from an expert expressing disagreement with the views of other qualified experts relied on by the agency, and a court may not weigh the contrary views of such experts to assess which may be more persuasive. *See Marsh v. Oregon Natural Resources Council,* 490 U.S. 360, 378, 109 S.Ct. 1851, 104 L.Ed.2d 377 (1989); *Price R. Neighborhood Ass'n v. U.S. Dept. of Transp.,* 1125 F.3d 1505, 1511 (9th Cir.1997). An agency is entitled to select any reasonable methodology and to resolve conflicts in expert opinion and studies in its best reasoned judgment based on the evidence before it. *See Hughes River Watershed v. Johnson,* 165 F.3d 283, 289-90 (4th Cir.1999); *Oregon Environmental Council v. Kunzman,* 817 F.2d 484, 496 (9th Cir.1987). As a practical matter, were it otherwise, virtually every agency action involving expertise or technical analyses could be obstructed by a party who engaged an expert willing to disagree with the views or conclusions of the experts utilized by the agency.

III. *Factual Background*

Defendant received reports that live Mediterranean Fruit Fly ("Medfly") larvae were found in clementines purchased on November 20, 2001 in Avon, North Carolina and on November 27, 2001 in Bowie, Maryland. An investigation by the Systematic Entomology Laboratory at the Smithsonian Institute determined that the larvae infested clementines were the "Nadal" brand, a Spanish brand of clementines that had entered the United States on November 10, 2001 at a Philadelphia port. [2]

In response, the Animal Plant Health Inspection Service ("APHIS"), an agency of the United States Department of Agriculture ("USDA"), temporarily suspended the entry of Spanish clementines into the United States on November 30, 2001. APHIS inspectors began examining and cutting Spanish clementines throughout the United States. By December 3, 2001, APHIS concluded that the live Medfly findings were attributable to a flaw in the cold treatment process employed aboard the vessels used to transport clementines from Spain to the United States.

On December 4, 2001 additional live Medfly larvae were found in clementines

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[2] Approximately five percent of Spanish clementine exports are shipped to the United States, primarily through the Holt Terminal in Camden and the Tioga Terminal in Philadelphia.

in Shreveport, Louisiana which were determined to have originated from Spain.[3] On December 5, 2001, APHIS informed the Spanish government that the suspension order was reimposed and was applicable to shipments of clementines that had not yet left Spain, shipments in transit from Spain and shipments that had arrived at U.S. ports but had not been unloaded.[4] The Spanish government was also notified that clementines currently in the southern tier states, where warmer temperatures increase the survival rate of Medfly larvae, were subject to internal recall and destruction or reshipment to northern locations. The USDA did permit clementines in southern states to be shipped to northern tier states and one shipload to be transported to Canada with appropriate safeguards. Three unloaded vessels were redirected to foreign ports.

A team of APHIS officials traveled to Spain on December 9, 2001 to identify possible causes for the Medfly larvae finds in the United States. While the inspectors were in Spain, the Spanish government made several proposals which were rejected by APHIS inspectors. [5]

Following the initial suspension order on November 30, 2001, Medfly larvae findings in the United States were reported on almost a daily basis. Larvae examined were variously reported to be gray, brown and black in color. Some were curling, although none were jumping. Live Medfly larvae were found throughout the United States on December 3, 4, 6, 7 and 11, 2001. At least eighty dead Medlfy larvae were found between December 3 and 5, 2001 in Michigan, Connecticut, Oklahoma, Louisiana and Missouri. Over 200 dead larvae were found between December 5 and 13, 2001 at U.S. ports of entry in New Jersey and Philadelphia.

As a result of the multiple confirmed live Medlfy larvae findings, the Secretary of Agriculture declined a request to reconsider the suspension order by letter of

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[3] Prior to these findings, APHIS informed Spanish authorities that clementine imports could resume as it then appeared that there was an isolated problem with the cold treatment aboard only one vessel. When the Louisiana Medfly larvae were traced back to Spanish clementines aboard a different vessel, however, APHIS concluded the problem was more widespread.

[4] It appears from communications to USDA from the Spanish embassy and Barthco, a customs broker, in the administrative record that there were three ships at U.S. ports at the time the suspension order was issued and four which arrived the following day.

[5] The Spanish government proposed extending the cold treatment on vessels in transit to the United States and offloading the fruit to allow storage for two weeks in sealed warehouses for reshipment elsewhere, if necessary. APHIS officials were not confident at the time that extended cold treatment would eliminate the larvae. APHIS ultimately approved extended cold treatment upon subsequent assessment after its investigation in Spain. Spain also suggested a joint inspection by APHIS personnel and Spanish officials of vessels currently at port in Philadelphia. This was undertaken by APHIS alone.

December 26, 2001. APHIS concluded that the entire cold treatment process aboard the vessels needed to be reviewed before imports of Spanish clementines could safely resume.

IV. *Discussion*

A. Requirements of Law

Plaintiffs contend that defendant ignored pertinent legal requirements in imposing the suspension.

1. "Sound science" and "transparent and accessible" requirements of 7 U.S.C. § 7712(b)

The suspension order was issued pursuant to 7 U.S.C. § 7712(a). This provision of the PAA grants the Secretary authority to "prohibit or restrict the importation, entry, exportation, or movement in interstate commerce of any plant, plant product, biological control organism, noxious weed, article, or means of conveyance, if the Secretary determines that the prohibition or restriction is necessary to prevent the introduction into the United States or the dissemination of a plant pest or noxious weed within the United States."

Plaintiffs assert that any action taken by the Secretary pursuant to § 7712(a) is subject to 7 U.S.C. § 7712(b) which reads:

> The Secretary shall ensure that processes used in developing regulations under this section governing consideration of import requests are based on sound science and are transparent and accessible.

Plaintiffs contend that the suspension order was not based on sound science and that the processes leading to the suspension were not transparent and accessible.

Section 7712(b) on its face imposes standards for "the processes used in developing regulations" and not requirements for the issuance of orders pursuant to § 7712(a). This is logical as there are often critical differences in the two functions. The process of promulgating regulations, like the drafting of legislation, generally lends itself to and benefits from full discourse including an open presentation of views by an array of interested citizens and groups. The need to issue an order, particularly one directed to public safety or health, may often be urgent and time-sensitive.

Indeed, the Secretary's decision in this case to suspend the importation of

Spanish clementines was based on unprecedented finds of live Medfly larvae. The Medfly is not native to the United States and its effects on American agricultural could potentially be devastating. Live Medfly larvae can develop into mature Medflies, reproduce and infest up to 250 American fruit and vegetable crops. An official faced with such a situation would reasonably be expected to have the flexibility needed to take prompt action.

Plaintiffs quote at length numerous provisions of The Agreement on the Application of Sanitary and Phytosanitary Measures ("SPS Agreements") of the Uruguay Round Agreement ("URA").[6] The court does not have jurisdiction to review compliance with the URA and the GATT. There is no private cause of action under the URA which precludes a "challenge, in any action brought under any provision of law, any action or inaction by any department, agency, or other instrumentality of the United States, any State, or any political subdivision of a State on the ground that such action or inaction is inconsistent with such agreement." *See* 19 U.S.C. §§ 3512(c)(1)(A) & (B).

The URA also provides that "[n]o provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstances, that is inconsistent with any law of the United States, shall have effect," 19 U.S.C. § 3512(a)(1), and "[n]othing in this act shall be construed to amend or modify any law of the United States, including any law relating to the protection of human, animal, or plant life or health." 19 U.S.C. § 3512(a)(2)(A)(i).

The Secretary nevertheless is required to base decisions involving imports and exports on sound science. *See* 7 U.S.C. §§ 7701(4) & 7751(e). Section 7751(e) of the PPA reads:

> "PHYTOSANITARY ISSUES--The secretary shall ensure that phytosanitary issues involving imports and exports are addressed based on sound science and consistent with applicable international agreements."

There is, however, no showing that she failed to do so in this case. The Secretary relied on reports from experts in the field and her decision comports with scientific information about the Medfly as recited by Dr. Susan McCombs, a Ph.D. in entomology.

2. "Least drastic action" requirement of § 7714(d)

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[6] The provisions of the Uruguay Round Agreements apply to the General Agreement on Tariffs and Trade ("GATT"). *See* 19 U.S.C. § 3511(d)(1).

Plaintiffs contend that the Secretary was required to take the least drastic action available and did not. The PPA permits the Secretary to destroy any plant or plant pest that "is moving into or through the United States or interstate, or has moved into or through the United States or interstate" when the "Secretary considers it necessary in order to prevent the dissemination of a plant pest." 7 U.S.C. § 7714(a).

Section 7714(d) provides:

> No plant, biological control organism, plant product, plant pest, noxious weed, article, or means of conveyance shall be destroyed, exported, or returned to the shipping point of origin, or ordered to be destroyed, exported, or returned to the shipping point of origin under this section unless, in the opinion of the Secretary, there is no less drastic action that is feasible and that would be adequate to prevent the dissemination of any plant pest or noxious weed new to or not known to be widely prevalent or distributed within and throughout the United States.

The issuance of a suspension order would thus be subject to the constraints of § 7714 insofar as it applied to those Spanish clementines found with Medfly larvae within the United States. Significantly, Congress has provided that the application of these constraints in any particular instance is substantially committed to the judgment of the Secretary with language such as when the "Secretary considers it necessary" and "in the opinion of the Secretary." There has been no showing that the Secretary, in her "opinion," did not take the least drastic action feasible regarding Spanish clementines in the country. The Secretary allowed Spanish clementines already in southern states to be reshipped to northern tier states and others to go to Canada with appropriate safeguards. Vessels with unloaded clementines were redirected to foreign ports.

APHIS did not unreasonably reject proposals of the Spanish government to extend cold treatment aboard vessels en route to the United States and to offload fruit from vessels in port to allow storage for two weeks in sealed warehouses prior to reshipment out of the country. At that time, APHIS had no reason to believe that extending the cold treatment period would be effective.[7] While the maturation cycle of the Medfly varies with temperature, it is quite short and there is no showing that

[7]The agricultural counselor at the Spanish embassy acknowledged this in a communication to USDA of December 9, 2001.

"sealed" means hermetically sealed. [8]

Permitting additional imports of Spanish clementines even to northern tier states still presented a risk of Medfly infestation. It was evident that the cold treatment process had not been effective and it was reasonable for the Secretary to believe there were likely additional live Medfly larvae in clementines aboard unloaded vessels. In these circumstances, the Secretary was not required to gamble with the vitality of domestic agriculture.

Plaintiffs also suggest that the USDA should have considered "the relative cost-effectiveness of alternative approaches to limiting risks." The Secretary reasonably need not expend time and resources to conduct an analysis of the costs of mitigating the risks associated with each possible option when confronted with an immediate risk of infestation. She may promptly take prudent prophylactic action and then proceed diligently to collect and analyze further data. The Secretary did dispatch APHIS officials to Spain to assist in ascertaining the precise cause of the infestation problem and is working on a permanent solution.

B. Application of the Arbitrary and Capricious Standard

Plaintiffs contend that the administrative record does not support defendant's assertion that the agency considered the relevant factors and made a decision rationally connected to the facts found.

Plaintiffs argue that none of the live Medfly larvae found were reared out and placed in growing medium to determine if they were capable of maturing into mating adult Medfly. They cite the conclusion of their expert, Timothy J. Gibb, that none of the reports of larval finds "stated, with specificity, characteristics or behaviors of the larvae or pupae that are sufficient to determine whether the insects were viable." He noted that none of the larvae were identified as "jumpers" or "wigglers" and some were described as moving very slowly which suggests they were close to death. [9] He also noted that healthy live larvae are "creamy-white in color" and the larvae found were variously brown or black which suggests imminent

[8] Once offloaded into warehouses, of course, the fruit would have moved into the United States and the Secretary would have been confronted with substantially more produce subject to the requirements of § 7714.

[9] The more mature Medfly larvae are able to build up tension through muscle contractions and lift themselves seven centimeters in the air and transverse a mean distance of twelve centimeters.

or actual mortality. [10]

The conclusion and many assumptions of plaintiffs' expert are refuted by Dr. McCombs who has studied fruit flies for seventeen years. She explains that jumping is a characteristic of mature third instar larvae and even certain mature larvae will cease movement in a wet environment. The movement described by one of the individuals who inspected the larvae, Paul A. Courneya, was consistent with larvae held in a moist environment, in that instance a sealed plastic bag with two clementines. Scott Sanner examined larvae that were "curling" which Dr. McCombs explains is typical of larvae attempting to jump. She also noted that larvae exposed to low temperatures can still survive and complete their development when moved to higher temperatures. Dr. McCombs explains that the color of larvae depends upon the material ingested in the feeding process and that the ingestion of fungi in decaying fruit can produce a gray or brown larva.

Live larvae were found when cold treatment should have killed virtually all of them.[11] Defendant was not arbitrary or capricious in taking prompt prophylactic action.

Plaintiffs argue that defendant should not have acted without determining that the Medfly finds constituted a significant breach of quarantine security. Quarantine security is defined in the USDA "Pre-Clearance Program Guidelines" memorandum as "a level of control which assures a 95% confidence level that a pest population will not become established based on the inspection/treatment certification procedure(s) used when considering the biology and ecology of the pest species." Plaintiffs' reliance on the 95% quarantine security level is misplaced. This definition of "quarantine security" applies to the effectiveness of procedures "aimed at detecting or eliminating exotic pests through actions taken at origin."

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[10]It appears from reports in the administrative record that in fact some of the larvae were light brown and some were gray.

[11]Although dead Medfly larvae pose no risk, the unusually high number of dead larvae found does reasonably indicate an exceptional infestation problem in the Spanish groves. Although subsequent tracking data proving that Medfly infestation in Spanish groves for the 2001-02 season was severe was not available to APHIS when the suspension order was issued, there is evidence in the administrative record that APHIS was aware of a high infestation rate based in part on the investigation of APHIS officials in Spain. APHIS ultimately concluded that unusually high temperatures caused or contributed to the problem. The Secretary need not defer action until receiving evidence of mature larvae approaching the reproductive stage. She may act to prevent the introduction or dissemination of a plant pest at "any living stage" that can "directly or indirectly injure, cause damage to, or cause disease in any plant or plant product." *See* 7 U.S.C. §§ 7702(14) & 7712(a).

When the suspension order was issued, Spanish clementines received no preventative treatment at the point of origin. The cold treatment process takes place aboard vessels after completion of the pre-clearance program. The relevant quarantine security level required of Probit 9 cold treatment is 99.9967%, virtually complete mortality of the larvae.

Plaintiffs also suggest that defendant acted arbitrarily and capriciously in according less favorable treatment to their product than that of others similarly situated. Plaintiffs contend that their imported produce was treated less favorably than like products of national origin in violation of Article III:4 of the GATT. Plaintiffs contend that the USDA did not restrict shipments of clementines from California after reported finds of live larvae and permitted Hawaii, Florida and California to ship locally grown clementines from areas near Medfly infested orchards to non-citrus producing states. Plaintiffs also contend they were discriminated against because the USDA permitted importation of clementines from Morocco, Israel and Italy during this time period.

There is absolutely no evidence of any live larvae finds in clementines from Morocco, Israel or Italy during this period. Only the Spanish clementines were found to provide a pathway for live Medfly larvae.

There is no evidence that infested clementines found in California originated there. Nancy Berrera, an agricultural biologist employed by the Santa Clara County Department of Agriculture, went to the store in San Jose where allegedly infested California clementines were found and discovered that store employees had placed California and Spanish clementines together in the cooler. Her examination of the fruit revealed that the live larvae were found in Spanish clementines and "no live or dead larvae were found in California Clementines." All of the other seven live larvae identified by the USDA in California were found in Spanish brand clementines.[12]

Plaintiffs also claim a discrepancy in the USDA's treatment of Mexican Hass avocados. Plaintiffs assert that Hass avocados do not go through cold treatment and yet the USDA allowed their importation to the northern tier states after concluding that there was no significant threat of infestation of the Mexican fruit fly ("Mexfly"), a cousin of the Medfly.

[12]On November 29, 2001, the California Department of Food and Agriculture issued a Pest Exclusion Advisory barring Spanish clementines.

As Dr. McCombs explained, however, "extrapolation of information for Mexican fruit fly to the Mediterranean fruit fly is inappropriate. These are not closely related species. The bioclimatic tolerances cannot be expected to be the same for a tropical species and one that has demonstrated cold tolerance under field conditions." The Medfly is a hardier species and can survive a much wider range of temperature. The Hass avocado also is not a preferred host for the Mexfly.

Most importantly, plaintiffs overlook the differences between the regulatory constraints on Mexican avocados and Spanish clementines. There are elaborate protections to guard against fruit fly infestation in Mexico that are not replicated in the Spanish clementine groves. All Mexican avocado orchards must be registered with the Mexican government and the export program. When a second Mexfly is captured, a Malathion bait spray of the orchards is mandatory. Fallen fruit in Mexican orchards must be collected and removed to minimize the presence of host fruit.

There is no evidence of disparate treatment by the USDA of similarly situated produce, and no basis on which the court could conscientiously conclude that the Secretary exceeded her legal authority or acted in an arbitrary or capricious manner.

That the Secretary's action was prudent and reasonable in the circumstances would not, of course, justify the exclusion of Spanish clementines in perpetuity.

Defendant is attempting to solve the problem permanently with a new proposed regulation which is now in the comment period. Public hearings are scheduled for the third week of August 2002. Plaintiffs suggest that the proposed new rule would impose additional cold treatment requirements with a cost which could result in a competitive disadvantage and that domestic producers have a motive to exaggerate the problem or otherwise prolong the rulemaking process. Plaintiffs express concern that the administrative process may consume part of the next season for clementines.

An extension of cold treatment was a measure first proposed by Spanish authorities themselves. It is true that domestic producers share with other producers an interest in maximizing their markets. It is also domestic producers, however, who face the greatest risk from the introduction of the Medfly into the United States and it is entirely reasonable to afford them an adequate opportunity to comment on a rule designed to mitigate that risk. Such an opportunity, of course, will also be afforded to plaintiffs.

A court may compel agency action which is unlawfully withheld or unreasonably delayed. *See* 5 U.S.C. § 706(1); *American Littoral Soc'y v. United States EPA Region,* 199 F.Supp.2d 217, 227 (D.N.J.2002). An administrative agency, however, is entitled to considerable deference in setting the timetable for completion of its proceedings. *See Natural Resource Defense Council v. Fox,* 93 F.Supp.2d 531, 544 (S.D.N.Y.2000). Court intervention generally is warranted only when an agency is withholding or delaying action in a manner which is arbitrary, capricious or contrary to law. *See Raymond Proffitt Foundation v. United States Army Corps of Eng'rs,* 128 F.Supp.2d 762, 767-68 (E.D.Pa.2000). Plaintiffs have not expressly requested such intervention and in any event have not shown that defendant is proceeding on an unreasonable timetable in view of its statutory authority, what is at stake, the type of regulation involved, its other priorities and the nature and extent of plaintiffs' interests which may be adversely affected.

C. Breach of Contract

Plaintiffs assert that the USDA breached the Spain Citrus Preclearance Program Work Plan for Exports to the United States to which the USDA, the Spanish Ministry of Agriculture and plaintiff Ibertrade are signatories. Plaintiffs contend that the Work Plan was breached when the USDA removed its personnel from Spain the week of December 9, 2001 and ceased to perform functions related to the export of clementines from Spain to the United States. Plaintiffs assert that the "USDA unilaterally shut down the entire program without first ascertaining whether there was any data to support any less drastic action appropriate to address the perceived problem" and suspended clementine shipments without first determining that "the rate of rejection of inspection lots reach[ed] a level (20%) determined by APHIS to be unacceptable."

Defendant initially argues that the Work Plan is not a contract but merely an operational plan to effectuate the importation of Spanish clementines under permits issued by the United States government and is unsupported by any distinct consideration. Defendant cites to *Quiman, S.A. de C.V. v. United States,* 39 Fed.Cl. 171 (Ct.Fed.Cl.1997), *aff'd,* 178 F.3d 1313 (Fed.Cir.1999). The Federal Circuit, however, expressly rejected the conclusion of the Court of Federal Claims that the cooperative import agreement at issue in *Quiman* was not an enforceable contract. The Federal Circuit found that the sums paid by the foreign exporter to defray the expense of the APHIS inspectors and the benefit of encouraging importation of a product "at a time of heightened demand" provided adequate consideration. There is no suggestion of a heightened need or demand for clementines in the instant case, however, Ibertrade paid for the cost of APHIS inspectors at Spanish groves.

Assuming that the Work Plan was a contract supported by adequate consideration, there was no breach by the USDA.

The Work Plan addresses the parties' respective functions relating to the facilitation of exports to the United States. The Secretary's decision to suspend the importation of Spanish clementines was not contrary to law, arbitrary or capricious. When and while importation is legally suspended, there are no functions to be performed under the Work Plan by APHIS inspectors in Spain.[13]

There is nothing in the Work Plan which imposes a least drastic feasible action requirement on the Secretary in preventing the introduction of plant pests or which otherwise restricts her authority to issue suspension orders pursuant to § 7712. Section VIII.C of the Work Plan provides that "[i]f the rate of rejection of inspectional lots reaches a level (20%) to be determined by APHIS to be unacceptable for reason of pest risk or operational practicality, the preclearance program will be subject to review and possible cancellation." The Work Plan encompasses procedures during pre-clearance to detect quarantine pests while the fruit is still in Spain. This would not include the cold treatment, the major method of treatment of clementines, which takes place on vessels after they have left Spain. The 20% rejection rate refers to fruit that receives "pre-clearance treatment."

V. *Conclusion*

It appears from the whole administrative record that the Secretary considered the relevant factors and her suspension decisions were rationally related to the facts found and consistent with the PPA. Her action was based on reports from professionals in the field and was consistent with sound entomological data. She made accommodations for clementines already in the country and was not required to admit further produce in the circumstances. Her action was not in breach of the Work Plan.

Agencies charged with responsibility to provide protection against infestation, contamination or pollution would appropriately be subject to criticism if they failed to act in the face of a credible threat. An agency is not required to complete its investigation of the possible causes of and potential long-term remedies for such a problem before taking prophylactic action.

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[13] Plaintiffs acknowledge that they cannot prevail on their breach of contract theory if they are not entitled to relief under the APA. As stated by plaintiffs at oral argument, "breach of contract is not a stand alone claim."

In view of the unusually high findings of live Medfly larvae and the apparent failure of the cold treatment, the Secretary's action was rational, prudent and in accord with applicable law. She is seeking to implement a regulation which would allow for the safe resumption of clementine imports from Spain. There is no basis on the current record to conclude that she is not proceeding conscientiously and within a reasonable time frame.

Accordingly, defendant's motion will be granted and plaintiffs' cross-motion will be denied. An appropriate order will be entered.

ORDER

AND NOW, this day of August, 2002, as plaintiffs did not demonstrate a reasonable probability of success on the merits or immediate harm pending resolution on the merits, and have indeed not prevailed on the merits, IT IS HEREBY ORDERED that plaintiffs' Motion for a Preliminary Injunction is DENIED.

ORDER

AND NOW, this day of August, 2002, upon consideration of defendant's Motion for Summary Judgment (Doc. # 9) and plaintiffs' Cross-Motion for Summary Judgment (Doc. # 13), and following review of the administrative record herein and an opportunity for the parties to be heard, consistent with the accompanying memorandum, IT IS HEREBY ORDERED that plaintiffs' Motion is DENIED, defendant's Motion is GRANTED and accordingly JUDGMENT is ENTERED in the above action for the defendant.

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PORK PROMOTION, RESEARCH, AND CONSUMER INFORMATION ACT

COURT DECISION

MICHIGAN PORK PRODUCERS, et al. v. CAMPAIGN FOR FAMILY FARMS, et al. v. USDA.
Case No. 1:01-CV-34.
2002 WL 31444447

Filed October 25, 2002.

(Cite as: 229 F. Supp. 2d 772)

PPRCA – Summary judgement – First Amendment – Membership lists, compelled disclosure – Government speech – Standing – Zones of interest.

Individual cross plaintiffs and the Campaign for Family Farms (CFF) were granted Summary Judgement in which the U.S. District Court struck down the Pork "Check off" program as being unconstitutional. CCF had objected to the mandatory collection of fees of 0.45% of sales value of their hogs and the use of those fees for an generic pork advertisement campaign which contained a message or theme they strongly disagreed with as being antithetical to hog raising practices of family farms. The court decided preliminary issues of standing in favor of CCF on the issues of being a "real party in interest" and being within the legislative "zone of interest." The court decided issues of standing in favor of the individual named members of CCF dismissing the government's contention of "lack of basis" and "lack of clean hands." Despite finding that the USDA had extensive oversight in the advertising message, the court determined that the "Pork - the other white meat" advertisement theme is essentially a self-help program for pork producers and does not rise to the level of "government speech." This case followed the reasoning of decisions of *U.S. v. Frame*, 885 F. 2d 1119 and *Livestock Marketing Assoc. v. USDA*, 207 F. Supp. 2d 992. The court distinguished *United Foods v. USDA*, 533 U.S. 405 which did not address the issue of "Government Speech." The court declined to follow the reasoning of *Wileman Brothers v. USDA,* 521 U.S. 457. [Note: *cf., Charter, et al. v. USDA*, *supra* at page 588 - Editor]

United States District Court,
W.D. Michigan.
Southern Division.

OPINION

ENSLEN, District Judge.

"[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical" Thomas Jefferson, Virginia

Act for Establishment of Religious Freedom (1786), codified at Va.Code Ann. § 57-1 (Miche 2002).

INTRODUCTION

This matter is before the Court on Defendants/Intervenors/Cross-Plaintiffs Campaign for Family Farms ("CFF") and its named members' (together "Cross-Plaintiffs") Motion for Summary Judgment and Motion to Dismiss.[1] It is also before the Court on the Motions for Summary Judgment filed by Plaintiffs Michigan Pork Producers *et al*[2] and Defendants Secretary of Agriculture Ann Veneman and Agriculture Administrator A.J. Yates ("Governmental Defendants"). Related to the above Motions for Summary Judgment are Motions to Strike filed by both Plaintiffs and Governmental Defendants (together "Cross- Defendants").

Ignoring preliminary questions for the minute, fundamentally this case asks the question of whether the system of mandated assessments for generic pork advertising created as a result of the Pork Production, Research and Consumer Education Act of 1985, 7 U.S.C. § 4801 *et seq.,* ("Pork Act"), *i.e.,* an assessment of 45 cents on each $100 of pork per hog sold, violates objecting producers' First Amendment rights of free speech and association.[3] The pole stars guiding this decision are the 2001 decision of the United States Supreme Court in *United States v. United Foods, Inc.,* 533 U.S. 405, 121 S.Ct. 2334, 150 L.Ed.2d 438 (2001) and its 1997 decision in *Glickman v. Wileman Brothers,* 521 U.S. 457, 117 S.Ct. 2130, 138 L.Ed.2d 585 (1997). For the reasons which follow, the Court determines that the *United Foods* decision is the more pertinent precedent and that the Pork Act offends objecting producers' First Amendment rights of free speech and association.

PROCEDURAL BACKGROUND

This case began as a judicial challenge to a voluntary, "fairness" referendum of pork producers as to whether the Pork Order (the executive order authorizing the Pork Check-off Program ("Pork Program" or "Program") under the Pork Act)

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[1] The named members are James Dale Joens, Richard Smith, Rhonda Perry and Lawrence Ginter collectively.

[2] The other named Plaintiffs include the National Pork Producers Council, Pete Blauwikel, Bob Bloomer, High Lean Pork, Inc., California Pork Producers, Kentucky Pork Producers, Indiana Pork Producers, New York Pork Producers, and Ohio Pork Producers.

[3] This is the current assessment rate under 7 C.F.R. § 1230.112. The Pork Act itself allows assessments of between 25 and 50 cents for $100 of pork sold as to each hog sold. 7 U.S.C. § 4809(b).

should continue. *See Michigan Pork Producers Association v. Campaign for Family Farms,* 174 F.Supp.2d 637 (W.D.Mich.2001). The result of the previous, disputed "fairness" referendum announced on January 11, 2001, was that 15,951 producers disfavored the Program and 14,396 producers favored the Program. *Id.* at 639. Plaintiffs initially challenged both the counting of the votes and the legal basis for Program termination. Subsequent to the filing of the Complaint, the change in Presidential administrations brought a new Secretary of Agriculture, Ann Veneman, who settled with Plaintiffs by agreeing not to terminate the Program based on the referendum vote. *Id.* This settlement was subsequently upheld by the Court as within the discretion of the Secretary. *Id.* at 648.

Notwithstanding the determinations in the published decision, this lawsuit continued. Cross-Plaintiffs filed cross-claims against the Governmental Defendants and the Plaintiffs. The constitutional basis for the new cross- claims was the First Amendment protections for freedom of speech and association. The precedential basis for the cross-claims was the Supreme Court's decision in the *United Foods* case (as well as the decision below by the Sixth Circuit Court of Appeals, *United Foods, Inc. v. United States,* 197 F.3d 221 (6th Cir.1999), which the Supreme Court affirmed). The parties have now filed multiple dispositive motions as to such claims as well as Motions to Strike portions of the evidentiary materials. Given the abundance of briefing and the need for prompt resolution, the Court dispenses with oral argument as to the pending motions.

FACTUAL RECORD

CFF is an advocacy group composed of four sub-groups, which are also community and public interest advocacy groups. Those groups are: the Land Stewardship Project; the Illinois Stewardship Alliance; Iowa Citizens for Community Improvement; and the Missouri Rural Crisis Center. (Perry Exhibit 1 at 5-7; Perry Exhibit 11 at 6-7.) Each of these organizations are compromised of individual members and each include substantial numbers of hog farmers. (Schultz Exhibit 6 at 40-44; King Exhibit 2 at 68, 70 & 79; Stokes Exhibit 26 at 58-61; Stokes Exhibit 27 at 159-64; Perry Exhibit 11 at 6-7, 22-23.) In addition to these sub-groups, CFF has 540 individual members who are hog farmers. (Perry Exhibit 4 at 233-34.)

CFF's agricultural interests are to promote family farming as opposed to the vertical integration of agricultural production, *i.e.,* factory farms. Since 1998, CFF has pursued as a primary goal the termination of the Pork Program. CFF views the Pork Program as beneficial to factory farming but antithetical to the interests of its

members, who are family farmers. (*See* Perry Exhibit 11 at 6-9; Perry Declaration at ¶¶ 4-5, 14 & 18.) Plaintiffs seek a declaration that the Pork Program is unconstitutional and an injunction preventing the operation of the Pork Program and the taking of mandatory assessments.

CFF's named members' particular objections are typical of CFF views. CFF members disagree with the generic advertising of pork, *i.e.,* the "Pork, the Other White Meat" advertising program paid for by use of the mandatory fees. CFF members assert that they raise hogs (animals), not pork (processed meat), and the Program supports a commodity they do not sell.[4] (Cross- Plaintiffs Brief, Dkt. No. 162, at 10.) They believe that this Program benefits packers and retailers to their detriment. (*See* Stokes Exhibit 12 at 1, stating that hog farmers' percentage of the revenue for each dollar of pork sold declined from 1996 to 2001 from 42.5 percent to 30.1 percent.) Cross- Plaintiffs also assert that generic advertising fails to promote the unique qualities and attributes of hogs raised on family farms. (Perry Declaration at ¶¶ 6, 7; Perry Exhibit 4 at 41-44; Joens Declaration at ¶¶ 13-14; Smith Declaration at ¶ 13.) Presumably, if Cross-Plaintiffs had control of their own advertising dollars, they might spend it in very different ways from a generic campaign. For example, a campaign to sell family farm products and to discourage consumption of mass produced pork. Cross-Plaintiffs also assert that the generic advertising promotes "lean pork" and that they are opposed to the production of excessively lean pork because of the unhealthy and inhumane conditions which they believe are connected with its production. (Perry Declaration ¶¶ 6-7; Smith Declaration ¶ 13; Schultz Exhibit 6 at 60-61.) Additionally, some CFF members disagree with the generic advertising because they believe it misrepresents pork as a white meat and discourages the sale of bacon and ham. (Cross-Plaintiffs Brief, Dkt. No. 162, at 11.)

Additionally, the Pork Program supports some name brand advertising of large processors such as Hormel or Smithfield. CFF includes members such as Perry and Joens who have chosen to slaughter their own hogs in order to market hogs raised in non-factory conditions. These members strongly oppose name brand advertising of products sold by their competitors. (*Id.* at 11-12; Perry Declaration at ¶ 8; Schultz Exhibit 6 at 68.) Cross-Defendants have admitted that about $800,000 of funds are used in branded ads, but have further clarified that the branded ads assert generic messages (*i.e.,* "Pork, the Other White Meat"). (Hugh Dorminy Declaration at ¶¶ 26-27; Plaintiffs' Opposition, Dkt. No. 198, at 16.)

[4]The implication being that the Pork Program supports pork processors whose advertising and financial interests are diverse from family hog farmers.

Pork Program funds also support certain "education" programs. Cross-Plaintiffs view these "education" programs as misinformation programs in that they propagate the view that large commercial farming operations are humane. Defendant Joens has stated:

> I raise my hogs using humane methods; they are not confined in pens their entire lives, as they are in many factory hog farms. I object to my checkoff dollars being used to publish information that helps cover up the abuses of those large corporate confinement facilities.

(Joens Declaration at ¶ 7.)

Defendant Smith has similarly stated:

> These programs are for people that work in the corporate hog factories that have never seen a hog before they went to work for a huge conglomerate. I object because this is independent producer money going to a program that is focused on corporate hog factories and not the independent producers who believe in animal husbandry and who have been handling hogs humanely for years....

(Smith Declaration ¶ 10.)

Some CFF members also object to funding of "education" because they adamantly oppose this method of raising livestock. (Perry Declaration ¶¶ 7-9, 11-13 & 15.)

Another portion of the allocations are dedicated to research, especially research as to the use of antibiotics. The Pork Board has apparently funded expenditures called "Antimicrobial Resistance and Alternatives Research." Some CFF members take issue with the research and believe that positions taken by the Pork Board as to antibiotics jeopardize the safe consumption of pork. (Perry Declaration at ¶ 15; Smith Declaration at ¶ 10; Schultz Declaration at ¶ 8.) This research is also apparently related to the "education" goals of the Pork Board--*i.e.,* communications to producers to convince them to adopt practices favored by the Pork Board. For 2002, $454,000 of the Pork Program budget was allocated to education. (Perry Exhibit 3.)

CFF members also object to forced association with both the Pork Board, the National Producers Council (the Iowan not-for-profit corporation that until recently has done advertising for the Pork Board) and the state pork associations who are allocated 18 percent of the assessments for their own advertising. CFF members are "forced" to associate with the Pork Board in that they are required to obtain a "Pork Quality Assurance" certification to sells hogs, which certification bears the name of the National Pork Board. (Smith Declaration at ¶ 7; Joens Declaration at ¶ 12; Smith Exhibit 2; Joens Exhibit 1.) Until 2002, the card also associated producers with the Producers Council. (Smith Exhibit 2.) State pork associations apparently

are involved in a variety of marketing activities and lobbying efforts. Cross-Plaintiffs' statements imply that they have strong philosophical and commercial objections to these efforts, similar to their objections to generic Pork Act advertising.

As is clear from the Declarations and Exhibits filed by Cross- Plaintiffs, CFF and its members principally oppose the Pork Program for a variety of reasons. Though those reasons are not always consistent nor persuasive, they are, nevertheless, Cross-Plaintiffs' sincere and strongly-held views.

On the other side of the ledger, Plaintiffs and Government Defendants have made clear the economy value of the Pork Program to the agricultural economy. According to an impressive expert study of a team of researchers at Texas A & M University's Agriculture Department, the Pork Program has a very positive economic effect on pork producers. (*See* Deposition of Oral Capps, Ph.D. and Deposition Exhibits 110 & 112.) This study was commissioned in 1998, significantly before the filing of this suit, to justify the original Program. One of the conclusions of the study is that each dollar of assessments generates $4.79 for pork producers. (Capps' Deposition Exhibit 112 at ¶ 3.) Further, it is estimated that "demand enhancement" (principally advertising) generates $15.26 per dollar invested. (*Id.* at ¶ 4-5.) To put it somewhat differently, on the sale of the typical hog, the producer earns an additional $1.17 because of the effect of advertising and marketing on demand. (*Id.*) Thestudy also indicated that a mandatory program was necessary because a system of voluntary payments would suffer from "free riders"--*i.e.,* producers who did not want to contribute, but who wanted to benefit from a program. (*Id.* at ¶ 2.) Also, a voluntary program would not generate sufficient revenue. (*Id.*) Prior to any mandatory program, a voluntary program had operated and generated only $9 million dollars of assessments per year. (Plaintiffs' Reply, Dkt. No. 215, at 16, citing S. Rep. 99-145.)

CFF's economic expert, Dr. Siegert, disagreed with Dr. Capps' conclusions to a limited degree. Dr. Siegert suggested that a different discount rate should be used to assess the economic effects and that, applying the different discount rate, the use of assessments generates only $2.63 for pork producers per dollar of assessments. Dr. Siegert also expressed a criticism of the report because he felt that there were some "free riders" of the Pork Program--*i.e.,* that the Program benefits wholesalers and processors without making them contribute to the cost. However, Dr. Siegert essentially admitted that due to the complexity of "tax incidence" it was difficult to assess the accuracy of this criticism. (Siegert Deposition at 102-104.)

Notwithstanding such data, CFF conducted its own study of 500 hog farmers in September 2001. (Stokes Supplemental Declaration Exhibit 44.) Fifty-seven percent of those surveyed believed that large producers received the greatest benefits from the Program; only 38 percent of those surveyed believed that the Program benefitted all producers equally. (*Id.*) These survey results are consistent with the referendum vote announced by Secretary Glickman in January 2001. The referendum vote itself evidences such widespread discontent with the Pork Program that it is bound to include many individuals who, like Cross- Plaintiffs, strongly disagree with Pork Program messages, and many others who simply believe that they can choose more economically effective uses of the funds assessed than can the functionaries of the Department of Agriculture.

STANDARD FOR SUMMARY JUDGMENT

As to the motions now before the Court, each of these motions turns on the standards set forth in Federal Rule of Civil Procedure 56.[5] Under Rule 56(c), summary judgment is proper if the pleadings, depositions, answers to interrogatories and admissions on file, together with 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. The initial burden is on the movant to specify the basis upon which summary judgment should be granted and to identify portions of the record which demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The burden then shifts to the non- movant to come forward with specific facts, supported by the evidence in the record, upon which a trier of fact could find there to be a genuine fact issue for trial. *Anderson v. Liberty Lobby,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). If, after adequate time for discovery on material matters, the non-movant fails to make a showing sufficient to establish the existence of a material disputed fact, summary judgment is appropriate. *Celotex Corp.,* 477 U.S. at 323, 106 S.Ct. 2548.

Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences are jury functions. *Adams v. Metiva,* 31 F.3d 375, 382 (6th Cir.1994). The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in the non-movant's favor. *Celotex Corp.,* 477 U.S. at 323, 106 S.Ct. 2548 (quoting *Anderson,* 477 U.S. at 255, 106 S.Ct. 2505). The

[5]One of the motions requested dismissal under Rule 12 as opposed to summary judgment. Nevertheless, because the Motion to Dismiss raised matters outside the pleadings, it is properly analyzed under Rule 56. *See* Rule 12(b). Furthermore, the Motions to Strike raised issues pertinent to the Rule 56(e) requirements, which are discussed herein.

factual record presented must be interpreted in a light most favorable to the non-movant. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

Rule 56 limits the materials the Court may consider in deciding a motion under the rule: "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits." *Copeland v. Machulis,* 57 F.3d 476, 478 (6th Cir.1995) (quoting Federal Rule of Civil Procedure 56(c)). Moreover, affidavits must meet certain requirements:

> [A]ffidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.

Fed.R.Civ.P. 56(e). The Sixth Circuit has held "that documents submitted in support of a motion for summary judgment must satisfy the requirements of Rule 56(e); otherwise, they must be disregarded." *Moore v. Holbrook,* 2 F.3d 697, 699 (6th Cir.1993). Thus, in resolving a Rule 56 motion, the Court should not consider unsworn or uncertified documents, *id.,* unsworn statements, *Dole v. Elliott Travel & Tours, Inc.,* 942 F.2d 962, 968-969 (6th Cir.1991), inadmissible expert testimony, *North American Specialty Ins. Co. v. Myers,* 111 F.3d 1273, 1280 (6th Cir.1997), or hearsay evidence, *Hartsel v. Keys,* 87 F.3d 795, 799 (6th Cir.1996); *Wiley v. United States,* 20 F.3d 222, 225-226 (6th Cir.1994).

LEGAL ANALYSIS

Motions to Strike

Cross-Defendants have filed Motions to Strike portions of the testimony of CFF's members. This testimony is obviously important since it provides a basis for standing and a basis for CFF's claims that its members oppose the use of Pork Program funds.

Governmental Defendants urge that CFF's members' objections to the Program are unreliable in that the members did not disclose the nature of their objections to particular Program expenditures in depositions predating their declarations. While it is true that it is improper for a witness to contradict deposition testimony by an affidavit or declaration for the purpose of avoiding summary judgment, *see Reid v. Sears, Roebuck and Co.,* 790 F.2d 453, 460 (6th Cir.1986), this rule does not apply to a witness who is simply clarifying or expanding upon previous testimony.

Messick v. Horizon Industries, Inc., 62 F.3d 1227, 1231 (9th Cir.1995). In this case, the challenge is unpersuasive since the Court does not recognize any "inconsistency." CFF's members are hog farmers. They have evidently objected to the taking and use of Pork Program funds for some time. Nevertheless, those members continue to investigate the objects of the Program and continue to find different aspects of the Program which are disagreeable to them. The fact that after their depositions they could articulate more and specific reasons for disagreeing with particular Pork Program messages (while in the process of continual research) is not a reason to pretend that they do not have serious objections to Pork Act spending. Rather, it seems to be substantial proof that CFF members are thinking persons open to continually analyzing their views and that in the course of analyzing their views CFF members have found additional reasons for objecting to Pork Act spending. None of these arguments gives the Court any pause in concluding that CFF's members have sincerely held and strong beliefs which cause them revulsion to Pork Act speech and association.

As for Plaintiffs' Motion to Strike, the Motion provides a specific sentence by sentence review of each of the declarations. The Motion objects to many exhibits based on lack of foundation, which is a poor objection in the context of Rule 56(e). Rule 56(e) is foremost a "personal knowledge" requirement, which is unrelated to the traditional evidentiary objection for lack of foundation. No persuasive legal authority is cited for this argument.

Plaintiffs' Motion does tender objections to many exhibits based on lack of personal knowledge and hearsay. While these are valid objections, legally speaking, they are inappropriate in this instance. The statement of CFF members' objections (and the reasons for those objections) was not intended to prove the truth of their statements about the state of the agricultural economy and pork promotions as a whole. It was only offered to prove that they have sincerely-held beliefs at odds with the use of Pork Act funds and particular Pork Program expenditures. Thus, hearsay and personal knowledge objections are not appropriate as to such testimony. Furthermore, the objections to the testimony (to the extent the testimony was intended to establish facts about the agricultural economy outside the speaker's direct knowledge) are generally not material. The point of this legal analysis is not to decide what is the best form of pork advertising, but rather to determine whether named Plaintiffs have strongly held beliefs at odds with the use of Pork Act assessments to fund generic advertising and other public expression contemplated

by the Act.[6] Further, it makes little sense to analyze Plaintiffs' Declarations to discover how the Pork Program operates since the operation of the Pork Program is a matter which is not in significant question given the statutory, administrative and public record of its operations. Therefore, both Motions to Strike will be denied.[7]

Standing and Capacity

Cross-Defendants argue that CFF and its named members lack standing and that CFF lacks capacity to sue. Article III of the United States Constitution, of course, limits the exercise of judicial power to actual cases and controversies. *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). The constitutional requirements for standingare also supplemented by the "prudential" requirements for standing-- which ask whether prudential concerns should limit a federal court's exercise of jurisdiction. *Warth v. Seldin,* 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). Prudential considerations include whether a party is asserting a generalized grievance that is not peculiar to the party; whether the party is asserting the rights of third parties; and whether the injury alleged is outside of the "zone of interest" protected by the law creating the cause of action. *Cannon v. J.C. Bradford & Co.,* 277 F.3d 838, 853 (6th Cir.2002). Rule 17 also imposes a "real party"/capacity requirement on organizational parties, which is related to the standing requirement. The burden of proof and persuasion as to standing and capacity is upon Cross- Plaintiffs. *See Lujan,* 504 U.S. at 561, 112 S.Ct. 2130.

To begin with the capacity question, Rule 17(a) requires that actions be prosecuted and defended by a "real party in interest." Rule 17(c) allows suit by an unincorporated association to the same extent as recognized by the laws of the forum state. Rule 17 is not intended to limit capacity beyond any state law controlling association requirements nor beyond the usual rules for standing. In this case, based on the argument, Cross-Defendants' concerns as to CFF appear for the most part to relate to standing and not to any particular requirements of state law. Governmental Defendants have argued that CFF lacks capacity because they are a "campaign" and not an "association." However, this argument is not made in the context of any state law requirements for capacity. It is made without reference to

[6]This is not to say that the Court has disregarded statements by CFF declarants which were within their personal knowledge as hog producers.

[7]The Court also adopts by reference Cross-Plaintiffs' responses to specific objections, contained at pages 7-14 of Cross-Plaintiffs' Opposition, Dkt. No. 219.

any controlling legal definitions distinguishing a "campaign" and an "unincorporated association." It is also made in the face of precedent which supports a view that association capacity be freely granted to associations meeting standing requirements.

Cross-Defendants' capacity argument is based on such cases as *Brown v. Fifth Judicial District Drug Task Force,* 255 F.3d 475, 476 (8th Cir.2001), a case holding that a drug task force lacks standing to assert rights on behalf of the constituent law enforcement entities, and *Roby v. Corp. of Lloyd's,* 796 F.Supp. 103, 109-10 (S.D.N.Y.1992), rejecting capacity of a business syndicate. These precedents are inapposite. As to the *Brown* case, an important and much different interest is served in the context of criminal tasks forces by limiting capacity to the constituent recognized legal entities forming the task force. This assures voters that the entities represented before Court are legally recognized and politically accountable to voters for the litigation choices made (as opposed to task force members who may have no allegiance to the voters of any given entity). Likewise, as to the *Roby* case, different interests are at play. A business syndicate is not a recognized legal entity and should not advocate financial interests contrary to those of syndicate members who are recognized legal entities. These precedents simply do not apply to unincorporated associations engaged in political and social advocacy, which often are fluid, created for the purpose of advocacy upon a single issue, and lacking in organization detail.[8]

Standing requirements for unincorporated associations were explained by the Supreme Court in its decision in *Hunt v. Washington State Apple Advertising Comm'n,* 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977). According to *Hunt,* the requirements for an unincorporated association to have standing to sue are: (1) the individual organization members would have standing in their own rights; (2) the interests sought to be protected are germane to the organization's purpose; and (3) neither the claims asserted nor the relief requested require participation by individual members. *Id.*

In this case, there is sworn unrebutted testimony that CFF includes 540 members, who oppose mandatory assessments on ongoing hog sales. (Schultz Exhibit 6 at 40-44; King Exhibit 2 at 68, 70, 76 & 79; Stokes Exhibit 26 at 58- 61; Stokes Exhibit 27 at 159-64; Perry Exhibit 11 at 6-7, 22-23.) According to CFF's

[8]Governmental Defendants have also cited the cases of *McKinney v. United States Dept. of Treasury,* 799 F.2d 1544, 1553 (Fed.Cir.1986) and *Minnesota Public Interest Research Group v. Selective Service System,* 557 F.Supp. 925 (D.Minn.1983). These cases are about standing under the *Hunt* factors; they do not establish a separate "capacity" test for unincorporated associations.

named members, these unnamed members are or were hog farmers subject to the assessments. (Perry Exhibit 4 at 233-34.) These individual members have been polled and contacted by telephone surveys and mailings to ascertain their opposition to the use of Pork Program funds. (Perry Exhibit 11 at 19-23.) This suit was brought only after CFF had received objections to the Pork Program from hundreds of its members. (Schultz Declaration at 4; King Declaration at 4.) This evidence and the lack of any real opposition to it establishes as a matter of law that the individual organization members would have standing to sue in their own right.

One point related to the first prong of the *Hunt* test is the extent of discovery as to CFF's membership. CFF has declined discovery requests for its membership list. It has done so based on federal case law which recognizes a right of an association to not disclose its membership because such disclosure is likely to erode membership. As was recognized by the Supreme Court in *Bates v. City of Little Rock,* 361 U.S. 516, 523, 80 S.Ct. 412, 4 L.Ed.2d 480 (1960), "[i]t is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute an effective ... restraint on freedom of association." *See also Eastland v. United States Servicemen's Fund,* 421 U.S. 491, 498, 95 S.Ct. 1813, 44 L.Ed.2d 324 (1975); *Familias Unidas v. Briscoe,* 544 F.2d 182, 192 (5th Cir.1976) (holding that membership information could be compelled through a discovery request); *cf. Marshall v. Bramer,* --- U.S. ----, ---- - ----, --- S.Ct. ----, ---- - ----, 828 F.2d 355, 359-60, 140 L.Ed.2d 180 (6th Cir.1987) (permitting sealed discovery as to membership of violent, white supremacist group for the purpose of prosecution of an arson suit).[9]

While the Court agrees in principle with Cross-Defendants that it must balance the need for discovery versus the First Amendment interests protected by non-disclosure, in this case the balance falls decidedly on the side of non-disclosure. The members are all persons subject to federal regulation by the Department of Agriculture. Whether true or not, those members are likely to have substantial fears that disclosure of their names to the Department of Agriculture could result in their disparate treatment. Under this scenario, disclosures of those names would be corrosive to the individuals' rights of association so as to be forbidden by the First Amendment and by prudential concerns. It would make little sense to require such discovery in the context of a First Amendment speech and association challenge. If this were done, the working of the discovery mechanisms

[9]The *Marshall* decision is distinguishable in that in such suit there was a much stronger need for the discovery; there was a lesser First Amendment interest at stake in that the defendants were engaged in non- protected and criminal activities in addition to protected activities; and the option of sealed discovery was a workable solution.

would impose an injury on Cross-Plaintiffs tantamount to the rights sought to be vindicated in the suit.

While it is also true that Governmental Defendants have cited cases for the proposition that associational standing should not be granted when opponents have not had a fair opportunity to discover facts concerning the standing of individual members, *see, e.g., American Immigration Lawyers Ass'n v. Reno,* 18 F.Supp.2d 38, 51 (D.D.C.1998), the focus of those cases is whether enough information was supplied as to *one or more* identified members so as to give the district court a proper basis for finding of standing. In this case, Cross-Plaintiffs have identified four individual members who have been subjected to grueling discovery and as to whom a finding of standing is clearly required. The law does not require that CFF impose these burdens on all of its membership as a condition for suit.

It further bears mention that this discovery issue was not properly raised in the context of these motions. If Cross-Defendants were owed discovery, the proper course was to, long ago, file a motion to compel discovery under Rule 37. If they objected to a discovery order by a magistrate judge, the proper course was to appeal it as clearly erroneous under Rule 72(a).[10] In the absence of any timely pursuit of the information through a proper procedural mechanism, the Court must view such complaints for what they are--chaff fit for the furnace.

In terms of the other prongs of the *Hunt* test, they too are satisfied. The interests sought to be protected in this suit (speech and association interests of family farmers) are germane to the interests of CFF-which is an acknowledged umbrella group for family farm organizations and individual farmers which has had since 1998 an objective to challenge the Pork Program. Also, individual members need not participate to obtain the very general relief sought--*i.e.,* a declaration of unconstitutionality and an injunction against future operation of the Program. Therefore, it is clear that CFF has capacity to sue. Since CFF has capacity to sue, the greatest part to the challenge to standing (against CFF) is not well taken.

Another general argument made by Plaintiffs is that some or all of the Cross-Plaintiffs lack standing because they receive federal producer subsidies as hog producers which are greater in value than the amount of assessments paid. While the premise may be true, it is irrelevant. Not a single case has been cited for the

[10]It is also possible to contest this issue through the filing of a persuasive Rule 56(f) affidavit. It does not appear that this procedure was followed in this case and, even if it had been made, it was untimely in light of a failure to timely pursue the discovery through motion practice.

proposition that a producer does not have standing to object to mandatory assessments because of a separate program of farm subsidies. The lack of precedent is telling in that the end of this argument is truly pernicious. This argument would deprive a litigant of standing and would deprive federal courts of inquiry as to all kinds of governmental abuses of the First Amendment whenever there was a separate and unrelated system of subsidies. If it was not clear to Plaintiffs when they wrote those words, they should understand now that this Court will not countenance any argument that the government has "bought" a system of unconstitutional treatment through the creation of a separate and unrelated system of subsidies.

As for the four individual members of CFF, Cross-Defendants have raised some questions as to the size of their hog production, the amount of their assessments paid, and the likelihood that they will pay future assessments. For instance, Lawrence Ginter, Jr. retired from hog sales in 2000, though he has "left the door open" as to whether he will sell hogs in the future. (Stokes Exhibit 51 at 44-48.) With respect to Ginter, his claims are not moot since they are "capable of repetition, but evading review." *Corrigan v. City of Newaygo,* 55 F.3d 1211, 1213 (6th Cir.1995).[11] As for the questions raised by Cross-Defendants regarding the other named members (with the exception of Richard Smith, who they concede has standing), a thorough analysis of the record reveals that these are inconsequential concerns in that the record evidence certainly supports that James Joens and Rhonda Perry have had some financial interests in hogs sold subject to assessment and continue to have some financial interests in hogs which will be sold subject to the assessment. (*See* Cross-Plaintiffs' Opposition to Plaintiffs' Motion for Summary Judgment on First Amendment Claims, at 27-28 and documents cited therein.) It is not required for standing that they have large swine herds nor that their hog ownership encompass any particular form of ownership (e.g., individual ownership as opposed to joint ownership). Therefore, the Court determines as a matter of law that Cross-Plaintiffs have both capacity and standing to assert their claims.

Unclean Hands

Cross-Defendants have urged that Cross-Plaintiffs should be prohibited from pressing its claims for equitable relief (declaratory judgment and injunction) due to

[11]Even if the claims of Ginter were moot, the Court would still properly rely upon his objections to the particular Pork Program spending because his views are representational of at least some of CFF's membership, given the uncontested evidence of CFF's membership surveys. Furthermore, much of the argument about standing in this case is unnecessary. As stated by Cross-Plaintiffs, the *United Foods* case struck down the Mushroom Act based on the standing of a single producer. (Reply Memorandum, Dkt. No. 228, at 3.) In this case, Cross-Defendants admit standing as to Richard Smith and Smith's standing, by itself, is sufficient to drive the litigation of the constitutional issues mentioned here.

the doctrine of unclean hands. Cross-Plaintiffs, though, have moved to dismiss this defense as a matter of law. This doctrine provides, generally, that a party seeking equity cannot obtain relief when the party is guilty of unconscionable conduct directly related to the matter of litigation. *Performance Unlimited v. Questar Publishers, Inc.,* 52 F.3d 1373, 1383 (6th Cir.1995); *In re Ben Jean Prevot,* 59 F.3d 556, 561 (6th Cir.1995). In this case, the inequitable conduct is only charged against one CFF member, Rhonda Perry. It is claimed that she improperly operated Patchwork Farms as a for- profit business and advocacy organization even though it was registered as a non-profit organization in violation of 26 U.S.C. § 501(c)(3). It is argued by Cross-Defendants that this violation is related because Patchwork Farms purchased a large numbers of hogs from Rhonda Perry's husband.

Even assuming that there was some proof of a section 501(c)(3) violation, which the Court cannot find on this record, there is nothing in the record which directly connects the violation by the not-for-profit corporation to the subject matter of this suit. Furthermore, even if some of Rhonda Perry's hog sales which were subject to assessment were made to the not-for-profit corporation, it remains true that many other sales were made to other buyers. Moreover, even assuming a violation, the worst that can be said is that the not-for-profit corporation received tax subsidies to which it was not entitled. This is hardly proof that Rhonda Perry is guilty of the kind of grossly unconscionable misconduct which is usually the source of an unclean hands defense. *See Performance Unlimited, supra.* It is also hardly proof that the misconduct was directly related to the First Amendment challenges in this case. *See Shondel v. McDermott,* 775 F.2d 859, 869 (7th Cir.1985) (holding that denial of preliminary injunction was inappropriate based on unrelated Hatch Act violation).

Cross-Defendants should also remember that the purpose of equity is to do equity. It would hardly be equitable to foreclose a constitutional argument regarding compelled association and speech because of a past receipt of a tax subsidy by a separate not-for-profit corporation. It also goes without saying that the attempt by Cross-Defendants to apply this argument to not only Perry but to all Cross-Plaintiffs would be a true perversion of equity and an affront to public policy. *See Perma Life Mufflers, Inc. v. International Parts Corp.,* 392 U.S. 134, 138, 88 S.Ct. 1981, 20 L.Ed.2d 982 (1968) (rejecting unclean hands defense in context of Sherman and Clayton Act cases). As Judge Posner stated in *Shondel,* 775 F.2d at 869, "[e]quitable defenses such as unclean hands may also have more limited play in free speech cases than elsewhere. There is an analogy to antitrust law, where the Supreme Court has forbidden the recognition of a similar defense--*in pari delicto* (equally at fault)-in order to encourage antitrust enforcement." *See also Mitchell*

Brothers Film Group v. Cinema Adult Theater, 604 F.2d 852, 861 (5th Cir.1979). The interests at stake here are simply too weighty to be driven upon the shoals of failed litigation because of the alleged tax cheating of a single litigant.[12] As such, the Court determines as a matter of law that Cross- Plaintiffs are entitled to summary judgment on the defense of unclean hands.

Governmental Speech

Cross-Defendants argue that a First Amendment violation cannot be established on the present record because the speech resulting from the payment of assessments is "governmental speech." This defense is commonly applied in cases before this Court involving individuals who object to particular governmental messages, such as libertarians who oppose government funded anti- drug ads or pacifists who oppose army recruitment. As the Supreme Court has said,

> If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed.

Keller v. State of Bar of California, 496 U.S. 1, 12-13, 110 S.Ct. 2228, 110 L.Ed.2d 1 (1990).

In addition to these general principles, Cross-Defendants have supported their argument by reference to cases which, generally speaking, stand for the propositions that the government may tax and assess for the purpose of governmental speech, that the government may employ private actors to perform its speech, and that the speech need not be agreeable to those taxed or assessed. (*See, e.g.,* Plaintiffs' Brief in Opposition, at 3-5 and authorities cited therein.) Adding to the force of these arguments is the fact that the Supreme Court failed to address a government speech defense in the *United Foods* case because it had not been briefed or argued by the parties before the Sixth Circuit. *United Foods,* 533 U.S. at 415, 121 S.Ct. 2334. Although the Supreme Court did not address the issue in *United Foods,* it did refer to its prior decision in *Lebron v. National Railroad Passenger Corp.,* 513 U.S. 374, 115 S.Ct. 961, 130 L.Ed.2d 902 (1995). In *Lebron,* the Supreme Court determined that Amtrack was a government entity for the purpose of determining whether it could limit speech in its leased facilities. To quote the Court:

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[12]By Cross-Plaintiffs' calculations, these issues will affect more than 80,000 hog farmers. (Cross-Plaintiffs' Motion to Dismiss, at 11.) They also evidently affect consumers, processors, retailers and countless workers.

> "We hold that where, as here, the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment."

Lebron, 513 U.S. at 400, 115 S.Ct. 961.

Review of the organizational structure behind Pork Act advertising evidences a complex structure with extensive government oversight. The National Pork Board is a 15 member Board appointed by the Secretary of Agriculture. 7 U.S.C. § 4808(a). The Act intended that the Pork Board employ private contractors for the purpose of carrying out Pork Act activities. However, the Act provided that, during an interim period, assessment funds would be supplied to the National Pork Producers Council (an Iowan not-for-profit corporation) to carry out the Act. *See* 7 U.S.C. § 4809. Since its creation, the National Pork Producers Council was the primary contractor for the Pork Board until July 1, 2001. (Stokes Declaration, Exhibit 2.) The Council's removal from that position resulted from the previous parties' February 28, 2001 settlement, which continued the Pork Program with modifications. Prior to the settlement, the previous parties were aware of a survey by the Office of Inspector General for the Department of Agriculture which criticized the extent to which the Pork Board had delegated authority to the Producers Council. (Plaintiffs' Motion, Dkt. No. 182, Appendix 14; Carpenter Deposition, Exhibit 51.) While the Producers Council is no longer the primary contractor, many of the same personnel who worked for the Producers Council still perform the Pork Act functions previously performed by the Producers Council. (Stokes Exhibit 5 at 6; Stokes Exhibit 16 at 131-41, 146-51.) Prior to 2002, the majority of Pork Act advertising was identified as from "America's Pork Producers," in reference to the Producers Council. (Hemmelman Reply Declaration at ¶ 3.)

Under the Pork Act, the Pork Board's planning and operations are to be overseen and approved by the Secretary of Agriculture. 7 U.S.C. § 4808(b)(1). The Secretary also has administrative authority to fire Board members when continued service would be "detrimental" to the purposes of the Pork Act. 7 C.F.R. § 1230.55. Furthermore, the Internal Revenue Service has determined to treat the Pork Board as a governmental entity for tax purposes. (*See* Plaintiffs' Motion, Dkt. No. 182, Appendix 27.) It is also noteworthy that Pork Board members are selected on a representational basis from nominees made by the National Pork Producers

Delegate Body. 7 U.S.C. §§ 4806(g) and 4808(a). The Delegate Body is a larger congress of pork producers which serves to recommend assessment rates and determine the percentage of overall assessments which are designated for use by state associations. 7 U.S.C. § 4806(h). The Delegate Body is nominated and elected within each state's producer association. 7 U.S.C. § 4807. There are currently 44 state pork associations, six of whom are parties to this suit. (Stokes Declaration ¶ 6; Stokes Exhibits 4 & 16.) The Department of Agriculture has no authority to appoint or approve the leadership of the state associations. 7 U.S.C. § 4802(16); 7 C.F.R. § 1230.25.

As stated earlier, the current assessment is 45 cents per $100 in market value for each hog sold. 7 C.F.R. § 1230.112. These assessments fund the Pork Board, whose budget was $57.5 million in 2001 (with a $4.5 million deficit). (Stokes Exhibit 1, NPPC 374.) Of this budget, $29.4 million was used for "demand enhancement." (*Id.*) Demand enhancement includes advertising, marketing and merchandising. (*Id.* , NPPC 274-378.) For 2001, state pork associations were allotted $10.4 million, or 18 percent of assessment funds. (*Id.* , NPPC 374.)

Consistent with the Pork Act, the Department of Agriculture regularly reviews the advertising and other project budgets of the Pork Board. (Carpenter Deposition at 33, 60-61; Dorminy Deposition at 101.) The Department also reviews the budgets of state associations. (Carpenter Deposition at 139-140; Dorminy Deposition at 60-61.) As part of this review, the Department may request modification of budgets or repayment of disallowed items. (Carpenter Deposition at 106-112.)

Similarly, the Department reviews each Pork Act advertisement before airing. (Carpenter Deposition at 173, 182.) This review is a general review to ensure that the advertisement is factual, is not disparaging of other commodities, and is consistent with the purposes of the Pork Act. (*Id.*) A similar review is done by the Department as to the advertisements of the state pork associations. (*Id.* at 148.) This kind of review results in amendments of only approximately four percent of the ads shown to the Department. (Hemmelman Reply Declaration at ¶ 3.)

While the Supreme Court did not address the governmental speech question in *United Foods,* this question has been addressed by federal courts in contexts very similar to the present one. In particular, the Third Circuit addressed this issue in the case of *United States v. Frame,* 885 F.2d 1119, 1132 (3rd Cir.1989). The *Frame* decision addressed the Beef Promotion and Research Act, 7 C.F.R. §§ 2901-11, which contained essentially identical mechanisms to those in the Pork Act for the funding and promotion of generic advertising to sell beef. The Third Circuit

analyzed the issues in detail and specifically with reference to the Supreme Court's decisions in *Abood v. Detroit Bd. of Educ.,* 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977) and *Wooley v. Maynard,* 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977). *Abood* upheld a First Amendment challenge to the use of union dues, by a public school system, to finance political speech. *Wooley* upheld a First Amendment challenge to a legal requirement that a state's citizen display an offensive state moto, "Live Free or Die." The *Frame* Court's analyzed the government speech issue as follows:

> The district court and the government have set forth sound reasons for concluding that the expressive activities financed by the Beef Promotion Act constitute "government speech." The Cattlemen's Board and the Operating Committee, the argument goes, are merely instrumentalities created to enable the Secretary of Agriculture to communicate his message that beef is good. As we have previously noted, the connection between these entities and the Secretary is a close one. The Board and Committee members serve at the pleasure of the Secretary of Agriculture: Cattlemen's Board members are appointed by the Secretary, 7 U.S.C. § 2904(1); 7 C.F.R. § 1260.141(b), while members of both the Board and the Operating Committee may be removed "if the Secretary determines that the person's continued service would be detrimental to the purposes of the Act," 7 C.F.R. § 1260.212. Moreover, the Secretary makes the final decisions on all projects funded under the Act. All budgets, plans or projects approved by the Board become effective only upon final approval by the Secretary, 7 U.S.C. § 2904(4)(C), and no contracts for the implementation of any plans may be entered into without the Secretary's approval, 7 U.S.C. §§ 2904(6)(A) & (B); 7 C.F.R. §§ 1260.150(f) & (g), 1260.168(e) & (f). Thus, when the Board or Committee "speaks," they do so on behalf of the Secretary of Agriculture and the government of the United States.
>
> Nevertheless, though we find the issue a close one, the underlying rationale of the right to be free from compelled speech or association leads us to conclude that the compelled expressive activities mandated by the Beef Promotion Act are not properly characterized as "government speech." Justice Powell's *Abood* concurrence sought to ensure that "a local school board need not demonstrate a compelling state interest every time it spends a taxpayer's money in ways the taxpayer finds abhorrent." 431 U.S. at 259 n. 13, 97 S.Ct. 1782 . . .. This attempt to cabin the *Abood* decision echoed prior sentiments that recognition of a broad right against compelled association and belief might obstruct normal governmental functions. In *Wooley v. Maynard,* for example, the Court determined that coerced bearing of the state slogan on one's car violated freedom of belief, but apparently

acquiesced to the dissent's observation that the state was free to tax all citizens for erection and maintenance of billboards bearing state motto "Live Free or Die," *see id.,* 430 U.S. at 721, 97 S.Ct. 1428 . . . (Rehnquist, J., dissenting) . . ..

These situations, we believe, are distinguishable from the case now before us. Both the right to be free from compelled expressive association and the right to be free from compelled affirmation of belief presuppose a coerced nexus between the individual and the specific expressive activity. When the government allocates money from the general tax fund to controversial projects or expressive activities, the nexus between the message and the individual is attenuated. *See Wooley v. Maynard,* 430 U.S. at 721, 97 S.Ct. 1428 . . . (Rehnquist, J., dissenting). In contrast, where the government requires a publicly identified group to contribute to a fund earmarked for the dissemination of a particular message associated with that group, the government has directly focused its coercive power for expressive purposes . . .. This sort of funding scheme, with its close nexus between the individual and the message funded, more closely resembles the *Abood* situation, where the unions, as exclusive bargaining agents, served as the locutors for a distinguishable segment of the population, *i.e.,* the employees, or the *Wooley* case, where the state "require[d] an individual to participate in the dissemination of an ideological message . . .," *Wooley,* 430 U.S. at 712-13, 97 S.Ct. at 1434, . . . regardless of whether state-issued license plates constituted "government speech."

Furthermore, Justice Powell's justification for distinguishing compelled support of government from support of a private association does not fit comfortably with a "self-help" measure like the Beef Promotion Act. According to Justice Powell, the reason for permitting the government to compel the payment of taxes and to spend money on controversial projects is that the government is representative of the people. The same cannot be said of a union, which is representative only of one segment of the population, with certain common interests. 431 U.S. at 259 n. 13, 97 S.Ct. at 1811-12 n. 13. The Cattlemen's Board seems to be an entity "representative of one segment of the population, with certain common interests." Members of the Cattlemen's Board and the Operating Committee, though appointed by the Secretary, are not government officials, but rather, individuals from the private sector. The pool of nominees from which the Secretary selects Board members, moreover, are determined by private beef industry organizations from the various states. Furthermore, the State organizations eligible to participate in Board nominations are those that "have a history of stability and permanency," and whose "primary or

> overriding purpose is to promote the economic welfare of cattle producers." 7 U.S.C. § 2905(b)(3) & (4). Therefore, we believe that although the Secretary's extensive supervision passes muster under the non- delegation doctrine, it does not transform this self-help program for the beef industry into "government speech."

Frame, 885 F.2d at 1132-33.

Another federal court which has recently followed the reasoning in *Frame* is the District of South Dakota in its decision of *Livestock Marketing Assoc. v. United States Dept. of Agriculture,* 207 F.Supp.2d 992 (D.S.D.2002.) Whereas the *Frame* court ultimately upheld the Beef Act speech as compelled, but non- ideological speech, the *Livestock Marketing* case enjoined assessments under the Beef Act due to the logic of the intervening *United Foods* decision. The Livestock Marketing case also commented,

> Common sense tells us that the government is not "speaking" in encouraging consumers to eat beef. After all, is the "government message" therefore that consumers should eat no other product or at least reduce the consumption of other products such as pork, chicken, fish, or soy meal? The answer is obvious.

Id. at 1006.

While the Eighth Circuit Court of Appeals has granted a stay of the *Livestock Marketing* decision, the stay itself does not provide much guidance. The Eighth Circuit's Order granting the stay was silent as to the merits of the controversy and should only be interpreted as staying the decision to maintain the status quo pending decision and protect the Eighth Circuit's jurisdiction. *See Livestock Marketing,* Appeal No. 02-2769, Order of July 10, 2002 (8th Cir. July 10, 2002) (included as Moeller Exhibit No. 59).

This Court concurs with the *Frame* and *Livestock Marketing* decisions. What is present here is a self-help program for pork producers. Though the Secretary is integrally involved with the workings of the Pork Board, this involvement does not translate the advertising and marketing in question into "government speech" as that term has been interpreted by the federal courts. You cannot make a silk purse from a sow's ear. This defense fails as a matter of law.

First Amendment Speech and Association

[8] Before deciding the question of whether either of the parties is entitled to summary judgment on the First Amendment Speech and Association Claims, the Court must set forth the backdrop of precedent created by the Supreme Court's *United Foods* and *Glickman* decisions. These precedents are such that once their

applicability is decided, conclusions of constitutionality or unconstitutionality are but a stone's throw away.

In *United Foods,* the Supreme Court tackled the constitutionality of the Mushroom Promotion, Research, and Consumer Information Act of 1990, 7 U.S.C. § 6101 *et seq.,* which was similar in its mechanisms and purpose--*i.e.,* the promotion of mushroom sales by generic mushroom advertising through an industry self-help program. In *United Foods,* the Supreme Court indicated that it was not addressing the question of whether the "commercial speech" analysis under *Central Hudson Gas & Electric Corp. v. Public Service Comm'n,* 447 U.S. 557, 566, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980) applied "for even viewing commercial speech as entitled to lesser protection, we find no basis under either *Glickman* or our other precedents to sustain the compelled assessments sought in this case." *United Foods,* 533 U.S. at 410, 121 S.Ct. 2334.

Before reaching a conclusion, the Supreme Court reviewed its *Glickman* precedent, which was made in 1997. In *Glickman,* the Supreme Court upheld a generic marketing program that was created during the depression era, which involved California fruit trees and which was in the context of a "collectivized" marketing order. According to the *United Foods* decision:

> In *Glickman* we stressed from the very outset that the entire regulatory program must be considered in resolving the case. In deciding that case we emphasized "the importance of the statutory context in which it arises." 521 U.S. at 469, 117 S.Ct. 2130. The California tree fruits were marketed "pursuant to detailed marketing orders that ha[d] displaced many aspects of independent business activity." *Id.* , at 469, 521 U.S. 457, 117S.Ct. 2130. Indeed, the marketing orders "displaced competition" to such an extent that they were "expressly exempted from the antitrust laws." *Id.* , at 461, 521 U.S. 457, 117 S.Ct. 2130. The market for the tree fruit regulated by the program was characterized by "[c]ollective action, rather than the aggregate consequences of independent competitive choices." *Ibid.* The producers of tree fruit who were compelled to contribute funds for use in cooperative advertising "d[id] so as a part of a broader collective enterprise in which their freedom to act independently [wa]s already constrained by the regulatory scheme." *Id.* , at 469, 521 U.S. 457, 117 S.Ct. 2130. The opinion and the analysis of the Court proceeded upon the premise that the producers were bound together and required by the statute to market their products according to cooperative rules. To that extent, their mandated participation in an advertising program with a particular message was the logical concomitant of a valid scheme of economic regulation.

United Foods, 533 U.S. at 412, 121 S.Ct. 2334.

In contrast, the *United Foods* case involved a mushroom industry which was not collectivized, which was not exempt from anti-trust laws, and was not the subject of an expansive marketing order. *Id.* at 412, 121 S.Ct. 2334. Thus, the Supreme Court rejected the application of *Glickman* and instead held that:

> the mandated support is contrary to the First Amendment principles set forth in cases involving expression by groups which include persons who object to the speech, but who, nevertheless, must remain members of the group by law or necessity.

See, e.g., Abood v. Detroit Bd. of Ed., 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977); *Keller v. State Bar of Cal.,* 496 U.S. 1, 110 S.Ct. 2228, 110 L.Ed.2d 1 (1990).

Id. at 412, 121 S.Ct. 2334.

In the case of pork marketing, this case resembles *United Foods* much more so than *Glickman*. As in the case of mushroom production considered in *United Foods,* pork is not subject to a comprehensive and collectivized marketing order. There is no necessity for a mandated marketing approach as part of a specialized industry. As such, the Court will apply the rule in *United Foods*.

As noted above, the *United Foods* decision relied in part on the Supreme Court's *Keller* decision. *Keller* is the precedent which forbids a state bar (as to which membership is required to practice law) from charging mandatory dues to members and then using those dues to pay for political or ideological advocacy as to which some members object. Similar to the *Keller* decision, the instant case involves mandated fees which are directed toward a discrete occupation (hog producers)[13] and which fund speech as to which some producers have sincere philosophical, political and commercial disagreements. Even aside from the important political and philosophical objections to such speech, the commercial interests of objecting producers to such speech is ample. In days of low return on agriculture, the decision of an individual farmer to devote funds to uses other than generic advertising are very important. Indeed, the frustration of some farmers are likely to only mount when those funds are used to pay for competitors' advertising, thereby depriving the farmer of the ability to pay for either niche advertising or non- advertising essentials (such as feed for livestock). This is true regardless of whether objecting farmers are correct in their economic analysis that the assessments and speech do not sufficiently further their own particular interests. In short, whether this speech is

[13] As part of the briefing Cross-Defendants have argued that the assessments are not directed at hog producers, but only the sale of hogs. This is a distinction without a difference. Hog producers, not others, sell hogs for slaughter. The assessments are directed toward them, just as surely as if the statutory language had branded their foreheads.

considered on either philosophical, political or commercial grounds, it involves a kind of outrage which Jefferson loathed. The government has been made tyrannical by forcing men and women to pay for messages they detest. Such a system is at the bottom unconstitutional and rotten.

For these reasons, the Court concludes that the mandated system of Pork Act assessments is unconstitutional since it violates the Cross-Plaintiffs' rights of free speech and association. *See also Roberts v. United States Jaycees,* 468 U.S. 609, 622, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984) (discussing association rights); *Frame,* 885 F.2d at 1133-34; *LMA,* 207 F.Supp.2d at 1003-7; *Cal-Almond, Inc. v. Dept. of Agriculture,* 14 F.3d 429, 434-35 (9th Cir.1993) (discussing issue in context of almond marketing order).

Remedy

Since the Court has granted Cross-Plaintiffs summary judgment as to liability, the question arises as to the scope of the necessary remedy. Cross-Plaintiffs have requested entry of a declaration, declaring the Pork Program unconstitutional, and the entry of an injunction, prohibiting the operation of the Pork Program and the collection of any assessments under the Pork Program. Plaintiffs and Governmental Defendants, however, argue that this scope of an injunction is much too broad. They urge that the Court should limit an injunction to a prohibition of making mandatory assessments against only the named Cross-Plaintiffs in this suit. This suggestion was contrary to the remedies ordered in *LMA* and *United Foods.*

It appears to the Court, as argued by Cross-Plaintiffs, that such a remedy would be at the least unwise. The Pork Act was written without severability provisions. This indicated an intent by Congress that the Act's provisions rise or fall when considering constitutionality. By making the Act a "voluntary" assessment as opposed to a "mandatory assessment," there is no assurance that the funds generated will be sufficient to support the infrastructure which Congress created to carry out the Act. This is a real concern in this case because the statute was enacted to require "mandatory" assessments precisely because the previous system of voluntary contributions would not support a sizable program. The provisions of the Pork Act are also intertwined. *See Hill v. Wallace,* 259 U.S. 44, 70-72, 42 S.Ct. 453, 66 L.Ed. 822 (1922) (holding that Futures Trading Act was wholly unconstitutional in light of its intertwined provisions and lack of a severability clause).

In this context, a limited injunction would essentially re-write the Act in a manner inconsistent with judicial interpretation. *See Eubanks v. Wilkinson,* 937

F.2d 1118, 1122 (6th Cir.1991) (citing *Blount v. Rizz,* 400 U.S. 410, 419, 91 S.Ct. 423, 27 L.Ed.2d 498 (1971)); *LMA, supra.* Additionally, as a practical matter, such would be impossible in this case. No suggested mechanism has been provided for making future assessments voluntary for claimants. Indeed, the identity of all of CFF's members are not even known. Finally, such an approach appears simply wrong-headed in the context of a program with a significant lack of producer support, such as the current Pork Program. Therefore, the Court will approve the declaratory and injunctive relief requested by Cross-Plaintiffs. The Court finds that such equitable relief is not only supported by the substantive law, but also by the equitable factors which support injunctive relief.

While doing so, the Court will not make the ordered injunction effective until 30 days from the date of the Injunction. The purpose of this delay is to allow Governmental Defendants and Plaintiffs to exercise their rights to seek a stay under Federal Rule of Appellate Procedure 8. The Court also denies any request for stay by this Court, for the reasons stated in this Opinion, so that any further request for such may be made directly to the Court of Appeals.

CONCLUSION

For the reasons stated, Cross-Plaintiffs' Motion for Summary Judgment and Motion to Dismiss Affirmative Defenses shall be granted, and the motions of the other parties denied. Further, for relief of Cross-Plaintiffs, the Court will grant declaratory relief declaring the Pork Act unconstitutional and enjoining the collection of Pork Act assessments and the operation of the Pork Check-off Program. This relief will be ordered as part of Final Judgment and Injunction since this disposition completes the adjudication of claims in this matter.

ORDER

Upon further inspection of its Opinion of October 25, 2002, this Court determines that said Opinion should be corrected, pursuant to Federal Rule of Civil Procedure 60(a), to remedy clerical error.

THEREFORE, IT IS HEREBY ORDERED that the word "agricultural" on page 28, line 9 of the second full paragraph, is corrected to read "agriculture".

FINAL JUDGMENT AND INJUNCTION

In accordance with the Opinion of this date;

IT IS HEREBY ORDERED that Cross-Plaintiffs Campaign for Family Farms, James Dale Joens, Richard Smith, Rhonda Perry and Lawrence Ginter's Motion for Summary Judgment (Dkt. No. 162) and Motion to Dismiss (Dkt. No. 170) are **GRANTED.**

IT IS FURTHER ORDERED that Plaintiffs Michigan Pork Producers, National Pork Producers Council, Pete Blauwikel, Bob Bloomer, High Lean Pork, Inc., California Pork Producers, Kentucky Pork Producers, Indiana Pork Producers, New York Pork Producers, and Ohio Pork Producers' Motion for Summary Judgment (Dkt. No. 182) and Motion to Strike (Dkt. No. 220) are **DENIED.**

IT IS FURTHER ORDERED that Governmental Defendants Secretary Ann Veneman and Administrator A.J. Yates' Motion for Summary Judgment (Dkt. No. 183) and Motion to Strike (Dkt. No. 199) are **DENIED.**

IT IS FURTHER ORDERED that the Court declares the Pork Production, Research and Consumer Education Act of 1985, 7 U.S.C. § 4801 *et seq.* to be unconstitutional.

IT IS FURTHER ORDERED that the Court enjoins Cross-Defendants Michigan Pork Producers, National Pork Producers Council, Pete Blauwikel, Bob Bloomer, High Lean Pork, Inc., California Pork Producers, Kentucky Pork Producers, Indiana Pork Producers, New York Pork Producers, Ohio Pork Producers, Secretary Ann Veneman and Administrator A.J. Yates and those acting for them as officers, agents, employees and contractors, to cease the collection of assessments under the Pork Act and to cease the operation of the Pork Check-off Program effective 30 days from the issuance of this Final Judgment and Injunction.

IT IS FURTHER ORDERED that any request for stay of this Final Judgment and Injunction is **DENIED** and Cross-Defendants are directed to seek such stay, should they so desire, from the Court of Appeals.

IT IS FURTHER ORDERED that attorney fees may be sought as directed under Federal Rule of Civil Procedure 54(d).

IT IS FURTHER ORDERED that costs may be billed as directed under Local Civil Rule 54.1.

_____

PLANT QUARANTINE ACT

DEPARTMENTAL DECISION

In re: KHALID AL-KHATIB.
P.Q. Docket No. 01-0003.
Decision and Order.
Filed on March 15, 2002.

P.Q. – Fresh Almonds – Prohibited importation from Israel – Unintentional violation not a defense – Civil penalty, no requirement for uniformity.

The Respondent was charged with the prohibited importation of fresh almonds from Israel in one his airline flight bags. The Administrative Law Judge (ALJ) accepted Respondent's statement as credible that he did not know the regulations and that another person had put the almonds in the bag. The ALJ found that the importation of fresh almonds from Israel is strictly construed and that a person in possession of the prohibited product is in violation of the Act. Penalties do not have to be uniform, but the lack of knowledge of the almonds warranted a reduction in the proposed penalty.

James Booth for Complainant.
Respondent, Pro se.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

This proceeding was instituted by a complaint filed on December 5, 2000, by the Administrator of the Animal and Plant Health Inspection Service ("APHIS"), United States Department of Agriculture ("USDA"). It alleges that on or about April 4, 2000, Respondent, Khalid Al Khatib,[1] violated 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, (7 C.F.R. §§ 319.56(b), 319.56-2(e), 319.56-3, and 319.56-4) ("regulations"), by importing 1 kilogram of fresh almonds into the United States from Israel, at Detroit, Michigan.

A hearing was held in Columbus, Ohio, on October 3, 2001. Complainant was represented by James A. Booth, Esq. Respondent, Khalid Al Khatib, represented himself.

Law

Pursuant to its authority under 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) to prevent the entry into the United States of injurious plant diseases,

[1] Respondent's name is hyphenated in the complaint. However, Respondent did not hyphenate his name in his answer.

injurious insect pests, and other plant pests, the Secretary of Agriculture has promulgated regulations to restrict the importation into the United States of certain agricultural articles from foreign countries and localities.

Part 319 of Title 7 of the Code of Federal Regulations ("C.F.R.") covers foreign quarantine notices. 7 C.F.R. § 319.56(b) of the regulations forbids, except as otherwise provided in the regulations, ". . .the importation into the United States of fruits and vegetables from foreign countries and localities named and from any other foreign country and locality . . ." 7 C.F.R. § 319.40-1 defines "import (imported, importation)" as meaning "[t]o bring or move into the territorial limits of the United States." 7 C.F.R. § 319.56-1 defines "fresh fruits and vegetables" as "[t]he edible, more or less succulent, portions of food plants in the raw or unprocessed state, such as bananas, oranges. . .peppers, lettuce, etc." 7 C.F.R. § 319.56-2(e) allows for some nonrestricted fruits and vegetables to be imported under a permit issued in accordance with certain rules and regulations, e.g., those specifically listed in 7 C.F.R. § 319.56-2a through 7 C.F.R. § 319.56-2gg. Fruits and vegetables that can be imported from Israel are listed in 7 C.F.R. § 319.56-2t. This regulation does not include fresh almonds. Some fruits and vegetables from Israel can be imported after being treated as designated in 7 C.F.R. § 319.56-2x. Fresh almonds are not included. Section 10 of the Plant Quarantine Act authorizes the Secretary to assess a civil penalty of not more than $1,000 per violation of the Act or regulations.

APHIS administers these regulations for the Secretary. It coordinates its efforts with the United States Customs Service at U.S. ports of entry, such as international airports, to intercept prohibited or restricted fruits, plants, pests, etc., to prevent them from entering and causing agricultural and economic harm within the United States. Complainant states that only one pest or disease brought into the country by a prohibited fruit or plant could cause "millions or even billions of dollars of damage to United States agriculture and trade." In fiscal year 2000 APHIS spent 200 million dollars to prevent pests from entering the United States. (Complainant's brief, p. 21; Tr. 69-74.)

Statement of the Case

On April 4, 2000, Respondent, Khalid Al Khatib, whose mailing address is 83 W.N. Broadway, Columbus, Ohio 43214, arrived at the Detroit, Michigan International Airport on a flight from Amsterdam. He had indicated on the U.S. Customs Declaration Form that he was not bringing any fruits or vegetables into the United States. After identifying himself to U.S. Immigration officials, he was allowed into the United States. He retrieved two pieces of luggage and proceeded to the U.S. Customs Service primary inspection point where the procedure is for the

Customs official to ask arriving passengers if they have claimed all their luggage and whether they had packed the luggage. Customs officials consider a passenger to be responsible for all contents of luggage in his/her possession regardless of whether the passenger may be carrying it for another person because "we have a lot of incidents where people will say after we've found contraband, that [it] isn't their[s], they were carrying it for a relative or another personnel." (Tr. 60.) Even if the person actually does not know that contraband is in his/her luggage, it is the Customs Service policy that "[i]ts still his responsibility to know everything that's in his luggage. . ." (Tr. 56-57.) The Customs Service does not accept excuses. The person in possession of luggage containing a prohibited matter will therefore "suffer the consequence." (Tr. 55, 61, 103.)

A "roving" APHIS Plant Protection and Quarantine (PPQ) inspector, Leslie Johnson, as part of her job of randomly checking incoming passengers, checked Respondent's Customs Declaration Form after he had cleared the Customs Service primary inspection point and wrote the letter "A" on the form to indicate that he was selected to proceed to the Customs' secondary inspection point where his luggage would be opened and inspected. (CX 2.) The inspecting official discovered in one of the pieces of luggage in Respondent's possession a plastic bag containing what the official identified as "food." The inspector asked Craig Kellogg, an APHIS PPQ Operations Officer, to look at the "food." Kellogg identified the food as fifty fresh almonds from Israel weighing one kilogram (a little over two pounds). He said fresh almonds are fruits and that their importation is prohibited by the regulations. (Tr. 26-49.) The fruit was confiscated and destroyed. Kellogg gave Respondent a "Notice of Alleged Violation" which stated that the fresh almonds violated 7 C.F.R. § 319.56 and further stated:

> Section 10 of the Plant Quarantine Act (7 U.S.C. 163), Section 108 of the Federal Plant Pest Act (7 U.S.C. 150gg) and Section 3 of the Act of February 2, 1903 (21 U.S.C. 122) authorize the Secretary of Agriculture to assess a civil penalty not exceeding $1000 against any person who violates any of these acts or any regulations promulgated thereunder, after notice and an opportunity for hearing on the record.
>
> You may waive hearing and agree to pay a specified civil penalty in settlement of this matter. If you do not wish to pay a specified civil penalty in settlement of this matter and to waive hearing, a complaint will be issued charging you with the above violation and affording you an opportunity for a hearing. However, the civil penalty offered to settle this mater at this time shall not be relevant in any respect to the civil penalty which may be assessed after a hearing.

(CX-1.)

Kellogg told Respondent that he could pay a penalty of fifty dollars as settlement of the alleged violation. Respondent declined to pay the fine and told Kellogg that "he would like to take his chances on a hearing." (Tr. 49.)

After the complaint was issued, Respondent filed the following answer (unedited) in which he stated:

> Sir:
>
> On April 4th 2000 I was arrived from Amsterdam to Detroit on Flight NW 41, Originally I flight with my daughter inlaw from TelaVive to Amsterdam to Columbus via Detroit. What happend when we arrived to Amsterdam, we found out no confirmation to my daughter at the same flight to Detroit, so she has to leave in the evening to Detroit, and I flight in the morning
>
> When I arrived to Detroit there was one of my daughter baggages with my flight, I found out when the officer open the laggage and it was belong to my doutrer and he found less than 1 kg of almond inside. It was a surprised to me, because when I filled the USDA card I marked no food so the officer was very upset and treated me as a criminal, Then he came and asked me to pay $50 fine I tried to explain to him he did not respond so I refused to pay the fine at that time because I am honest and straight and I never done that before, I respect the law and I beleive in justice
>
> This not a matter of $50 It is a matter of accusing me as a lier Please understand that it was honest mistake by the airline since all laggage looks alike, And next time I will be very carfull before I sighn the card,.
>
> All what I feel is that I am innocent, so I leave this case for your judgment, and sorry for this incident
>
> Note: My addresses are the same:
> My phone: No 614-2684970
> 614-8935172
> fax; 614-2917248
>
> Sincerely,
> /s/
> Khalid Al Khatib

At the hearing, Respondent testified that for the past seven or eight years he has made two trips a year to Israel. He said he knows that food like fresh almonds cannot be imported into the U.S. and, further, that he could never bring contraband into the country because he is always selected for inspection every time he returns to the United States. Respondent testified that he had made the trip to Israel in April 2000 to bring his daughter-in-law to the United States. He said they had four pieces of identical luggage of which two were his and two were his daughter-in-law's and that all four pieces had the name "Al Khatib" on them. The return flight went through Amsterdam where, due to some mix-up, Respondent and his daughter-in-law were not booked on the same flight from Amsterdam to Detroit. He took an earlier flight than his daughter-in-law and two of the four pieces of luggage accompanied him. When one of the pieces, which contained the almonds, was opened for inspection by the Customs Service in Detroit and revealed that it contained women's clothes, Respondent realized it belonged to his daughter-in-law. He said he did not know that she had packed almonds in her luggage and said she had not told him about the almonds. He indicated that succulent fresh almonds are a popular food in the Middle East and that his daughter-in-law, who accompanied him to the hearing but could not speak English, told him that "she put this small amount because -- she feel sorry because she don't know that it would cause all this problem. She brought it for her personal -- to eat it when she come to Columbus. So she feel very sorry about all the situation. She don't know that it would cause all these problems." (Tr. 81-97.)

Discussion

Respondent sought a hearing because he believes he did no wrong since he did not know that fresh almonds were in the luggage. I find his testimony credible that he did not know about the fresh almonds before the luggage was inspected. While ignorance of the law is never an excuse for committing a violation, ignorance of a material fact may, in other proceedings, be a defense. *U.S. v. Fieros,* 692 F.2d 1291, 1294 (9th Cir. 1983), cert. den. 462 U.S. 1120 (1983); *U.S. v. Lopez-Lima,* 738 F.Supp. 1404, 1412 (D.C. S.D. Fla. 1990); *U.S. v. Smith,* 592 F.Supp. 424, 434 (D.C. E.D. Va. 1984) vacated on other grounds, 780 F.2d 1102 (4th Cir. 1985). In other words, if the facts were as a person believed them to be there would be no violation. In this case, if as Respondent believed, there were no fresh almonds in the luggage in his possession, there would have been no violation. The Judicial Officer, however, has held that ignorance of law or fact is not a defense in plant quarantine cases. *Rene Vallalta,* 45 Agric. Dec. 1421 (1986). It is also the policy of the Customs Service to automatically hold responsible any person possessing luggage containing a prohibited matter regardless of whether the luggage may

actually have been owned by another person. Therefore, even though Respondent did not know that fresh almonds were in the luggage, the fact that they were in luggage which was in his possession constitutes a violation of 7 C.F.R. §§ 319.56(b) and 319.319.56-2(e).

The Judicial Officer's sanction (penalty) policy for violations is that sanctions should be warranted in law and justified in fact and that:

> [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 recommendation of the administrative officials charged with the responsibility for achieving the congressional purpose.

La Fortuna Tienda, 58 Agric. Dec. 833 (1999).

Complainant seeks a penalty of $1,000 for the single violation in this case. In other recent plant quarantine cases, the most common penalty for a single violation seems to have been $500, but Complainant has also sought penalties ranging from $250 to $1,000 ($250 in *Cynthia Twum Boafo*, 60 Agric. Dec. 191 (2001); $1,000 in *Meralda Miller*, 58 Agric. Dec. 287 (1999)). The Judicial Officer has held that sanctions do not have to be uniform. *Nkiambi Jean Lema*, 58 Agric. Dec. 291 (1999)[2]. The penalties in thirteen plant quarantine cases cited in *Nkiambi* (fn. 6) ranged from $125 to $750. In some cases sanctions have been doubled for comparable violations without being "justified in fact." In *Guadalupe Ramirez Magana*, 60 Agric. Dec. 280 (2001), the penalty for importing prohibited mangoes was $500, while the penalty for mangoes in *Meralda Miller, supra*, was $1,000.

In this case, as in all plant quarantine cases, the importation of prohibited fresh fruits presents a potentially serious economic threat to American agriculture. While Respondent's violation was unintentional and his lack of knowledge of the fresh almonds is not a defense, they are still mitigating factors. In *Richard Duran Lopez*, 44 Agric. Dec. 2201, 2211 (1985), the Judicial Officer held that a penalty may be reduced for an unintentional violation of the regulations and may be reduced to $250. As for the deterrent effect of a penalty on Respondent, it is not likely that a penalty of any size will have a greater deterrent effect than Respondent's present

[2]In *Spencer Livestock Com'n v. Dept. Of Agriculture*, 841 F.2d 1451, 1457 (9th Cir. 1988), the Ninth Circuit affirmed that penalties imposed by the Judicial Officer do not have to be uniform, but in doing so noted that "the JO explained the factors that mandated a more extreme penalty in this case than in a similar recent case." The Judicial Officer's prior policy was that sanctions for comparable violations should have comparable sanctions: "The goal of uniform sanctions in contested cases for comparable violations of a particular regulatory act is an important part of the Department's sanction policy which has been followed under all of the Department's regulatory programs in recent years." *Toscony Provision Company, Inc.*, 40 Agric. Dec. 533, 540 (1981).

knowledge, based on eight years experience, that he will be searched for contraband every time he enters the United States. Considering all the circumstances, I find a penalty of $250 appropriate.

Findings of Fact

1. Respondent, Khalid Al Khatib, is an individual whose mailing address is 83 W.N. Broadway, Columbus, Ohio 43214.

2. On or about April 4, 2000, Respondent entered the United States at the Detroit, Michigan International Airport from Israel by way of Amsterdam.

3. The United States Customs Service inspected luggage in Respondent's possession and discovered in one luggage what was initially identified as "food."

4. An APHIS official identified the "food" as one kilogram of fresh almonds from Israel. Fresh almonds are fruits.

5. Respondent did not have knowledge of the fresh almonds being in the luggage in his possession.

6. Fresh almonds from Israel are not permitted to be imported into the United States without a permit.

7. Respondent did not have a permit to import fresh almonds from Israel into the United States.

Conclusion of Law

On or about April 4, 2000, Respondent, Khalid Al Khatib, imported one kilogram of fresh almonds from Israel into the United States in Detroit, Michigan, without a permit in violation of 7 C.F.R. §§ 319.56(b) and 319.56-2(e) of the regulations.

Order

Respondent, Khalid Al Khatib, is assessed a civil penalty of two hundred and fifty dollars ($250.00). The penalty shall be payable to the "Treasurer of the United States" by certified check or money order and shall be forwarded to:

United States Department of Agriculture
APHIS Field Servicing Office, Accounting Section
P.O. Box 3334
Minneapolis, MN 55403

within thirty (30) days from the effective date of this Order. Respondent shall indicate on the certified check or money order that payment is in reference to P.Q.

Docket No. 01-0003.

This Decision and Order will become final and effective 35 days after service on Respondent unless there is an appeal to the Judicial Officer by a party to the proceeding within 30 days after service as provided in Sections l.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145). This Order became effective April 26, 2002. - Editor).

MISCELLANEOUS ORDERS

In re: THE COULSTON FOUNDATION.
AWA Docket No. 01-0044.
Order Dismissing Complaint.
Filed November 4, 2002.

Robert A. Ertman, for Complainant.
Respondent, Pro se.
Order issued by Jill S. Clifton, Administrative Law Judge.

The Complaint against The Coulston Foundation, is hereby dismissed.

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 Order Dismissing Complaint. If no such request is filed, without further action or notice the dismissal will become final and with prejudice one year from today. 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.

In re: STATE OF FLORIDA DEPARTMENT OF CHILDREN and FAMILY SERVICES.
FSP Docket No. 02-0006.
Withdrawal of Appeal.
Filed July 11, 2002.

Jill R. Maze, for Appellee.
Herschel C. Minnis, for Appellant.
Order issued by Dorothea A. Baker, Administrative Law Judge.

The record shall reflect Appellant has withdrawn its Appeal. Accordingly, the matter is no longer pending before this Office.

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.

In re: ROBERT B. MCCLOY, JR.
HPA Docket No. 99-0020.
Stay Order.
Filed July 17, 2002.

Colleen Carroll, for Complainant.
Respondent, Pro se.
Order issued by William G. Jenson, Judicial Officer.

On March 22, 2002, I issued a Decision and Order: (1) concluding that on September 4, 1998, Robert B. McCloy, JR. [hereinafter Respondent], allowed the entry of a horse known as "Ebony Threat's Ms. Professor" for the purpose of showing or exhibiting the horse as entry number 654 in class number 121 at the 60th Annual Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, while the horse was sore, in violation of the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831); (2) assessing Respondent a $2,200 civil penalty; and (3) disqualifying Respondent for a period of 1 year 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. *In re Robert B. McCloy, Jr.,* 61 Agric. Dec. 173 (2002).

On April 22, 2002, Respondent filed a petition for reconsideration of the March 22, 2002, Decision and Order, which I denied. *In re Robert B. McCloy, Jr.,* 61 Agric. Dec. 228 (2002) (Order Denying Pet. For Recons.).

On July 15, 2002, Respondent filed "Respondent Motion to Stay Order of the Judicial Officer Dated March 22, 2002" [hereinafter Motion for Stay] requesting a stay of the Order in *In re Robert B. McCloy, Jr.,* 61 Agric. Dec. 173 (2002), while he pursues review of the March 22, 2002, Order in the United States Court of Appeals for the Tenth Circuit. On July 16, 2002, the Hearing Clerk transmitted the record to the Judicial Officer for ruling on Respondent's Motion to Stay.

On July 16, 2002, Colleen Carroll, counsel for the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], informed me that Complainant], informed me that Complainant does not object to Respondent's Motion for Stay.

In accordance with 5 U.S.C. § 705, Respondent's Motion for Stay is granted.

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

———————

In re: JEAN D. PHILLIPS, BRUCE PHILLIPS, AND MICKEY JOE MCCORMICK.
HPA Docket No. 01-0028.

Order Dismissing Complaint Against Bruce Phillips.
Filed September 5, 2002.

Sharlene Deskins, for Complainant.
L. Thomas Austin, for Respondent.
Order issued by Jill S. Clifton, Administrative Law Judge.

Complainant, the Administrator of the Animal and Plant Health Inspection Service ("APHIS"), moved to dismiss the complaint against Bruce Phillips without prejudice. The Motion states that "Respondents have produced evidence which shows the Mr. Phillips has died and it is therefore not in the interests of justice to pursue the violations further." I have decided to grant Complainant's motion, subject to the following limitations.

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.

_____

In re: BRUCE EDWIN BAUCOM, a/k/a EDDIE BAUCOM, CHAD BAUCOM, AND JEANETTE BAUCOM, a/k/a JEANETTE MELINDA BAUCOM, INDIVIDUALS d/b/a BAUCOM STABLES, AN UNINCOPORATED ASSOCIATION AND TRACY C. GUNTER, JR., AN INDIVIDUAL; AND JEANETTE MELINDA BAUCOM, AN INDIVIDUAL.
HPA Docket No. 01-0002 and HPA Docket No. 01-0015.
Dismissal of the Complaint as to Chad Baucom.
Filed September 12, 2002.

Donald A. Tracy, for Complainant.
Brenda S. Bramlett, for Respondents
Order issued by Jill S. Clifton, Administrative Law Judge.

Complainant's Motion dated September 10, 2002, to dismiss the complaint as to Chad Baucom is hereby **GRANTED.**

The Complaint as to Chad Baucom 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.

_____

In re: LINK WEBB, HEIRWAY FARMS, AND BOBBY BIGGS.
HPA Docket No. 01-0010.
Dismissal of Complaint as to Respondent Bob Culbreath.
Filed September 16, 2002.

Robert A. Ertman, for Complainant.
Brenda S. Bramlett, for Respondents.
Order issued by Dorothea A. Baker, Administrative Law Judge.

Pursuant to Motion therefor, the Motion of Complainant to dismiss the Complaint as to Respondent Bob Culbreath is hereby granted and the proceeding re-captioned to remove his name.

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.

_____

In re: PIONEER STABLES, A GENERAL PARTNERSHIP OR UNINCORPORATED ASSOCIATION; FRED DILLION, AN INDIVIDUAL; DALE WATTS, AN INDIVIDUAL; LUCY WATTS, AN INDIVIDUAL; AND HERBERT G. WEILER, JR., AN INDIVIDUAL.
HPA Docket No. 01-0021.
Dismissal as to Respondents Pioneer Stables and Dale Watts.
Filed October 7, 2002.

Robert A. Ertman, for Complainant.
Pioneer Stables, Pro se.
Mike R. Wall, for Dale Watts, Respondent.
Order issued by James W. Hunt, Chief Administrative Law Judge.

Pursuant to Motion filed by Attorney for Complainant, the Complaint as to Pioneer Stables, a general partnership, or unincorporated association and Dale Watts is hereby dismissed for the reason that Pioneer Stables is not a legal entity and Dale Watts is not a principal in it.

_____

In re: J.R. SIMPLOT COMPANY.
PVPA Docket No. 02-0001.
Order as to Commissioner's Answer.
Filed July 19, 2002.

Robert Ertman, for Commissioner.
Richard C. Peet, for Petitioner.
Ruling issued by William G. Jenson, Judicial Officer.

J.R. Simplot Company [hereinafter Petitioner] instituted this appeal of a decision by Paul M. Zankowski, Commissioner, Plant Variety Protection Office, Science and Technology Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Commissioner], by filing "Petition Under 7 C.F.R. § 97.300 For Recording PVP Application No. 9600256 in the Name of J.R. Simplot Company" [hereinafter Petition] with the Secretary of Agriculture on June 28, 2002. Petitioner instituted the proceeding under the Plant Variety Protection Act, as amended (7 U.S.C. §§ 2321-2583) [hereinafter the PVPA]; and the regulations promulgated pursuant to the PVPA (7 C.F.R. pt. 97) [hereinafter the Regulations].

Section 97.301(a) of the Regulations provides the Commissioner may furnish a written statement to the Secretary of Agriculture in answer to the Petition, as follows:

> **§ 97.301 Commissioner's answer.**
>
> (a) The Commissioner may, within such time as may be directed by the Secretary, furnish a written statement to the Secretary in answer to the appellant's petition, including such explanation of the reasons for the action as may be necessary and supplying a copy to the appellant.

7 C.F.R. § 97.301(a).

Pursuant to section 97.301(a) of the Regulations (7 C.F.R. § 97.301(a)), the Commissioner shall have 20 days from the date of service of this Order on the attorney for the Commissioner[1] to furnish a written statement to the Judicial Officer[2]

[1]The record before me establishes that, for the purposes of this proceeding, Robert A. Ertman, Office of the General Counsel, United States Department of Agriculture, is the attorney for the Commissioner.

[2]Effective December 1, 1977, the Secretary of Agriculture delegated to the Judicial Officer, United States Department of Agriculture, the authority to exercise the functions of the Secretary of Agriculture (continued...)

in answer to the Petition.

———————

In re: J.R. SIMPLOT COMPANY.
PVPA Docket No. 02-0001.
Order to Show Cause.
Filed September 12, 2002.

Robert Ertman, for Commissioner.
Richard C. Peet, for Petitioner.
Ruling issued by William G. Jenson, Judicial Officer.

J.R. Simplot Company [hereinafter Petitioner] instituted this appeal of a decision by Paul M. Zankowski, Commissioner, Plant Variety Protection Office, Science and Technology Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Commissioner], by filing "Petition Under 7 C.F.R. § 97.300 For Recording PVP Application No. 9600256 in the Name of J. R. Simplot Company" [hereinafter Petition] on June 28, 2002. Petitioner instituted the proceeding under the Plant Variety Protection Act, as amended (7 U.S.C. §§ 2321-2583) [hereinafter the PVPA]; and the regulations promulgated pursuant to the PVPA (7 C.F.R. pt. 97) [hereinafter the Regulations]. Petitioner seeks review of the Commissioner's May 13, 2002, denial of Petitioner's request to record assignment of PVP Application No. 9600256.

On August 23, 2002, the Commissioner filed "Answer to Petition for Recording of Abandoned Application." On September 10, 2002, Petitioner filed "Simplot's (1) Reply to Commissioner's Answer to Petition for Recording of Application and (2) Suggestion that Petition be Deferred Pending Disposition of Upcoming Related Petition" wherein Petitioner suggests that I defer the decision in this proceeding until such time as an agency decision is issued on a petition that Petitioner intends to file seeking review of the Commissioner's July 25, 2002, denial of Petitioner's request for revival of PVP Application No. 9600256.

No later than October 1, 2002, the Commissioner is ordered to show cause why I should not defer seeking the advice of the Plant Variety Protection Board in this proceeding[1] and why I should not defer a decision in this proceeding until after an agency decision has been issued regarding Petitioner's contemplated petition

[2](...continued)
where an appeal is filed under section 63 of the PVPA (7 U.S.C. § 2443) (42 Fed. Reg. 61,029-30 (Dec. 1, 1977)).

[1]The PVPA and the Regulations require that I seek and receive advice from the Plant Variety Protection Board before deciding the appeal in this proceeding. (See 7 U.S.C. § 2443; 7 C.F.R. § 97.302(a).)

regarding the revival of PVP Application No. 9600256.

In re: J.R. SIMPLOT COMPANY.
PVPA Docket No. 02-0002.
Order as to Commissioner's Answer.
Filed September 25, 2002.

Robert Ertman, for Commissioner.
Richard G. Stoll, for Petitioner.
Ruling issued by William G. Jenson, Judicial Officer.

J.R. Simplot Company [hereinafter Petitioner] instituted this appeal of a decision by Paul M. Zankowski, Commissioner, Plant Variety Protection Office, Science and Technology Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Commissioner], by filing "Petition Under 7 C.F.R. § 97.300 for Revival of Application No. 9600256 in the Name of J.R. Simplot Company" [hereinafter Revival Petition] with the Judicial Officer on September 20, 2002. Petitioner instituted the proceeding under the Plant Variety Protection Act, as amended (7 U.S.C. §§ 2321-2583) [hereinafter the PVPA]; and the regulations promulgated pursuant to the PVPA (7 C.F.R. pt. 97) [hereinafter the Regulations].

Section 97.301(a) of the Regulations provides the Commissioner may furnish a written statement to the Secretary of Agriculture in answer to the Petition, as follows:

> **§ 97.301 Commissioner's answer.**
>
> (a) The Commissioner may, within such time as may be directed by the Secretary, furnish a written statement to the Secretary in answer to the appellant's petition, including such explanation of the reasons for the action as may be necessary and supplying a copy to the appellant.

7 C.F.R. § 97.301(a).

Pursuant to section 97.301(a) of the Regulations (7 C.F.R. § 97.301(a)), the Commissioner shall have 20 days from the date of service of this Order on the

attorney for the Commissioner[1] to furnish a written statement to the Judicial Officer[2] in answer to the Petition.

In re: J.R. SIMPLOT COMPANY.
PVPA Docket No. 02-0001.
Ruling on Order to Show Cause.
Filed September 25, 2002.

Robert A. Ertman, for Commissioner.
Richard C. Peet, Richard G. Stoll & James M. Silbermann, for Petitioner.
Decided by William G. Jenson, Judicial Officer.

On September 12, 2002, I issued an Order to Show Cause: (1) stating J.R. Simplot Company [hereinafter Petitioner] suggests that I defer the decision in this proceeding until such time as an agency decision is issued on a petition that Petitioner intends to file seeking review of the Commissioner's July 25, 2002, denial of Petitioner's request for revival of PVP Application No. 9600256; and (2) ordering Paul M. Zankowski, Commissioner, Plant Variety Protection Office, Science and Technology Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Commissioner], to show cause why I should not defer seeking the advice of the Plant Variety Protection Board in this proceeding and why I should not defer a decision in this proceeding until after an agency decision has been issued regarding Petitioner's contemplated petition regarding the revival of PVP Application No. 9600256.

On September 20, 2002, Petitioner instituted appeal of the Commissioner's July 25, 2002, denial of Petitioner's request for revival of PVP Application No. 9600256 by filing "Petition Under 7 C.F.R. § 97.300 for Revival of Application No. 9600256 in the Name of J.R. Simplot Company" [hereinafter Revival Petition]. That proceeding is captioned *In re J.R. Simplot Company*, PVPA Docket No. 02-0002.

On September 23, 2002, the Commissioner responded to the Order to Show Cause stating the Commissioner agrees that it would be appropriate to defer a

[1]The record before me establishes that, for the purposes of this proceeding, Robert A. Ertman, Office of the General Counsel, United States Department of Agriculture, is the attorney for the Commissioner.

[2]Effective December 1, 1977, the Secretary of Agriculture delegated to the Judicial Officer, United States Department of Agriculture, the authority to exercise the functions of the Secretary of Agriculture where an appeal is filed under section 63 of the PVPA (7 U.S.C. § 2443) (42 Fed. Reg. 61,029-30 (Dec. 1, 1977)).

decision in this proceeding and consider Petitioner's petition in this proceeding simultaneously with Petitioner's contemplated related petition (Response to Order to Show Cause).[1]

No cause having been shown for not deferring the decision in this proceeding, at this time, I intend to defer seeking the advice of the Plant Variety Protection Board in this proceeding until I seek the advice of the Plant Variety Protection Board in *In re J.R. Simplot Company*, PVPA Docket No. 02-0002, and I intend to defer issuing a decision in this proceeding until I issue a decision in *In re J.R. Simplot Company*, PVPA Docket No. 02-0002.

———————

[1]Apparently, at the time the Commissioner filed the Response to Order to Show Cause, the Commissioner was unaware that Petitioner had filed its Revival Petition in *In re J.R. Simplot Company*, PVPA Docket No. 02-0002.

DEFAULT DECISIONS

AGRICULTURAL MARKETING AGREEMENT ACT

In re: CALE BLOCKER, AN INDIVIDUAL.
AMAA Docket No. 01-0004.
Decision and Order.
Filed May 13, 2002.

AMAA – Default – Failure to pay assessments.

Sheila Deskins, for Complainant.
Respondent, Pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

This proceeding was instituted under the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. § 601 *et seq*. ("the Act"), and the Marketing Order for Vidalia Onions Grown in Georgia, 7 C.F.R. Part 955 (the "Vidalia Onion Order"), by a complaint filed by the Administrator of the Agricultural Marketing Service, United States Department of Agriculture, alleging that respondent Cale Blocker, willfully violated the Vidalia Onion Order.

The Hearing Clerk served on the respondent, by mail, copies of the complaint and the Rules of Practice governing proceedings under the Act (7 C.F.R. §§ 1.130-1.151). The respondent was informed in the accompanying letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation. The respondent has failed to file an answer within the time prescribed in the Rules of Practice, or at all, and the material facts alleged in the complaint, which are admitted by the respondent's failure to file an answer, are adopted and set forth herein as Findings of Fact. This decision and order is issued pursuant to section 1.139 of the Rules of Practice.

Findings of Fact

1. Respondent Cale Blocker is an individual whose mailing address is Route 1, Box 80, Glennville, Georgia 30427. At all times mentioned herein, said respondent was a "handler" as that term is defined in the Act, 7 U.S.C. § 608c(1), and the Vidalia Onion Order, 7 C.F.R. § 955.6.

2. In the 1998-1999 marketing year, respondent Cale Blocker willfully violated sections 955.42 and 955.142 of the Vidalia Onion Order, 7 C.F.R. §§ 955.42, 955.142, by failing to remit $1,995.55 in past due assessments, late payment

charges and accrued interest thereon.

1. The Secretary of Agriculture has jurisdiction in this matter.

2. By reason of the facts set forth in the Findings of Fact above, the respondent has violated sections 955.42 and 955.142 of the Vidalia Onion Order (7 C.F.R. §§ 955.42 and 955.142).

3. The following Order is authorized by the Act and warranted under the circumstances.

Order

1. Respondent is assessed a civil penalty of $5,000 which shall be paid by a certified check or money order made payable to the Treasurer of the United States.

2. 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, and in particular, from paying to the Vidalia Onion Committee $1,995.55 in past due assessments for 1998-1999 crop year, plus interest pursuant to section 955.142 of the Vidalia Onion Order, and from paying to the Vidalia Onion Committee any and all assessments, late fees and interest due under the Vidalia Onion Order from previous crop years.

The provisions of this order shall become effective on the first day after this decision becomes final. This decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice. Copies of this decision shall be served upon the parties.

[This Decision and Order became final July 25, 2002, and effective July 26, 2002. - Editor]

In re: EDWARD MARTIN, d/b/a EDWARD MARTIN ORCHARDS, A SOLE PROPRIETORSHIP.
AMAA Docket No. 01-0001.
Filed August 27, 2002.

AMAA – Default – Failure to pay assessments.

Colleen A. Carroll, for Complainant.
Respondent, Pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

This proceeding was instituted under the Agricultural Marketing Agreement Act

of 1937, as amended 7 U.S.C. § 601 *et seq.* (The "Act"), and the Marketing Orders for Nectarines Grown in California, 7 C.F.R. Part 916 (the "Nectarine Order") and for Pears and Peaches Grown in California, 7 C.F.R. Part 917 (the "Peach Order"), by a complaint filed by the Administrator of the Agircultural Marketing Service, United States Department of Agriculture, alleging that respondent Edward Martin, doing business as Edward Martin Orchards, a sole proprietorship, willfully violated the Order and the Regulations.

The Hearing Clerk served on the respondent, by mail copies of the complaint and the Rules of Practice governing proceedings under the Act (7 C.F.R. §§ 1.130-1.151). The respondent was informed in the accompanying letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation. The respondent has failed to file an answer within the time prescribed in the Rules of Practice. The material facts alleged in the complaint, which are admitted by the respondent's failure to file an answer, are adopted and set forth herein as Findings of Fact. This decision and order is issued pursuant to section 1.139 of the Rules of Practice.

Findings of Fact

1. Respondent Edward Martin is an individual whose mailing address [as alleged in the complaint] is 10187 Witworth, Gustine, California 95322, and does business as, and is the sole proprietor of, Edward Martin Orchards, located at the same address. At all times mentioned herein, respondent Edward Martin dba Edward Martin Orchards was a handler of California peaches and nectarines as defined in the Act, 7 U.S.C. § 609C(1), and in the Peach and Nectarine Orders, 7 C.F.R. §§ 916.10 and 917.7.

2. Respondent willfully violated section 916.41 of the Nectarine Order, 7 C.F.R. § 916.41, by failing to pay to the California Tree Fruit Agreement $2,220.70 in assessments owed in the 2000 marketing season.

3. Respondent willfully violated section 917.37 of the Peach Order 7 C.F.R. § 917.37 by failing to pay to the California Tree Fruit Agreement $2,779.35 in assessments owed in the 2000 marketing season.

4. On or about June 15, 2000, respondent willfully violated section 917.50(1)(6) of the Peach Order (7 C.F.R. § 917.50(a)(6)), by failing to file with the California Tree Fruit Agreement destination reports for the month of May 2000.

5. On or about July 15, 2000, respondent willfully violated section 917.50 (a)(6) of the Peach Order (7 C.F.R. § 917.50(a)(6)), by failing to file with the California Tree Fruit Agreement destination reports for the month of June 2000.

6. On or about August 15, 2000, respondent willfully violated section

916.60(a)(6) of the Nectarine Orders (7 C.F.R. § 916.60(a)(6)), by failing to file with the California Tree Fruit Agreement destination reports for the month of July 2000.

7. On or about August 15, 2000, respondent willfully violated section 917.50 (a)(6) of the Peach Order (7 C.F.R. § 917.50(a)(6)), by failing to file with the California Tree Fruit Agreement destination reports for the month of July 2000.

8. On or about September 15, 2000, respondent willfully violated section (a)(6) of the Nectarine Order (7 C.F.R. § 916.60(a)(6)), by failing to file with the California Tree Fruit Agreement destination reports for the month of August 2000.

9. On or about September 15, 2000, respondent willfully violated section 917.50(a)(6) of the Peach Order (7 C.F.R. § 917.50(a)(6)), by failing to file with the California Tree Fruit Agreement destination reports for the month of August 2000.

10. On or about October 15, 2000, respondent willfully violated section 916(a)(6) of the Nectarine Order (7 C.F.R. § 916.60(a)(6)), by failing to file with the California Tree Fruit Agreement destination reports for the month of September 2000.

11. On or about October 15, 2000, respondent willfully violated section 917.50(a)(6) of the Peach Order (7 C.F.R. § 917.50(a)(6)), by failing to file with the California Tree Fruit Agreement destination reports for the month of September 2000.

12. On or about November 15, 2000, respondent willfully violated section 916.60(b) of Nectarine Order (7 C.F.R. § 916.160(b)), by failing to file with the California Tree Fruit Agreement recapitulation of shipment reports for the 2000 marketing year.

13. On or about November 15, 2000, respondent willfully violated section 917.178(b) of the Peach Order (7 C.F.R. § 917.178(b)), by failing to file with the California Tree Fruit Agreement recapitulation of shipment reports for the 2000 marketing year.

Conclusion

a. The Secretary of Agriculture has jurisdiction in this matter.

b. By reason of the facts set forth in the Findings of Fact above, the respondent has violated sections 916.41, 916.60(a)(6), and 916.160(b) of the Nectarine Order (7 C.F.R. §§916.41, 916.60(a)(6), 916.160(b)) and sections 917.37, 917.50, and 917.178(b) of the Peach Order (7 C.F.R. §§ 917.37, 917.50, 917.178(b)).

c. The following Order is authorized by the Act and warranted under the circumstances.

Order

1. Respondents are assessed a civil penalty of $15,000, which shall be paid by a certified check or money order made payable to the Treasurer of the United States.

2. Respondents, their agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the regulations and standards issued thereunder, and in particular, from paying to the Nectarine Administrative Committee #2,220.70 in past due assessments for crop year 2000, and from paying to the Control Committee #2,779.35 in past due assessments for crop year 2000.

The provisions of this order shall become effective on the first day after this decision becomes final. This decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice. Copies of this decision shall be served upon the parties.

[This Decision and Order became final August 26, 2002, and effective August 27, 2002.-Editor]

_____

ANIMAL QUARANTINE ACT

In re: ROBERT K. GRIDER.
A.Q. Docket No. 02-0003.
Decision and Order.
Filed October 22, 2003.

AQ – Default – Transporting swine without certificate.

Darlene Bolinger, for Complainant.
Respondent, Pro se.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the interstate transportation of animals, including poultry, and animal products (9 C.F.R. §§ 71.19 and 85.1 *et seq*.), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. § 1.130 *et seq*.

This proceeding was instituted under section 2 of the Act of February 2, 1903, as amended (21 U.S.C. § 111)(Act)[1] and the regulations promulgated thereunder, by a complaint filed on February 7, 2002, by the Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the 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. Robert K. Grider is an individual with a mailing address of Route 1, Box 177L, Road 611, Duffield, Virginia 24244.

2. On or about January 12, 1999, respondent violated 9 C.F.R. §§ 85.7(c) by

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[1] The combined authority sections for Parts 71 and 85 are the Act of February 2, 1903 (21 U.S.C. §§ 111, 120 through 122); Sections 4-8, 11 and 13 of the Act of May 29, 1884, (21 U.S.C. §§ 113, 114a, 114a-1,115-117, 120); Section 1-4 of the Act of March 3, 1905 (21 U.S.C. §§ 123-126); and sections 3 and 11 of Public Law 87-518 (21 U.S.C. §§ 134b, and 134f).

moving approximately 47 swine from Indiana to Virginia without a certificate.

3. On or about January 12, 1999, respondent violated 9 C.F.R. § 71.19 by the movement of approximately 47 swine from Indiana to Virginia, without individual identification.

4. On or about January 12, 1999, respondent violated 9 C.F.R. §§ 85.7(c) by moving approximately nineteen swine from Indiana to Kentucky, without a certificate.

5. On or about January 12, 1999, respondent violated 9 C.F.R. § 71.19 by the moving approximately nineteen swine from Indiana to Kentucky, without individual identification.

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Act and the regulations issued under the Act (9 C.F.R. §§ 71.19 and 85.1 *et seq*.). Therefore, the following Order is issued.

Order

The respondent is hereby assessed a civil penalty of ten thousand dollars ($10,000.00). This penalty shall be payable to the "Treasurer of the United States" to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

within thirty (30) days from the effective date of this Order. The civil penalty shall be made payable as follows: five hundred dollars ($500 .00) of the assessed amount shall be payable within thirty days from the effective date of this Order. Thereafter, a monthly installment of five hundred dollars ($500.00) shall be due and payable on or before the tenth day of each month, for the next nineteen (19) months, until the assessed penalty is paid in full. Each 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 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 November 30, 2002.-Editor]

ANIMAL WELFARE ACT

In re: JACK OSTERHOUT d/b/a JACK'S PETTING ZOO.
AWA Docket No. 01-0050.
Decision and Order.
Filed June 7, 2002.

AWA – Default – Failure to obtain license.

Donald Tracy, for Complainant.
Respondent, Pro se.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

Preliminary Statement

This proceeding was instituted under the Animal Welfare Act ("Act"), as amended (7 U.S.C. § 2131 *et seq.*), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent willfully violated the Act.

The Hearing Clerk served a copy of the complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130-1.151, on the respondent on August 20, 2001. The letter of service informed the respondent 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 Jack Osterhout, d/b/a Jack's Petting Zoo, 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

A. Jack Osterhout, hereinafter referred to as respondent, is an individual doing business as Jack's Petting Zoo, whose address is Box 344, Medora, North Dakota 58645.

B. The respondent, at all times material herein, was operating as an exhibitor as defined in the Act and the regulations.

II

On October 5, 1995, October 3, 1996, August 8, 1997, August 2, 1998, August 29, 1998, and June 10, 2000, the respondent has operated as an exhibitor as defined in the Act and the regulations, without being licensed, in willful violation of section 4 of the Act (7 U.S.C. § 2134) and subsection 2.1 of the regulations (9 C.F.R. § 2.1).

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, and in particular, respondent 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 $3,200.00, 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 and effective October 1, 2002.]

In re: BETTY MOREY a/k/a BETTY FARAONE.
AWA Docket No. 02-0012.
Decision and Order.
Filed August 14, 2002.

AWA – Default – Failure to obtain license.

Brian T. Hill, for Complainant.
Respondent, Pro se.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

Preliminary Statement

This proceeding was instituted under the Animal Welfare Act ("Act"), as amended (7 U.S.C. § 2131 et seq.), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent 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 Betty Morey on February 27, 2002. 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

Betty Morey, a/k/a Betty Faraone, hereinafter referred to as respondent, is an individual, whose address is Route 1, Box 96-A, Greenville, Missouri 63922.

II

On or about March 29, 1999 and continuing through December 28, 2000, 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)). Respondent sold, in commerce, at least 33 dogs for resale for use as pets. The sale of each animal constitutes a separate violation.

Conclusions

1. The Secretary has jurisdiction in this matter.

2. The following Order is authorized by the Act and warranted under the circumstances.

Order

1. Respondent, 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:

(a) Operating as a dealer as defined in the Act and the regulations, without being licensed.

2. The respondent is assessed a civil penalty of $3,575.00, which shall be paid by a certified check or money order made payable to the Treasurer of United States.

3. Respondent is disqualified from obtaining a license for a period of one year and continuing thereafter until she demonstrates to the Animal and Plant Health Inspection Service that she is in full compliance with the Act, the regulations and standards issued thereunder, and this order, including payment of the civil penalty imposed herein.

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 and effective on November 4, 2002.-Editor]

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In re: THOMAS W. RASPOPTSIS d/b/a PETS-N-US.
AWA Docket No. 02-0027.
Decision and Order.
Filed November 18, 2002.

AWA – Default – Failure to obtain license.

Sharlene A. Deskins, for Complainant.
Respondent, Pro se.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

Preliminary Statement

This proceeding was instituted under the Animal Welfare Act ("Act"), as amended (7 U.S.C. § 2131 *et seq.*), by a Complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent willfully violated the Act and the regulations issued thereunder (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 upon respondent by certified mail on January 12, 2002. Respondent was informed in the letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation.

The Respondent failed to file an answer addressing the allegations contained in the complaint within the time prescribed in the Rules of Practice. Therefore, the material facts alleged in the Complaint, are admitted as set forth herein by Respondent's failure to file an answer pursuant to the Rules of Practice, are adopted as 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 Thomas W. Raspopstsis is an individual whose address is 25001 W. 8 Mile Road, Redford MI 48240. The Respondent operates under the business name of Pets-N-Us.

B. At all material times the respondent operated as a dealer and exhibitor as defined in the Act and the regulations.

C. While the respondent was licensed he annually received copies of the Act and the regulations and standards issued thereunder and agreed in writing to comply with them.

D. The Respondent was licensed until 1998 when he failed to renew his license. The Respondent was disqualified for a nine month period starting on October 1, 1999 from applying for or obtaining a license. The disqualification has continued since the Respondent failed to pay a civil penalty assessed against him for previous violations of the Act. *See* 58 *Agric. Dec.* 908, 911 (1999).

II

E. Since at least April 7th, 2000, the respondent has operated as a dealer and as an exhibitor as defined in the Act and the regulations, without having obtained a

license, in willful violation of section 4 of the Act (7 U.S.C. § 2134) and section 2.1 of the regulations (9 C.F.R. § 2.1).

III

F. Since at least April 7th, 2000, the Respondent has operated as a dealer and as an exhibitor as defined in the Act and the regulations, without having obtained a license, in willful violation of section 4 of the Act (7 U.S.C. § 2134) and section 2.1 of the regulations (9 C.F.R. § 2.1). The Respondent's violated the Act and regulations by :

1. exhibiting marmosets without having obtained a license.
2. offering animals for sale over the internet without having obtained a license.
3. offering animals for sale at his store in Redford, Michigan.

Conclusions

1. The Secretary has jurisdiction in this matter.
2. By reason of the facts set forth in the Findings of Fact above, the respondent has violated the Act and regulations promulgated under the Act.
3. The following Order is authorized by the Act and warranted under the circumstances.

Order

1. Respondent, his agents and employees, successors and assigns, directly, indirectly or through any corporate or other device, shall cease and desist from violating the Act and the regulations issued thereunder, and in particular, shall cease and desist from:

(A) Engaging in any activity for which a license is required under the Act and regulations without being licensed as required including but not limited to exhibiting, selling and offering animals for sale without
having a license.

2. The respondent is assessed a civil penalty of $11,000, which shall be paid by a certified check or money order made payable to the Treasurer of United States. The check shall be sent to Sharlene Deskins, STOP 1417, 1400 Independence Ave., S.W., Washington, D.C. 20250-1417.

3. The respondent is disqualified for one year from applying for or becoming licensed under the Act and regulations. The disqualification from applying for a licensed or becoming licensed will continue until the respondent has paid the civil penalty assessed against him in this case and in all previous cases filed under the

Animal Welfare Act including but not limited to AWA Dkt. No. 99-0005 and all court costs associated with trying to collect the civil penalties assessed against him.

The provisions of this Order shall become effective on the first day after service of this decision on the respondent.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in section 1.142 and 1.145 of the Rules of Practice, 7 C.F.R. §§ 1.142 and 1.145.

Copies of this decision shall be served upon the parties.

[This Decision and Order became final on December 28, 2002.-Editor]

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FEDERAL CROP INSURANCE ACT

In re: JOHN HOUCHIN.
FCIA Docket No. 02-0001.
Decision and Order.
Filed July 5, 2002.

FCIA – Default – Fraud, insurance.

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 to respondent, John Houchin, 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 of 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 28, 2002.-Editor]

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In re: KENNETH J. WINTER.
FCIA Docket No. 01-0001.
Decision and Order.
Filed July 5, 2002.

FCIA – Default – Fraud, insurance.

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, Kenneth J. Winter, to file an amended answer within the time provided is deemed an admission of the allegations contained in the Amended Complaint. Since the allegations in paragraph II of the Amended 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 September 19, 2002.-Editor]

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In re: LAKE WENDELL FARMS, INC.
FCIA Docket No. 02-0002.
Decision and Order.
Filed August 27, 2002.

FCIA – Default – Fraud, insurance.

Donald Brittenham, for Complainant.
Andy W. Gay, for Respondent.
Decision and Order issued by Jill S. Clifton, 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, Lake Wendell Farms, Inc., to file an Answer within the time provided

is deemed an admission of the allegations contained in the Amended Complaint. Since the allegations in paragraphs I and II of the Amended Complaint are deemed admitted, it is found that Respondent has willfully and intentionally provided false or 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 (Act). (7 U.S.C. 1515 (h)).

It is further found that, pursuant to section 515 of the Act (7 U.S.C. 1515), Respondent is disqualified from receiving any monetary or nonmonetary benefit provided under each of the following for a period of 2 crop years:

(i) The Federal Crop Insurance Act (7 U.S.C. 1501 *et seq.*).
(ii) The Agricultural Market Transition Act (7 U.S.C. 7201 *et seq.*), including the noninsured crop disaster assistance program under section 196 of that Act (7 U.S.C. 7333).
(iii) The Agricultural Act of 1949 (7 U.S.C. 1421 *et seq.*).
(iv) The Commodity Credit Corporation Charter Act (15 U.S.C. 714 *et seq.*).
(v) The Agricultural Adjustment Act of 1938 (7 U.S.C. 1281 *et seq.*).
(vi) Title XII of the Food Security Act of 1985 (16 U.S.C. 3801 *et seq.*).
(vii) The Consolidated Farm and Rural Development Act (7 U.S.C. 1921 *et seq.*).
(viii) Any law that provides assistance to a producer of an agricultural commodity affected by a crop loss or a decline in the prices of agricultural commodities.

The period of disqualification shall be effective 35 days after this decision is served on Respondent unless there is an appeal to the Judicial Officer within 30 days after service pursuant to § 1.145 of the Rules of Practice, 7 C.F.R. § 1.145.

If the period of disqualification would commence after the beginning of the crop year, and 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 October 10, 2002.-Editor]

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In re: WILLIAM D. EDWARDS, JR.
FCIA Docket No. 02-0003.
Decision and Order.
Filed August 27, 2002.

FCIA – Default – Fraud, insurance.

Donald Brittenham, for Complainant.
Andy W. Gay, for Respondent.
Decision and Order issued by Jill S. Clifton, 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, William D. Edwards, Jr., to file an Answer within the time provided is deemed an admission of the allegations contained in the Amended Complaint. Since the allegations in paragraphs I and II of the Amended Complaint are deemed admitted, it is found that Respondent has willfully and intentionally provided false or 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 (Act). (7 U.S.C. 1515 (h)).

It is further found that, pursuant to section 515 of the Act (7 U.S.C. 1515), Respondent is disqualified from receiving any monetary or nonmonetary benefit provided under each of the following for a period of 2 crop years:

(i) The Federal Crop Insurance Act (7 U.S.C. 1501 *et seq.*).
(ii) The Agricultural Market Transition Act (7 U.S.C. 7201 *et seq.*), including the noninsured crop disaster assistance program under section 196 of that Act (7 U.S.C. 7333).
(iii) The Agricultural Act of 1949 (7 U.S.C. 1421 *et seq.*).
(iv) The Commodity Credit Corporation Charter Act (15 U.S.C. 714 *et seq.*).
(v) The Agricultural Adjustment Act of 1938 (7 U.S.C. 1281 *et seq.*).
(vi) Title XII of the Food Security Act of 1985 (16 U.S.C. 3801 *et seq.*).
(vii) The Consolidated Farm and Rural Development Act (7 U.S.C. 1921 *et seq.*).
(viii) Any law that provides assistance to a producer of an agricultural commodity affected by a crop loss or a decline in the prices of agricultural commodities.

The period of disqualification shall be effective 35 days after this decision is served on Respondent unless there is an appeal to the Judicial Officer within 30 days after service pursuant to § 1.145 of the Rules of Practice, 7 C.F.R. § 1.145.

If the period of disqualification would commence after the beginning of the crop year, and 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 October 10, 2002.-Editor]

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In re: GEORGE A. BARGERY.
FCIA Docket No. 00-0006.
Decision and Order.
Filed October 4, 2002.

FCIA – Default – Summary judgement – Fraud, insurance.

Donald McAmis, for Complainant.
Phillip Fraas, for Respondent.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

The complaint herein was filed on September 12, 2000, by the Federal Crop Insurance Corporation under section 506(n) of the Federal Crop Insurance Act ("FCIA") (7 U.S.C. § 1506(n)) and subpart R of the Regulation (7 C.F.R. § 400.451 - 400.500). It alleges that in 1991 Respondent, George A. Bargery, wilfully and intentionally provided false and inaccurate information with respect to an insurance plan or policy under the FCIA and that on April 21, 1999, Respondent was convicted by a U.S. District Court of knowingly making false statements under the FCIA. The complaint seeks to disqualify Respondent from purchasing catastrophic risk protection for one year and from receiving any other benefit under the FCIA for a period of five years.

In his answer Respondent stated, *inter alia*, that he was convicted pursuant to a plea agreement of one count of conspiracy to defraud the Federal Crop Insurance Corporation, that the proposed penalty is excessive, that the complaint is barred by a "general statute of limitations," and that the Complainant lacks jurisdiction because subpart R of the regulations applies only to acts occurring after October 14, 1993.

Complainant replied with a Motion for Summary Judgment. It contended that, as Respondent admitted that he had been convicted of violating the FCIA, there are no material issues of fact and that its jurisdiction in this matter was conferred when FCIA was enacted in 1990.

Respondent filed objections to Complainant's motion, and filed a Counter Motion for Summary Judgment, in which he contended, *inter alia*, that the complaint is barred because 28 U.S.C. § 2462 requires that a proceeding for the enforcement of a civil penalty be commenced within five years of the date the

violation occurred. In this instance the violation occurred in 1991 but the complaint was not filed until 2000.

Complainant filed a "Counter Statement" contending that Section 2462 of Title 28 of the United States Code is inapplicable to this matter because Section 2462 is concerned with proceedings involving a punitive penalty or forfeiture, whereas this matter concerns a disqualification form participation in the crop insurance program. It contends that this is remedial in nature and akin to revocation of a privilege, which is not a punitive measure. In its reply Respondent argues that the sanction proposed by the complaint is punitive.

The Department's Rules of Practice do not specifically provide for a motion for summary judgment, but does prohibit motions for judgments based on the pleadings. The Federal Rules of Civil Procedure, which provide for summary judgments, are not applicable to Department proceedings. *Ron Morrow,* 53 Agric. Dec. 144, 154 (1994); *James Joseph Hickey*, 53 Agric. Dec. 1087, 1097 (1994). However, the Administrative Procedure Act, which does control this proceeding, does not preclude summary judgments. Koch, Administrative Law and Practice, § 5.77 (West Publishing Co., 1985). The Department has also ruled that, when facts established in a collateral proceeding show that there is no material issue of fact, a decision without hearing – in effect a summary judgment – can be issued. See e.g., *Veg-Mix, Inc.*, 44 Agric. Dec. 1583, 1590 (1985), *aff'd in relevant part, Veg-Mix, Inc. v. USDA*, 832 F.2d 601, 607-608 (D.C. Cir. 1987). Accordingly, as a collateral action shows that there is no material issue of fact in this matter, the respective motions for summary judgment by Complainant and Respondent will be entertained.

28 U.S.C. § states in relevant part:

> [A]n action, suit, or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued. . . .

Section 2462 applies to administrative penalty proceedings as well as judicial actions and the three circuits that have considered the issue have held that the five years in which an administrative enforcement proceeding must be instituted starts

with the date the alleged violation occurred[1] *U.S. v. Core Laboratories, Inc.,* 759 F.2d 480 (5th Cir. 1985); *U.S. v. Meyer,* 808 F.2d 912 (1st Cir. 1987); *3M Co. v. Browner,* 17 F.3d 1453 (D.C. Cir. 1994). Thus, if section 2462 is applicable to this matter, it is barred by that section because it was instituted over five years after Respondent's violation occurred.

Complainant contends that the section is not applicable to this matter because it applies to punitive actions and that the sanction it seeks here – disqualification from the federal crop insurance program – is suspension of a privilege and is not punitive.

The Department, however, has held that its purpose in seeking sanctions in its enforcement of federal statues is to punish violators in order to deter them from future violations. *Spencer Livestock Commission*, 46 Agric. Dec. 268, 437-446 (1987).[2] It considers any statute that allows a person to engage in a regulated business to be granting the person a privilege (*Id* at 436) and that a sanction to remedy a violation of the statute should be a suspension or revocation of the privilege. Respondent stated in his affidavit that "I could not get financing to farm commercially as I am doing now if I could not get crop insurance."

I find that the effects of the sanction sought in the complaint is punitive and that this matter is therefore a proceeding for the enforcement of a civil penalty. As it was not instituted within five years from the date of the accural of the action, the complaint is barred by 28 U.S.C. § 2462. Accordingly, Complainant's Motion for Summary Judgment is denied and Respondent's Motion for Summary Judgment is granted. The complaint will be ordered dismissed.

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[1] The Court in *3M Co. v. Browner, infra*, also held that an agency has another five years following the assessment of a penalty to institute a judicial action to enforce the penalty.

[2] The Department's sanction policy has been affirmed by the courts. See *Hutto Stockyards, Inc.*, 48 Agric. Dec. 436, 486, fn. 28 (1989).

Order

The complaint, filed September 12, 2000, is dismissed.

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 Judicial Officer 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).

[This Decision and Order became final November 14, 2002.-Editor]

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PLANT QUARANTINE ACT

In re: MARIA GUZMAN.
P.Q. Docket No. 00-0016.
Decision and Order.
Filed November 7, 2001.

PQ – Default – Importation, prohibited – Potatoes.

Rick Herndon, for Complainant.
Respondent, Pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the movement of fruits and vegetables (7 C.F.R. § 319.56 *et seq.*), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq.* and 380.1 *et seq.*

This proceeding was instituted under the Federal Plant Pest Act, as amended (7 U.S.C. §§ aa 150aa-150jj), the Plant Quarantine Act, as amended (7 U.S.C. §§ 151-154, 156-165 and 167) (Acts), and the regulations promulgated under the Acts, by a complaint filed on August 8, 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. § 1.1.36(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. Maria J. Guzman, herein referred to as the respondent, is an individual whose mailing address is 603 West 140th Street, Apartment #1, New York, New York 10031.

2. On or about September 2, 1999, at Jamaica, New York, respondent imported six pounds of potatoes from the Dominican Republic into the United States in violation of 7 C.F.R. §319.56 because importation of potatoes from the Dominican

Republic 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 (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 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. 00-0016.

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 the proceeding. (7 C.F.R. § 1.145).

[This Decision and Order became final August 5, 2002.-Editor]

In re: VASU PERSAUD; a/k/a ANTHONY PERSAUD; d/b/a PERSAUD ENTERPRISES, D&H SERVICES, B&H SERVICES, G&L WEST INDIAN GROCERY, VP TRADING, V PERSAUD IMPORTS, and other unnamed business.
P.Q. Docket No. 01-0020.
Decision and Order.
Filed July 11. 2002.

PQ – Default – Importation, prohibited – Fruit – Vegetables – Plant pests.

Margaret Burns, for Complainant.
Respondent, Pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the movement of fruits and vegetables (7 C.F.R. § 319.56 *et seq.*), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq.* And 380.1 *et seq.*

This proceeding was instituted under the Federal Plant Pest Act, as amended (7 U.S.C.§§ 150aa-150jj), the Plant Quarantine Act, as amended (7 U.S.C. §§ 151-154, 156-165 and 167) (Acts), and the regulations promulgated under the Acts, by a complaint filed on August 7, 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 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. Vasu Persaud, aka Anthony Persaud, dba Persaud Enterprises, D&H Services, B&H Services, G&L West Indian Grocery, VP Trading, V Persaud Imports, and other unnamed businesses, hereinafter referred to as respondent, is a business with a mailing address of 91-14 182nd Street, Hollis, NY 11432.

2. On or about June 5, 1997, respondent violated 7 C.F.R. § 319.56 of the regulations by importing in the United States, five boxes of prohibited fresh Genips, from Guyana into JFK International Airport, New York, New York.

3. On or about June 5, 1997, respondent violated 7 C.F.R. § 319.56 of the regulations by importing into the United States, two boxes of prohibited fresh Hyacinth Beans, from Guyana into JFK International Airport, New York, New York.

4. On or about June 5, 1997, respondent violated 7 C.F.R. § 319.56 of the regulations by importing into the United States, on box of prohibited fresh Mangoes, from Guyana into JFK International Airport, New York, New York.

5. On or about June 5, 1997, respondent violated 7 C.F.R. § 319.56 of the regulations by importing into the United States, on box of prohibited fresh

Mammae-apples, from Guyana into JFK International Airport, New York, New York.

6. On or about January 14, 2000, respondent violated 7 C.F.R. § 319.56-6(d) of the regulations by moving ten cartons fresh Long Beans imported from the Dominican Republic, from JFK International Airport, New York, New York, the port of firs arrival, without release by USDA.

7. On or about January 14, 2000, respondent violated 7 C.F.R. § 319-56-6(e) of the regulations by failing to hold and fumigate ten cartons of fresh Long Beans imported from the Dominican Republic, into JFK International Airport, New York, New York, after a plant pest was found in the shipment.

8. On or about January 14, 2000, respondent violated 7 C.F.R. § 330.200 of the regulations by knowingly moving from JFK International Airport, New York, New York, ten cartons of fresh Long Beans infested with plant pests imported from the Dominican Republic, into or through the United States without a permit for such movement of plant pests.

9. On or about February 17, 2000, respondent violated 7 C.F.R. § 319.56-6(d) of the regulations by moving sixty-nice cartons of fresh Eggplants imported from the Dominican Republic, from JFK International Airport, New York, New York, the port of first arrival without release by USDA.

10. On or about February 17, 2000, respondent violated 7 C.F.R. § 319.56-6(e) of the regulations by failing to hold and fumigate as prescribed sixty-nine cartons fresh Eggplants imported from the Dominican Republic, into JFK International Airport, New York, New York, after a plant pest was found in the shipment.

11. On or about February 17, 2000, respondent violated 7 C.F.R. § 330.200 of the regulations by knowingly moving from JFK International Airport, New York, New York, sixty-nine cartons of fresh Eggplant infested with plant pests imported from Dominican Republic, into or through the United States, without a permit for such movement of plant pests.

12. On or about March 2, 2000, respondent violated 7 C.F.R. § 319.56-6 (e) of the regulations by failing to move fifty cartons of fresh Long Squash imported from the Dominican Republic, from JFK International Airport, New York, New York, to an authorized site for treatment, as prescribed by the USDA after plant pests were found in the shipment.

13. On or about March 2, 2000, respondent violated 7 C.F.R. § 330.200 of the regulations by knowingly moving from JFK International Airport, New York, New York, fifty cartons of fresh Long Squash infested with plan pests imported from the Dominican Republic into or through the United States without a permit for such movement of plant pests.

14. On or about March 31, 2000, respondent violated 7 C.F.R. § 319.56-6(e)

of the regulations by failing to move eighteen boxes of fresh Pigeon Peas imported from the Dominican Republic, from JFK International Airport, New York, New York to an authorized site for treatment, as prescribed by the USDA, after plant pests were found in the shipment.

15. On or about March 31, 2000, respondent violated 7 C.F.R. § 300.200 of the regulations by knowingly moving from JFK International Airport, New York, New York, eighteen boxes of fresh Pigeon Peas infested with plant pests imported from the Dominican Republic, into or through the United States without a permit for such movement of plant pests.

16. On or about April 6, 2000, respondent violated 7 C.F.R. § 319.56-6 (e) of the regulations by failing to move seventeen boxes of fresh Eggplant imported from the Dominican Republic from JFK International Airport, New York, New York, to an authorized site for treatment, as prescribed by the USDA, after plant pests were found in the shipment.

17. On or about April 6, 2000, respondent violated 7 C.F.R. § 300.200 of the regulations by knowingly moving from JFK International Airport, New York, New York, seventeen boxes of fresh Eggplant infested with plant pests imported from the Dominican Republic, into or through the United States without a permit for such movement of plant pests.

Conclusions

By reason of the Findings of Fact set forth above, the respondent has violated Acts and the regulations issued under the Acts (7 C.F.R. § 319.56 *et seq*.). Therefore, the following Order is issued.

Order

The respondent is hereby assessed a civil penalty of seventeen thousand dollars ($17,000). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondent shall indicate that payment is in reference to P.Q. Docket NO. 01-0020.

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 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 September 10, 2002.-Editor]

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CONSENT DECISIONS

(Not published herein-Editor)

AGRICULTURAL MARKETING AGREEMENT ACT

Feliciano Lucas and Lucas Tomatoes, Inc. AMAA Docket No. 02-0006. 10/25/02.

ANIMAL QUARANTINE ACT

Harold Stewart d/b/a O&S Cattle Company, and FRS Farms, Inc. (Consent Decision Regarding Harold Stewart d/b/a O&S Cattle Co.). A.Q. Docket No. 01-0008. 10/3/02.

Harold Stewart d/b/a O&S Cattle Company, and FRS Farms, Inc. (Consent Decision Regarding FRS Farms, Incorporated). A.Q. Docket No. 01-0008. 11/15/02.

ANIMAL WELFARE ACT

Tropicana Living Things, Inc., and Joseph Hereau. AWA Docket No. 02-0013. 7/9/02.

Northwest Airlines, Inc. AWA Docket No. 01-0042. 9/5/02.

Sandra Slaughter and Rex Slaughter. AWA Docket No. 00-0030. 9/6/02.

Jewel Bond d/b/a Bond Kennel. AWA Docket No. 01-0023. 9/6/02.

Joe Vala d/b/a Lost World Reptiles. AWA Docket No. 02-0015. 9/12/02.

Alder Ridge Farm, Inc. AWA Docket No. 02-0019. 9/23/02.

Sydney Perkins and Herbert Perkins, d/b/a SYD's Hilltop Kennel. AWA Docket No. 01-0043. 10/8/02.

Wildlife Waystation, a California corporation; and Martine Colette, an individual. AWA Docket 00-0013. 10/31/02.

Fred Bauer and Margie Bauer, d/b/a Bauer Kennels. AWA Docket No. 01-0055. 11/19/02.

John Hartsock. AWA Docket No. 01-0054. 12/20/02.

EGG RESEARCH AND CONSUMER INFORMATION ACT

K-Brand Farms, a New York corporation. ERCIA Docket No. 02-0001. 10/3/02.

Dyness Farms, Inc., a Washington corporation. ERCIA Docket No. 02-0002. 12/12/02.

FEDERAL MEAT INSPECTION ACT

White Dairy Ice Cream Company, Inc., and Donald R. Tankersley. FMIA Docket No. 02-0002. 7/3/02.

Central Kentucky Custom Meats, Inc. and Tommie Neil Buck. FMIA Docket No. 02-0003. 7/8/02.

Hagemann Meat Company, Inc. and Raymond A. Hagemann. FMIA Docket No. 02-0004. 7/23/02.

S&S Meat Purveyors, Inc., d/b/a United Provision Meat Company. FMIA Docket No. 02-0005. 8/30/02.

Billy Ray Phillips and Bill Phillips Sales, Inc. d/b/a Rocket City Meats & Seafoods. FMIA Docket No. 02-0006. 09/26/02.

HORSE PROTECTION ACT

Alan Love. HPA Docket No. 01-0031. 11/01/01.

Warner, Baucom, et al., and Tracy C. Gunter, Jr. and Jeanette Melinda Baucom. (Consent Decision as to Tracy C. Gunter, Jr.). HPA Docket No. 01-0002 and HPA Docket No. 01-0015. 8/26/02.

William L. Russell, Alice L. Russell, and Mickey McCormick. (Consent Decision as to William and Alice Russell). HPA Docket No. 01-0025. 8/26/02.

William L. Russell, Alice L. Russell, and Mickey McCormick. (Consent Decision as to Mickey McCormick). HPA Docket No. 02-0025. 8/26/02.

Jean D. Phillips, Bruce Phillips, and Mickey Joe McCormick. (Consent Decision as to Jean D. Phillips and Mickey Joe McCormick). HPA Docket No. 01-0028. 8/30/02.

Alan Love and Charlie Green. (Consent Decision and Order as to Charlie Green). HPA Docket No. 01-0031. 9/9/02.

Warner, Baucom, et al., and Tracy C. Gunter, Jr. and Jeanette Melinda Baucom. (Consent Decision as to Bruce Edwin Baucom and Jeanette Melinda Baucom). HPA Docket No. 01-0002 and HPA Docket No. 01-0015. 9/12/02.

Link Webb, Heirway Farms, Bobby Biggs, and Bob Culbreath. (Consent Decision as to Heirway Farms and Robby Biggs. (Consent Decision and Order as to Heirway Farms and Robby Biggs). HPA Docket No. 01-0010. 9/16/02.

Link Webb, Heirway Farms, Robby Biggs. (Consent Decision and Order as to Link Webb). HPA Docket No. 01-0010. 9/16/02.

Bruce Wilson Williams and Larry G. Patton, d/b/a Larry Patton Stables. HPA Docket No. 01-0027. 9/26/02.

Pioneer Stables, a general partnership, or unincorporated association; FRED DILLON, an individual; DALE WATTS, an individual; LUCY WATTS, an individual; and HERBERT G. WEILER, JR., an individual. (Consent Decision and Order as to Fred Dillon). HPA Docket No. 01-0021. 10/07/02.

Pioneer Stables, a general partnership, or unincorporated association; FRED DILLON, an individual; DALE WATTS, an individual; LUCY WATTS, an individual; and HERBERT G. WEILER, JR., an individual. (Consent Decision and Order as to Respondent Lucy Watts). HPA Docket No. 01-0021. 10/7/02.

Pioneer Stables, a general partnership, or unincorporated association; FRED DILLON, an individual; DALE WATTS, an individual; LUCY WATTS, an individual; and HERBERT G. WEILER, JR., an individual. (Consent Decision and Order as to Herbert G. Weiler, Jr.). HPA Docket No. 01-0021. 10/10/02.

Morris W. Anderson, owner; and Don Milligan, an individual. HPA Docket No. 01-0020. 12/20/02.

Lloyd Touchton, an individual; Mary Touchton, an individual; Touchton Farms, an unincorporated association; Bill C. Cantrell an individual; and Bill Cantrell Stables, Inc., an Alabama corporation. (Consent Decision and Order as to Lloyd and Mary Touchton). HPA Docket No. 01-0003. 12/20/02.

PLANT QUARANTINE ACT

Martin Ramirez Mojica. P.Q. Docket No. 02-0007. 9/3/02.

ProdiGene, Inc. P.Q. Docket No. 03-0009. 12/6/02.

POULTRY PRODUCTS INSPECTION ACT

White Dairy Ice Cream Company, Inc., and Donald R. Tankersley. PPIA Docket No. 02-0001. 7/3/02.

Hagemann Meat Company, Inc. and Mr. Raymond A. Hagemann. PPIA Docket No. 02-0002. 7/3/02.

S&S Meat Purveyors, Inc., d/b/a United Provision Meat Company. PPIA Docket No. 02-0003. 8/30/02.

Phoenix Poultry Corporation and George D. Oppenheimer. PPIA Docket No. 01-0001. 9/19/02.

Billy Ray Phillips. and Bill Phillips Sales, Inc. d/b/a Rocket City Meats & Seafoods. PPIA Docket No. 02-0005. 09/26/02.

New On Sang Poultry Company, Inc. PPIA Docket No. 02-0004. 10/24/02.

PORK PROMOTION RESEARCH and CONSUMER INFORMATION ACT

Guntrhop Pasture-ized Pork and Poultry, LLC, Union Packing, a partnership, Gunthrop Farms, Lei A. Guntrhop and Gregory T. Gunthrop. PPRCIA Docket No. 02-0001. 10/30/02.

AGRICULTURE DECISIONS

Volume 61

July - December 2002
Part Two (P & S)
Pages 786 - 813

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 (from the beginning of the annual Volume) are included in a separate volume, entitled Part Four.

Volumes 59 (circa 2000) through the current volume of *Agriculture Decisions* are also available online at http://www.usda.gov/da/oaljdecisions/ along with links to other related websites.

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.

LIST OF DECISIONS REPORTED

JULY - DECEMBER 2002

PACKERS AND STOCKYARDS ACT

MISCELLANEOUS DECISIONS

DEFAULT DECISIONS

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PACKERS AND STOCKYARDS ACT

MISCELLANEOUS ORDERS

In re: WAYNE W. COBLENTZ, d/b/a COBLENTZ & SONS LIVESTOCK.
P. & S. Docket No. D-01-0013.
Stay Order.
Filed July 29, 2002.

Charles E. Spicknall, for Complainant.
Bruce H. Wilson, for Respondent.
Order issued by William G. Jenson, Judicial Officer.

On May 30, 2002, I issued a Decision and Order: (1) concluding that Wayne W. Coblentz, d/b/a Coblentz & Sons Livestock [hereinafter Respondent], willfully violated the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §§ 181-229) [hereinafter the Packers and Stockyards Act]; (2) ordering Respondent to cease and desist from (a) issuing checks in payment for livestock purchases without maintaining sufficient funds on deposit and available in the account upon which the checks are drawn to pay the checks when presented, (b) failing to pay, when due, the full purchase price of livestock, and (c) failing to pay the full purchase price of livestock; and (3) suspending Respondent as a registrant under the Packers and Stockyards Act for 5 years. *In re Wayne W. Coblentz*, 61 Agric. Dec. 330 (2002).

On July 23, 2002, Respondent filed "Motion for Stay of Suspension" [hereinafter Motion for Stay] requesting a stay of the Order in *In re Wayne W. Coblentz*, 61 Agric. Dec. 330 (2002), during the pendency of Respondent's Petition for Review filed in the United States Court of Appeals for the Sixth Circuit. On July 24, 2002, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Respondent's Motion for Stay.

On July 24, 2002, Charles E. Spicknall, counsel for the Deputy Administrator, Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture [hereinafter Complainant], informed me by telephone that Complainant does not oppose Respondent's Motion for Stay.

Respondent has appealed *In re Wayne W. Coblentz*, 61 Agric. Dec. 330 (2002), to the United States Court of Appeals for the Sixth Circuit. Therefore, in accordance with 5 U.S.C. § 705, Respondent's Motion for Stay is granted.

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

ORDER

The Order issued in *In re Wayne W. Coblentz*, 61 Agric. Dec. 330 (2002), is stayed pending the outcome of proceedings for judicial review. This Stay Order shall remain in effect until it is lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

In re: MARVIN WINEGAR.
P&S Docket No. D-02-0020.
Order of Dismissal.
Filed August 30, 2002.

Mary Hobbie, for Complainant.
Respondent, Pro se.
Order issued by Jill S. Clifton, Administrative Law Judge.

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*) herein referred to as the "Act", instituted by a complaint filed by the Acting Deputy Administrator, Grain Inspection Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondent wilfully violated the Act.

Copies of the complaint and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.130 *et seq.*) governing proceedings under the Act were served upon Respondent by certified mail.

Findings of Fact

1. Marvin Winegar, hereinafter referred to as the Respondent, is a individual whose mailing address is 9090 NE 38th, Altoona, Iowa 50009.

2. Respondent is, and at all times material herein was:

(a) Engaged in business of a market agency buying on commission livestock in commerce;

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account, and as a market agency buying on commission.

3. Respondent has an adequate bond or its equivalent as required by the Act and regulations.

Conclusions

By reason of the facts found in the Finding of Facts herein, Respondent is in compliance with section 312(a) of the Act (7 U.S.C. § 213(a)), and sections 201.29 and 201.30 of the regulations (9 C.F.R. §§ 201.29, 201.30), therefore the complaint should be dismissed.

Order

Complaint is dismissed.
Copies hereof shall be served upon the parties

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PACKERS AND STOCKYARDS ACT

DEFAULT DECISIONS

In re: BILLY MIKE GENTRY.
P&S Docket No. D-02-0002.
Decision and Order.
Filed July 25, 2002.

P&S – Default – Bond, failure to maintain adequate, bond.

Ann Parness, for Complainant.
Respondent, Pro se.
Decision and Order issued by Jill S. Clifton, Administrative Law Judge.

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Deputy Administrator, Packers and Stockyards Programs, Grain, Inspection, Packers and Stockyards Administration, United States Department of Agriculture, alleging that Respondent willfully violated the Act and the regulations promulgated thereunder (9 C.F.R. § 201.1 *et seq.*). The complaint and a copy of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.130 *et seq.*), hereinafter the Rules of Practice, were mailed to Respondent by regular mail on February 28, 2002. Accompanying the complaint was a cover letter informing Respondent that an answer must be filed within twenty (20) days of service and that failure to file an answer would constitute an admission of all of the material allegations in the complaint and a waiver of the right to an oral hearing.

Respondent has failed to file an answer within the time period required by the Rules of Practice (7 C.F.R. § 1.136), and the material facts alleged in the complaint, which are admitted by Respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent Gentry, hereinafter referred to as Respondent, is an individual whose mailing address is P. O. Box 667, Houston, Mississippi 38851.
2. Respondent is and at all times material herein was:

(a) Engaged in the business of a market agency buying on commission, and of a dealer buying and selling livestock in commerce for his own account; and

(b) Registered with the Secretary of Agriculture as a market agency buying on commission, and as a dealer to buy and sell livestock in commerce for his own account.

3. Respondent Gentry was ordered in docket D-91-24 issued July 5, 1991, to cease and desist from engaging in business in any capacity for which bonding is required under the Act and regulations without filing and maintaining a reasonable bond or its equivalent, as required by the Act and regulations. Respondent Gentry was also assessed a civil penalty.

4. As set forth in section II of the complaint, Respondent was served with a letter of notice on March 13, 2000, informing him that the $10,000.00 surety bond he maintained was inadequate, and that a $75,000.00 surety bond was required to secure the performance of his livestock obligations. Notwithstanding this notice, the Respondent continued to engage in the business of a market agency and a dealer without maintaining an adequate bond or its equivalent.

Conclusions

By reason of the facts alleged in Finding of Fact 4, Respondent has wilfully violated section 312(a) of the Act (7 U.S.C. § 213(a)), and sections 201.29 and 201.30 of the regulations (9 C.F.R. §§ 201.29, 201.30).

Respondent did not file an answer within the time period prescribed by section 1.136 of the Rules of Practice (7 C.F.R. § 1.136), which constitutes an admission of all of the material allegations in the complaint. Complainant has moved for the issuance of a Decision Without Hearing by Reason of Default, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). Accordingly, this decision is entered without hearing or further procedure.

Order

Respondent Billy Mike Gentry, his agents and employees, directly or indirectly through any corporate or other device, in connection with his operations subject to the Packers and Stockyards Act, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), Respondent is hereby assessed a civil penalty in the amount of five thousand dollars ($5,000).

This decision and order shall become final and effective without further proceedings thirty-five (35) days after service on Respondent, if it is not appealed to the Judicial Officer by a party to the proceeding within thirty (30) days, pursuant

to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final November 2, 2002. - Editor]

In re: HOUSTON LIVESTOCK CO., INC., BILLY MIKE GENTRY.
P&S Docket No. D-02-0003.
Decision and Order.
Filed July 25, 2002.

P&S – Default – Proceeds, failure to remit, net – Custodial account, failure to maintain .

Ann Parnes, for Complainant.
Respondents, Pro se.
Decision and Order issued by Jill S. Clifton, Administrative Law Judge.

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Deputy Administrator, Packers and Stockyards Programs, Grain, Inspection, Packers and Stockyards Administration, United States Department of Agriculture, alleging that Respondents willfully violated the Act and the regulations promulgated thereunder (9 C.F.R. § 201.1 *et seq.*). The complaint and a copy of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.130 *et seq.*), hereinafter the Rules of Practice, were mailed to both parties via certified mail on January 29, 2002. On February 21, 2002, the complaint addressed to Houston Livestock was returned undeliverable and remailed by regular mail on February 21, 2002. The complaint addressed to Billy Mike Gentry came back unclaimed on March 5, 2002, and was remailed by regular mail on March 6, 2002. Accompanying the complaint was a cover letter informing Respondents that an answer must be filed within twenty (20) days of service and that failure to file an answer would constitute an admission of all of the material allegations in the complaint and a waiver of the right to an oral hearing.

Respondents have failed to file an answer within the time period required by the Rules of Practice (7 C.F.R. § 1.136), and the material facts alleged in the complaint, which are admitted by Respondents' failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

(1) Houston Livestock Co, Inc. hereinafter referred to as Respondent Houston, is

a corporation organized and existing under the laws of the state of Mississippi. Its business mailing address is 5050 Highway 6 East, Pontonoc, MS, 38863.

(2) Respondent Houston is and at all times material herein was:

(a) Engaged in the business of a market agency selling livestock on a commission basis; and

(b) Registered with the Secretary of Agriculture as a market agency to sell livestock in commerce on a commission basis.

(3) Respondent Billy Mike Gentry, hereinafter referred to as Respondent Gentry, is an individual whose mailing address is P.O. Box 667, Houston, Mississippi 38851.

(4) Respondent Gentry is and at all times material herein was:

(a) President and Treasurer of Respondent Houston;

(a) Owner of 50% of the stock of Respondent Houston; and

(c) Responsible for the direction, management, and control of Respondent Houston;

(d) Registered with the Secretary of Agriculture as a market agency buying on commission, and as a dealer to buy and sell livestock in commerce for his own account;

(e) alter ego of the Respondent Houston.

(5) As set forth in section II(a) of the complaint, Respondent Houston, under the direction, management and control of Respondent Gentry, issued insufficient funds checks in purported payment of the net proceeds from the sale of consigned livestock.

(6) As set forth in section II(b) of the complaint, Respondent Houston, under the direction, management and control of Respondent Gentry, failed to remit, when due, the net proceeds from the sale of consigned livestock.

(7) As set forth in section II(c) of the complaint, Respondent Houston, under the direction, management and control of Respondent Gentry, failed to remit the net proceeds from the sale of consigned livestock.

(8) As set forth in section III of the complaint, Respondent Houston, under the direction, management and control of Respondent Gentry, failed to maintain and use properly its Custodial Account for Shippers' Proceeds.

Respondents did not file an answer within the time period prescribed by section 1.136 of the Rules of Practice (7 C.F.R. § 1.136), which constitutes an admission of all of the material allegations in the complaint. Complainant has moved for the issuance of a Decision Without Hearing by Reason of Default, pursuant to section 1.139 of the Rules of Practice

(7 C.F.R. § 1.139). Accordingly, this decision is entered without hearing or further procedure.

Order

By reason of the facts alleged in Findings of Fact 4,5 and 6, Respondents have willfully violated sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228(b), and section 201.43 of the regulations (9 C.F.R. § 201.43).

By reason of the facts alleged in Finding of Fact 7, Respondents have willfully violated section 312(a) of the Act (7 U.S.C. § 213(a)), and section 201.42 of the regulations (9 C.F.R. § 201.42).

Respondents Houston and Gentry, their agents and employees, directly or through any corporate or other device, in connection with their activities subject to the Packers and Stockyards Act, shall cease and desist from:

1. Issuing checks or drafts in payment of the net proceeds from the sale of consigned livestock without having sufficient funds on deposit and available in the custodial account upon which such checks are drawn to pay such checks when presented;

2. Failing to remit, when due, the net proceeds received from the sale of consigned livestock;

3. Failing to remit the net proceeds received from the sale of consigned livestock;

4. Failing to deposit in the Custodial Account for Shippers' Proceeds within the time prescribed by section 201.42 of the regulations (9 C.F.R. § 201.42), an amount equal to the proceeds receivable from the sale of consigned livestock; and

5. Failing to otherwise maintain the Custodial Account for Shippers' Proceeds in strict conformity with the provisions of Section 201.42 of the regulations (9 C.F.R. § 201.42)

Houston Livestock Co., Inc., and Billy Mike Gentry as its alter ego, are suspended for a period of five years and thereafter until such time as the shortage in the Custodial Account for Shippers' Proceeds is corrected, provided, however, that upon application to the Packers and Stockyards Programs, a supplemental order may be issued after 90 days of the suspension have been served allowing for the salaried employment of Billy Mike Gentry by another registrant or by a packer. If the Respondents pay in full all debts to consignors resulting from the Respondents' failure to remit the net proceeds from the sale of consigned livestock, and the shortage in the Custodial Account for Shippers' Proceeds is corrected, and upon application to the Packers and Stockyards Programs and documentation substantiating such restitution and compliance, a supplemental order may be issued terminating the suspension after 90 days of the suspension have been served.

This decision and order shall become final and effective without further proceedings thirty-five (35) days after service on Respondents, if it is not appealed to the Judicial Officer by a party to the proceeding within thirty (30) days, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final October 2, 2002. - Editor]

In re: BERT SMITH, IV d/b/a B4 CATTLE COMPANY, AND B4 CATTLE COMPANY, INC.
P&S Docket No. D-02-0010.
Decision and Order.
Filed August 12, 2002.

P&S – Default – Bond, failure to maintain adequate, bond – Custodial account, failure to maintain adequate – Purchase price, failure to pay full.

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

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Deputy Administrator, Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture, alleging that Respondents willfully violated the Act and the regulations promulgated thereunder (9 C.F.R. § 201.1 *et seq.*) The complaint and a copy of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.130 *et seq.*), hereinafter "Rules of Practice," were mailed to the Respondents via certified mail on March 22, 2002. As indicated by the return date stamped on the return receipt cards, copies of the complaint were received by both Respondents, on March 25, 2002. Accompanying the complaint was a cover letter informing Respondents that an answer must be filed within twenty (20) days of service, and that failure to file an answer would constitute an admission of all of the material allegations in the complaint and a waiver of the right to an oral hearing.

Respondents have failed to file an answer within the time period prescribed by the Rules of Practice (7 C.F.R. § 1.136), and the material facts alleged in the complaint, which are admitted by Respondents' failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Bert Smith, IV, hereinafter referred to as "Respondent Smith, is an individual who was doing business as B4 Cattle Company until September 5, 2001, the date on which B4 Cattle Company was incorporated under the laws of the

Commonwealth of Virginia as the successor entity B4 Cattle Company, Inc. Respondent Smith's business mailing address is P.O. Box 1610, Chilhowie, VA 24319.

2. Respondent Smith is, and at all times material herein was:

(a) Engaged in the business of a dealer buying and selling livestock in commerce for his own account;

(b) Either doing business as B4 Cattle Company or was president and 100% shareholder of B4 Cattle Company, Inc.;

(c) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account or the accounts of others;

(d) Responsible for the direction, management and control of the day-to-day operations of B4 Cattle Company and its successor entity B4 Cattle Company, Inc.

3. B4 Cattle Company, Inc., hereinafter referred to as the "Corporate Respondent," is a successor entity to B4 Cattle Company, and a corporation organized and existing under the laws of the Commonwealth of Virginia, whose business mailing address is P.O. Box 1610, Chilhowie, VA 24319.

4. The Corporate Respondent is, and at all times material herein was:

(a) Engaged in the business of a dealer buying and selling livestock in commerce for its own account; and

(b) Not registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for its own account or the accounts of others.

5. Respondent Smith is the alter ego of the Corporate Respondent.

6. As set forth in section II of the complaint, Respondent Smith, doing business as B4 Cattle Company, and/or as President of the successor entity B4 Cattle Company, Inc., engaged, and has continued to engage, in the business of a dealer subject to the Act without obtaining an adequate bond or bond equivalent.

7. As set forth in section III of the complaint, Respondent Smith, doing business as B4 Cattle Company, and the Corporate Respondent issued checks in payment for livestock purchases which were returned unpaid by the bank upon which they were drawn because Respondents did not have and maintain sufficient funds on deposit and available in the accounts upon which such checks were drawn to pay such checks when presented.

8. As set forth in section IV of the complaint, Respondent Smith, doing business as B4 Cattle Company, and the Corporate Respondent, in connection with their operations subject to the Act, purchased livestock and failed to pay, when due, the full purchase price of such livestock.

Respondents did not file an answer within the time period prescribed by section 1.136 of the Rules of Practice (7 C.F.R. § 1.136), which constitutes an admission of all of the material allegations in the complaint. Complainant has moved for the issuance of a Decision Without Hearing by Reason of Default, pursuant to section 1.139 of the Rules of Practice

(7 C.F.R. § 1.139). Accordingly, this decision is entered without hearing or further procedure.

Order

By reason of the facts alleged in finding of fact 6, the Respondents have willfully violated section 312(a) of the Act (7 U.S.C. §§ 213(a)), and sections 201.29 and 201.30 of the Regulations (9 C.F.R. §§ 201.29, 201.30) .

By reason of the facts alleged in findings of fact 7 and 8, the Respondents have willfully violated sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b).

Respondents Bert Smith, IV and B4 Cattle Company, Inc., their agents and employees, directly or through any corporate or other device, in connection with their activities subject to the Packers and Stockyards Act, shall cease and desist from:

1. Failing to pay the full purchase price of livestock;
2. Failing to pay, when due, the full purchase price of livestock;
3. Issuing checks in payment for livestock purchases without maintaining sufficient funds on deposit and available in the account upon which the checks are drawn to pay the checks when presented; and
4. Engaging in business in any capacity for which registration and bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without registering and filing an adequate bond or its equivalent, as required by the Act and the regulations.

Respondent Bert Smith, IV is hereby suspended as a registrant under the Act for a period of ten (10) years. Provided, however, that upon application to the Packers and Stockyards Programs, a supplemental order terminating the suspension may be issued at any time after the expiration of 390 days upon demonstration by Respondent Smith that he has obtained the required bond or bond equivalent, and that all unpaid livestock sellers identified in the complaint have been paid in full; and provided further that this order may be modified upon application to the Packers and Stockyards Programs to permit the salaried employment of Respondent by another registrant or packer after the expiration of the initial 390 days and upon demonstration of circumstances warranting modification of the order.

Respondent B4 Cattle Company, Inc. shall not be registered with the Secretary of Agriculture for a period of ten (10) years. Pursuant to section 303 of the Act (7 U.S.C. § 203), Respondent B4 Cattle Company, Inc. is prohibited from operating subject to the Act without being registered. Provided, however, that upon application to the Packers and Stockyards Programs, a supplemental order allowing Respondent B4 Cattle Company, Inc. to register with the Secretary of Agriculture may be issued at any time after the expiration of 390 days upon demonstration by Respondent B4 Cattle Company, Inc. that it has obtained the required bond or bond

equivalent, and that all unpaid livestock sellers identified in the complaint have been paid in full.

This decision and order shall become final and effective without further proceedings thirty-five (35) days after service on Respondents, if it is not appealed to the Judicial Officer by a party to the proceeding within thirty (30) days, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final October 31, 2002 - Editor]

In re: WAITE & WAITE COMPANY, L.L.C., RALPH B. WAITE, SR., AND RALPH WAITE, JR.
P&S Docket No. D-02-0008.
Decision Without Hearing by Reason of Default as to Corporate Respondent Waite & Waite Company, L.L.C.
Filed September 19, 2002.

P&S – Default – Payment, failure to make prompt – Funds on account, failure to maintain adequate.

Charles L. Kendall, for Complainant.
Resspondent, Pro se.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*)(hereinafter referred to as the "Act"), instituted by a Complaint filed on March 1, 2002, by the Deputy Administrator, Packers and Stockyards Programs, GIPSA, United States Department of Agriculture. The Complaint alleged that during the period January 3, 2001, through January 13, 2001, Waite & Waite Company, L.L.C., hereinafter referred to as the Corporate Respondent, issued checks in payment for livestock purchases which checks were returned unpaid by the bank upon which they were drawn, because Corporate Respondent did not have and maintain sufficient funds on deposit and available in the account upon which such checks were drawn to pay such checks when presented. The Complaint further alleged that Corporate Respondent purchased livestock during that same period and failed to pay, when due, the full purchase price of such livestock to nine (9) sellers for eleven (11) transactions. As of the date of the issuance of the complaint, there remained unpaid $69,681.09 for the livestock purchases referred to herein.

A copy of the Complaint was served on Corporate Respondent, and Corporate Respondent has not responded. 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 procedure pursuant to Section 1.139 of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.130 *et seq.*)("Rules of Practice").

Findings of Fact

1. Waite & Waite Company, L.L.C., hereinafter referred to as the Corporate Respondent, is a limited liability company organized and doing business in the State of Oklahoma, with a mailing address of 913 North 161st East Avenue, Tulsa, Oklahoma 74116.

2. The Corporate Respondent, at all times material herein, was engaged in the business of a dealer buying and selling livestock in commerce for its own account and for the account of others and registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce.

3. The Secretary has jurisdiction over Respondent and the subject matter involved herein.

4. As set forth in paragraph II, subpart (a), of the Complaint, during the period January 3, 2001, through January 13, 2001, Corporate Respondent issued checks in payment for livestock purchases which checks were returned unpaid by the bank upon which they were drawn, because Corporate Respondent did not have and maintain sufficient funds on deposit and available in the account upon which such checks were drawn to pay such checks when presented.

5. As set forth in paragraph II, subpart (b), of the Complaint, during the period January 3, 2001, through January 13, 2001, Corporate Respondent purchased livestock and failed to pay, when due, the full purchase price of such livestock to nine (9) sellers for eleven (11) transactions. As of the date of the issuance of the complaint, there remained unpaid $69,681.09 for the livestock purchases referred to herein.

Conclusions

Corporate Respondent's issuance of checks in payment for livestock purchases without sufficient funds on deposit and available in the account upon which such checks were drawn to pay such checks when presented, and Corporate Respondent's failure to make full payment promptly with respect to the 11 transactions set forth in Finding of Fact No. 4 above, constitute wilful violations of sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b) for which the Order below is issued.

Order

Respondent Waite & Waite Company, L.L.C., its agents and employees, directly or through any corporate or other device, in connection with its operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Failing to pay the full purchase price of livestock;
2. Failing to pay, when due, the full purchase price of livestock; and
3. Issuing checks in payment for livestock purchases without sufficient funds on deposit and available in the account upon which such checks are drawn to pay such checks when presented.

In accordance with 7 U.S.C. § 204, the registration of Respondent Waite & Waite Company, L.L.C. is suspended for a period of five (5) years. Provided, however, that should full restitution be made to all unpaid sellers identified in the Complaint, a supplemental order may be issued terminating the suspension at any time after 125 days of suspension.

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).

[This Decision and Order became final November 1, 2002. - Editor]

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In re: MBA POULTRY, LLC, AND MARK A. HASKINS.
P&S Docket No. D-01-0010.
Decision and Order as to Respondent MBA Poultry, LLC Upon Admission of Facts by Reason of Default.
Filed October 3, 2002.

P&S – Default – Payment, failure to make full.

Eric Paul, for Complainant.
James J. Stumpf, Trustee, for Respondent.
Decision and Order issued by Jill S. Clifton, Administrative Law Judge.

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (U.S.C. § 181 *et seq*.), herein referred to as the Act, instituted by a complaint filed by the Deputy Administrator, Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration (GIPSA), United States Department of Agriculture, charging that the Respondents wilfully violated the Act.

Copies of the complaint and the Rules of Practice (7 C.F.R. § 1.130 *et seq*.)

governing proceedings under the Act were served upon Respondents. Respondent Mark A. Haskins filed an answer as an individual Respondent, and subsequently resolved the allegations brought against him as a Respondent in this proceeding by agreeing to a consent decision. Service was made on Respondent MBA Poultry, LLC, by regular mail sent to its Chapter 7 Trustee, Mr. James J. Stumpf, on July 25, 2001, after an attempted delivery by certified mail was returned refused on July 16, 2001. By letter dated August 15, 2001, Respondent MBA Poultry, LLC, was notified that it had failed to file an answer with the Hearing Clerk by the required date of August 14, 2001.

Respondent MBA Poultry, LLC, has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by Respondent MBA Poultry, LLC's failure to file an answer, are adopted and set forth herein as findings of fact.

Findings of Fact

1. Respondent MBA Poultry, LLC, hereinafter Respondent MBA, is a Nebraska limited liability company whose business address at all times material herein was 333 South 3rd Street, Tecumseh, NE 68450.

2. The current mailing address of Respondent MBA, as a debtor under Chapter 7 of the Bankruptcy Code, is: MBA Poultry, LLC, c/o James J. Stumpf, Trustee, 11623 Arbor St., # 100, Omaha, NE 68144.

3. Respondent MBA at all times material herein was:

(a) Engaged in the business of obtaining live poultry under a poultry growing arrangement for the purpose of slaughter and the sale and shipment of poultry products in commerce; and

(b) A live poultry dealer within the meaning of and subject to the provisions of the Act.

4. Respondent MBA, on or about the dates and in the transactions set forth below, obtained live chickens under poultry growing arrangements and failed to pay, when due, for this live poultry when it failed to deliver to the poultry growers, before the close of the fifteenth day following the week in which the poultry was slaughtered, the full amount due to such poultry growers on account of such poultry.

Poultry Grower	Flock Kill Date	Payment Due per §410(a)	Poultry Amt. Due Grower	Unpaid Poultry Amounts
Steve Jennett	10/07/99	10/25/99	$8,196.20	$8,196.20

Kenneth Jennett	10/08/99	10/25/99	9,133.40	9,133.40
Todd Dunphy	10/12/99	11/01/99	17,740.09	17,740.09
Jerry Burtnett	10/13/99	11/01/99	7,807.80	7,807.80
Wendell Jackson	10/15/99	11/01/99	14,297.36	14,297.36
Frederick Kay	10/19/99	11/08/99	16,698.11	16,698.11
Tom Kosch [Chicks II, Inc.]	10/22/99	11/08/99	7,824.14	7,824.14
Kenneth Kosch [Chicks R US, Inc.]	10/25/99	11/15/99	8,040.16	8,040.16
Darell Aerts	10/27/99	11/15/99	$18,275.36	$18,275.36
Gerald Schmidt [Elton Schmidt & Sons]	10/29/99	11/15/99	18,117.71	18,117.71
Gary Wiese	11/03/99	11/22/99	17,577.78	17,577.78
Michael Standley	11/05/99	11/22/99	15,371.36	15,371.36
William (Bill) Ehm	11/10/99	11/29/99	15,977.28	15,977.28
Rex Adams	11/11/99	11/29/99	10,265.30	10,265.30
Richard Weehler [Weehler Farms]	11/15/99	12/06/99	16,488.23	16,488.23
Joe & Michael Warin [W&W Partnership]	11/17/99	12/06/99	15,832.68	15,832.68
John Priest	11/19/00	12/06/99	16,481.04*	16,481.04*
Dennis Quam [Quam Brooders, LLC]	11/23/99	12/13/99	10,159.79**	10,159.79**

*This amount includes $78.11 due under a retroactive incentive program addendum to the poultry growout agreement.

**This amount includes $50.55 due under a retroactive incentive program addendum to the poultry growout agreement.

5. The total amount unpaid to poultry growers for live poultry grown pursuant to a poultry growing arrangement in the above transactions is $244,283.79.

6. Respondent MBA, on or about the dates and in the transactions set forth below, obtained live chickens under poultry growing arrangements and failed to pay, when due, for this live poultry when it failed to deliver to poultry growers, before the close of the fifteenth day following the week in which the poultry was slaughtered, the full amount due to such poultry growers on account of such poultry.

Poultry Grower	Flock Kill Date	Payment Due per §410(a)	Poultry Amt. Due Grower	Full Payment Made By Poultry Trust Distribution Check	No. of Days Payment Late
Robert Drewes [Triple DDD, Inc.]	12/01/99	12/20/99	$26,977.54	03/14/00	85
Johnny Haer	12/03/99	12/20/99	17,382.66	03/14/00	85
Richard Moberg	12/06/99	12/27/99	8,266.89	03/14/00	78
Roland Routh	12/08/99	12/27/99	17,373.91	03/14/00	78
Joe Maynes	12/10/99	12/27/99	16,438.38	03/14/00	78
Gary Kunkel	12/13/99	01/03/00	7,835.94	03/14/00	71
Lee Smith	12/15/99	01/03/00	17,803.46	03/14/00	71
Steve Jennett	12/16/99	01/03/00	8,156.03	03/14/00	71
Kenneth Jennett	12/17/99	01/03/00	9,086.40	03/14/00	71
Todd Dunphy	12/22/99	01/10/00	17,288.10	03/14/00	64
Jerry Burtnett	12/23/99	01/10/00	8,348.64	03/14/00	64
Ralph Oliphant	01/04/00	01/24/00	18,521.42	03/14/00	50

Poultry Grower	Flock Kill Date	Payment Due per §410(a)	Poultry Amt. Due Grower	Full Payment Made By Poultry Trust Distribution Check	No. of Days Payment Late
Tom Kosch [Chicks II, Inc.]	01/05/00	01/24/00	7,865.72	03/14/00	50
Kenneth Kosch [Chicks R US, Inc.]	01/06/00	01/24/00	8,007.38	03/14/00	50
Darell Aerts	01/10/00	01/31/00	17,321.75	03/14/00	43
Gerald Schmidt [Elton Schmidt & Sons]	01/12/00	01/31/00	17,648.36	03/14/00	43
Gary Wiese	01/14/00	01/31/00	17,718.08	03/14/00	43

Conclusions

By reason of the facts alleged admitted in Finding of Fact 4 through 6 herein, Respondent MBA has wilfully violated section 410 of the Act (7 U.S.C. § 228b-1).

Order

Respondent MBA Poultry, LLC, its officers, directors, agents and employees, successors and assigns, in connection with their operations as a live poultry dealer, shall cease and desist from:

1. Failing to pay the full amount due to poultry growers on account of live poultry obtained under poultry growing arrangements; and

2. Failing to pay, when due, for live poultry obtained under poultry growing arrangements by not delivering to poultry growers the full amount due for the live poultry before the close of the fifteenth day following the week in which the poultry was slaughtered.

This decision shall become final and effective without further proceedings 35 days after the date of service upon Respondent MBA Poultry, LLC, unless it is appealed to the Judicial Officer by a party to the proceeding within 30 days pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Copies of this decision shall be served upon the parties.

[This Decision and Order became final November 12, 2002. - Editor]

In re: BARNESVILLE LIVESTOCK SALES CO. AND GARY W. FOGLE.
P&S Docket No. D-00-0007.
Decision and Order.
Filed November 1, 2002.

P&S – Default – Payment, failure to make full – Account, failure to maintain custodial – Funds on deposit, failure to maintain adequate.

Charles Spicknal, for Complainant.
Respondent, Pro se.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

This proceeding under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*), hereinafter the "Act," was instituted by a complaint filed on June 21, 2000, by the Deputy Administrator, Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration (GIPSA), United States Department of Agriculture alleging that the Respondents willfully violated the Act. The complaint and a copy of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.130), hereinafter the "Rules of Practice," were served on the Respondents.

The Hearing Clerk's letter of service accompanying the complaint informed the Respondents that their answers to the complaint were to set forth any defenses that they wished to assert and that they were to specifically admit, deny or explain each allegation of the complaint. The letter went on to explain that "filing an answer which does not deny the material allegations of the complaint, shall constitute an admission of those allegations and a waiver of your right to an oral hearing." Letter from Joyce A. Dawson, Hearing Clerk to Respondent Barnesville Livestock Sales Co. (dated June 22, 2000). In a letter response dated July 10, 2000, Respondents failed to deny the material allegations in the complaint. Instead, Respondents asserted that Barnesville Livestock Sales Co. ("Barnesville Livestock") was working to obtain a bank loan and that the money necessary to cure the complaint violations would be "in place with in 30 to 60 days. *See* Letter from Gary Fogle to Hearing Clerk (dated July 10, 2000) (emphasis added).

The complaint was subsequently amended on August 23, 2000 and a "Second Amended Complaint" was filed on April 24, 2002. The amended complaints were served on the Respondents and alleged continuing violations of the Act and the regulations promulgated thereunder by the Secretary of Agriculture (9 C.F.R. § 201.1 et seq.). Respondents answered both complaints with letter responses asserting that Barnesville Livestock was in the process of obtaining the financing necessary to cure the alleged violations. Respondents did not deny any of the

continuing violations alleged in the amended complaints.

Respondents have failed to file an answer denying the material allegations in the Second Amended Complaint, thus, pursuant to section 1.136 of the Rules of Practice (7 C.F.R. § 1.136) the material allegations of fact in the Second Amended Complaint are deemed admitted. Based on these admissions, Complainant's motion for the issuance of a decision pursuant to section 1.139 of the Rules of Practice, (7 C.F.R. § 1.139) is hereby granted and this Decision and Order are entered without hearing or further procedure.

Findings of Fact

1. Barnesville Livestock Sales Co., hereinafter referred to as "Corporate Respondent," is a corporation organized and existing under the laws of the state of Ohio. Its mailing address is P.O. Box 377, Barnesville, Ohio 43713.

2. Corporate Respondent is and, at all times material herein, was:

(a) Engaged in the business of conducting and operating Barnesville Livestock Sales Co., a posted stockyard under the Act located in Barnesville, Ohio;

(b) Engaged in the business of a market agency selling livestock on a commission basis; and

(c) Registered with the Secretary of Agriculture as a market agency to sell livestock in commerce on a commission basis and furnish stockyard services.

3. Gary Fogle, hereinafter referred to as "Respondent Fogle," is an individual whose mailing address is P.O. Box 377, Barnesville, Ohio 43713.

4. Respondent Fogle is and, at all times material herein, was:

(a) The president of Corporate Respondent;

(b) The owner of 50 percent of the corporate stock issued by Corporate Respondent;

(c) Responsible for the day-to-day direction, management and control of Corporate Respondent;

(d) A market agency within the meaning of and subject to the provisions of the Act; and

(e) The alter ego of Corporate Respondent.

5. Corporate Respondent, under the direction, management, and control of Respondent Fogle, on or about the dates and in the transactions set forth in paragraph II of the Second Amended Complaint, failed to properly use and maintain its Custodial Account for Shipper's Proceeds ("custodial account"), thereby endangering the faithful and prompt accounting therefor and the payment of portions due the owners or consignors of livestock.

6. As more fully set forth in paragraph III of the Second Amended Complaint, the financial condition of the Corporate Respondent does not meet the requirements of the Packers and Stockyards Act.

7. Corporate Respondent, under the direction, management and control of Respondent Fogle, in connection with its operations subject to the Act, on or about the dates and in the transactions set forth in paragraph IV of the Second Amended Complaint, sold livestock on a consignment basis and in purported payment of the net proceeds therefor, issued checks which were returned unpaid by the bank upon which they were drawn because Corporate Respondent did not have sufficient funds on deposit and available in the custodial account upon which such checks were drawn to pay the checks when presented.

8. Corporate Respondent, under the direction, management and control of Respondent Fogle, in connection with its operations subject to the Act, on or about the dates and in the transactions listed paragraph IV of the Second Amended Complaint, sold consigned livestock on a commission basis and failed to remit, when due, proceeds to its consignors from the sale of livestock.

Conclusions

By reason of the facts found herein, Corporate Respondent's financial condition does not meet the requirements of the Act (7 U.S.C. § 204) and Respondents have willfully violated sections 307 and 312(a) of the Act (7 U.S.C. §§ 208, 213(a)) and section 201.42 of the Regulations (9 C.F.R. § 201.42).

Order

Respondents Gary W. Fogle and Barnesville Livestock Sales Co., their agents and employees, directly, or through any corporate or other device, in connection with their activities subject to the Packers and Stockyards Act, shall cease and desist from:

1. Failing to deposit in the Custodial Account for Shippers' Proceeds, within the time prescribed by Section 201.42 of the Regulations (9 C.F.R. § 201.42), amounts equal to the proceeds received or due from the sale of consigned livestock;

2. Failing to otherwise maintain the Custodial Account for Shippers' Proceeds in strict conformity with the provisions of Section 201.42 of the Regulations (9 C.F.R. § 201.42);

3. Using funds received from the sale of consigned livestock for purposes of their own or for any purpose other than payment to consignors of the amount due from the sale of their livestock and the payment of lawful marketing charges;

4. Engaging in the business of a market agency while insolvent with current liabilities exceeding current assets;

5. Issuing checks in payment for livestock sold on a commission basis without maintaining sufficient funds on deposit and available in the account upon which such checks are drawn to pay such checks when presented; and

6. Failing to remit, when due, the full amount owed to consignors following the sale of livestock consigned to Respondents.

Respondents Gary W. Fogle and Barnesville Livestock Sales Co., are hereby suspended as registrants under the Act for a period of forty-nine (49) days and thereafter until the custodial account shortage and insolvency have been eliminated

Pursuant to the Rules of Practice governing procedures under the Act, this Order shall become final without further proceedings thirty-five (35) days after service hereof, unless appealed to the Secretary by a party to the proceeding within thirty (30) days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies of this Decision and Order shall be served upon the parties.

[This Decision and Order became final January 8, 2003. - Editor]

In re: PHILIP G. COX.
P&S Docket No. D-02-0019.
Decision and Order.
Filed November 25, 2002.

P&S – Default – Payment, failure to make prompt – Funds on deposit, failure to maintain adequate funds.

Ann Parnes, for Complainant.
Respondent, Pro se.
Decision and Order issued by Jill S. Clifton, Administrative Law Judge.

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Deputy Administrator, Packers and Stockyards Programs, Grain, Inspection, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the Respondent willfully violated the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), hereinafter referred to as the Act, by failing to pay when due the full purchase price of livestock. The complaint also alleged that Respondent further violated the Act and regulations promulgated thereunder (9 C.F.R. § 201.1 *et seq.*), hereinafter referred to as the regulations, by failing to maintain an adequate bond or its equivalent as is required.

The complaint and a copy of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.130 *et seq.*), hereinafter the Rules of Practice, were served on Respondent by certified mail on July 5, 2002. Accompanying the complaint was a cover letter informing Respondent that an answer must be filed within twenty

(20) days of service and that failure to file an answer would constitute an admission of all of the material allegations in the complaint and a waiver of the right to an oral hearing.

Respondent has failed to file an answer within the time period required by the Rules of Practice (7 C.F.R. § 1.136), and the material facts alleged in the complaint, which are admitted by Respondent's failure to file an answer, are adopted and set forth herein as Findings of Fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Philip G. Cox, hereinafter referred to as Respondent, is an individual whose mailing address is 431 Old Mayfield Mill Road, Glasgow, Kentucky 42141.
2. The Respondent, at all times material herein, was engaged in the business of a dealer buying and selling livestock in commerce for his own account and the account of others, and as a market agency buying livestock on a commission basis.
3. The Respondent, at all times material herein, was registered with the Secretary of Agriculture as a dealer and as a market agency to buy livestock on a commission basis.
4. As set forth in paragraph II of the complaint, Respondent purchased livestock, and in purported payment issued checks that were returned unpaid by the bank upon which they were drawn because Respondent did not have sufficient funds available in the account upon which the checks were drawn to pay the checks when presented.
5. As set forth in paragraph II of the complaint, Respondent purchased livestock and failed to pay, when due, the full purchase price of such livestock.
6. As set forth in paragraph II of the complaint, Respondent purchased livestock and failed to pay the full purchase price of such livestock.
7. As set forth in paragraph III of the complaint, Respondent engaged in the business of a dealer and market agency without obtaining the necessary bond or equivalent as is required by the Act and regulations.

Conclusions

By reason of the facts alleged in Findings of Fact 4, 5, and 6, Respondent has willfully violated sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228(b)).

By reason of the facts alleged in Finding of Fact 7, Respondent has violated sections 312(a) of the Act (7 U.S.C. § 213(a)) and sections 201.29 and 201.30 of the regulations (9 C.F.R. §§ 201.29, 201.30).

Respondent did not file an answer within the time period prescribed by section

1.136 of the Rules of Practice (7 C.F.R. § 1.136) which constitutes an admission of all of the material allegations in the complaint. Complainant has moved for the issuance of a Decision Without Hearing by Reason of Default, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). Accordingly, this Order is entered without hearing or further procedure.

Order

Philip G. Cox, his agents and employees, directly or through any corporate or other device, in connection with his activities subject to the Packers and Stockyards Act, shall cease and desist from:

1. Issuing checks in payment for livestock purchases without maintaining sufficient funds on deposit and available in the account upon which such checks were drawn to pay such checks when presented;

2. Failing to pay, when due, the full purchase price of livestock;

3. Failing to pay the full purchase price of livestock; and

4. Engaging in the business of a dealer and market agency without first obtaining an adequate bond or bond equivalent.

Respondent Philip G. Cox is hereby suspended as a registrant under the Act for a period of five (5) years and thereafter until he obtains the required bond or bond equivalent. Provided, however, that upon application to Packers and Stockyards Programs, a Supplemental Order may be issued terminating the suspension of the Respondent at any time after 150 days upon demonstration by Respondent that the livestock sellers identified in the complaint have been paid in full and upon demonstration that the required bond or bond equivalent has been obtained. Further, this Order may be modified upon application to Packers and Stockyards Programs to permit Respondent's salaried employment by another registrant or a packer after the expiration of the 150 day period of suspension, upon demonstration of circumstances warranting modification of the Order.

This Decision and Order shall become final and effective without further proceedings thirty-five (35) days after service on Respondent, if it is not appealed to the Judicial Officer by a party to the proceeding within thirty (30) days after service, pursuant to 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 and Order became final January 6, 2003. - Editor]

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In re: BOBBY L. BROTHERTON d/b/a B&B CATTLE COMPANY.
P&S Docket No. D-02-0017.
Decision and Order.
Filed November 18, 2002.

P&S – Default – Payment, failure to make full – Records, failure to maintain.

David Richman, for Complainant.
Respondent, Pro se.
Decision and Order issued by Jill S. Clifton, Administrative Law Judge.

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Deputy Administrator, Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture, alleging that Bobby L. Brotherton (hereinafter "Respondent") willfully violated the Act and the regulations promulgated thereunder (9 C.F.R. § 201.1 *et seq.*) The complaint and a copy of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.130 *et seq.*), hereinafter "Rules of Practice," were mailed to Respondent via certified mail on June 26, 2002. As indicated by the return date stamped on the return receipt card, the complaint was received by Respondent on July 2, 2002. Accompanying the complaint was a cover letter informing Respondent that an answer must be filed within twenty (20) days of service, and that failure to file an answer would constitute an admission of all of the material allegations in the complaint and a waiver of the right to an oral hearing.

Respondent has failed to file an answer within the time period prescribed by the Rules of Practice (7 C.F.R. § 1.136), and the material facts alleged in the complaint, which are admitted by Respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Bobby L. Brotherton, the Respondent, is an individual doing business as B&B Cattle Company, whose mailing address is P.O. Box 1850, Palestine, Texas 75802-1850.

2. The Respondent is, and at all times material herein was:

(a) Engaged in the business of a dealer buying and selling livestock in commerce for his own account;

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell

livestock in commerce.

3. As set forth in section II of the complaint, Respondent, in connection with his operations subject to the Act, purchased livestock and failed to pay, when due, the full purchase price of such livestock.

4. As set forth in section III of the complaint, Respondent failed to keep such accounts, records, and memoranda which fully and correctly disclosed all transactions in his business as a dealer under the Act in that he failed to keep and maintain load make-up sheets, scale tickets evidencing weighing of livestock, adequate sales invoices and deposit slips.

Order

By reason of the facts alleged in finding of fact 3, the Respondent has willfully violated sections 312(a) and 409 of the Act (7 U.S.C.§§ 213(a), 228(b)).

By reason of the facts alleged in finding of fact 4, the Respondent has willfully violated sections 312(a) and 401 of the Act (7 U.S.C. §§ 213(a), 221).

Respondent Bobby L. Brotherton, his agents and employees, directly or through any corporate or other device, in connection with activities subject to the Packers and Stockyards Act, shall cease and desist from:

1. Failing to pay, when due, the full purchase price of livestock;

2. Failing to keep such accounts, records, and memoranda which fully and correctly disclose all transactions in his business as a dealer under the Act, specifically including load make-up sheets, scale tickets evidencing weighing of livestock, adequate sales invoices and deposit slips.

Respondent Bobby L. Brotherton is hereby assessed a civil penalty in the amount of Eight Thousand Dollars ($8,000.00).

This decision and order shall become final and effective without further proceedings thirty-five (35) days after service on Respondent, if it is not appealed to the Judicial Officer by a party to the proceeding within thirty (30) days, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final December 30, 2002. - Editor]

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CONSENT DECISIONS

(Not published herein-Editor)

PACKERS AND STOCKYARDS ACT

Richard H. Swanz d/b/a Lewistown Livestock Auction. P&S Docket No. D-01-0009. 7/29/2002.

Carl M. Simon. P&S Docket No. D-02-0016. 7/31/2002.

Calhan Auction Market, Inc. and Kenneth Larry Miller. P&S Docket No. D-01-0004. 8/1/2002.

Salah Abdalla and Hassan Boukhari d/b/a Wells Processing Plant a/k/a Badr Halal Meat Plant. P&S Docket No. D-01-0012. 8/14/2002.

Sheridan Livestock, Inc. and Gib Lloyd. P&S Docket No. D-02-0014. 9/16/2002.

Waite & Waite Company, L.L.C. Ralph B. Waite, Sr. Ralph Waite, Jr. (Consent as to Ralph Waite, Jr.) P&S Docket No. D-02-0006. 9/19/2002.

Weikert's Livestock, Inc., and Todd D. Weikert. P&S Docket No. D-02-0006. 9/19/2002.

MBA Poultry, LLC, and Mark A. Haskins. P&S docket No. D-01-0010. Decision as to Respondent Mark A. Haskins. 10/3/2002.

Foremost Packing Company and William McDermott. P&S Docket No. D-01-0006. 10/18/2002.

Ronald A. Wilson d/b/a Parkersburg Livestock Market. P&S Docket No. D-02-0018. 10/22/2002.

Ranger Auction Co., Inc., d/b/a Eastland Auction Co. and Ranger Auction Co., David L. Coan, and Laquetta J. Coan. Decision as to Respondent Ranger Auction Co., Inc. . P&S Docket No. 02-0007. 11/18/2002

Ranger Auction Co., Inc. d/b/a Eastland Auction Co., and Ranger Auction Co., David L. Coan; and Laquetta J. Coan.. Decision as to Respondents David L. Coan and Laquetta J. Coan. P&S Docket No. D-02-0007. 11/18/2002.

Larry C. Smith d/b/a Big Springs Cattle Company. P& S Docket No. D-02-0012. 11/22/2002.

Sugarcreek Livestock Auction, Inc., and Leroy H. Baker, Jr. P&S Docket No. D-02-0001. 12/3/2002.

Dale Meyer d/b/a Wagner Livestock Sales Company. P&S Docket No. D-01-0005. 12/9/2002.

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AGRICULTURE DECISIONS

Volume 61

July - December 2002
Part Three (PACA)
Pages 814 - 869

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 (from the beginning of the annual Volume) are included in a separate volume, entitled Part Four.

Volumes 59 (circa 2000) through the current volume of *Agriculture Decisions* are also available online at http://www.usda.gov/da/oaljdecisions/ along with links to other related websites.

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.

hearing. Its counsel, Paul T. Gentile, Esq., submitted the following letter regarding Respondent's decision not to appear.

* * *

Gentile & Dickler
Attorneys at Law
15 Maiden Lane
New York, NY 10038

March 25, 2002

James W. Hunt, A.L.J.
c/o U.S. District Courthouse
500 Pearl Street
New York, NY 10007

Re: In re: Kirby Produce Company, Inc.
PACA Docket No. D-98-0002

Dear Judge Hunt:

Late Friday afternoon, March 22, 2002, I was notified by the principals of the above named Respondent, that personal and financial considerations would prevent any further litigation of the case. Thereafter, I unsuccessfully attempted to prevent the necessity of persons traveling to New York in order to conduct the hearing. I have been informed by Mr. Paul that the Department intends to proceed with the case.

In conjunction with the hearing, I have previously supplied Mr. Paul with copies of promissory notes presented to the produce creditors of the Respondent. It is my understanding that Tennessee counsel for the Respondent, Lynn Tarpy, Esq., prepared and presented the notes to the creditor. He further informs me that no note was returned or rejected.

Regretfully, the posture of my clients prohibit my appearance at the hearings. In addition no one else will appear on behalf of the Respondent.

Thank you for the courtesies extended the Respondent and this office.

2. 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 and failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of $1,602,736.15.

3. As of March 26, 2002, $1,305,148.78 of the $1,602,736.15 that Respondent owed to 19 sellers for purchases of perishable agricultural commodities in interstate commerce remained past due and unpaid.

Conclusion of Law

The failure of Respondent, Kirby Produce Company, Inc., to make full payment promptly of its purchases of perishable agricultural commodities constitutes repeated, flagrant, and wilful violations of section 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)).

Order

Respondent's PACA license is hereby revoked.

This Order shall be published.

This Decision will become final without further proceedings thirty-five (35) days after service hereof unless appealed to the Judicial Officer by a party to the proceeding within thirty (30) days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

[This Decision and Order became final August 19, 2002. - Editor]

LIST OF DECISIONS REPORTED

JULY - DECEMBER 2002

PERISHABLE AGRICULTURAL COMMODITIES ACT

DEPARTMENTAL DECISION

REPARATION DECISIONS

MISCELLANEOUS ORDERS

DEFAULT ORDERS

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PERISHABLE AGRICULTURAL COMMODITIES ACT

DEPARTMENTAL DECISION

In re: KIRBY PRODUCE COMPANY, INC.
PACA Docket No. D-98-0002.
Decision and Order.
Filed July 8, 2002.

PACA – Payment, failure to make prompt – Penalties, revocation – No pay/slow pay.

Respondent found to have admitted to all material facts in complaint when respondent did not appear at scheduled oral hearing. Complainant presented evidence of failure to pay in full sellers of produce. Respondent tendered copies of promissory notes to sellers, but failed to show that the notes were accepted by the sellers as extinguishing the debt by the time of the hearing.

Eric Paul, for Complainant.
Paul T. Gentile, for Respondent.
Decision issued by James W. Hunt, Chief Administrative Law Judge.

This decision is made pursuant to a remand from the Court of Appeals for the District of Columbia (*Kirby Produce Company, Inc. v. USDA,* 256 F.3d 830 (2001)) and from the Judicial Officer (*In re Kirby Produce Company, Inc*., 60 Agric. Dec. 847 (2001)).

The proceeding originally was instituted by a complaint filed on October 20, 1997, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The complaint alleged that Respondent, Kirby Produce Company, Inc., had committed wilful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to 20 sellers for purchases of 206 lots of perishable agricultural commodities in the course of interstate or foreign commerce in the amount of $1,609,859.45 during the period August 1995 through July 1996. Section 2(4) of the PACA requires "full payment promptly" for produce purchases. The Department's regulations interpret this as payment within ten days after the day the produce is accepted. (7 C.F.R. § 46.2(aa)(5).)

Respondent filed an answer to the complaint on November 12, 1997, and an amended answer on December 4, 1997. A hearing was set for January 13, 1999. On November 12, 1998, Respondent sought a delay of the scheduled hearing so that it could make full payment to all trust creditors pursuant to an order entered on June 25, 1996, by a United States District Court (*Brown's Produce, et al. v. Kirby Produce Company, et al.*, Case No. 3:96-CV-526 (E.D. Tenn. 1996)). The request

was denied on November 16, 1998.

On December 4, 1998, Complainant filed a Motion for Decision Without Hearing by Reason of Admissions and a request for official notice of the District Court's order and attachments. On December 31, 1998, I issued a Decision Without Hearing by Reason of Admissions finding that, based on the Court's order and attachments thereto, Respondent had admitted failing to pay $1,602.736.16 to 19 sellers of perishable agricultural commodities, and that $1,215,723.99 of this amount remained past due and unpaid as of December 2, 1998. I found that Respondent committed wilful, repeated, and flagrant violations of section 2(4) of the PACA and ordered that its license be revoked. The hearing scheduled for January 13, 1999, was canceled.

On July 12, 1999, the Judicial Officer issued a decision and order affirming my initial decision. *Kirby Produce Co.,* 58 Agric. Dec. 1011 (1999). Respondent appealed this order to the United States Court of Appeals for the District of Columbia Circuit. On November 13, 2000, the court issued an order requiring Respondent, Kirby Produce, to certify whether the PACA creditors named in the complaint of October 20, 1997, were paid in full prior to the hearing date of January 13, 1999. On November 17, 2000, Kirby stated that the creditors had been paid.

On August 3, 2001, the Court, in *Kirby Produce Company, Inc. v. USDA*, supra, issued an opinion granting Kirby's petition for review and remanded the case for proceedings consistent with its opinion. In its opinion, the Court affirmed the Judicial Officer's finding that Kirby had not promptly paid its PACA creditors, but found that a material issue of fact existed whether Kirby could have paid its creditors by the date of the hearing scheduled for January 13, 1999. The significance of the payment date is that it would determine the penalty for Kirby's violation of the PACA. Payment by the hearing date would convert the case from "no-pay" to "slow-pay" which would result in a PACA license suspension rather than a license revocation under the Judicial Officer's policy in effect at the time the complaint was filed. *See Gilardi Truck & Transportation, Inc.*, 43 Agric. Dec. 118 (1984).[1] On August 27, 2001, the Judicial Officer remanded the matter to me to conduct a hearing to determine "whether Respondent is in full compliance with the PACA at the time the hearing in this proceeding actually commences."

A hearing on remand was held on March 26, 2002, in New York City. Complainant was represented by Eric Paul, Esq. Respondent did not appear at the

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[1]This policy was changed in 1998 in *Scamcorp, Inc.*, 57 Agric. Dec. 527. Under the new policy, the date of the hearing no longer necessarily controls whether a license is suspended or revoked. A license will now be revoked if full payment is not made within 120 days after a complaint is served on a respondent or by the date of the hearing, whichever occurs first.

hearing. Its counsel, Paul T. Gentile, Esq., submitted the following letter regarding Respondent's decision not to appear.

* * *

Gentile & Dickler
Attorneys at Law
15 Maiden Lane
New York, NY 10038

March 25, 2002

James W. Hunt, A.L.J.
c/o U.S. District Courthouse
500 Pearl Street
New York, NY 10007

Re: In re: Kirby Produce Company, Inc.
PACA Docket No. D-98-0002

Dear Judge Hunt:

Late Friday afternoon, March 22, 2002, I was notified by the principals of the above named Respondent, that personal and financial considerations would prevent any further litigation of the case. Thereafter, I unsuccessfully attempted to prevent the necessity of persons traveling to New York in order to conduct the hearing. I have been informed by Mr. Paul that the Department intends to proceed with the case.

In conjunction with the hearing, I have previously supplied Mr. Paul with copies of promissory notes presented to the produce creditors of the Respondent. It is my understanding that Tennessee counsel for the Respondent, Lynn Tarpy, Esq., prepared and presented the notes to the creditor. He further informs me that no note was returned or rejected.

Regretfully, the posture of my clients prohibit my appearance at the hearings. In addition no one else will appear on behalf of the Respondent.

Thank you for the courtesies extended the Respondent and this office.

Kindly make this letter part of the record of this proceeding.

Very truly yours,

/s/

Paul T. Gentile

PTG:ah
cc: Kirby Produce Company, Inc.

* * *

I ruled that Mr. Gentile's letter and the promissory notes referred to therein be made a part of the record in order to comply with the Court's remand order to determine whether Respondent had made full payment to its creditors.[2]

At the hearing on March 26, 2002, Complainant presented evidence that Respondent had made partial payment on its debt of $1,609,858.45 to its produce creditors, but that Respondent had failed to make full payment as of that date. Josephine Jenkins, a marketing specialist, testified that she reviewed the records relating to payments that Respondent had made and that she had also attempted to contact the creditors. She determined that, as of February 22, 2002, the amount remaining unpaid came to $1,346,859.78. (Tr. 63; CX 45.)

Respondent's promissory notes that I entered in the record are all dated June 26, 1966, and are all identical, except for a different produce creditor and amount due on each note. (RX 1.) They provide:

PROMISSORY NOTE

June 26, 1996

For value received, Kirby Produce Company (Kirby) hereby promises to pay to [name of creditor] the principal sum of [amount owed the named creditor] plus interest at the rate of 5-1/4% pursuant to the Order of the United States District Court for the Eastern District of Tennessee Case

[2]I made this ruling as I believe, in this case, the Court's directive overrides the Department's Rules of Practice which provide that a respondent who fails to appear at a hearing is deemed to have admitted any facts which may be presented at the hearing and is considered to have admitted all the material allegations of fact contained in the complaint. 7 C.F.R. § 1.141(e).

Number 3:96-CV-526. This represents payment in full of any and all claims the holder of this note may have against Kirby under the Perishable Agricultural Commodities Act. In the event of default on this note, holder's remedy shall be limited to its rights under the Order of the Court and this note.

Apart from Mr. Gentile's statement that creditors had not returned or rejected the notes that Respondent had given them, Respondent offered no evidence on whether these promissory notes were accepted by any of its creditors as constituting payment of its debt to them.

Complainant's exhibit CX 41 indicates that one creditor, Juniper Tomato Growers, Inc., may have accepted a promissory note as payment in full for the produce it sold to Respondent. However, there is no evidence that any of the other creditors accepted the notes as payment. Moreover, Ms. Jenkins testified that the creditors she contacted told her that they did not accept the notes as payment. (Tr. 50-53.) Complainant also presented as witnesses representatives from three of Respondent's produce creditors who jointly were owed over one million dollars. They all testified that they did not accept the notes as payment for the produce debt.

Gordon Tantum, president of Gordon Tantum, Inc.:

Q. Did you, in fact, when you received this promissory note, consider it full payment?

A. No, I did not. (Tr. 78.)

Charles Weisinger, president of Weis-Buy Services, Inc.:

Q. I'm assuming you never agreed to accept a promissory note as full payment of the outstanding debt?

A. No, sir. (Tr. 103.)

Garford Tony Hill, president and owner of Apple Action Fruit Sales, Inc.:

Q. You did not at any time agree with Mr. Randy Kirby to accept a promissory note in full payment for your debt, is that correct?

A. You mean to write my debt off in exchange for a promissory note?

Q. That's correct.

A. Absolutely not. (Tr. 123.)

Discussion

In its remand opinion the Court of Appeals affirmed the finding by the Judicial Officer that Respondent, as alleged in the complaint, had failed to make full and prompt payment for its produce purchases. Accordingly, as I found previously, Respondent's failure to pay promptly constitutes wilful, repeated and flagrant violations of Section 2(4) of the PACA (7 U.S.C. § 499b(4)).

The Judicial Officer's policy at the time the complaint in this matter was filed in 1997, and his policy since at least 1965, was that a promissory note that a produce buyer gives to a creditor as payment on the debt it incurred when it purchased produce does not extinguish that debt in the absence of an agreement to that effect. *Federal Fruit & Produce Company v. Sandy's Produce*, 24 Agric. Dec. 1121 (1965); *Turbana Fruit Co. v. Larry Merrill Produce Co.*, 50 Agric. Dec. 1872 (1991).[3]

Respondent here has not shown that its creditors, except for perhaps one, agreed to accept promissory notes as payment for Respondent's purchases of perishable agricultural commodities. The failure of creditors to expressly reject or return the notes to Respondent does not constitute an implicit agreement by them to accept the notes. 17A Am. Jur. 2d Contracts § 71. Indeed, what evidence was presented shows that the creditors spurned the notes. Respondent presented no other evidence that, as of the date of the remand hearing, it had paid in full the $1,346,895.78 that remained unpaid. As Respondent failed to be in compliance with the full and prompt payment requirement of the PACA as of the hearing on March 26, 2002, the sanction for its non-compliance is revocation of its license.

Findings of Fact

1. Respondent, Kirby Produce Company, Inc., a Tennessee corporation, whose business address is 2127 Chipman Street, Knoxville, TN 37916, was issued PACA license number 931573. (CX 1.) This license has been renewed annually and is next subject to renewal on or before October 27, 2002.

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[3]This policy was changed in *Scamcorp, supra*. Under the new policy, a promissory note does not extinguish the debt, even if the parties so agree, unless it is also shown that the agreement was arrived at through arm's length negotiations.

2. 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 and failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of $1,602,736.15.

3. As of March 26, 2002, $1,305,148.78 of the $1,602,736.15 that Respondent owed to 19 sellers for purchases of perishable agricultural commodities in interstate commerce remained past due and unpaid.

Conclusion of Law

The failure of Respondent, Kirby Produce Company, Inc., to make full payment promptly of its purchases of perishable agricultural commodities constitutes repeated, flagrant, and wilful violations of section 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)).

Order

Respondent's PACA license is hereby revoked.

This Order shall be published.

This Decision will become final without further proceedings thirty-five (35) days after service hereof unless appealed to the Judicial Officer by a party to the proceeding within thirty (30) days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

[This Decision and Order became final August 19, 2002. - Editor]

PERISHABLE AGRICULTURE COMMODITIES ACT

REPARATION DECISIONS

JODY DESOMMA d/b/a IMPACT BROKERAGE v. ALL WORLD FARMS, INC.
PACA Docket R-01-190.
Decision and Order.
Filed August 21, 2002.

Collateral Attack on State Court Judgment.
Accord and Satisfaction — Payment did not specify account to which it was to be applied.
F.O.B. Acceptance Final — Material breach of contract.
Damages for Material Breach — Alternative determination.
Damages — Accounting without breakdown of sales utilized in restricted circumstances.

Where a reparation respondent brought an action in state court against an out of state reparation complainant, and the reparation complainant was served with process under the forum state's long arm statute, the judgment of the state court was subject to collateral attack in the reparation forum if minimal contacts were not present between the reparation complainant and the state where the civil suit was brought.
Where a partial payment check was tendered on the condition that it be accepted as payment in full, but the debtor did not specify to what debt it was to be applied, and there were several open accounts at the time of tender, the creditor was within its rights when it applied the payment to an open freight bill, and no accord and satisfaction of the produce debt was accomplished.
Where contract terms were f.o.b. acceptance final, the supply of vine ripe tomatoes when the contract specified gas green tomatoes was a material breach.
Where an f.o.b.a.f. contract called for the supply of gas green tomatoes, and, at a distant destination, the contract was discovered to have been breached by the supply of vine ripe tomatoes which could not be expected to carry to a distant destination as well as gas green tomatoes, it was held that it was reasonable under the peculiar circumstances of the case to assess damages by the differential between market price and the value of delivered product at destination even though the warranty of suitable shipping condition was not applicable, and even though acceptance took place at shipping point.
An accounting that supplied the sales total rather than showing a breakdown of sales could be utilized where sales were reasonably close to market price, and the difference could be accounted for because of the ripeness of the product.

George S. Whitten, Presiding Officer.
Pro se, for Complainant.
Robert E. Goldman, 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 $14,216.50 in connection with a transaction in interstate commerce involving a truckload of tomatoes.

A copy of the formal complaint was served upon Respondent which filed an answer thereto denying liability to Complainant. The Department did not file a report of investigation.

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. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, Respondent filed an answering statement, and Complainant filed a statement in reply. Respondent filed a brief.

In conjunction with the filing of the brief, on June 8, 2001, Respondent's counsel also filed a motion to reopen the proceeding to take further evidence. In this motion Respondent's counsel pointed out that a copy of his client's check, tendered as an accord and satisfaction of the claim at issue in this proceeding, was attached to his client's answering statement. Respondent's counsel then stated that in the statement in reply Complainant claimed "that 'On the check that All World Farms sent to Impact Brokerage there was no invoice, lot or file number to apply it to,' and that he did not know that 'this specific check was to be applyed [sic] to the trouble file in question.'" Respondent's counsel stated that by moving to reopen the proceeding he sought to respond to Complainant's claim as stated above. However, Respondent's counsel failed to disclose in his motion that accord and satisfaction was pleaded in his client's answer, and that in its opening statement Complainant set forth essentially the same claim that is reiterated in its statement in reply, and quoted above. Complainant's opening statement states:

> At the time All World Farms said it paid Impact Brokerage on this file, All World Farms owed Impact Brokerage for several files. All World sent Impact a check for $2,679.50 with no lot # or statement. Impact applied the check to the oldest file which was not paid yet, not the file in question. Then All World Farms sent another check for that old file that Impact thought it had paid. This showed as an over payment on an old file so impact applied it to the file in question. All World Farms puts "payment in full" on almost all of it [sic] checks, and again there is no lot # on the check to show what file it belongs to. . . .

Obviously, Respondent's counsel had ample opportunity to submit responsive

evidence in the answering statement. The Rules of Practice (7 C.F.R. § 47.24(b)) require that a petition to reopen the hearing to take further evidence shall set forth a good reason why such evidence was not adduced at the hearing. By stating that he sought, by moving for a reopening of this matter, to reply to the allegation in Complainant's statement in reply (the last evidentiary submission permitted under the Documentary Procedure) Respondent's counsel clearly implied that there had been no previous opportunity to respond to such evidence. This implication was not true. The Presiding Officer correctly denied the motion to reopen.

Findings of Fact

1. Complainant, Jody DeSomma, is an individual doing business as Impact Brokerage, whose address is 144 South Hillside Ave., Nesconset, New York 11767.

2. Respondent, All World Farms, Inc., is a corporation whose address is 1180 S. Powerline Rd., Suite 208, Pompano Beach, Florida 33069.

3. On or about April 5, 2000, Complainant sold to Respondent one truckload containing 1,600 cartons of size 6 x 6 gas green "Mr. Tasty" brand tomatoes at $10.50 per carton, plus $96.00 for a federal shipping point inspection, or $16,896.00, F.O.B. Acceptance Final.

4. The tomatoes were grown in Florida by Dimare Homestead of Florida City, Florida. While physically located in Hapeville, Georgia, and without moving from that location, the tomatoes were sold by Fresh Pac, LLC of Hapeville, Georgia to D & C Produce of Bass, North Carolina, by D & C Produce to Jody DeSomma d/b/a Impact Brokerage (Complainant) of Nesconset, New York, by Jody DeSomma to All World Farms, Inc. (Respondent) of Pompano Beach, Florida, and by All World Farms, Inc. to R & R Fresh Fruit & Vegetables, Inc. of Boca Raton, Florida. The tomatoes were then sold by R & R Fresh Fruit & Vegetables, Inc. to Global M.J.L. Ltd., and shipped from Hapeville, Georgia, to Global M.J.L. Ltd. in Montreal, Quebec, Canada.

5. On April 5, 2000, at 7:55 a.m., a federal inspection was made of the tomatoes, following unloading from the transport, while they were stored in the warehouse of Fresh Pac, LLC, in Hapeville, Georgia. That inspection showed in relevant part as follows:

LOT: A
TEMPERATURES: 53 to 57°F.
PRODUCT: Tomatoes
BRAND/MARKINGS: "Mr. Tasty" Dimare 6x6 25lbs
ORIGINS: FL
LOT ID.: See Remarks
NUMBER OF CONTAINERS: 1,600 Cartons
INSP. COUNT: N

LOT	AVERAGE DEFECTS	including SER. DAM.	Including V. S. DAM.	OFFSIZE/DEFECT	OTHER
A	04 %	01 %	00 %	Quality - misshappen (sic), scars	Corresponds to size as marked. Average approximately 20% Turning & Pink, 75% Light Red & Red
	04 %	00 %	00 %	Abnormal color	
	01 %	01 %	01 %	Soft	
	0½ %	0½ %	0½ %	Decay	
	09 %	02 %	01 %	Checksum	

GRADE: U S No 1

REMARKS: USDA/FL PLI: 12930CGR14; 12928C50; 12928CGR86; 12927CGR50; 12929CGR14; 12930CGR14; 12929C48; 12929CGR60.

6. Following arrival at the place of business of Global M.J.L. Ltd. in Montreal, Canada, a Canadian inspection was made of the tomatoes on April 9, 2000, between 9:55 and 11:00 a.m., which showed the following in relevant part:

[illegible] Packages: Produce of U.S.A. Mr. Tasty brand, The Dimare Co., Homestead, Fl. 33090. USDA/FL. 129[??]C. [??] 15-86-12-14-48-60-50-47.

Produce or [illegible] Variety: Tomatoes
No. [illegible] of Pkgs.: 1313 ctns. [illegible]
Size of Produce: 6X6
Temperature: Product: 12°C
Condition of Vehicle [illegible] Pkgs. and Pack: Clean containers, in good order, properly packed.
Condition: Decay - average 10%, range nil to 24%
Mature green - average 1%
Semi ripe - average 2%
Ripe - average 87%
[illegible] - average 4%
Soft areas - average 6%

Inspection requested for and restricted to condition only.

7. On or about April 9, 2000, Respondent received a faxed notice from the party to which it sold the tomatoes that the tomatoes received were vine ripe instead of the gas green tomatoes ordered. On April 10, 2000, Respondent notified Complainant by telephone of the trouble with the load, and faxed a copy of the Canadian inspection to Complainant. On April 12, 2000, Respondent faxed a copy of Complainant's invoice back to Complainant. Complainant's invoice clearly

stated: "FOB ACCEPTANCE FINAL WITH USDA INSPECTION US # 1." Across the bottom of the invoice Respondent had hand written the following: "Jody - After further review, I had thought we had discussed doing FOB Final on the second load which never materialized, not on this load. Thanks, George."

8. The Canadian firm rendered an accounting of its handling of the tomatoes which showed the following in relevant part:

ACCOUNT OF SALE
DATE: 4/18/00
SHIPPER: R&R FRESH FRUIT & VEG
BOCA RATON, FLA.

BROKER: BRUCE
. . .
SHIPMENT DATE 04/05/00 DATE RCV'D: 04/09/00
. . .
LOT ITEM, QUANTITY, DESCRIPTION; 1600 LG TOMATOES
LABEL: M TASTY

EXPENSES IN U.S. DOLLARS
QUANTITY 1600
FREIGHT $ 1.25
RYAN & OTHER $ 0.01
ENTRY $ 0.02
INSPECTION $ 0.19
OTHER
REPACKING $ 0.75
DUMPING $ 0.05 202 CRTN LOST IN REGRADING ($80.00)
. . .
TOTAL $ 2.27 TOTAL EXPENSES: $3,632.00

SALES IN CANADIAN DOLLARS		SALES IN U.S. DOLLARS	
SALES AVE ON 1600 ONLY 1398 SOLD			
TOTAL SALES THIS LOT	$16,259.00	TOTAL SALES . . .	$10,912.08
AVERAGE PER PACKAGE	$ 10.16	AVERAGE . . .	$ 6.82

. . .
EXCHANGE RATE USED: 149%

TOTAL RECEIPTS LESS TOTAL EXPENSES: $7,280.08
COMMISSION (15% OF SALES) . . . $1,636.81
TOTAL NET RETURN (LOSS) $5,643.27
NET RETURN (LOSS) PER PACKAGE $ 3.53

9. The Canadian firm, Global M.J.L. Ltd., paid R & R $5,643.27. R & R paid Respondent $5,248.00. On October 24, 2000, Respondent sent Complainant a check for $2,679.50. This check had stamped upside down on its face the following:

"CASHING THIS CHECK CONSTITUTES ACCEPTANCE OF PAYMENT IN FULL FOR A DISPUTED DEBT." The same stamp appeared on the back of the check. No information was on the check, or accompanied the check, that would indicate what transaction was being paid, and there was no direction from Respondent as to how the payment was to be applied. Complainant applied the payment to an open freight invoice.

10. The formal complaint was filed on December 1, 2000, which was within nine months after the cause of action alleged herein accrued.

Conclusions

On September 6, 2001, Respondent's counsel filed a motion to dismiss the complaint. The background facts relevant to this motion are as follows. On March 19, 2001, approximately one week prior to the filing of Respondent's answering statement, Respondent filed a civil complaint, against Jody DeSomma doing business as Impact Brokerage, in the County Court of the 17th Judicial Circuit in and for Broward County, Florida. This civil complaint alleged fraud and breach of contract arising out of the same transaction, and embracing the principal issue,[1] involved in this proceeding before the Secretary. The complaint was personally served upon Jody DeSomma at his place of business in Nesconset, New York, on March 29, 2001. Thereafter, on June 13, 2001, Jody Desoma d/b/a Impact Brokerage, acting pro se, filed a paper with the Florida court which disclosed the existence of "USDA PACA case NO:R-9889,"[2] acknowledged that "both cases pertain to the same information," and stated that he could "not supply all evidence pertaining to [the Florida civil case] until the first case is finished." On August 13, 2001, the Florida court issued an order in which, after stating that "Jody DeSomma, d/b/a Impact Brokerage did not appear," it made findings of fact based on the sworn testimony of a witness who appeared on behalf of All World Farms, Inc., concluded that the parties contracted for gas green tomatoes, and that Impact knew or should have known that it was not delivering gas green tomatoes, but instead delivering vine ripe tomatoes. On this basis the Court concluded that All World Farms, Inc. suffered a cessation of business with the customer to which it supplied the tomatoes, and consequent damages. The Court entered an order in favor of All World Farms, Inc. for $15,000.00, the maximum jurisdictional award of the Court. Respondent's

[1]That issue is whether Complainant herein contracted to supply gas green tomatoes, and instead breached the contract by supplying vine ripe tomatoes.

[2]This was the number assigned to this case during the informal stages of the proceeding.

motion to dismiss relies upon the judgment of the Florida court as being res judicata of the issues before the Secretary.

Under 28 U.S.C. section 1738 all courts of the United States are required to give full faith and credit to the judgements of the courts of the several states. Although this tribunal is not a court, its rulings are appealable to the district courts of the United States, and we obviously fall within the intent of the statute. The only way in which we would not be bound by the judgment of the Florida Court would be if that Court did not have jurisdiction over the person of the defendant in that Court, Jody DeSomma.[3]

Personal service was apparently effectuated on Mr. DeSomma under the Florida long-arm statute. The United States Supreme Court, in *Burger King Corp. v. Rudzewicz,* 471 U.S. 462 (1985), affirmed the constitutionality of personal service under the Florida long-arm statute on individual residents of Michigan. The Michigan residents, Rudzewicz, and a partner, had entered into a contract with Burger King whereby they became the owner of a Burger King franchise. The contract provided that the franchise relationship would be established in Miami and governed by Florida law. Burger King maintained a Michigan district office that carried on day-to-day monitoring of the franchisees. Rudzewicz and the partner executed the contract in Michigan, and never visited Florida. When a dispute arose over the operation of the franchise Burger King brought a diversity action in Federal District Court in Florida, alleging that the franchisees had breached their franchise obligations, and requesting damages and injunctive relief. The franchisees claimed that, because they were Michigan residents, and because appellant's claim did not "arise" within Florida, the District Court lacked personal jurisdiction over them. The Court held that the District Court's exercise of jurisdiction pursuant to Florida's long arm statute did not violate the Due Process clause of the Fourteenth Amendment. The Court stated:

> The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a *472 forum with which he has established no meaningful "contacts, ties, or relations." *International Shoe Co. v. Washington*, 326 U.S., at 319. By requiring that individuals have "fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign," *Shaffer v. Heitner*, 433 U.S. 186, 218 (1977) (STEVENS, J., concurring in judgment), the Due Process Clause "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where

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[3] *Old Wayne Mut. Life Ass'n v. McDonough* 204 U.S. 8, 27 S.Ct. 236, 51 L.Ed. 345 (1907).

that conduct will and will not render them liable to suit," *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

> Where a forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there, this "fair warning" requirement is satisfied if the defendant has "purposefully directed" his activities at residents of the forum, *Keeton v. Hustler Magazine, Inc*., 465 U.S. 770, 774 (1984), and the litigation results from alleged injuries that "arise out of or relate to" those activities, *Helicopteros Nacionales de Colombia, S. A. v. Hall*, 466 U.S. 408, 414 *473 (1984).15 Thus "[t]he forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State" and those products subsequently injure forum consumers. *World-Wide Volkswagen Corp. v. Woodson, supra*, at 297-298. Similarly, a publisher who distributes magazines in a distant State may fairly be held accountable in that forum for damages resulting there from an allegedly defamatory story. *Keeton v. Hustler Magazine, Inc*., *supra; see also Calder v. Jones*, 465 U.S. 783 (1984) (suit against author and editor). And with respect to interstate contractual obligations, we have emphasized that parties who "reach out beyond one state and create continuing relationships and obligations with citizens of another state" are subject to regulation and sanctions in the other State for the consequences of their activities. *Travelers Health Assn. v. Virginia*, 339 U.S. 643, 647 (1950). *See also McGee v. International Life Insurance Co.*, 355 U.S. 220, 222-223 (1957).
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> . . .
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> Jurisdiction in these circumstances may not be avoided merely because the defendant did not physically enter the forum State. Although territorial presence frequently will enhance a potential defendant's affiliation with a State and reinforce the reasonable foreseeability of suit there, it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted. So long as a commercial actor's efforts are "purposefully directed" toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there. *Keeton v. Hustler Magazine, Inc., supra,* at 774-775; *see also Calder v. Jones*, 465 U.S., at 788-790; *McGee v.*

International Life Insurance Co., 355 U.S., at 222-223. *Cf. Hoopeston Canning Co. v. Cullen,* 318 U.S. 313, 317 (1943).

> Once it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with "fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S., at 320. Thus *477 courts in "appropriate case[s]" may evaluate "the burden on the defendant," "the forum State's interest in adjudicating the dispute," "the plaintiff's interest in obtaining convenient and effective relief," "the interstate judicial system's interest in obtaining the most efficient resolution of controversies," and the "shared interest of the several States in furthering fundamental substantive social policies." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S., at 292. These considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required. *See, e. g., Keeton v. Hustler Magazine, Inc., supra,* at 780; *Calder v. Jones, supra,* at 788-789; *McGee v. International Life Insurance Co., supra,* at 223-224. On the other hand, where a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable. Most such considerations usually may be accommodated through means short of finding jurisdiction unconstitutional. For example, the potential clash of the forum's law with the "fundamental substantive social policies" of another State may be accommodated through application of the forum's choice-of-law rules. Similarly, a defendant claiming substantial inconvenience may seek a change of venue. Nevertheless, minimum requirements inherent in the concept of "fair play and substantial *478 justice" may defeat the reasonableness of jurisdiction even if the defendant has purposefully engaged in forum activities. *World-Wide Volkswagen Corp. v. Woodson, supra,* at 292; *see also* Restatement (Second) of Conflict of Laws 36-37 (1971). As we previously have noted, jurisdictional rules may not be employed in such a way as to make litigation "so gravely difficult and inconvenient" that a party unfairly is at a "severe disadvantage" in comparison to his opponent. The *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 18 (1972) (re forum-selection provisions); *McGee v. International*

Life Insurance Co., supra, at 223-224.[4]

In this case since personal service was effected upon Mr. DeSoma[,] we will assume that the requirements of the Florida long arm statute were met.[5] Complainant herein has filed a reply to Respondent's motion to dismiss this action. In its reply Complainant, now represented by counsel, contends that the determination of the Florida county court should not be given res judicata effect herein. Complainant thus seeks to collaterally attack the decision of the Florida court. The grounds alleged by Complainant for not giving effect to the Florida court's order are that the merits of the Florida action were never litigated, that the receipt of evidence herein was well underway prior to the institution of the Florida action, and that Respondent's motion to dismiss "is a sham and constitutes nothing more that a "end run" seeking to circumvent the jurisdiction of P.A.C.A. to determine this case."

In determining whether the Florida court rightly exercised jurisdiction, the first question that must be answered is whether the minimum contacts requirement necessary to satisfy the due process clause, as delineated by the Supreme Court in Burger King, was met. The complaint filed by All World in the Florida county court states that "[v]enue is appropriate in this jurisdiction because the parties entered into the subject transaction in part in Broward County, Florida, and because the transaction concerns perishable agricultural commodities grown in Florida." While it is certainly true that the tomatoes were grown in Florida, at the time the contract was entered into the tomatoes were physically located in Georgia, and did not move from Georgia by reason of that contract. Subsequently they were shipped to the ultimate purchaser in Canada.[6] While the record in this proceeding discloses that at

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[4]*Burger King Corp. v. Rudzewicz*, 471 U.S. 462, at 471-478 (1985). (footnotes omitted.)

[5]The provisions of that statute are not before us.

[6]The subject tomatoes were grown in Florida by Dimare Homestead. This record does not disclose how the tomatoes came into the possession of Fresh Pac, LLC in Hapeville, Georgia, but no doubt it was through direct sale by Dimare, or by sale through undisclosed intermediaries. Then, without physically changing hands, the tomatoes were sold by Fresh Pac in Georgia to D & C Produce in North Carolina, by D & C to Complainant in New York, by Complainant to Respondent in Florida, and by Respondent to R & R Fresh Fruit & Vegetables, Inc. in Florida. Finally, by R & R they were sold, and shipped from Georgia, to the ultimate purchaser, Global M.J.L. Ltd., in Canada.

least two other transactions had occurred between the parties to this proceeding,[7] the initiating party to those transactions is not disclosed.[8] The complaint before the Florida county court does not make any reference to other transactions, nor does the order of that court. There is nothing to show that the subject tomato transaction was initiated by Complainant. The usual nature of transactions in perishables such as the one between Complainant and Respondent is fairly informal, and these transactions are not normally preceded by extensive negotiation in terms of substance or time. The number of times the subject tomatoes were traded is indicative of the fact that quick turnover and small profits were contemplated. There is no reason to believe that Mr. DeSomma had any reason to contemplate that he was subjecting himself to the jurisdiction of the Florida courts by these transactions. It should be remembered that only the actions of the non-resident defendant determine whether the court has jurisdiction over him.[9] In defining the "minimum contacts" needed to establish personal jurisdiction, the Supreme Court has prescribed that the defendant must "purposely avail[ ] itself of the privilege of conducting activities within the forum State. . . ."[10] The Fourth Circuit has stated the law as follows:

> For a defendant to be subject to suit in a forum where it is not physically present, due process demands certain "minimum contacts" with the forum such "as make it reasonable . . . to require the corporation to defend the particular suit which is brought there." *International Shoe*, 326 U.S. at 316-17, 66 S.Ct. at 158-59. Ordinarily these contacts should be "continuous and systematic," as opposed to "casual . . . single or isolated," *id.* at 317, 66 S.Ct. at 159, a requirement springing from the essential principle "that there

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[7]In its opening statement Complainant states that the time of Respondent's payment it "owed [Complainant] for several files. In its statement in reply Complainant disclosed that these several files were a freight bill and a cucumber transaction. In addition, another transaction was apparently contemplated, but failed to occur. Attached to Respondent's answering statement is a copy of Complainant's invoice on which a "George" connected with Respondent wrote a note to "Jody" stating: "After further review, I had thought we had discussed doing the FOB Final on the second load which never materialized, not on this load."

[8]These transactions appear to fit within the characterization "casual . . . single or isolated" as used in *International Shoe Co. v. Washington*, 326 U.S. 310, 316, at 317, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945). See also *Choon Young Chung v. Nana Development Corporation*, 783 F.2d 1124 (4th Cir.1986).

[9]*Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416-17 (1984).

[10]*See Hanson v. Denckla*, 357 U.S. 235, 250-251 (1958).

be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson*, 357 U.S. at 253, 78 S.Ct. at 1240.

> The significant contacts considered are those actually generated by the defendant. It is firmly established that "[t]he unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State." *Id. See also World-Wide Volkswagen*, 444 U.S. at 298, 100 S.Ct. at 567. Jurisdiction may not be manufactured by the conduct of others. Rather, "the defendant's conduct and connection with the forum State [must be] . . . such that he should reasonably anticipate being ha[u]led into court there." *World-Wide Volkswagen,* 444 U.S. at 297, 100 S.Ct. at 567. Absent foreseeability of this sort, derived from purposeful contacts, it is irrelevant that a defendant could foresee the likelihood that its product would arrive in the forum state. Id.[11]

As regards interstate contractual obligations the Court in *Burger King* stated that the required minimum contacts would be such as create "continuing relationships and obligations with citizens of another state." We do not see these type contacts as being present between the parties to the litigation before the Florida court. We find that the Florida court did not have jurisdiction to enter the order upon which Respondent relies herein in its motion for dismissal on res judicata grounds.

Although not the basis of our finding of lack of jurisdiction in the Florida court, there are other considerations that bear upon that finding which should be mentioned. The jurisdiction accorded to the Secretary of Agriculture under the Act is not exclusive jurisdiction. On the contrary, the Act specifically provides that liability for violation of section 2:

> may be enforced either (1) by complaint to the Secretary as hereinafter provided, or (2) by suit in any court of competent jurisdiction; but this section shall not in any way abridge or alter the remedies now existing at common law or by statute, and the provisions of this chapter are in addition to such remedies.[12]

However, once a reparation complaint is filed with the Secretary against a

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[11] *Choon Young Chung v. Nana Development Corporation*, 783 F.2d 1124 (1986).

[12] 7 U.S.C. 499(e)(b).

licensee the matter is then within the Secretary's jurisdiction, and some deference should be accorded by other tribunals to that jurisdiction. This is particularly true where a licensee under the Act, properly before the Secretary as a reparation respondent, files an action in another forum based upon the same subject matter as that before the Secretary, and seeks damages arising out of that subject matter that could have been sought before the Secretary. Respondent's action in the Florida court was not filed until the submission of evidence before the Secretary under the documentary procedure was well underway. It is our opinion that under the doctrine of primary jurisdiction[13] the Florida court should have deferred to this administrative agency.[14] While this, in and of itself, is insufficient to sustain a collateral attack on the judgment of the Florida court, it is relevant to one of the other factors listed by the Court in *Burger King* for the determination of whether the assertion of personal jurisdiction would comport with "fair play and substantial justice," namely, "the interstate judicial system's interest in obtaining the most efficient resolution of controversies." In this regard it is relevant that Mr. DeSomma, acting pro se, notified the Florida court of the pendency of this action. Apparently, the Florida court correctly treated this notice as a special appearance, because the order of the Florida court specifically states that Mr. DeSomma did not appear in that proceeding.

Another factor impinging upon the "fair play and substantial justice"

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[13]The primary jurisdiction doctrine applies where a court and agency have concurrent jurisdiction to decide issues within the special competence of the administrative agency. Under the doctrine the court is required to stay or dismiss the action before it in favor of the jurisdiction of the agency. The doctrine has no application where only a question of law is concerned. *Pan American Petroleum Corp. v. Superior Court of Delaware*, 366 U.S. 656 (1961). The purpose of the doctrine is to promote uniformity and consistency in the regulation of business entrusted to an administrative agency (*Weinberger v. Bendex Pharmaceuticals, Inc*. 412 U.S. 645 (1973)), to promote the employment of agency expertise in cases raising issues of fact not within the conventional experience of judges (*Nader v. Allegheny Airlines, Inc*., 426 U.S. 290 (1976)), and the promotion of efficiency (*Christian v. New York State Board of Labor*, 414 U.S. 614 (1974)). State courts also apply the primary jurisdiction doctrine. See, for example, *Gulf Pines Memorial Park, Inc. v. Oaklawn Memorial Park, Inc*, 361 So.2d 695(Fla. 1978); *Florida Marine Fisheries Commission, et al. v. Raymond S. Pringle, Jr. and Ronald Fred Crum*, 736 So.2d 17 (Fla. Dist. Ct. App.1999) *The State Bar of Texas v. David Lee McGee*, 972 S.W.2d 770 (Tex. App. 1998); *South Lake Worth Inlet District v. Town of Ocean Ridge, et al*., 633 So.2d 79 (Fla. Dist. Ct. App. 1994); *Dioxin/Organochlorine Center v. The Department of Ecology*, 119 Wash. 2d 761, 837 P.2d 1007 (1992); and *Hawaii Blind Vendors Assn. v. Department of Human Services*, 71 Haw. 367, 791 P.2d 1261 (1990).

[14]The variable caducity of the different commodities subject to the Act has occasioned the development of unique expertise in this administrative agency in the assessment of whether there is a breach relative to the sale of such commodities under differing terms of sale, and in the assessment of damages for breach.

determination is the fact that since Complainant is a licensee under the Act, Respondent could have filed a counterclaim in the action before the Secretary, but did not do so. Thus "the [Florida] plaintiff's interest in obtaining convenient and effective relief" was not furthered by subjection of the non-resident to the jurisdiction of the Florida court. These additional considerations bolster our opinion that the Florida court's assertion of jurisdiction over Mr. DeSomma involved a violation of due process which deprived it of jurisdiction. For these reasons Respondent's motion to dismiss is denied.

Turning to the substantive allegations of the parties, we will first deal with Respondent's defense of accord and satisfaction, already discussed in another context in the preliminary statement. As stated in the Findings of Fact, no information was on Respondent's payment check, or accompanied the check, that would indicate what transaction was being paid, and there was no direction from Respondent as to how the payment was to be applied. Where a debtor does not specify to what debt a payment is to be applied the creditor may apply the payment to whatever open account it wishes.[15] Without such information the implied mutual assent consequent upon the negotiation of the check could not be present, and no accord could be accomplished. We find, therefore, that there was no accord and satisfaction relative to the subject tomato transaction.

We turn now to consideration of the merits of Complainant's claim. We note initially that the acceptance of the tomato load by Respondent is embodied in the contract terms, and accordingly, Respondent is liable to Complainant for the full purchase price of the load, less any damages caused by any breach of contract by Complainant. Although Respondent disputes that the terms of the contract were f.o.b. acceptance final, it is clear that Complainant's invoice, stating those terms in all caps clearly on its face, was issued very promptly on the day of the sale, April 5, 2000, and was faxed on that day to Respondent. However, the somewhat equivocal objection to those terms written across the bottom of the invoice by Respondent was not faxed to Complainant until April 12, 2000. The Regulations provide that:

> "F.o.b. acceptance final" or "Shipping point acceptance final" means that the buyer accepts the produce at shipping point and has no right of rejection. Suitable shipping condition does not apply under this trade term. The buyer does have recourse for a material breach of contract, providing the shipment is not rejected. The buyer's remedy under this type of contract is by

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[15] *Mendelson-Zeller Co. v. Bleier*, 34 Agric. Dec. 683 (1975).

recovery of damages from the seller and not by rejection of the shipment.[16]

The question, therefore, is not whether the Canadian inspection demonstrates a breach of the suitable shipping condition warranty, but whether Complainant committed a material breach of the contract by failing to supply gas green tomatoes. Complainant asserts that the contract did not call for gas green tomatoes, and that, therefore, there was no breach. However, this assertion is made in the statement in reply following Respondent's submission of an affidavit from the grower stating that the "Mr. Tasty" label is applied only to vine ripe tomatoes. In the opening statement Complainant contended strongly that he had supplied gas green tomatoes. We conclude that the contract called for gas green tomatoes, and that Complainant breached that contract by supplying vine ripe tomatoes.

The Uniform Commercial Code, section 2-714 provides that:

> (1) Where the buyer has accepted goods and given notification (subsection (3) of Section 2-607) he may recover as damages for any nonconformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.
>
> (2) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.
>
> (3) In a proper case any incidental and consequential damages under section 2-715 may also be recovered.

The place of acceptance for this f.o.b. acceptance final contract was the place of shipment in Georgia. Market reports furnished by the Federal-State Market News Service of this Department (of which we take official notice) show that on April 5, 2000, the day of sale and shipment, 6x6 vine ripe tomatoes were selling for $2.25 more per carton than mature green tomatoes. Thus it would appear that under the measure of damages suggested by the UCC Respondent was not damaged by the breach. However, this ignores the peculiar facts of this transaction. The fact that a material breach occurred was not discovered until the arrival of the tomatoes in Canada, and the nature of the breach, meant that the tomatoes supplied were not as appropriate for transport to a distant market as gas green tomatoes would have been.

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[16] 7 C.F.R. §46.43(m).

The above quoted section of the UCC provides, in addition to the measure of damages set forth in paragraph (2), that the buyer may "recover as damages for any nonconformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable." As stated earlier, the f.o.b. acceptance final terms of the sale negate any applicability of the warranty of suitable shipping condition.[17] However, to allow recovery of reasonable damages "resulting in the ordinary course of events from the seller's breach" will, in the peculiar circumstances of this case, require an assessment very similar to that in which we engage when we award damages for breach of the warranty of suitable shipping condition. The similarity, however, is only that, and is occasioned by the nature of the breach, and the fact that it was not discovered until arrival of the

[17]The suitable shipping condition provisions of the Regulations (7 C.F.R. § 46.43(j)) are made applicable in f.o.b. sales. The Regulations (7 C.F.R. § 46.43 (i)) 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 as meaning, "that the commodity, at time of billing, is in a condition which, if the shipment is handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the contract destination agreed upon between the parties." The rule is 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 which were not present, or were not present in sufficient degree to be cognizable by the federal inspector, at shipping point. Conversely, since the inherently perishable nature of commodities subject to the Act dictates that a commodity cannot remain forever in the same condition, the application of the good delivery concept requires that we allow for a "normal" amount of deterioration. This means that it is entirely possible for a commodity sold f.o.b. under a U.S. grade description to fail, at destination, to meet the published tolerances of that grade, and thus fail to grade at destination, and nevertheless make good delivery. 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). This is true because under the f.o.b. terms the grade description applies only at shipping point, and the applicable warranty is only that the commodity thus sold will reach contract destination without abnormal deterioration, not that it will meet the grade description at destination. If the latter result is desired then the parties should effect a delivered sale rather than an f.o.b. sale. For all commodities other than lettuce (for which specific good delivery standards have been promulgated) what is "normal" or abnormal deterioration is judicially determined. See *Harvest Fresh Produce Inc. v. Clark-Ehre Produce Co*., 39 Agric. Dec. 703 (1980).

tomatoes in Canada.[18]

One reasonable way to assess damages flowing from Complainant's breach is to allow Respondent the difference between the value the tomatoes would have had in Montreal if they had met contract specifications, and the value of the non-conforming tomatoes. Market quotations in Montreal do not list any quotations for mature green tomatoes, but only for vine ripe tomatoes. However, it was no doubt contemplated that the sale in Montreal would be of tomatoes that were at a greater degree of ripeness, and the order for gas green tomatoes was made to assure their arriving without being overripe. The accounting supplied by Respondent from the Canadian firm was reasonably prompt and detailed as to expenses, and how the tomatoes were handled, but did not break down the sales on a lot by lot basis. However, the total sales accord with both the condition of the tomatoes and the quotations for vine ripe tomatoes on the Montreal market. The tomatoes were reworked by the Canadian firm which recorded the loss of 202 cartons out of the original 1,600. This loss is not at all excessive considering the degree of decay, softness, and ripeness recorded by the Canadian inspection. Gross sales for the remaining 1,398 cartons amounted to $16,259.00 Canadian. This amounts to $11.63 per carton for each of the cartons sold. Prices in Montreal on April 12, 2000, the first date for which there are any available prices after April 7, averaged $15.55 per carton. Since the tomatoes were ripe they would not likely bring as much, even after reworking, as the average sales for vine ripes. Accordingly, we will accept the $16,259.00, Canadian, realized from the sales in Montreal as showing the value of the tomatoes accepted.[19] As the value of the tomatoes if they had been as warranted we will accept the $15.55 average market price for vine ripes. The difference between these two figures, is $3.92 per carton, or $6,272.00 Canadian for the 1,600 cartons, or $4,209.39 U.S. funds. This constitutes Respondent's basic damages. In addition we should allow the $1,200.00 for repacking, the $80.00 cost of dumping, and the $304.00 cost of inspection, or $1,584.00. Respondent's total damages, therefore, amount to $5,793.39.

As stated earlier, since Respondent accepted the tomatoes it became liable to

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[18]It might be objected that under the f.o.b. acceptance final terms Respondent should have inspected the tomatoes at shipping point in Georgia, and should not be allowed damages based on the discovery of the breach in Canada. However, this ignores the fact that Complainant knew that Respondent was not located in Georgia, and the multiple trades of the tomatoes were by firms not located there. It also ignores the fact that by the express provision of the f.o.b. acceptance final terms the seller is liable for any material breach.

[19]*See Great American Farms, Inc. v. William P. Hearne Produce Co., Inc.*, 59 Agric. Dec. 466 (2000).

Complainant for the full purchase price of $16,896.00. Respondent's damages deducted from this amount leaves $11,102.61 as Respondent's basic liability for this load. Respondent has already paid Complainant $2,679.50, which leaves $8,423.11 still owing to Complainant. Respondent's failure to pay Complainant this amount is a violation of section 2 of the Act.

Section 5(a) of the Act requires that we award to the person or persons injured by a violation of section 2 of the Act "the full amount of damages sustained in consequence of such violations." Such damages include interest.[20] 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.[21] 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, $8,423.11, with interest thereon at the rate of 10% per annum from May 1, 2000, until paid, plus the amount of $300.

Copies of this order shall be served upon the parties.

C.H. ROBINSON COMPANY v. BUDDY'S PRODUCE, INC.
PACA Docket No. R-02-0021.
Order of Dismissal.
Filed August 21, 2002.

Election of Remedies – trust action in federal district court as affecting Res judicata – effect of voluntary dismissal with prejudice on parallel litigation before the Secretary.

Where Complainant filed a trust action in federal district court involving the same parties and subject

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[20] *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).

[21] *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).

matter as in a reparation action before the Secretary, and the trust action was opposed by Respondent, there was no election of remedies under section 5(b) of the Act. A voluntary dismissal with prejudice in the trust action by order of the District Court upon stipulation of the parties was res judicata of all the issues before the Secretary, and precluded maintenance of the claim before the Secretary. The complaint was dismissed.

George S. Whitten, Presiding Officer.
Ben G. Campbell, for Complainant.
Pro se, for Respondent.
Order of Dismissal 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.). On January 16, 2001, Complainant filed a formal complaint alleging the sale and shipment to Respondent of various lots of perishable produce between January 31, 2000, and July 10, 2000.[1] In addition Complainant alleged Respondent's acceptance of the produce, and that Respondent failed to pay the contract prices totaling $26,510.00.

On February 26, 2001, Complainant filed a trust action under section 5(c) of the Act[2] against Respondent, and Respondent's principals, in the United States District Court for the Western District of Oklahoma alleging failure to maintain the statutory trust as to the same transactions that are covered by the complaint herein, and, inter alia, breach of contract by failure to pay for the produce. Respondent filed an answer in the reparation proceeding before the Secretary on March 30, 2001, alleging that the produce shipped was distressed, and that the transactions were adjusted between the parties. On April 4, 2001, Respondent filed an answer in the trust action denying any liability to Complainant. On July 27, 2001, the parties were notified in the reparation action that the submission of evidence had been completed, and that the record was closed. On October 2, 2001, the parties to the reparation proceeding were notified that the time for the filing of briefs had expired, and that the matter was being assigned to a Presiding Officer for the preparation of a decision.

On January 25, 2002, the parties to the District Court action filed with the Court a "STIPULATION AND ORDER FOR DISMISSAL." This document was signed by the attorneys for each party. The body of the document consisted of one sentence as follows: "The undersigned counsel for Plaintiff and Defendants hereby stipulate and agree that the within civil action may be dismissed with prejudice and without costs to any party, pursuant to Federal Rule of Civil Procedure 41(a)." On January

[1] A timely informal complaint covering the same transactions was filed on October 26, 2000.

[2] 7 U.S.C. 499(e)(c).

28, 2002, the court entered the following order:

ORDER

> Now, on this 28th day of January, 2002, this matter comes before this Court upon the stipulation of the parties that the civil matter designated as CIV-01-349(R) should be dismissed with prejudice and without costs to any party, pursuant to Federal Rule of Civil Procedure 41(a), and this Court, being advised in the premises and for good cause shown, finds that this Order should be granted.
>
> IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the civil matter CIV-01-349(R) is hereby dismissed with prejudice and without costs to any party, pursuant to Federal Rule of Civil Procedure 41(a).

On January 31, 2002, Respondent's counsel filed a motion with this Department to dismiss the reparation action on the basis of lack of jurisdiction resulting form Complainant's having made an election of remedies by the filing of the trust action, and on the basis of claim preclusion resulting from the voluntary dismissal in the District Court. On April 15, 2002, Complainant filed a response to this motion.

The District Court action was an action for the enforcement of the statutory trust, and, in and of itself, would not normally involve an election of remedies. In the event that a trust claim is contested on the merits it is our policy to stay reparation actions pending the outcome of the district court action, and to treat the final judgment in the district court as res judicata of the issues in the reparation case. Furthermore, it is also our policy to not treat the filing of a separate civil court action as an election of remedies under section 5(b) when there is a voluntary dismissal by the party instituting the action.[3] We conclude that Respondent has not shown that an election of remedies pursuant to section 5(b) took place.

In this case the voluntary dismissal in the District Court was with prejudice. A dismissal with prejudice implies an adjudication on the merits, which bars the right

[3] *See Han Yang Trade Co., Inc. v. A.F. & Sons Produce, Inc.*, 52 Agric. Dec. 765 (1993); *Spring Acres Sales Company, Inc., v. Freshville Produce Distributors, Inc.*, 45 Agric. Dec. 2181 (1986); and *Gilliland & Co. v. San Antonio Commission Co.*, 2 Agric. Dec. 492, at 495 (1943).

to bring or maintain an action on the same claim.[4] Normally such a dismissal is res judicata as to every matter in issue. Complainant, however, in its response to the motion to dismiss, alleges that the intent of the parties was that the dismissal not preclude the continuance of this reparation case, and that the purpose of the dismissal was to avoid duplicate litigation and conform with the election of remedies requirement of section 5(b). Complainant's counsel attached an affidavit to the response to the motion to dismiss. This affidavit was given by Mark A. Amendola, Esq., an Ohio attorney who was retained by Complainant to handle the trust litigation, and who negotiated and signed the dismissal stipulation. Mr. Amendola stated in part:

> There was no settlement or compromise of the District Court case. Moreover, there was no value and no consideration for the dismissal of the District Court case. Prior to executing the Stipulation for Dismissal, I discussed with Buddy's counsel the possibility of Robinson agreeing to also dismiss its pending reparation claim in exchange for an appropriate settlement payment. Buddy's did not accept that proposal and it was my understanding that both parties preferred to obtain a final adjudication on Robinson's claim from the Secretary of Agriculture.

Complainant asserts that in "determining the preclusive effect of a stipulation of dismissal, the courts . . . routinely look to the intent of the parties," and urges that, in accord with the affidavit of the Ohio attorney quoted above, the intent of the parties was that the dismissal not have preclusive effect. In 1975 the United States Supreme Court stated that:

> Since a consent decree or order is to be construed for enforcement purposes basically as a contract, reliance upon certain aids to construction is proper, as with any other contract. Such aids include the circumstances surrounding the formation of the consent order, any technical meaning words used may have had to the parties, and any other documents expressly incorporated in the decree . . .[5]

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[4] *See Chase Manhattan Bank, N.A. v. Celotex Corp.*, 56 F.3d 343, 345 (2d Cir.1995); *Brooks v. Barbour Energy Corp.*, 804 F.2d 1144, 1146 (10th Cir.1986); *Clark v. Haas Group, Inc.*, 953 F.2d 1235, 1238 (10th Cir.), *cert. denied,* 506 U.S. 832, 113 S.Ct. 98, 121 L.Ed.2d 58 (1992).

[5] *United States v. ITT Continental Baking Co.*, 420 U.S. 223 at 238 (1975).

The Court was interpreting an elaborate consent decree issued in a Federal Trade Commission case that prohibited the "acquiring" of certain assets. It was undisputed that the decree had been violated, but for purposes of assessment of penalty it was questioned whether daily penalties could be assessed for the violation of a decree that prohibited only acquisition, allegedly a one time event. The Court found, in essence, that reference to the agreement between the parties and supporting documents was permissible to ascertain the meaning of an ambiguous word in the consent decree. Numerous circuits have followed this case in stating that the intent of the parties is an element for inquiry in connection with the determination of whether a voluntary dismissal with prejudice based upon a settlement agreement should have a claim preclusive effect.[6] However, it should be noted that the holding of the Court was based squarely upon the contractual nature of the consent decree, and the cases that have followed this holding have made similar observations. However, in this case Complainant's contention that "[t]here was no settlement or compromise of the District Court case," and that "there was no value and no consideration for the dismissal . . .," argues against considering the intent of the parties, since it eliminates any contractual element in the voluntary dismissal.

There is another consideration that bears upon this question. Were we to say, in spite of the above reasoning, that there is a substantial contractual element to the voluntary dismissal so as to open the possibility of an inquiry into the intent of the parties, the cases which allow such an inquiry presuppose an ambiguity in the stipulation such as would make an inquiry as to the intent of the parties appropriate in the same manner in which it would be in a purely contractual context.[7] Here there

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[6] *See*, for example, *Ronald F. Keith v. Edward C. Aldridge, Jr.*, 900 F.2d 736 (Fourth Cir. 1990), *cert. denied,* 498 U.S. 900, 111 S.Ct. 257, 112 L.Ed.2d 215 (1990), where the court stated: "When a consent judgment entered upon settlement by the parties of an earlier suit is invoked by a defendant as preclusive of a later action, the preclusive effect of the earlier judgment is determined by the intent of the parties. . . . This approach, following from the contractual nature of consent judgments, dictates application of contract interpretation principles to determine the intent of the parties." The court then looked to the "mutually manifested . . . intentions" of the parties, noting that "the settlement agreement and the dismissal order entered pursuant to it do not expressly reserve to Keith the right to raise due process or other substantive claims in subsequent litigation."

[7] *Israel v. Carpenter*, 120 F.3d 361(2nd Cir. 1997) (applying Massachusetts law that "in order to utilize extrinsic evidence of the parties' intent, a court need not invariably find facial ambiguity."); *Coakley & Williams Construction, Incorporated v. Structural Concrete Equipment, Incorporated*, 973 F.2d 349 (4th Cir. 1992); *Marvel Characters, Inc. v. Simon,* No. 00 CIV. 1393(RCC), 2002 WL 313865 (S.D.N.Y. Feb. 27, 2002); *WILJ International Limited v.Biochem Immonusystems, Inc*., 4 F.Supp.2d 1(D. Mass. 1998).

was no ambiguity in the stipulation or order, and it must be deemed a final adjudication on the merits for res judicata purposes of the claims asserted, or which could have been asserted, in the District Court trust action.[8] Furthermore, a misunderstanding by the parties as to the legal effect of an agreed upon dismissal with prejudice does not warrant voiding the agreement,[9] and, where "a genuine misunderstanding had occurred concerning the stipulation's scope" it was held that counsel's misunderstanding could not void the agreement, even though "the consequences of entering into [the] agreement were not fully weighed" and "the choice was poor."[10]

Complainant, in resisting Respondent's motion for dismissal, asserts that a 1913 Oklahoma case requires that for a dismissal of a suit to have a preclusive effect it must be "based upon an agreement between the parties by which a settlement and adjustment of the subject matter is made."[11] Complainant argues that since there was no settlement or adjustment between the parties to the District Court action, preclusive effect should not be given to the voluntary dismissal with prejudice. However, we are here dealing with an order of a federal district court in a federal trust case, not a diversity case, and it is clear that federal law must determine the interpretation of the order.[12] Under federal law:

> . . . where there is no settlement agreement at all, there is nothing for the court to consider other than the voluntary dismissal with prejudice, which

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[8] *Marvel Characters, Inc. v. Simon*, No. 00 CIV. 1393(RCC), 2002 WL 313865 (S.D.N.Y. Feb. 27, 2002).

[9] *TCBY Systems, Inc. v. EGB Associates, Inc.*, 2 F.3d 288 (8th Cir. 1993); and *Citibank, N.A. v. Data Lease Financial Corporation*, 904 F.2d 1498 (1990) ". . . misunderstanding as to the legal effect of a dismissal with prejudice does not warrant a hearing."

[10] *Nemaizer v. Baker*, 793 F.2d 58 (2d Cir.1986).

[11] *Turner v. Fleming,* 130 P. 551(OK 1913).

[12] *Semtek International Incorporated v. Lockheed Martin Corporation*, 531 U.S. 497 (2001); *Heck v. Humphrey*, 512 U.S. 477, at 488 n. 9 (1994) "It is clear that where the federal court decided a federal question, federal res judicata rules govern," quoting P. Bator, D. Meltzer, P. Mishkin, & D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 1604 (3d ed. 1988); *Deposit Bank v. Frankfort*, 191 U.S. 499 (1903). *See also Hallco Manufacturing Co., Inc. v. Raymond Keith Foster*, 256 F.3d 1290 (Fed. Cir. 2001); *Foster v. Hallco Mfg. Co.*, 947 F.2d 469 (Fed.Cir.1991); *PRC Harris, Inc. v. the Boeing Company,* 700 F.2d 894 at n. 1(2nd Cir.1983).

. . . is sufficient by itself to invoke the preclusive effect of res judicata.[13]

We conclude that Complainant's claim in this reparation proceeding is precluded by the dismissal with prejudice of the trust action in the District Court. The complaint should be, and hereby is, dismissed.

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[13] *Edward T. Hanley v. Cafe Des Artistes, Inc.*, No. 97 Civ. 9360(DC), 1999 WL 688426 (S.D.N.Y. Sept. 3, 1999) (mem.)

PERISHABLE AGRICULTURAL COMMODITIES ACT

MISCELLANEOUS ORDERS

In re: CAPTAIN JACK'S TOMATOES, INC., AND THE FRESH GROUP, LTD., d/b/a MAGLIO AND COMPANY.
PACA Docket No. D-00-0008.
Stay Order as to The Fresh Group, Ltd., d/b/a Maglio and Company.
Filed July 16, 2002.

Ruben D. Rudolph, Jr., for Complainant.
Jordan B. Reich,, for Respondent.
Order issued by William G. Jenson, Judicial Officer.

On April 30, 2002, I issued a Decision and Order as to The Fresh Group, Ltd., d/b/a Maglio and Company: (1) concluding that beginning on December 7, 1998, and continuing through December 29, 1998, The Fresh Group, Ltd., d/b/a Maglio and Company [hereinafter Respondent], committed willful, flagrant, and repeated violations of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA], by failing to pay promptly for 11 lots of perishable agricultural commodities which Captain Jack's Tomatoes, Inc., purchased, received, and accepted in interstate commerce; (2) assessing Respondent a $150,000 civil penalty; and (3) stating that in the event the $150,000 civil penalty is not paid in accordance with the April 30, 2002, Order, Respondent's PACA license shall be suspended for 60 days. *In re Captain Jack's Tomatoes, Inc. (Decision as to The Fresh Group, Ltd., d/b/a Maglio and Company),* 61 Agric. Dec. 356 (2002).

On July 1, 2002, Respondent filed "Motion to Stay Order of Judicial Officer, United States Department of Agriculture Pending Review of Decision and Order" [hereinafter Motion for Stay] requesting a stay of the Order in *In re Captain Jack's Tomatoes, Inc. (Decision as to The Fresh Group, Ltd., d/b/a Maglio and Company)*, 61 Agric. Dec. 356 (2002), pending the outcome of proceedings for judicial review. On July 15, 2002, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Respondent's Motion for Stay.

On July 16, 2002, Ruben D. Rudolph, Jr., counsel for the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], contacted the Office of the Judicial Officer by telephone and stated that Complainant does not object to Respondent's Motion for Stay.

Respondent appealed *In re Captain Jack's Tomatoes, Inc. (Decision as to The Fresh Group, Ltd., d/b/a Maglio and Company),* 61 Agric. Dec. 356 (2002), to the

United States Court of Appeals for the Seventh Circuit.[1] Therefore, in accordance with 5 U.S.C. § 705, Respondent's Motion for Stay is granted.

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

ORDER

The Order issued in *In re Captain Jack's Tomatoes, Inc. (Decision as to The Fresh Group, Ltd., d/b/a Maglio and Company)*, 61 Agric. Dec. 356 (2002), is stayed pending the outcome of proceedings for judicial review. This Stay Order as to The Fresh Group, Ltd., d/b/a Maglio and Company, shall remain in effect until it is lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

In re: CAPE FEAR PRODUCE, INC.
PACA Docket No. D-02-0009.
Order Dismissing the Complaint.
Filed August 29, 2002.

Charles E. Spicknall, for Complainant.
Respondent, Pro se.
Order issued by Dorothea A. Baker, Administrative Law Judge.

Complainant's motion to dismiss the disciplinary complaint filed on February 14, 2002 against Cape Fear Produce, Inc., alleging willful 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.

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[1] *The Fresh Group, Ltd. v. United States Dep't of Agric.*, *appeal docketed*, No. 02-2636 (7th Cir. June 24, 2002).

In re: SHK PRODUCE BROKERS, INC.
PACA Docket No. D-03-0004.
Order Dismissing Case.
Filed December 3, 2002.

Andrew Y. Stanton, for Complainant.
Paul T. Gentile, for Respondent.
Order issued by Jill S. Clifton, Administrative Law Judge.

The Agricultural Marketing Service, Fruit and Vegetable Programs, has withdrawn its Notice to Show Cause and has withdrawn its Motin for Expedited Hearing, for the reason that SHK Produce Brokers, Inc. has withdrawn its PACA license application.

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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PERISHABLE AGRICULTURAL COMMODITIES ACT

DEFAULT DECISIONS

In re: T. RODES AND SONS, INC.
PACA Docket No. D-01-0002.
Decision Without Hearing.
Filed November 8, 2001.

PACA – Default – Prompt payment, failure to make.

Christopher Young-Morales, for Complainant
Andrew M. Osborne for Respondent
Decision and Order issued by Dorthea 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 October 24, 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 February through December 1999, Respondent purchased, received, and accepted, in interstate and foreign commerce, from 16 sellers, 119 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices in the total amount of $323,016.67.

A copy of the Complaint was served upon Respondent; Respondent submitted an answer in which it generally denied the allegations of the Complaint pertaining to its failure to make payment promptly. On July 10 through July 20, 2001 a follow up investigation was conducted by the PACA Branch of the Agricultural Marketing Service which revealed that as of July 18, 2001, 13 of the 16 sellers listed in the Complaint were still owed $71,766.97. Based on the results of the investigation, Complainant filed a Motion for an Order Requiring Respondent to Show Cause Why a Decision Without Hearing Should Not Be Issued; Respondent did not answer the Motion.

Hearing no objection, Administrative Law Judge Baker issued a Notice To Show Cause Why A Decision Without Hearing Should Not Be Issued, based upon Complainant's allegation in its Motion, substantiated by affidavit, that Respondent

failed to pay the produce debt alleged in the Complaint within 120 days of the service of the Complaint.

Under the sanction policy enunciated by the Judicial Officer in *In re Scamcomp, Inc., d/b/a Goodness Greeness*, 57 Agric. Dec. 527, 547 (1998), "PACA requires full payment promptly, and commission merchants, dealers and brokers are required to be in compliance with the payment provisions of the PACA at all times . . .. In any PACA disciplinary proceeding in which it is shown that a [R]espondent has failed to pay in accordance with the PACA and is not in full compliance with the PACA within 120 days after the [C]omplaint is served on that [R]espondent, or the date of the hearing, whichever occurs first, the PACA case will be treated as a "no-pay" case . . .. In any "no-pay" case in which the violations are flagrant or repeated, the license of a PACA licensee, shown to have violated the payment provisions of the PACA, will be revoked." *Id.* at 548-549.

According to the Judicial Officer's policy set forth in *ScamCorp*, this Respondent had 120 days from the date the complaint was served upon it, or until March 14, 2001, to come into full compliance with the PACA. Therefore, as Respondent was not in full compliance by that date, this case should be treated as a "no pay" case for purposes of sanction, which warrants the issuance of a Decision Without Hearing finding that Respondent committed willful, flagrant and repeated violations of section 2(4) of the PACA and revoking Respondent's license.

As Respondent has failed to Show Cause Why a Decision Without Hearing Should Not Be Issued, 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 mailing address is 126-127 New England Produce Center, Chelsea, Massachusetts 02150-1711.

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 991579 was issued to Respondent on August 24, 1999. This license was renewed on its anniversary date on August 24, 2000, but was not renewed on August 24, 2001.

3. As more fully set forth in paragraph III of the Complaint, during the period February through December 1999, Respondent purchased, received, and accepted, in interstate and foreign commerce, from 16 sellers, 119 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 $323,016.67.

4. Respondent failed to pay the produce debt described above and to come into full compliance with the PACA within 120 days of the filing of the Complaint against it.

Conclusions

Respondent's failure to make full payment promptly with respect to the 119 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 license of Respondent shall be revoked.

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.
[Note: This decision and order became final December 29, 2001- Editor]

In re: SOUND COMMODITIES, INC.
PACA Docket No. 01-0031.
Decision Without Hearing by Reason of Default.
Filed April 4, 2002.

PACA – Default – Payment, failure to make full, prompt.

Ann K. Parnes, for Complainant,
Respondent, Pro se.
Decision issued by James W. Hunt, Chief Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a et seq.) hereinafter referred to as "the Act," instituted by a complaint filed on September 13, 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 2, 1998, through August 28, 1999, Sound Commodities, Inc. (hereinafter "Respondent"), failed to make full payment promptly to 15 sellers of the agreed purchase prices in the total amount of $707,373.62 for 296 lots of perishable agricultural commodities that it received, accepted, and sold in interstate commerce. A distribution of trust assets in 2000 reduced the amount that remains past due and unpaid by Respondent to $601,786.97.

A copy of the complaint was served upon Respondent by certified mail on September 24, 2001. Respondent did not file an answer. The time for filing an answer having run, and upon Complainant's motion for the issuance of a Decision without Hearing by Reason of Default, the following Decision and Order is issued without further investigation or hearing pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. §1.139).

Findings of Fact

1. Respondent, Sound Commodities, Inc., is a corporation organized and existing under the laws of the state of Washington. Respondent's business mailing address is 218 Main Street, PMB 516, Kirkland, Washington 98033.

2. At all times material herein, Respondent was licensed under the Act. License number 890812 was issued to Respondent on March 6,1989. This license was suspended on September 28, 1999, for failing to pay a reparation order pursuant to

Section 7(d) of the Act (7 U.S.C. §499g(d)). Subsequently, eight additional reparation orders were issued against Respondent. These nine orders remain unsatisfied. Respondent's license terminated on March 6, 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. During the period September 2, 1998, through August 28, 1999, Respondent failed to make full payment promptly to 15 sellers for 296 lots of fruits and vegetables that it received, accepted, and sold in interstate commerce in the total amount of $707,373.62. In 2000, a distribution of trust assets totaling $105,586.65 was made to 11 PACA claimants who protected their trust rights under Section 5(c)(2) of the Act (7 U.S.C. §499e(c)(2)). This distribution reduced the amount that remains past due and unpaid for purchases made by Respondent in the course of interstate commerce to $601,786.97.

Conclusions

Respondent's failure to make full payment promptly with respect to the 296 transactions set forth in Finding of Fact 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

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 shall be published.

This Order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings thirty-five days after service hereof, unless appealed to the Secretary by a party to the proceeding within thirty days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§1.139 and 1.145).

Copies hereof shall be served upon parties.

[This Decision and Order became final July 2, 2002. - Editor]

In re: OPC LIQUIDATION CORPORATION, formerly d/b/a OREGON POTATO COMPANY.
PACA Docket No. D-02-0007.
Decision Without Hearing by Reason of Default.
Filed June 20, 2002.

PACA – Default – Payment, failure to make full, prompt.

Charles E. Spicknall, 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 February 6, 2002, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The complaint alleges that during the period of March 1999 through June 2000, Respondent OPC Liquidation Corporation, formerly known as the Oregon Potato Company, (hereinafter the "Respondent"), failed to make full payment promptly to 40 sellers of the agreed purchase prices in the total amount of $6,792,743.62 for 2,869 lots of perishable agricultural commodities, which it purchased, received and accepted and in interstate and foreign commerce.

A copy of the complaint was served on the Respondent by certified mail on February 12, 2002, which complaint has not been 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).

Findings of Fact

1. Respondent, OPC Liquidation Corporation, formerly known as Oregon Potato Company, is a corporation organized and existing under the laws of the State of Oregon, also formerly doing business as Washington Potato Company. Oregon Potato Company changed the name of the company to OPC Liquidation Corporation on January 8, 2001, while in bankruptcy, in order to facilitate the sale of the company's assets, including the Oregon Potato Company name and Washington Potato Company trade name. OPC Liquidation Corporation and the

former Oregon Potato Company's business address is East Columbia Avenue, Boardman, Oregon 97818. The mailing address is P.O. Box 169, Boardman, Oregon 97818.

2. At all times material herein, OPC Liquidation Corporation and the former Oregon Potato Company were licensed under the provisions of the PACA. The License and Program Review Branch, PACA Branch, Fruit and Vegetable Division, were informed when the company changed names and permitted OPC Liquidation Corporation to retain PACA license number 810641, which had been issued to the former Oregon Potato Company on March 4, 1981. Respondent's license was terminated on March 4, 2001, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499(a)), when OPC Liquidation Corporation failed to renew it.

3. During the period March 1999 through June 2000, Respondent failed to make full payment promptly to 40 sellers of the agreed purchase prices in the total amount of $6,792,743.62 for 2,869 lots of perishable agricultural commodities, which it purchased, received and accepted in interstate and foreign commerce.

Conclusions

Respondent's failure to make full payment promptly with respect to the 2,869 transactions described 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 eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings thirty-five days after service hereof unless appealed to the Secretary by a party to the proceeding within thirty days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. 1.139 and 1.145). [This Decision and Order became final July 30, 2002. - Editor]

In re: JANNY WATERMELON & PRODUCE, INC.
PACA Docket No. D-01-0021.
Decision Without Hearing by Reason of Default.
Filed July 15, 2002.

PACA – Default – Payment, failure to make full, prompt.

Charles E. Spicknall, for Complainant.
Respondent, Pro se.
Decision issued by Jill S. Clifton, 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 June 28, 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 of December 1999 through September 2000, Respondent Janny Watermelon & Produce, Inc., (hereinafter "Respondent") failed to make full payment promptly to six sellers of the agreed purchase prices, or balances thereof, in the total amount of $195,352.54 for 30 lots of perishable agricultural commodities that it received, accepted and sold in interstate and foreign commerce.

A copy of the complaint filed on June 28, 2001 was sent to Respondent at 2438 Nostrand Avenue, Brooklyn, New York 11210 by certified mail on the filing date. On July 9, 2001, the Hearing Clerk wrote to the Postmaster in Brooklyn, New York requesting delivery date confirmation and the signature card. When no response was forthcoming, on September 18, 2001, the Hearing Clerk once again requested that the delivering post office provide delivery date confirmation and a signature. When no response was received, the complaint was sent once again to the same address by certified mail on October 4, 2001. The delivery receipt for the complaint mailed on October 4th returned to the Hearing Clerk on October 30, 2001. It was signed on October 1, 2001 and date stamped by the post office on October 16th. The return receipt for the complaint mailed on June 28, 2001 was also subsequently returned to the Hearing Clerk with a signed receipt date of October 14, 2001 and post office date stamp of October 16, 2001.

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).

Findings of Fact

1. Respondent is a corporation organized and existing under the laws of the state of New York. Its business mailing address is 2438 Nostrand Avenue, Brooklyn, New York 11210.

2. At all times material herein, Respondent was licensed under the provisions of the PACA. License number 981714 was issued to Respondent on August 3, 1998.[1] This license terminated on August 3, 2001, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499d(a)), when Respondent failed to pay the required annual renewal fee.

3. During the period of December 1999 through September 2000, Respondent purchased, received, and accepted in interstate and foreign commerce, from six sellers, 30 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 $195,352.54.

Conclusions

Respondent's failure to make full payment promptly with respect to the 30 transactions described 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 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

[1] A typographical error in the complaint mistakenly identified Respondent's license number as 980214.

hereof unless appealed to the Secretary by a party to the proceeding within thirty days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. 1.139 and 1.145). [This Decision and Order became final September 9, 2002. - Editor]

In re: D&E PRODUCE, LLC t/a ALLRED PRODUCE, LLC.
PACA Docket No. D-02-0006.
Decision Without Hearing by Reason of Default.
Filed July 19, 2002.

PACA – Default – Payment, failure to make full, prompt.

Charles E. Spicknall, 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 on January 15, 2002, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The complaint alleges that during the period of February through October 2000, Respondent D&E Produce, LLC, trading as Allred Produce, (hereinafter "Respondent") failed to make full payment promptly to seven sellers of the agreed purchase prices in the total amount of $228,287.45 for 33 lots of perishable agricultural commodities that it purchased, received, and accepted in interstate commerce. The complaint further alleges that Respondent's PACA license was obtained through false and misleading statements and that Respondent continued to use a denied trade name.

A copy of the complaint was sent to Respondent by certified mail on January 15, 2002 and received by the Respondent on January 24, 2002. No answer to the complaint has been received. 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).

Findings of Fact

1. Respondent is a limited liability company organized and existing under the laws of the State of Texas. Its business mailing address is 1901 Fir Avenue, McAllen, Texas 78501. Its business mailing address is P.O. Box 3866, McAllen, Texas 78502.

2. At all times material herein, Respondent was licensed under the provisions of the PACA. License number 001843 was issued to Respondent on August 31, 2000. This license terminated on August 31, 2001, 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. On July 20, 2000, Respondent was denied a license for the name "Allred's Produce" based on a determination by the agency that the use of that name would be deceptive, misleading or confusing to the trade. In obtaining PACA license number 001843 in the name of D&E Produce, LLC, Respondent reported no intention of using any additional trade or fictitious names in the licensing application. Question 3 of the license application specifically required Respondent to list any additional trade or fictitious names. Despite being denied a license for the use of the name "Allred's Produce," and failing to report its intention to continue to use the name "Allred's Produce" on its license application, at all times material herein, Respondent continued to use the trade name "Allred's Produce."

4. During the period of February through October 2000, Respondent purchased, received, and accepted in interstate commerce, from seven sellers, 33 lots of fruit and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $228,287.45.

Conclusions

Respondent's continued use of a denied trade name, "Allred's Produce," constitutes a violation of Section 3(c) of the Act (7 U.S.C. § 499c(c)).

Respondent's failure to disclose its continued use of the denied trade name "Allred's Produce" on its licensing application constitutes a violation of Section 8(c) of the Act (7 U.S.C. § 499h(c)).

Respondent's failure to make full payment promptly with respect to the 33 transactions described above, constitutes willful, repeated and flagrant violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)).

Order

A finding is made that Respondent has violated Sections 3(c) and 8(c) of the

Act (7 U.S.C. §§ 499c(c), 499h(c)) and committed willful, flagrant and repeated violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)).

The facts and circumstances of the violations set forth herein shall be published.

This Order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings thirty-five days after service hereof unless appealed to the Secretary by a party to the proceeding within thirty days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145). [This Decision and Order became final September 9, 2002. - Editor]

In re: C.L. CONTRERAS PRODUCE, INC.
PACA Docket No. D-01-0009.
Decision Without Hearing by Reason of Default.
Filed August 6, 2002.

PACA – Default – Payment, failure to make full, prompt.

Ruben D. Rudolph, for Complainant.
Respondent, Pro se.
Decision issued by Jill S. Clifton, 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 "PACA", instituted by a Complaint filed on February 28, 2001, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The complaint was served on Respondent by certified mail on March 3, 2001. Respondent has failed to file an answer to the complaint.

The Complaint alleges that during the period September 1997 through March 1998, C. L. Contreras Produce, Inc., (hereinafter "Respondent") failed to make full payment promptly to 10 sellers of the agreed purchase prices in the total amount of $181,093.38 for 78 lots of perishable agricultural commodities, which it purchased, received and accepted in interstate and foreign commerce. The Complaint also noted that on March 6, 1998, Respondent filed a voluntary petition in the United States Bankruptcy Court, Southern District of Texas pursuant to Chapter 7 of the Bankruptcy Code (11 U.S.C § 701 et seq.), designated Case No. 98-32553. Complainant requested that a finding be made that Respondent committed willful,

flagrant and repeated violations of Section 2(4) of the Act (7 U.S.C. § 499(4)), and that such findings be published.

On March 6, 1998, Respondent filed a Voluntary Petition pursuant to Chapter 7 of the Bankruptcy Code (11 U.S.C. § 701 et seq.) in the United States Bankruptcy Court, Southern District of Texas. This petition has been designated Case Number 98-32553. According to Schedule F of the Petition, Respondent admits that all of the 10 sellers listed in Paragraph III of the Complaint hold unsecured claims that are more than or equal to the amounts alleged in the Complaint, for a total of $259,558.00.

Findings of Fact

1. Respondent was a corporation organized and existing under the laws of the State of Texas. Its business mailing address was 4910 North Main Street, Houston, Texas 77009.

2. Pursuant to the licensing provisions of the PACA, license number 951040 was issued to Respondent on April 4, 1995. This license terminated on April 4, 1998, pursuant to section 4(a) of the PACA (7 U.S.C. § 499(a)), when Respondent failed to pay the required annual renewal fee.

3. Respondent, during the period September 1997 through March 1998 failed to make full payment promptly to 10 sellers of the agreed purchase prices in the total amount of $181,093.38 for 78 lots of perishable agricultural commodities, which it purchased, received and accepted in interstate and foreign commerce.

Conclusions

Respondent failed to make payment for purchases of produce, as set forth in Finding of Fact 3 (above). Respondent's failure to make full payment constitutes willful, flagrant and repeated violations of Section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, the following Order is issued.

Order

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 PACA, 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).
[This Decision and Order became final September 14, 2002. - Editor]

In re: ARMENO FOODS, INC.
PACA Docket No. D-02-0010.
Decision Without Hearing by Reason of Default.
Filed August 13, 2002.

PACA – Default – Payment, failure to make full, prompt.

Clara Kim, for Complainant.
Respondent, Pro se.
Decision issued by James W. Hunt, Chief Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a et seq.) (hereinafter referred to as the "Act" or "PACA"), instituted by a Notice to Show Cause and Complaint filed on February 27, 2002, 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 2001 through November 2001, Respondent, Armeno Foods, Inc., (hereinafter "Respondent") failed to make full payment promptly to 4 sellers of the agreed purchase prices, or balances thereof, in the total amount of $96,520.88 for 53 lots of perishable agricultural commodities which it purchased, received, and accepted in interstate and foreign commerce.

Respondent's PACA license terminated on August 22, 2001, pursuant to Section 4(a) of the Act (7 U.S.C. § 499d(a)), because Respondent failed to pay the required renewal fee. On January 28, 2002, Complainant received Respondent's completed application for a new PACA license. Due to Respondent's failures to make full payment promptly for its purchases of perishable agricultural commodities as stated above, Complainant alleges that Respondent has engaged in practices of a character prohibited by the PACA and is therefore unfit to engage in the business of a commission merchant, dealer, or broker. In accordance with Section 4(d) of the Act (7 U.S.C. § 499d(d)), Complainant withheld the issuance of a new license pending

its investigation to determine whether Respondent was unfit to engage in business subject to the Act. Subsequently, the Associate Deputy Administrator filed the Notice to Show Cause why Respondent should not be denied a PACA license and Complaint on February 27, 2002. On February 28, 2002, the Hearing Clerk mailed the Notice to Show Cause and Complaint to Respondent via certified mail at its last known business address at 109 Prospect Place, Hillsdale, New Jersey 07642 but it was returned unclaimed by the U.S. Postal Service on April 9, 2002. On April 11, 2002, the Hearing Clerk re-sent the Notice to Show Cause and Complaint, via regular mail, to the home of Respondent's President, Gregory Minasian at 137 Patrick Avenue, Emerson, New Jersey 07630.

Complainant's counsel filed a Motion for Expedited Hearing on March 27, 2002. In that motion, Complainant's counsel requested that a hearing be held on or before March 29, 2002, in order to meet the statutory mandate of providing Respondent an opportunity for hearing within 60 days from the date of the license application (7 U.S.C. § 499d(d)).

The case was assigned to the undersigned on March 27, 2002. I attempted to contact Gregory Minasian, President of Respondent, by telephone, but those attempts were unsuccessful. On March 28, 2002, I issued an Order Scheduling Hearing. That order directed that an oral hearing be conducted by telephone on March 29, 2002, at a time acceptable to Respondent. It further stated that Respondent might contact me to waive the right to a hearing by March 29, 2002, and request a hearing at another date. The Hearing Clerk sent the Order Scheduling Hearing to Respondent via over-night express mail on March 28, 2002, to Respondent's last known business address at 109 Prospect Place, Hillsdale, New Jersey 07642. It was returned because Respondent was no longer located at that address. Respondent did not notify the Department of its current business address.

The hearing by telephone commenced in this proceeding at approximately 2:45 p.m. on March 29, 2002. Complainant was represented by Clara Kim, Esq. Respondent did not make an appearance in person or by telephone. Due to these circumstances, I stated that the hearing would be continued in order to allow Respondent further opportunity to participate. On April 1, 2002, I issued an Order Continuing Hearing and directed Respondent to contact my office to schedule a date to reconvene the hearing.

On April 3, 2002, Respondent was served the following documents at the home of its President, Gregory Minasian, at 137 Patrick Avenue, Emerson, New Jersey 07630: Notice to Show Cause and Complaint; Order Scheduling Hearing; Order Continuing Hearing; and Rules of Practice (7 C.F.R. § 1.130 et seq.).

On May 3, 2002, Complainant filed a Motion for Decision Without Hearing by Reason of Default.

On June 3, 2002, Mr. Minasian filed a letter stating that he had received the Complaint at his home address on May 10, 2002, and acknowledged that "the only thing I am guilty of is paying my vendors late." He also stated that Respondent's office location was 192 Third Avenue, Westwood, New Jersey 07675.

On July 2, 2002, I issued an order denying Complainant's Motion for Default Decision "at this time" and ordered Respondent to provide by July 15, 2002, its current business address, telephone and facsimile numbers in order to re-schedule the hearing. The order was sent to addresses for both Respondent and Mr. Minasian. There was no reply from either Respondent or Mr. Minasian. On July 29, 2002, Respondent was directed to show cause by August 9, 2002, why a default decision should not be issued. Respondent did not reply to the show cause order.

Accordingly as Respondent has failed to request a new date for a continuance of the hearing, failed to avail itself of the opportunity to show cause why its application for license should not be denied, and failed to file an answer, Complainant's motion for the issuance of a Default Order Without Hearing by Reason of Default is now granted.[1] The following Decision and Order is therefore 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, Armeno Foods, Inc., is a corporation organized and existing under the laws of the State of New Jersey. Its business addresses have been 109 Prospect Place, Hillsdale, New Jersey 07642 and 192 Third Avenue, Westwood, New Jersey 07675. Respondent's president is Gregory Minasian. His mailing address is Gregory Minasian, 137 Patrick Avenue, Emerson, New Jersey 07630.

2. PACA license number 951813 was issued to Respondent on August 22, 1995. This license terminated on August 22, 2001, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499d(a)), when Respondent failed to pay the required renewal fee.

3. At all times material herein, Respondent has operated subject to the PACA.

4. During the period June 2001 through October 2001, Respondent purchased, received, and accepted in interstate and foreign commerce, from 4 sellers, 53 lots of vegetables, all being perishable agricultural commodities, but failed to make full

[1]In the event Mr. Minasian's June 3, 2002, letter could be considered an answer, it admits the allegations in the Complaint and thus warrants a default decision pursuant to Section 1.136 (7 C.F.R. § 1.136).

payment promptly of the agreed purchase prices, or balances thereof, in the total amount of $96,520.88.

5. On January 28, 2002, Complainant received Respondent's completed application for a PACA license.

6. A Complaint was filed against Respondent alleging that it violated Section 2(4) of the Act (7 U.S.C. § 499b(4)) for failing to make full payment promptly for the purchases found in paragraph 4 above.

7. Respondent failed to file an Answer.

Conclusions

Respondent was given an opportunity for a hearing to show cause why its application for a PACA license should not be denied, pursuant to Section 4(d) of the Act (7 U.S.C. § 499d(d)). Respondent failed to avail itself of its right to a hearing and failed to file an Answer to the Complaint. A hearing was held on March 29, 2002, during which Respondent did not make an appearance. Respondent's failures to make full payment promptly with respect to the 53 transactions set forth in Finding of Fact No. 4 above, constitute willful, flagrant and repeated violations of Section 2(4) of the Act (7 U.S.C. §499b(4)). As a result of Respondent's failures to make full payment promptly for its purchases of perishable agricultural commodities, Respondent has engaged in practices of a character prohibited by the PACA. Pursuant to Section 4(d) of the Act (7 U.S.C. § 499d(d)), Respondent is unfit to engage in the business of a PACA commission merchant, dealer, or broker.

Order

Respondent has committed willful, flagrant and repeated violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)). The facts and circumstances of the violations set forth above shall be published.

Respondent is unfit to be licensed under the PACA. Its application for a PACA license is denied.

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).

[This Decision and Order became final October 24, 2002. - Editor]

In re: OTERO FROZEN FOODS, L.L.C.
PACA Docket No. D-02-0008.
Decision Without Hearing by Reason of Default.
Filed September 26, 2002.

PACA – Default – Payment, failure to make full, prompt.

Charles Kendall, 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 February 12, 2002, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The Complaint alleged that during the period October 2, 2000, through February 3, 2001, Respondent Otero Frozen Foods, L.L.C. (hereinafter "Respondent") failed to make full payment promptly to 10 sellers of the agreed purchase prices, or balances thereof, in the total amount of $211,467.40 for 85 lots of onions which it purchased, received, and accepted in interstate commerce.

A copy of the Complaint was mailed to Respondent by certified mail at its last known principal place of business on February 12, 2002, and was returned with the notation "Moved–Left No Address" to the office of the Hearing Clerk on March 5, 2002. A copy of the Complaint was remailed to Respondent at the same address by ordinary mail on March 19, 2002 pursuant to Section 1.147(c) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.130 et seq., hereinafter "Rules of Practice"). Also, a copy of the Complaint was sent to the forwarding address and it is indicated it was received March 14, 2002, by signed receipt of Certified Mail #70993400001388058317. 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 procedure pursuant to Section 1.139 of the Rules of Practice.

Finding of Fact

1. Respondent is a limited liability company registered in the State of Colorado on April 23, 1999. Respondent's mailing address is P. O. Box 4835, Blue Jay, California 92317-4835. Its business address is 20094 Hwy. 50, Rocky Ford, Colorado 81067-9473.

2. At all times material herein, Respondent was licensed under the provisions of the PACA. License number 991073 was issued to Respondent on May 20, 1999. This license terminated on May 20, 2001, 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 October 2, 2000, through February 3, 2001, Respondent purchased, received, and accepted in interstate commerce, from 10 sellers, 85 lots of onions, a perishable agricultural commodity, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $211,467.40.

Conclusions

Respondent's failure to make full payment promptly with respect to the 85 transactions set forth in Finding of Fact No. 4 above constitutes wilful, 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

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 shall be published.

This order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon parties.

[This Decision and Order became final November 8, 2002. - Editor]

In re: DEL CAMPO PRODUCE, INC.
PACA Docket No. D-02-0018.
Decision Without Hearing by Reason of Default.
Filed October 17, 2002.

PACA – Default – Payment, failure to make full, prompt.

Charles E. Spicknall, for Complainant.
Respondent, Pro se.
Decision issued by Jill S. Clifton, 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 May 20, 2002, 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 June 2000, Respondent Del Campo Produce, Inc., [hereinafter "Respondent"], failed to make full payment promptly to fifteen sellers of the agreed purchase prices, or balances thereof, in the total amount of $335,174.93 for 193 lots of perishable agricultural commodities which it received, accepted and sold in interstate and foreign commerce.

A copy of the complaint filed on May 20, 2002 was sent to the Respondent at 60 East Terminal Produce Drive, Nogales, Arizona 85621 and P.O. Box 1404, Nogales, Arizona 85628 by certified mail on the filing date. The complaints were unclaimed or refused by Respondent and returned by the postal service to the Hearing Clerk. Pursuant to section 1.147(c) of the Rules of Practice, (7 C.F.R. § 1.147(c)), on June 6, 2002, the complaint was sent by regular mail to 60 East Terminal Produce Drive, Nogales, Arizona 85621. Similarly, on June 13, 2002 the complaint was sent once again by regular mail to P.O. Box 1404, Nogales, Arizona 85628. No answer to the complaint has been received. 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 proceedings 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 Arizona. Its business address was 60 East Terminal Produce Drive,

Nogales, Arizona 85621. Its mailing address is P.O. Box 1404, Nogales, Arizona 85628-1404.

2. At all times material herein, Respondent was licensed under the provisions of the Act. License number 800264 was issued to Respondent on December 12, 1979. This license terminated on December 12, 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. As more fully set forth in paragraph III of the complaint, during the period November 1998 through June 2000, Respondent purchased, received and accepted in interstate and foreign commerce, from fifteen sellers, 193 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 $335,174.93.

Conclusions

Respondent's failure to make full payment promptly with respect to the 193 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(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, this Decision will become final without further proceedings thirty-five days after service hereof unless appealed to the Secretary by a party to the proceeding within thirty days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139, 1.145).

Copies hereof shall be served upon parties.

[This Decision and Order became final December 4, 2002. - Editor]

CONSENT DECISIONS

(Not published herein - Editor)

Western Fresh Fruit Sales. PACA Docket No. 02-0022. 7/31/02.

Lonny Saverino d/b/a Green Thumb Produce. PACA Docket No. 02-0022. 7/31/02.

Harvest Distributing, Inc. PACA Docket No. 01-0016. 8/2/02.

John Alascio. PACA Docket No. D-01-0007. 8/30/02.

Lexington Produce Co., Inc. PACA Docket No. D-01-007. 8/30/02.

A.L Harrison Company Distributors. PACA Docket No. D-02-0026. 9/9/02.

Turbeville Food Products Corporation. PACA Docket No. D-02-0012. 9/17/02.

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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

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The published decisions and orders may be cited by giving the volume number, page number and year, e.g., 1 Agric. Dec. 472 (1942). It is unnecessary to cite a decision's docket 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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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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