AGRICULTURE DECISIONS

Volume 62

January – June 2003

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.

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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.

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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.

AGRICULTURE DECISIONS

Volume 62

January - June 2003
Part One (General)
Pages 1 - 195

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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Errata
Corrections to
61 Agric. Dec. 275, 278

The record establishes that the Hearing Clerk served Respondent with the Decision and Order as to Samuel K. Angel on February 1, 2002.[5] Section 1.145(a) of the Rules of Practice provides the time for appealing an administrative law judge's decision, as follows:

§ 1.145 Appeal to Judicial Officer.

(a) *Filing of petition.* Within 30 days after receiving service of the Judge's decision, a party who disagrees with the decision, or any part thereof, or any ruling by the Judge or any alleged deprivation of rights, may appeal such decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk.

7 C.F.R. § 1.145(a).

Therefore, Respondent's appeal petition was required to be filed with the Hearing Clerk no later than March 4, 2002.[6] On March 11, 2002, Respondent filed an appeal petition with the Hearing Clerk.

The Judicial Officer has continuously and consistently held under the Rules of Practice that the Judicial Officer has no jurisdiction to hear an appeal that is filed after an initial decision and order becomes final.[7] The ALJ's Decision and

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[5]See note 4.

[6]Thirty days after February 1, 2002, was March 3, 2002. However, March 3, 2002, was a Sunday, and section 1.147(h) of the Rules of Practice provides that when the time for filing expires on a Sunday, the time for filing shall be extended to the next business day, as follows:

§ 1.147 Filing; service; extensions of time; and computation of time.

. . . .

(h) *Computation of time.* Saturdays, Sundays and Federal holidays shall be included in computing the time allowed for the filing of any document or paper: *Provided*, That, when such time expires on a Saturday, Sunday, or Federal holiday, such period shall be extened [sic] to include the next following business day.

7 C.F.R. § 1.147(h).

The next business day after Sunday, March 3, 2002, was Monday March 4, 2002. Therefore, Respondent was required to file his appeal petition no later than March 4, 2002.

[7]*See In re Paul Eugenio*, 60 Agric. Dec. 676 (001) (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

(continued...)

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LIST OF DECISIONS REPORTED

AGRICULTURAL MARKETING AGREEMENT ACT

COURT DECISION

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AGRICULTURAL MARKETING AGREEMENT ACT

COURT DECISION

HILLSIDE DAIRY INC., A&A DAIRY, L&S DAIRY, AND MILKY WAY FARMS v. WILLIAM J. LYONS, JR., SECRETARY, CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE, et al.
AND
PONDEROSA DAIRY, PAHRUMP DAIRY, ROCKVIEW DAIRIES, INC., AND D. KUIPER DAIRY v. WILLIAM J. LYONS, JR., SECRETARY, CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE, et al.
Nos. 01-950, 01-1018.
Decided June 9, 2003.

(Cite as: 123 S. Ct. 2142).

AMMA – Privileges and immunities clause – Corporate citizens – Non-resident petitions. Commerce clause, negative assertion of.

California's milk marketing program is similar to Federal Milk Market Orders in that both set up pricing structures for various classes of uses for milk sold in California. California's plan has more classes in its price structure than the Federal plan. The California processors pay a unit price for milk into a pool which includes the unit price paid to the producer plus a premium which is paid into an "equalization pool." Under certain market conditions, California processors can acquire milk from out-of-state producers under Federal Milk Marketing Orders at a lower unit price than paid to California milk producers under the California Milk marketing program as long as the processors did not also have to pay into the California "equalization pool." Under certain market conditions, non-resident individual and corporate milk-producers contend that the California milk marketing program violates the Commerce clause and the "privileges and immunities" clauses of the Constitution by imposing additional financial burdens on the milk sold by non-resident producers. The court determined that since the Federal milk marketing statute (7 U.S.C. § 7254) did not grant specific exemption to the California milk marketing program to control pricing, then the power to exempt California's milk purchases and sales from interstate commerce transactions would not be presumed as having Congressional intent. The case was remanded to the lower court for a determination consistent with the pricing structure of the Federal milk marketing order which would not violate the commerce clause and privileges and immunities clauses with respect to non-resident producers.

Supreme Court of the United States

Justice STEVENS delivered the opinion of the Court.

In most of the United States, not including California, the minimum price

paid to dairy farmers producing raw milk is regulated pursuant to federal marketing orders. Those orders guarantee a uniform price for the producers, but through pooling mechanisms require the processors of different classes of dairy products to pay different prices. Thus, for example, processors of fluid milk pay a premium price, part of which goes into an equalization pool that provides a partial subsidy for cheese manufacturers who pay a net price that is lower than the farmers receive. *See West Lynn Creamery, Inc. v. Healy,* 512 U.S. 186, 189, n. 1, 114 S.Ct. 2205, 129 L.Ed.2d 157 (1994).

The California Legislature has adopted a similar program to regulate the minimum prices paid by California processors to California producers. In the cases before us today, out-of-state producers are challenging the constitutionality of a 1997 amendment to that program. They present us with two questions: (1) whether § 144 of the Federal Agriculture Improvement and Reform Act of 1996, 110 Stat. 917, 7 U.S.C. § 7254, exempts California's milk pricing and pooling regulations from scrutiny under the Commerce Clause; and (2) whether the individual petitioners' claim under the Privileges and Immunities Clause is foreclosed because those regulations do not discriminate on their face on the basis of state citizenship or state residence.

I

Government regulation of the marketing of raw milk has been continuous since the Great Depression.[1] In California, three related statutes establish the regulatory structure for milk produced, processed, or sold in California. First, in 1935, the State enacted the Milk Stabilization and Marketing Act, Cal. Food & Agric. Code Ann. §§ 61801-62403 (West 2001), "to establish minimum producer prices at fair and reasonable levels so as to generate reasonable producer incomes that will promote the intelligent and orderly marketing of market milk . . ." § 61802(h). Then, California created requirements for composition of milk products in the Milk and Milk Products Act of 1947. §§ 32501-39912. The standards created under this Act mandate minimum percentages of fat and solids-not-fat in dairy products and often require fortification of milk by adding solids-not-fat. In 1967, California passed another milk pricing act, the Gonsalves Milk Pooling Act, §§ 62700-62731, to address deficiencies in the existing pricing scheme. Together, these three Acts

[1]The history and purpose of federal regulation of milk marketing is described in some detail in *Zuber v. Allen,* 396 U.S. 168, 172-187, 90 S.Ct. 314, 24 L.Ed.2d 345 (1969).

(including numerous subsequent revisions) create the state milk marketing structure: The 1935 and 1967 Acts establish the milk pricing and pooling plans, while the 1947 Act governs the composition of milk products sold in California.

While it serves the same purposes as the federal marketing orders, California's regulatory program is more complex. Federal orders typically guarantee all producers the same minimum price and create only two or three classes of end uses to determine the processors' contributions to, or withdrawals from, the equalization pools, whereas under the California scheme some of the farmers' production commands a "quota price" and some receives a lower "overbase price," and the processors' end uses of the milk are divided into five different classes.

The complexities of the California scheme are not relevant to these cases; what is relevant is the fact California processors of fluid milk pay a premium price (part of which goes into a pool) that is higher than either of the prices paid to the producers.[2] During the early 1990's, market conditions made it profitable for some California processors to buy raw milk from out-of-state producers at prices that were higher than either the quota prices or the overbase prices guaranteed to California farmers yet lower than the premium prices they had to pay when making in-state purchases. The regulatory scheme was at least partially responsible for the advantage enjoyed by out-of-state producers because it did not require the processors to make any contribution to the equalization pool on such purchases. In other words, whereas an in-state purchase of raw milk resold as fluid milk required the processor both to pay a guaranteed minimum to the farmer and also to make a contribution to the pool, an out-of-state purchase at a higher price would often be cheaper because it required no pool contribution.

In 1997, the California Department of Food and Agriculture amended its plan to require that contributions to the pool be made on some out-of-state

[2]Because processors of fluid milk typically manufacture some other products as well, their respective pool contributions reflect the relative amounts of those end uses. Each processor's mix of end uses produces an individual monthly "blend price" that is multiplied by its total purchases. Under federal orders the term "blend price" has a different meaning; it usually refers to the price that the producer receives. *See West Lynn Creamery, Inc. v. Healy,* 512 U.S. 186, 189, n. 1, 114 S.Ct. 2205, 129 L.Ed.2d 157 (1994).

purchases.[3] It is the imposition of that requirement that gave rise to this litigation. Petitioners in No. 01-950 operate dairy farms in Nevada; petitioners in No. 01-1018 operate such farms in Arizona. They contend that the 1997 amendment discriminates against them. In response, the California officials contend that it merely eliminated an unfair competitive advantage for out-of-state producers that was the product of the regulatory scheme itself.

Without reaching the merits of petitioners' constitutional claims, the District Court dismissed both cases and the Court of Appeals for the Ninth Circuit affirmed. 259 F.3d 1148 (2001). Relying on its earlier decision in *Shamrock Farms Co. v. Veneman,* 146 F.3d 1177 (C.A.9 1998), the court held that a federal statute enacted in 1996 had immunized California's milk pricing and pooling laws from Commerce Clause challenge. It also held that the corporate petitioners had no standing to raise a claim under the Privileges and Immunities Clause, and that the individuals' claim under that Clause failed because the 1997 plan amendments did not "on their face, create classifications based on any individual's residency or citizenship." 259 F.3d, at 1156. We granted certiorari to review those two holdings, 537 U.S. 1099, 123 S.Ct. 818, 154 L.Ed.2d 766 (2003), but in doing so we do not reach the merits of either constitutional claim.

II

In some respects, the State's composition standards set forth in the 1947 Act exceed those set by the federal Food and Drug Administration (FDA). For example, California's minimum standard for reduced fat milk requires that it contain at least 10 percent solids-not-fat (which include protein, calcium, lactose and other nutrients). Cal. Food & Agric. Code Ann. § 38211 (West 2001). Federal standards require that reduced fat milk contain only 8.25 percent solids-not-fat. *See* 21 CFR §§ 131.110, 101.62 (2002). Some of California's standards were arguably pre-empted by Congress' enactment of the Nutrition Labeling and Education Act of 1990 (NLEA), 104 Stat. 2353, which contains a prohibition against the application of state quality standards to foods moving in interstate commerce. *See* 21 U.S.C. § 343-1(a). The District Court so held in *Shamrock Farms Co. v. Veneman,* No. Civ-S-95-318 (E.D.Cal.1996). In response to that decision, California sought an exemption from both the FDA and Congress. See *Shamrock Farms,* 146 F.3d, at 1180. Before the FDA acted,

[3] After the 1997 amendment, processors whose blend price exceeds the quota price must make contributions to the pool on their out-of-state purchases as well as their in-state purchases.

Congress responded favorably with the enactment of the statute that governs our disposition of these cases. That statute, § 144 of the Federal Agriculture Improvement and Reform Act of 1996, provides:

> "Nothing in this Act or any other provision of law shall be construed to preempt, prohibit, or otherwise limit the authority of the State of California, directly or indirectly, to establish or continue to effect any law, regulation, or requirement regarding--
>
> "(1) the percentage of milk solids or solids not fat in fluid milk products sold at retail or marketed in the State of California; or
>
> "(2) the labeling of such fluid milk products with regard to milk solids or solids not fat."

7 U.S.C. § 7254.

[1] Thereafter, Shamrock Farms brought another suit against the Secretary of the California Department of Food and Agriculture challenging the validity of both the State's compositional standards and its milk pricing and pooling laws. In that case, the Court of Appeals held that § 144 had immunized California's marketing programs as well as the compositional standards from a negative Commerce Clause challenge. *Shamrock Farms,* 146 F.3d, at 1182. In adhering to that ruling in the cases before us today, the Ninth Circuit erred.

[2] The text of the federal statute plainly covers California laws regulating the composition and labeling of fluid milk products, but does not mention laws regulating pricing. Congress certainly has the power to authorize state regulations that burden or discriminate against interstate commerce, *Prudential Ins. Co. v. Benjamin,* 328 U.S. 408, 66 S.Ct. 1142, 90 L.Ed. 1342 (1946), but we will not assume that it has done so unless such an intent is clearly expressed. *South-Central Timber Development, Inc. v. Wunnicke,* 467 U.S. 82, 91-92, 104 S.Ct. 2237, 81 L.Ed.2d 71 (1984). While § 144 unambiguously expresses such an intent with respect to California's compositional and labeling laws, that expression does not encompass the pricing and pooling laws. This conclusion is buttressed by the separate California statutes addressing the composition and labeling of milk products, on the one hand, and the pricing and pooling of milk on the other. See *supra,* at 2145- 2146. The mere fact that the composition and labeling laws relate to the sale of fluid milk is by no means sufficient to bring them within the scope of § 144. Because § 144 does not clearly express an intent to insulate California's pricing and pooling laws from a Commerce Clause challenge, the Court of Appeals erred in relying on § 144 to dismiss the challenge.

III

[3] Article IV, § 2, of the Constitution provides:

> "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

Petitioners, who include both individual dairy farmers and corporate dairies, have alleged that California's milk pricing laws violate that provision. The Court of Appeals held that the corporate petitioners have no standing to advance such a claim, and it rejected the individual petitioners' claims because the California laws "do not, on their face, create classifications based on any individual's residency or citizenship." 259 F.3d, at 1156. Petitioners do not challenge the first holding, but they contend that the second is inconsistent with our decision in *Chalker v. Birmingham & Northwestern R. Co.,* 249 U.S. 522, 39 S.Ct. 366, 63 L.Ed. 748 (1919). We agree.

In *Chalker,* we held that a Tennessee tax imposed on a citizen and resident of Alabama for engaging in the business of constructing a railroad in Tennessee violated the Privileges and Immunities Clause. The tax did not on its face draw any distinction based on citizenship or residence. It did, however, impose a higher rate on persons who had their principal offices out of State. Taking judicial notice of the fact that "the chief office of an individual is commonly in the State of which he is a citizen," we concluded that the practical effect of the provision was discriminatory. *Id.,* at 527, 39 S.Ct. 366. Whether *Chalker* should be interpreted as merely applying the Clause to classifications that are but proxies for differential treatment against out-of- state residents, or as prohibiting any classification with the practical effect of discriminating against such residents, is a matter we need not decide at this stage of the case. Under either interpretation, we agree with petitioners that the absence of an express statement in the California laws and regulations identifying out-of-state citizenship as a basis for disparate treatment is not a sufficient basis for rejecting this claim. In so holding, however, we express no opinion on the merits of petitioners' Privileges and Immunities Clause claim.

The judgment of the Court of Appeals is vacated, and these cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

* * *

Justice THOMAS, concurring in part and dissenting in part.

I join Parts I and III of the Court's opinion and respectfully dissent from Part II, which holds that § 144 of the Federal Agriculture Improvement and Reform Act of 1996, 7 U.S.C. § 7254, "does not clearly express an intent to insulate California's pricing and pooling laws from a Commerce Clause challenge." *Ante,* at 2147. Although I agree that the Court of Appeals erred in its statutory analysis, I nevertheless would affirm its judgment on this claim because "[t]he negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application," *Camps Newfound/Owatonna, Inc. v. Town of Harrison,* 520 U.S. 564, 610, 117 S.Ct. 1590, 137 L.Ed.2d 852 (1997) (THOMAS, J., dissenting), and, consequently, cannot serve as a basis for striking down a state statute.

_____

AGRICULTURAL MARKETING AGREEMENT ACT

DEPARTMENTAL DECISION

In re: FOSTER ENTERPRISES, A CALIFORNIA GENERAL PARTNERSHIP, AND EGGS WEST, A CALIFORNIA CORPORATION.
2002 AMA Docket No. F&V 1250-1.
Decision and Order.
Filed April 8, 2003.

AMAA – Eggs – Egg promotion – Petition to modify or exempt – Standing to file petition – Investigatory authority, as to any person.

The Judicial Officer (JO) affirmed Chief Administrative Law Judge James W. Hunt's Order Dismissing Petition. Neither Respondent nor Petitioners asserted Petitioners were persons subject to the Egg Research and Promotion Order (7 C.F.R. §§ 1250.301-363) (Egg Order). Petitioners, therefore, lacked standing to file a petition for modification of, or to be exempted from, the Egg Order under 7 U.S.C. § 2713(a). The JO rejected Petitioners' argument that the Secretary of Agriculture's requests for Petitioners' documents pertaining to transactions during a period prior to Petitioners' filing the Petition made Petitioners persons subject to the Egg Order with standing to file a petition in accordance with 7 U.S.C. § 2713(a). The JO also rejected Petitioners' argument that *Midway Farms v. United States Dep't of Agric.*, 188 F.3d 1136 (9th Cir. 1999), was apposite.

Colleen A. Carroll, for Respondent.
Brian C. Leighton, for Petitioners.
Initial decision issued by James W. Hunt, Chief Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

Foster Enterprises, a California general partnership, and Eggs West, a California corporation [hereinafter Petitioners], instituted this proceeding by filing a Petition[1] on September 27, 2002. Petitioners instituted the proceeding under the Egg Research and Consumer Information Act, as amended (7 U.S.C. §§ 2701-2718) [hereinafter the Egg Research and Consumer Information Act]; the Egg Research and Promotion Order (7 C.F.R. §§ 1250.301-.363)

[1]Petitioners entitle their Petition "Petition Pursuant to 7 U.S.C. § 2713 Contending That the Egg Research and Consumer Information Legislation, 7 U.S.C. § 2701 *et seq*., and the Egg Research and Promotion Order of 7 C.F.R. Part 1250, and the Assessments Imposed for the Same Violate Petitioners' Rights Guaranteed Under the First Amendment of the United States Constitution, and Seeking a Modification of the Order and an Exemption From the Order From Having to Pay Assessments or Supply Records to the American Egg Board or USDA Which Are Used for the Collection of Assessments (7 U.S.C. § 2713; 7 C.F.R. Part 1250; 7 C.F.R. § 1209.402 *et seq*.)" [hereinafter Petition].

[hereinafter the Egg Order]; and the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Research, Promotion and Education Programs (7 C.F.R. §§ 1200.50-.52) [hereinafter the Rules of Practice].[2]

Petitioners contend the Egg Research and Consumer Information Act, the Egg Order, the assessments imposed under the Egg Research and Consumer Information Act and the Egg Order, and the collection of records violate Petitioners' rights to freedom of speech and freedom of association guaranteed under the First Amendment to the Constitution of the United States. Petitioners seek an exemption from, or modification of, the Egg Research and Consumer Information Act and the Egg Order. (Pet. ¶ 14.)

On November 25, 2002, the Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], filed "Motion to Dismiss Petition Contending that the Egg Research and Consumer Information Act and Egg Research and Promotion Order are Unconstitutional" [hereinafter Motion to Dismiss] and "Memorandum of Points and Authorities." On December 18, 2002, Petitioners filed "Petitioners' Opposition to Respondent's Motion to Dismiss Petition; Petitioners' Cross-Motion for Summary Judgment" [hereinafter Response to Motion to Dismiss].

On February 4, 2003, Chief Administrative Law Judge James W. Hunt [hereinafter the Chief ALJ] dismissed the Petition on the ground that Petitioners do not have standing to file the Petition (Order Dismissing Petition at 2).

On February 26, 2003, Petitioners appealed to the Judicial Officer. On March 24, 2003, Respondent filed "Respondent's Response to Petitioners' Appeal of the ALJ's 'Order Dismissing Petition'" and "Memorandum of Points and Authorities." On March 28, 2003, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I adopt, with minor modifications, the Chief ALJ's Order Dismissing Petition as the final Decision and Order. Additional conclusions by the Judicial Officer follow the Chief ALJ's discussion as restated.

APPLICABLE CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

[2]Section 1200.52(d) of the Rules of Practice (7 C.F.R. § 1200.52(d)) provides 7 C.F.R. §§ 900.52(c)(2)-.71 also govern proceedings on petitions to modify or to be exempted from research, promotion, and education programs. Therefore, where appropriate, references to the "Rules of Practice" in this Decision and Order include 7 C.F.R. §§ 900.52(c)(2)-.71.

U.S. Const.

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 60—EGG RESEARCH AND CONSUMER INFORMATION

. . . .

§ 2702. Definitions

As used in this chapter—

. . . .

(b) The term "person" means any individual, group of individuals, partnership, corporation, association, cooperative, or any other entity.

. . . .

(t) The term "handler" means any person, specified in the order or the rules and regulations issued thereunder, who receives or otherwise acquires eggs from an egg producer, and processes, prepares for marketing, or markets such eggs, including eggs of his own production.

§ 2713. Administrative review of orders; petition; hearing; judicial review

(a) Any person subject to any order may file a written petition with the Secretary, stating that any such order or any provisions of such order or any obligations imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary. After such hearing, the Secretary shall make a ruling upon

the prayer of such petition which shall be final, if in accordance with law.

§ 2717. Investigations by Secretary; oaths and affirmations; subpoenas; judicial enforcement; contempt proceedings; service of process

The Secretary may make such investigations as he deems necessary for the effective carrying out of his responsibilities under this chapter or to determine whether an egg producer, processor, or other seller of commercial eggs or any other person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provisions of this chapter, or of any order, or rule or regulation issued under this chapter. For the purpose of such investigation, the Secretary is empowered to administer oaths and affirmations, subpena witnesses, compel their attendance, take evidence, and require the production of any books, papers, and documents which are relevant to the inquiry. Such attendance of witnesses and the production of any such records may be required from any place in the United States. In case of contumacy by, or refusal to obey a subpena to, any person, including an egg producer, the Secretary may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, and documents; and such court may issue an order requiring such person to appear before the Secretary, there to produce records, if so ordered, or to give testimony touching the matter under investigation. Any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found.

7 U.S.C. §§ 2702(b), (t), 2713(a), 2717.

7 C.F.R.:

TITLE 7—AGRICULTURE

. . . .

SUBTITLE B—REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

. . . .

CHAPTER XI—AGRICULTURAL MARKETING SERVICE (MARKETING AGREEMENTS AND ORDERS; MISCELLANEOUS COMMODITIES), DEPARTMENT OF AGRICULTURE

. . . .

PART 1250—EGG RESEARCH AND PROMOTION

Subpart—Egg Research and Promotion Order

DEFINITIONS

. . . .

§ 1250.304 Egg Board or Board.

Egg Board or *Board* or other designatory term adopted by such Board, with the approval of the Secretary, means the administrative body established pursuant to § 1250.326.

. . . .

§ 1250.307 Person.

Person means any individual, group of individuals, partnership, corporation, association, cooperative, or any other entity.

. . . .

§ 1250.309 Handler.

Handler means any person who receives or otherwise acquires eggs from an egg producer, and processes, prepares for marketing, or markets, such eggs, including eggs of his own production.

7 C.F.R. §§ 1250.304, .307, .309.

CHIEF ADMINISTRATIVE LAW JUDGE'S ORDER DISMISSING PETITION (AS RESTATED)

Petitioners allege:

. . . .

4. From approximately 1988 to December 1995, Petitioner Eggs West was a handler of eggs and thus arguably subject to the Egg Research and Consumer Information Act (hereinafter the "Act") and

> arguably subject to the Egg Research and Promotion Order (hereinafter the "Order"). Since December of 1995 Eggs West has not been a handler of eggs. Eggs West submits this petition, on behalf of its self, because apparently USDA believes that Eggs West should be subject to the Order and the Act for activities that occurred prior to December 1995 or thereafter and thus Eggs West submits this petition in order to determine the constitutionality of the Act and the Order.
>
> 5. Petitioner Foster Enterprises from December of 1995 until the first part of 2002 was a handler of eggs and arguably subject to the Act and the Order. . . .
>
> 6. . . . It is believed that USDA will assert that Foster Enterprises was a handler from 1995 until at least early 2002 and subject to the Act and the Order, and subject to assessments. Foster Enterprises contests the constitutionality of the Act and the Order or the levying of assessments, interest or penalties applicable to Foster Enterprises.

Pet. ¶¶ 4-6.

Respondent filed a Motion to Dismiss on the ground, *inter alia*, that Petitioners lack standing to file the Petition because they do not state they are persons subject to the Egg Order.

Section 14(a) of the Egg Research and Consumer Information Act provides that any person subject to any order may file a petition with the Secretary of Agriculture, as follows:

> **§ 2713. Administrative review of orders; petition; hearing; judicial review**
>
> (a) Any person subject to any order may file a written petition with the Secretary, stating that any such order or any provisions of such order or any obligations imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom.

7 U.S.C. § 2713(a).

Petitioners argue Respondent considered them to be subject to the Egg Research and Consumer Information Act and Egg Order by sending them letters and a subpoena duces tecum (Response to Motion to Dismiss at 3-4). One letter from the Agricultural Marketing Service cautions Petitioners not to destroy,

tamper with, or remove any records relating to an audit being conducted by the Agricultural Marketing Service.[3] The second letter from the Agricultural Marketing Service states that it had requested a review of the "egg handling records of Eggs West, Inc. and/or Foster Enterprises between August, 1993 and April, 2001, or during this period of time when Eggs West, Inc. or Foster Enterprises was engaged in handling eggs."[4] A third letter refers to records from 1995 to 2000.[5] The subpoena duces tecum orders Petitioners to produce for inspection and copying documents pertaining to the period January 1, 1995, to December 31, 1999.[6]

Petitioners cite *Midway Farms v. United States Dep't of Agriculture*, 188 F.3d 1136 (9th Cir. 1999), in support of their Petition. In *Midway Farms*, the United States Court of Appeals for the Ninth Circuit held, even though a person does not admit it is a handler, that person has standing to file a petition requesting the modification of, or to be exempted from, a marketing order, when a person with authority to apply the marketing order seeks to apply the marketing order to the petitioner.

However, *Midway Farms* is inapposite. Respondent in this proceeding does not allege Petitioners are handlers or persons subject to the Egg Order. The letters and subpoena duces tecum filed by Petitioners establish that the Agricultural Marketing Service is reviewing records for a period of time prior to Petitioners' filing the Petition. Further, Petitioners do not assert that they are persons subject to the Egg Order. Therefore, Petitioners lack standing to file the Petition.

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[3]See undated letter from G. Neil Blevins, Chief Compliance Officer, Agricultural Marketing Service, Marketing and Regulatory Programs, United States Department of Agriculture, to Jeff Foster, Chief Financial Officer, Foster Enterprises, attached to Petitioners' Response to Motion to Dismiss.

[4]See letter dated July 10, 2002, from Maria Martinez-Esguerra, Compliance Officer, Agricultural Marketing Service, Marketing and Regulatory Programs, United States Department of Agriculture, to Dorothy Chu, Foster Enterprises and Eggs West, Inc. attached to Petitioners' Response to Motion to Dismiss.

[5]See letter dated September 24, 2002, from Kenneth H. Vail, Assistant General Counsel, Marketing Division, Office of the General Counsel, United States Department of Agriculture, to Jeff Foster, Chief Financial Officer, Foster Enterprises, attached to Petitioners' Response to Motion to Dismiss.

[6]See subpoena duces tecum dated September 25, 2002, issued by A. J. Yates, Administrator, Agricultural Marketing Service, United States Department of Agriculture, to Petitioners and attachment A to the subpoena duces tecum, attached to Petitioners' Response to Motion to Dismiss.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Petitioners raise one issue in "Petitioners' Appeal of the ALJ's 'Order Dismissing Petition'" [hereinafter Appeal Petition]. Petitioners contend the Chief ALJ erred "when he claimed that since Petitioners do not allege or admit that they are handlers subject to the order, they have no standing to bring a petition pursuant to Title 7 U.S.C. § 608c(15)(A)" (Appeal Pet. at 1).

As an initial matter, the Chief ALJ did not conclude Petitioners lack standing to file a petition pursuant to section 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. § 608c(15)(A)), as Petitioners contend. Instead, Petitioners filed the Petition pursuant to section 14 of the Egg Research and Consumer Information Act (7 U.S.C. § 2713) (Pet. at 1), and the Chief ALJ concluded Petitioners do not have standing to file a petition pursuant to section 14 of the Egg Research and Consumer Information Act (7 U.S.C. § 2713) (Initial Decision and Order).

Petitioners rely on *Midway Farms v. United States Dep't of Agric.*, 188 F.3d 1136 (9th Cir. 1999), as support for their contention that the Chief ALJ's conclusion that Petitioners lack standing, is error. In *Midway Farms*, the United States Court of Appeals for the Ninth Circuit concluded that a processor of off-grade raisins was a handler with standing to file a petition under 7 U.S.C. § 608c(15)(A)[7] notwithstanding the processor's claim that it was not a handler, as follows:

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[7]Section 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended, provides that only a handler may file a petition with the Secretary of Agriculture for modification of, or to be exempted from, a marketing order, as follows:

> **§ 608c. Orders regulating handling of commodity**
>
> . . . .
>
> **(15) Petition by handler for modification of order or exemption; court review of ruling of Secretary**
>
> (A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

7 U.S.C. § 608c(15)(A).

> The operative statute allows "[a]ny handler subject to an order" to file an administrative petition with the Secretary. 7 U.S.C. § 608c(15)(A). The term "handler" is defined by regulation for purposes of section 608c(15)(A) as "any person who, by the terms of a marketing order, is subject thereto, or to whom a marketing order is sought to be made applicable." 7 C.F.R. § 900.51(i). Neither party contends, for purposes of this action, that Midway is a "person who, by the terms of a marketing order, is subject thereto." Thus, the sole question is whether Midway is a "person . . . to whom a marketing order is sought to be made applicable." 7 C.F.R. § 900.51(i).
>
> . . . .
>
> . . . Because it cannot be controverted that the [*Raisin Administrative*] *Committee* did in fact seek to apply the Raisin Marketing Order to Midway, we conclude that Midway is a person to whom a Marketing Order has been sought to be made applicable and is thus a "handler," if only for purposes of section 608c(15). Accordingly, we hold that Midway has standing to file an administrative petition with the Secretary under section 608c(15)(A).

Midway Farms v. United States Dep't of Agric., 188 F.3d at 1139-40 (footnotes omitted).

I agree with the Chief ALJ's conclusion that *Midway Farms* is inapposite. The United States Court of Appeals of the Ninth Circuit's conclusion that Midway Farms was a handler with standing to file a petition under 7 U.S.C. § 608c(15)(A) turns on the definition of the word *handler* in section 900.51(i) of the Rules of Practice Governing Proceedings on Petitions to Modify or to be Exempted from Marketing Orders (7 C.F.R. § 900.51(i)), which defines *handler* to include *any person to whom a marketing order is sought to be made applicable*. The United States Court of Appeals for the Ninth Circuit found the Raisin Administrative Committee sought to apply the marketing order entitled "Raisins Produced from Grapes Grown in California" (7 C.F.R. pt. 989) [hereinafter the Raisin Order] to Midway Farms.[8] The Ninth Circuit concluded that, as Midway Farms met the definition of the word *handler* in 7 C.F.R. § 900.51(i), it had standing to file a petition in accordance with 7 U.S.C. §

[8]The Ninth Circuit found the Raisin Administrative Committee had the power to administer and apply the Raisin Order. *Midway Farms v. United States Dep't of Agric.*, 188 F.3d at 1140.

608c(15)(A).[9] Section 900.51(i) of the Rules of Practice Governing Proceedings on Petitions to Modify or to be Exempted from Marketing Orders (7 C.F.R. § 900.51(i)) is not applicable to the instant proceeding.

Further, I can find nothing in the Egg Research and Consumer Information Act, the Egg Order, or the Rules of Practice, all of which are applicable to the instant proceeding, which confers standing to file a petition under section 14(a) of the Egg Research and Consumer Information Act (7 U.S.C. § 2713(a)) on *a person to whom an order is sought to be made applicable*. Instead, section 14(a) of the Egg Research and Consumer Information Act (7 U.S.C. § 2713(a)) and section 1200.52(a) of the Rules of Practice (7 C.F.R. § 1200.52(a)) confers standing only on *persons subject to an order*.

Further still, even if the definition of the word *handler* in 7 C.F.R. § 900.51(i) were applicable to this proceeding, I would not reverse the Chief ALJ. In *Midway Farms*, the United States Court of Appeals for the Ninth Circuit found Midway Farms was a handler with standing to file a petition under 7 U.S.C. § 608c(15)(A) because the Raisin Administrative Committee sought to make the Raisin Order applicable to Midway Farms. I find nothing on the record before me to establish that the Agricultural Marketing Service, the Egg Board, or any other person with authority to apply the Egg Order seeks to make Petitioners subject to the Egg Order.

Specifically, I agree with the Chief ALJ that the three letters and the subpoena duces tecum attached to Petitioners' Response to Motion to Dismiss, which Petitioners contend establish that the Agricultural Marketing Service seeks to make Petitioners subject to the Egg Order, pertain to records of transactions that occurred prior to the time Petitioners filed the Petition. The letters and the subpoena duces tecum are related to an exercise of the Secretary of Agriculture's investigatory authority under section 18 of the Egg Research and Consumer Information Act (7 U.S.C. § 2717), which provides the Secretary of Agriculture with authority to require the production of records from any person, not just from persons subject to the Egg Order. The Secretary of Agriculture's investigation of Petitioners' records pursuant to her authority under section 18 of the Egg Research and Consumer Information Act (7 U.S.C. § 2717) does not make Petitioners persons subject to the Egg Order or confer standing on Petitioners to file a petition under section 14(a) of the Egg Research and Consumer Information Act (7 U.S.C. § 2713(a)).

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

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[9] *Midway Farms v. United States Dep't of Agric.*, 188 F.3d at 1140.

ORDER

The relief requested by Petitioners is denied. The Petition is dismissed without prejudice.

_____

ANIMAL WELFARE ACT

COURT DECISION

DORIS DAY ANIMAL LEAGUE, et al. v. USDA.
No. 01-5351.
Filed January 14, 2003.

(Cite as: 315 F.3d 297).

AWA – Rule making petition – Dealer, wholesale – Retail pet store – Residential sales.

The Appeals court reversed the lower court's decision which invalidated APHIS's decision to decline to modify its AWA regulations so as to expand the definitions of "persons" requiring licensure as "dealers" to include those making "residential retail sales." Both litigants argued the congressional intent using the legislative record. However, the court found the Secretary's considered reasoning compelling for declining to modify the AWA regulations. Additionally, the 30 year history of the regulations having no congressional or judicial challenges to the agency's interpretation of the Act was persuasive that residential sales are not required to be classified as retail sales.

United States Court of Appeals,
District of Columbia Circuit

Before: RANDOLPH and ROGERS, Circuit Judges, and WILLIAMS, Senior Circuit Judge.

Opinion for the Court filed by Circuit Judge RANDOLPH.

RANDOLPH, Circuit Judge:

Hundreds of thousands of dog breeders throughout the United States raise and sell puppies from their homes. The Animal Welfare Act requires certain animal "dealers" to be licensed and to submit to inspections. The Act, which is administered by the Department of Agriculture, exempts "retail pet stores" from these requirements. The Secretary defines "retail pet store" as "any outlet where only the following animals are sold or offered for sale, at retail for use as pets: Dogs, cats, rabbits, guinea pigs, hamsters, gerbils, rats, mice, gophers, chinchilla, domestic ferrets, domestic farm animals, birds, and coldblooded species." 9 C.F.R. § 1.1. The effect of this regulation is to exempt breeders who sell dogs as pets from their residences. The issue is whether the regulation is valid.

Doris Day Animal League, a membership organization, filed a rulemaking petition with the Agriculture Department, urging a change in the regulatory definition of "retail pet store" so that residential operations would not be exempted. The Secretary published the petition in the Federal Register (62 Fed.Reg. 14,044 (Mar. 25, 1997)) and received more than 36,000 comments. When the Secretary announced that he would retain the definition, and stated the reasons why, 64 Fed.Reg. 38,546 (July 19, 1999), Doris Day Animal League and other organizations and individuals concerned about the mistreatment of dogs brought this action for judicial review.

The Animal Welfare Act, 7 U.S.C. § 2131 *et seq.,* seeks to insure the humane treatment of dogs (and other animals) raised and sold at wholesale and retail for research, for exhibitions, for hunting, to serve as guard dogs, and to be pets. *Id*. § 2131(1). Animal dealers must obtain licenses, they must comply with standards governing the handling, care, treatment, and transportation of the animals, and their facilities may be inspected for compliance. *See id*. §§ 2133, 2143, 2146(a). The Act defines "dealer" to exclude "a retail pet store except such store which sells any animals to a research facility, an exhibitor, or a dealer." *Id*. § 2132(f)(i). The Act does not define "retail pet store." Pursuant to rulemaking authority in 7 U.S.C. § 2151, the Secretary promulgated the regulation, quoted above, defining "retail pet store." The regulation's basic definition of "retail pet store" to mean "any outlet," without distinguishing homes from traditional business locations, dates back to 1971. *See* 36 Fed.Reg. 24,919 (Dec. 24, 1971) (§ 1.1(t) of the regulations: " 'Retail pet store' means any retail outlet where animals are sold only as pets at retail.").

The district court viewed the meaning of "retail pet store" as plainly not including one who sells dogs for use as pets from his residence, and therefore held the regulation invalid. *Doris Day Animal League v. Veneman,* No. 00-1057, mem. op. at 15 (D.D.C. July 30, 2001). The court relied on the specific exemptions in the definition of "dealer" in 7 U.S.C. § 2132(f) and the licensing exemption of § 2133.

There is no need to repeat the standards for reviewing an agency's interpretation of a statute it alone administers. *See Envirocare of Utah, Inc. v. Nuclear Regulatory Comm'n,* 194 F.3d 72, 75-77 (D.C.Cir.1999). The question is what "retail pet store" in § 2132(f)(i) means, or more precisely, what Congress intended it to mean. Those who sell dogs as pets to consumers from their residences are selling pets at retail. But is a residence a "store"? One usually thinks of a store as a business open to the public and engaged in the sale

of goods. But not all stores are open to the public and not all stores are located in shopping malls or other typical business locations. If a homeowner raised dogs; set up a separate place on his property - say, for instance, a small building; installed a counter and a cash register; displayed leashes, collars, and other dog paraphernalia for sale; and advertised the sale of puppies at his address, it would not be much of a stretch to view this too as a store. The local zoning authority might also view the matter that way.

The government cites a dictionary to show that treating residences as "retail pet stores" is possible. One definition of "store" is "a business establishment where goods are kept for retail sale." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2252 (1986). But what is a "business" and what is an "establishment"? A "business" is a "commercial or mercantile activity customarily engaged in as a means of livelihood," *id*. at 302, and an "establishment" is a "more or less fixed and usu. (sic.) sizable place of business or residence together with all the things that are an essential part of it." *Id*. at 778. WEBSTER'S lexicographers thus might say that because a residence can be a "business establishment," a residence can be viewed as a "retail pet store" if dogs are sold there. Those at BLACK'S LAW DICTIONARY (7th ed.1999), would get to the same conclusion by a more direct route. BLACK'S defines "store" as a "place where goods are deposited to be purchased or sold." *Id*. at 1432. Residences are of course places and dogs can be considered "goods." Still, we do not pretend these dictionaries, or any others, provide a complete refutation of plaintiffs' contention that the so-called plain meaning of "retail pet store" excludes residences, or that the opposite is what Congress clearly had in mind. Whatever the printed dictionaries say, we cannot be sure what was in the mental dictionaries of the members of Congress. And so we will move on.

Both sides rely on statements from the legislative history of the Animal Welfare Act. The government and *amicus* American Kennel Club, Inc. say the legislative history reveals that the emphasis of the Act was on regulation of wholesale, not retail, sellers of animals. Plaintiffs point to other statements suggesting that the exemption for retail pet stores should be construed narrowly. In the end we can find no solid evidence showing that Congress came to any conclusion about the issue we face, one way or the other.

Plaintiffs' more serious claim, one that convinced the district court, rests on the structure of 7 U.S.C. § 2132(f), the provision defining "dealer." The definition of "dealer" has two exceptions. The first we have already mentioned: it provides that "dealer" does not include a "retail pet store" (unless

the animals are sold to a research facility, exhibitor, or dealer). *Id.* § 2132(f)(i). The second excludes from the definition of dealer "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." *Id.* § 2132(f)(ii). One of plaintiffs' arguments is that by not giving sellers of dogs a *de minimis* ($500) exemption in subsection (ii), Congress meant to make sure that those who sold dogs from their homes remained covered by the Act no matter how much income they generated. But the argument begs the question. If subsection (i) already gave an exemption to residential sellers of dogs as pets (because they were "retail pet stores"), there was no need to give them a *de minimis* exemption in subsection (ii). Plaintiffs also point out that if Congress had wanted to exempt individuals selling dogs from their homes, it could easily have written subsection (i) to cover "any person" rather than "retail pet store," as it did in subsection (ii). The argument is weak. It may be countered by arguing that if Congress wanted to exclude residential sellers from the definition of retail pet store it easily could have said as much. The argument is, in any event, one that can be made in any case in which there is a fair dispute about the meaning of a statute. Often it is put this way: Congress knows how to say thus and so, and would have written thus and so if that is what it really intended. This proves very little. Congress almost always could write a provision in a way more clearly favoring one side - or the other - in a dispute over the interpretation of a statute. Its failure to speak with clarity signifies only that there is room for disagreement about the statute's meaning.

Plaintiffs also direct us to the licensing exemption contained in § 2133. The relevant portion reads:

> any retail pet store or other person who derives less than a substantial portion of his income (as determined by the Secretary) from the breeding and raising of dogs or cats on his own premises and sells any such dog or cat to a dealer or research facility shall not be required to obtain a license as a dealer....

The argument is that § 2133 reflects two separate and distinct licensing exemptions for dog sellers: "retail pet stores" and "other persons." The second category, plaintiffs continue, "does not apply to persons who sell dogs or cats to consumers for use as pets from their own premises." Therefore Congress intended to keep the categories separate, while the regulatory definition of "retail pet store" lumps them together.

We will assume that the "other person" clause applies only to those persons who are selling dogs and cats to dealers and research facilities, rather than to consumers who want the animals for pets. Even so, we cannot see how this helps plaintiffs' contention that the plain meaning of "retail pet store" does not include residences. Plaintiffs read the qualification - breeding and raising dogs and cats, on the person's premises, as a result of which he does not derive a substantial part of his income, and selling to dealers and research facilities - to refer only to "other person," not to "retail pet store." Because of the disjunctive "or" in the passage, *Dep't of Hous. & Urban Dev. v. Rucker,* 535 U.S. 125, 122 S.Ct. 1230, 1234, 152 L.Ed.2d 258 (2002), supports their interpretation. But even if plaintiffs are correct about what § 2133 means, which we need not decide, those "other" persons are not within the Secretary's definition of "retail pet store" for the obvious reason that they are not selling at retail. Under the regulation, residential retail sellers, like traditional pet stores, are exempt from licensing regardless of whether they make a substantial part of their income from this activity. If the Secretary's interpretation of "retail pet store" is correct, it would have been senseless for Congress to add retail residential sellers in the "other person" clause of § 2133; that would have created a redundancy, or an overlap between the two classes exempt from licensing. Given the regulation, a residential seller may sell an unlimited number of dogs to the public as pets, but he may sell outside of retail channels only if his sales of dogs are less than a substantial portion of his income. The regulation thus preserves both parts of § 2133, allowing each to operate in its sphere.

[1] While the regulation's definition of "retail pet store" does not exactly leap from the page, there is enough play in the language of the Act to preclude us from saying that Congress has spoken to the issue with clarity. From what we can make out, Congress has paid little attention to the question posed in this case. Still, it is true that in the years since passage of the Act and the Secretary's adoption of the regulation, Congress has not altered the regulatory definition of "retail pet store" although it has amended the act three times. One line of Supreme Court cases holds that "when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'" *Commodity Futures Trading Comm'n v. Schor,* 478 U.S. 833, 846, 106 S.Ct. 3245, 3254, 92 L.Ed.2d 675 (1986) (quoting *NLRB v. Bell Aerospace Co.,* 416 U.S. 267, 275, 94 S.Ct. 1757, 1762, 40 L.Ed.2d 134 (1974)). The quotation fits this case perfectly. *Compare Alexander v. Sandoval,* 532 U.S. 275, 292, 121

S.Ct. 1511, 1522-23, 149 L.Ed.2d 517 (2001), refusing to find that Congress, through silence, had endorsed a judicial interpretation of a statute. *But see Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran,* 456 U.S. 353, 381-82, 102 S.Ct. 1825, 1840-41, 72 L.Ed.2d 182 (1982).

[2] This leaves the argument that the Secretary's resolution of the meaning of "retail pet store" is not a reasonable one. In our judgment the Secretary's decision and policy statement declining to modify the regulation is supported with reasoning that is persuasive and faithful to the Act's purpose of protecting animal welfare. *See generally* Licensing Requirements for Dogs and Cats, 64 Fed.Reg. 38,546 (July 19, 1999).

> The Secretary spelled out several policy considerations thus:
> . . . .
> Second, we have determined that retail dealers, especially those who sell from their homes, are already subject to a degree of self-regulation and oversight by persons who purchase animals from the retailers' homes, as well as by breed and registry organizations. Breed and registry organizations, such as kennel clubs, require their registrants to meet certain guidelines related to the health and genetic makeup of animals bred and to the education of the registrants. These organizations also monitor the conditions under which animals are bred and raised. Wholesale dealers typically do not have this type of oversight from the public.
> . . . .
> Fourth, retail outlets are not unregulated. There are already many State and local laws and ordinances in place to monitor and respond to allegations of inhumane treatment of and inadequate housing for animals owned by private retail dealers. If we were to regulate these dealers along with State and local officials, it would clearly not be the most efficient use of our resources.

Id. at 38,547.

While plaintiffs are unhappy about the degree of self- regulation and the amount of oversight from local humane societies, kennel clubs, and state agencies, the Secretary, applying his expertise, was entitled to rely on these factors in making his judgment about the need for federal regulation. And he was entitled also to differentiate retail sales from wholesale sales of dogs on the basis that "wholesale dealers typically do not have this type of oversight from the public." *Id.*

The Secretary also declined to amend the definition on the ground that the best interest of animal welfare is supported by allowing the Department to "concentrate [its] resources on those facilities that present the greatest risk of noncompliance with the regulations." *Id.* The Department has decided to focus on wholesale dealers, where its resources are likely to yield the greatest benefit. This is a reasonable choice, keeping in mind the purpose of the Act to promote animal welfare. *See Envirocare,* 194 F.3d at 77-78. It was also within the authority delegated to him by Congress for the Secretary to decline to amend the definition in light of the potential invasions of privacy that would result if federal inspectors began enforcing "cleaning, sanitation, handling, and other regulatory requirements in private homes." 64 Fed.Reg. at 38,547.

Taken together, the Secretary's decision to retain the regulatory definition of "retail pet store" reflects the judgment of the agency entrusted with administering the Animal Welfare Act to fulfill the purpose of the Act as effectively as possible. For the reasons given, the regulation is a permissible construction of the statutory term "retail pet store."

The order of the district court granting partial summary judgment to the plaintiffs and declaring the regulation invalid is therefore

Reversed.

BEEF PROMOTION AND RESEARCH ACT

DEPARTMENTAL DECISION

In re: HERMAN CAMARA, d/b/a CAMARA'S NEW ENGLAND COMMISSION AUCTION, INC., AND ALSO d/b/a CAMARA'S AUCTION SALES.
BPRA Docket No. 02-0002.
Decision and Order.
Filed April 3, 2003.

BPRA – Default — Failure to file timely answer — Beef promotion — Collecting person — Late-payment charges — Assessments — Required information — Civil penalty — Cease and desist order — Appeal issues plainly stated.

The Judicial Officer (JO) affirmed the Default Decision by Administrative Law Judge Jill S. Clifton: (1) concluding Respondent violated the Beef Promotion Order and the Beef Promotion Regulations (7 C.F.R. §§ 1260.172, .175, .310, .312); (2) assessing Respondent an $11,000 civil penalty; (3) ordering Respondent to pay past-due assessments and late-payment charges to the Cattlemen's Beef Board; and (4) ordering Respondent to cease and desist from violating the Beef Promotion Act, the Beef Promotion Order, and the Beef Promotion Regulations. The JO rejected Respondent's contention that he was not properly served with documents filed in the proceeding. The JO also rejected Respondent's contention that there were "other valid reasons" for setting aside the Initial Decision and Order and providing Respondent with opportunity for hearing. The JO stated the Rules of Practice require that each issue in an appeal petition must be plainly stated (7 C.F.R. § 1.145(a)). The JO dismissed Respondent's unadorned "other valid reasons" as a basis for setting aside the Default Decision and providing opportunity for hearing on the ground that Respondent failed to plainly state the issue.

Sharlene Deskins, for Complainant.
Respondent, Pro se.
Initial decision issued by Jill S. Clifton, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

The Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a "Complaint" on February 19, 2002. Complainant instituted the proceeding under the Beef Promotion and Research Act of 1985 (7 U.S.C. §§ 2901-2911) [hereinafter the Beef Promotion Act]; the Beef Promotion and Research Order issued under the Beef Promotion Act (7 C.F.R. §§ 1260.101-.217) [hereinafter the Beef Promotion Order]; the Rules and Regulations issued under the Beef Promotion Act (7 C.F.R. §§ 1260.301-.316) [hereinafter the Beef Promotion Regulations]; and the Rules of

Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges that Herman Camara, d/b/a Camara's New England Commission Auction, Inc., and also d/b/a Camara's Auction Sales [hereinafter Respondent]: (1) willfully violated section 1260.175 of the Beef Promotion Order (7 C.F.R. § 1260.175) by failing to pay the late-payment charges due on 5,573 cattle on which Respondent collected assessments from February 15, 1995, through May 30, 1996, and February 15, 2000, through September 30, 2000; (2) willfully violated section 1260.172 of the Beef Promotion Order and section 1260.310 of the Beef Promotion Regulations (7 C.F.R. §§ 1260.172, .310) by failing to collect and remit assessments due from the sale of 8,320 cattle sold from at least May 27, 1996, through December 27, 1999; (3) violated section 1260.175 of the Beef Promotion Order (7 C.F.R. § 1260.175) by failing to pay the late-payment charges due on 8,320 cattle on which Respondent collected assessments from May 27, 1996, through December 27, 1999; and (4) willfully violated section 1260.312 of the Beef Promotion Regulations (7 C.F.R. § 1260.312) by failing to submit required information in required reports (Compl. ¶¶ II-IV).

On March 26, 2002, the Hearing Clerk served Respondent by ordinary mail with a copy of the Complaint, a copy of the Rules of Practice, and a service letter dated February 20, 2002.[1] Moreover, Deputy Sheriff Carl A. Munroe of the Bristol County Deputy Sheriffs' Office, New Bedford, Massachusetts, personally served Respondent with a copy of the Complaint, a copy of the Rules of Practice, and the Hearing Clerk's February 20, 2002, service letter on April 18, 2002.[2] Respondent failed to file an answer to the Complaint within 20 days after service of the Complaint, as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). The Hearing Clerk sent Respondent a letter dated June 20, 2002, informing him that his answer to the Complaint had not been filed within the time required in the Rules of Practice.[3] Respondent failed to respond to the Hearing Clerk's June 20, 2002, letter.

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[1]*See* Memorandum to the File dated March 26, 2002, from LaWuan Waring, Legal Technician, Office of Administrative Law Judges, United States Department of Agriculture.

[2]*See* Return of Service dated April 22, 2002, signed by Carl A. Munroe, Deputy Sheriff, Bristol County Deputy Sheriffs' Office, New Bedford, Massachusetts; Notice of Service filed May 9, 2002.

[3]*See* letter dated June 20, 2002, from Joyce A. Dawson, Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture, to Respondent.

On July 22, 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 Upon Admission of Facts by Reason of Default" [hereinafter Motion for Default Decision] and a "Proposed Decision and Order Upon Admission of Facts by Reason of Default" [hereinafter Proposed Default Decision]. On September 12, 2002, the Hearing Clerk served Respondent with Complainant's Motion for Default Decision and Complainant's Proposed Default Decision.[4] Respondent failed to file objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision within 20 days after service, as required by section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). The Hearing Clerk sent a letter dated December 20, 2002, to Respondent informing him that no objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision had been filed within the time required in the Rules of Practice.[5] Respondent failed to respond to the Hearing Clerk's December 20, 2002, letter.

On December 30, 2002, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] issued a "Decision and Order Upon Admission of Facts by Reason of Default" [hereinafter Initial Decision and Order]: (1) concluding Respondent willfully violated sections 1260.172 and 1260.175 of the Beef Promotion Order and sections 1260.310 and 1260.312 of the Beef Promotion Regulations (7 C.F.R. §§ 1260.172, .175, .310, .312); (2) assessing Respondent an $11,000 civil penalty; (3) ordering Respondent to pay past-due assessments and late-payment charges to the Cattlemen's Beef Board; and (4) ordering Respondent to cease and desist from violating the Beef Promotion Act, the Beef Promotion Order, and the Beef Promotion Regulations (Initial Decision and Order at 2-4).

On March 10, 2003, Respondent appealed to the Judicial Officer. On March 27, 2003, Complainant filed "Reply to Respondent's Appeal of the ALJ's Decision and Order by Reason of Default." On March 28, 2003, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I adopt, with minor modifications, the ALJ's Initial Decision and Order as the final Decision and

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[4]*See* Memorandum to the File dated September 12, 2002, from LaWuan Waring, Legal Technician, Office of Administrative Law Judges, United States Department of Agriculture.

[5]*See* letter dated December 20, 2002, from Trible Greaves, Acting Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture, to Respondent.

Order. Additional conclusions by the Judicial Officer follow the ALJ's conclusions

of law, as restated.

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 62—BEEF RESEARCH AND INFORMATION

. . . .

§ 2902. Definitions

For purposes of this chapter—

. . . .

(3) the term "Board" means the Cattlemen's Beef Promotion and Research Board established under section 2904(1) of this title;

. . . .

(10) [t]he term "order" means a beef promotion and research order issued under section 2903 of this title[;]

. . . .

(14) the term "qualified State beef council" means a beef promotion entity that is authorized by State statute or is organized and operating within a State, that receives voluntary contributions and conducts beef promotion, research, and consumer information programs, and that is recognized by the Board as the beef promotion entity within such State;

. . . .

(16) the term "Secretary" means the Secretary of Agriculture[.]

§ 2903. Issuance of orders

(a) During the period beginning on January 1, 1986, and ending thirty days after the receipt of a proposal for a beef promotion and research order, the Secretary shall publish such proposed order and give due notice and opportunity for public comment on such proposed order. Such proposal may be submitted by any organization meeting the

requirements for certification under section 2905 of this title or any interested person, including the Secretary.

(b) After notice and opportunity for public comment are given, as provided for in subsection (a) of this section, the Secretary shall issue a beef promotion and research order. The order shall become effective not later than one hundred and twenty days following publication of the proposed order.

§ 2904. Required terms in orders

An order issued under section 2903(b) of this title shall contain the following terms and conditions:

. . . .

(8)(A) The order shall provide that each person making payment to a producer for cattle purchased from the producer shall, in the manner prescribed by the order, collect an assessment and remit the assessment to the Board. The Board shall use qualified State beef councils to collect such assessments.

(B) If an appropriate qualified State beef council does not exist to collect an assessment in accordance with paragraph (1), such assessment shall be collected by the Board.

. . . .

(11) The order shall require that each person making payment to a producer, any person marketing beef from cattle of the person's own production directly to consumers, and any importer of cattle, beef, or beef products maintain and make available for inspection such books and records as may be required by the order and file reports at the time, in the manner, and having the content prescribed by the order. Such information shall be made available to the Secretary as is appropriate to the administration or enforcement of this chapter, the order, or any regulation issued under this chapter. In addition, the Secretary shall authorize the use of information regarding persons paying producers that is accumulated under a law or regulation other than this chapter or regulations under this chapter.

. . . .

(12) The order shall contain terms and conditions, not inconsistent with the provisions of this chapter, as necessary to effectuate the provisions of the order.

§ 2908. Enforcement

(a) Restraining order; civil penalty

If the Secretary believes that the administration and enforcement of this chapter or an order would be adequately served by such procedure, following an opportunity for an administrative hearing on the record, the Secretary may—

(1) issue an order to restrain or prevent a person from violating an order; and

(2) assess a civil penalty of not more than $5,000 for violation of such order.

7 U.S.C. §§ 2902(3), (10), (14), (16), 2903, 2904(8)(A)-(B), (11), (12), 2908(a) (footnotes omitted).

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 [20 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 [bracketed material in original]; 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*–(1) *Agricultural Marketing Service*. . .

. . . .

(xvi) Civil penalty for failing to remit any assessment or fee or for violating a program under the Beef Research and Information Act, codified at 7 U.S.C. 2908(a)(2), has a maximum of $5,500.

SUBTITLE B—REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

. . . .

CHAPTER XI—AGRICULTURAL MARKETING SERVICE (MARKETINGAGREEMENTS AND ORDERS; MISCELLANEOUS COMMODITIES), DEPARTMENT OF AGRICULTURE

. . . .

PART 1260—BEEF PROMOTION AND RESEARCH

Subpart A—Beef Promotion and Research Order

DEFINITIONS

. . . .

§ 1260.102 Secretary.

Secretary means the Secretary of Agriculture of the United States or any other officer or employee of the Department to whom there has heretofore been delegated, or to whom there may hereafter be delegated, the authority to act in the Secretary's stead.

§ 1260.103 Board.

Board means the Cattlemen's Beef Promotion and Research Board established pursuant to the Act and this subpart.

. . . .

§ 1260.106 Collecting person.

Collecting person means the person making payment to a producer for cattle, or any other person who is responsible for collecting and remitting an assessment pursuant to the Act, the order and regulations prescribed by the Board and approved by the Secretary.

. . . .

§ 1260.115 Qualified State beef council.

Qualified State beef council means 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 Board pursuant to this subpart as the beef promotion entity in such State.

. . . .

§ 1260.128 Act.

Act means the Beef Promotion and Research Act of 1985, Title XVI, Subtitle A of the Food Security Act of 1985, Pub. L. 99-198 and any amendments thereto.

. . . .

ASSESSMENTS

§ 1260.172 Assessments.

(a) *Domestic assessments*. (1) Except as prescribed by regulations approved by the Secretary, each person making payment to a producer for cattle purchased from such producer shall be a collecting person and shall collect an assessment from the producer, and each producer shall pay such assessment to the collecting person, at the rate of one dollar ($1) per head of cattle purchased and such collecting person shall remit the assessment to the Board or to a qualified State beef council pursuant to § 1260.172(a)(5).

. . . .

(5) Each person responsible for the remittance of the assessment pursuant to § 1260.172(a)(1) and (2) shall remit the assessment to the qualified State beef council in the State from which the cattle originated prior to sale, or if there is no qualified State beef council within such State, the assessment shall be remitted directly to the Board. . . . Assessments shall be remitted not later than the 15th day of the month following the month in which the cattle were purchased or marketed.

. . . .

§ 1260.175 Late-payment charge.

Any unpaid assessments due to the Board pursuant to § 1260.172 shall be increased 2.0 percent each month beginning with the day following the date such assessments were due. Any remaining amount due, which shall include any unpaid charges previously made pursuant to this section, shall be increased at the same rate on the corresponding day of each month thereafter until paid. For the purposes of this section, any assessment that was determined at a date later than prescribed by this subpart because of a person's failure to submit a report to the Board when due shall be considered to have been payable by the date it would have been due if the report had been filed when due. The timeliness of a payment to the Board shall be based on the applicable postmark date or the date actually received by the qualified State beef council or Board, whichever is earlier.

. . . .

Subpart B—Rules and Regulations

. . . .

§ 1260.310 Domestic assessments.

(a) A $1.00 per head assessment on cattle sold shall be paid by the

producer of the cattle in the manner described in § 1260.311.

(b) If more than one producer shares the proceeds received for the cattle sold, each such producer is obligated to pay that portion of the assessments which are equivalent to the producer's proportionate share of the proceeds.

(c) Failure of the collecting person to collect the assessment on each head of cattle sold as designated in § 1260.311 shall not relieve the producer of his obligation to pay the assessment to the appropriate qualified State beef council or the Cattlemen's Board as required in § 1260.312.

. . . .

§ 1260.312 Remittance to the Cattlemen's Board or Qualified State Beef Council.

Each person responsible for the collection and remittance of assessments shall transmit assessments and a report of assessments to the qualified State beef council of the State in which such person resides or if there is no qualified State beef council in such State, then to the Cattlemen's Board as follows:

(a) *Reports*. Each collecting person shall make reports on forms made available or approved by the Cattlemen's Board. Each collecting person shall prepare a separate report for each reporting period. Each report shall be mailed to the qualified State beef council of the State in which the collecting person resides, or its designee, or if there exists no qualified State beef council in such State, to the Cattlemen's Board. Each report shall contain the following information:

(1) The number of cattle purchased, initially transferred or which, in any other manner, is subject to the collection of assessment, and the dates of such transactions;

(2) The amount of assessment remitted;

(3) The basis, if necessary, to show why the remittance is less than the number of head of cattle multiplied by one dollar; and

(4) The date any assessment was paid.

(b) *Reporting periods*. Each calendar month shall be a reporting period and the period shall end at the close of business on the last business day of the month.

(c) *Remittances*. The remitting person shall remit all assessments to the qualified State beef council or its designee, or, if there is no qualified State beef council, to the Cattlemen's Board at P.O. Box 27-275; Kansas City, Missouri 64180-0001, with the report required in paragraph (a) of

> this section not later than the 15th day of the following month. All remittances sent to a qualified State beef council or the Cattlemen's Board by the remitting persons shall be by check or money order payable to the order of the qualified State beef council or the Cattlemen's Board. All remittances shall be received subject to collection and payment at par.

7 C.F.R. §§ 3.91(a), (b)(1)(xvi); 1260.102-.103, .106, .115, .128, .172(a)(1), (a)(5), .175, .310, .312.

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

Respondent failed to file an answer within the time prescribed in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the failure to file a timely answer constitutes a waiver of hearing. Accordingly, the material allegations of the Complaint are adopted as Findings of Fact, and this Decision and Order is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent, Herman Camara, is in the business of buying and selling livestock. Prior to October 1998, Camara's New England Commission Auction, Inc. operated as a corporation. In October 1998, Camara's New England Commission Auction, Inc. dissolved and ceased to operate as a corporation. Since October 1998, Respondent has operated his business as a sole proprietorship doing business under the name of Camara's New England Commission Auction, Inc. and also under the name of Camara's Auction Sales. Respondent's mailing address is 275 Hortonville Road, Swansea, Massachusetts 02777.

2. Respondent, at all times material to this Decision and Order, was the *collecting person* as defined in section 1260.106 of the Beef Promotion Order (7 C.F.R. § 1260.106); therefore, Respondent was required by the Beef Promotion Act, the Beef Promotion Order, and the Beef Promotion Regulations to collect and remit assessments for cattle he bought or sold in the manner

provided in the Beef Promotion Act, the Beef Promotion Order, and the Beef Promotion Regulations.

3. Respondent willfully violated section 1260.175 of the Beef Promotion Order (7 C.F.R. § 1260.175) in that Respondent, as the collecting person, failed to pay the late-payment charges due on 5,573 cattle on which Respondent collected assessments from February 15, 1995, through May 30, 1996, and February 15, 2000, through September 30, 2000. Respondent started to remit the assessments collected on the 5,573 cattle in March 2000 and continued to pay until October 2000. However, Respondent failed to pay the late-payment charges due for failing to pay the assessments in a timely manner as required by the Beef Promotion Order and thereby violated section 1260.175 of the Beef Promotion Order (7 C.F.R. § 1260.175). The amount of late-payment charges due on the 5,573 cattle totaled $14,488.60 as of January 3, 2002. Each transaction constitutes a separate violation.

4. Respondent willfully violated section 1260.172 of the Beef Promotion Order and section 1260.310 of the Beef Promotion Regulations (7 C.F.R. §§ 1260.172, .310) in that Respondent, as the collecting person, failed to collect and remit assessments due from the sale of 8,320 cattle sold from at least May 27, 1996, through December 27, 1999. Respondent violated section 1260.175 of the Beef Promotion Order (7 C.F.R. § 1260.175) in that Respondent, as the collecting person, failed to pay the late-payment charges due on 8,320 cattle on which Respondent collected assessments from May 27, 1996, through December 27, 1999. The amount of assessments and late-payment charges due on the 8,320 cattle totaled $22,880.25 as of January 3, 2002. Each transaction constitutes a separate violation.

5. Respondent willfully violated section 1260.312 of the Beef Promotion Regulations (7 C.F.R. § 1260.312) by failing to submit required information in required reports.

Conclusions of Law

1. The Secretary of Agriculture has jurisdiction in this matter.

2. By reason of the facts set forth in the Findings of Fact in this Decision and Order, Respondent has violated sections 1260.172 and 1260.175 of the Beef Promotion Order and sections 1260.310 and 1260.312 of the Beef Promotion Regulations (7 C.F.R. §§ 1260.172, .175, .310, .312).

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent requests that I set aside the Initial Decision and Order and

provide him with opportunity for hearing. Respondent bases his requests on the purported "failure to obtain good service" and on "other valid reasons." (Respondent's Appeal Pet.)

As an initial matter, Respondent fails to identify, describe, or otherwise clarify the "other valid reasons" as a basis for his requests that I set aside the Initial Decision and Order and that I provide him with opportunity for hearing. Section 1.145(a) of the Rules of Practice (7 C.F.R. § 1.145(a)) provides that each issue in an appeal petition "shall be plainly and concisely stated." While Respondent's unadorned "other valid reasons" may be a concise statement of an issue, I do not find the issue to be plainly stated. Moreover, I find Respondent's "other valid reasons" too vague to address further, except to dismiss the issue as a basis for setting aside the Initial Decision and Order and providing Respondent with opportunity for hearing, on the ground that Respondent has failed to plainly state the issue, as required in section 1.145(a) of the Rules of Practice (7 C.F.R. § 1.145(a)).

I also reject Respondent's contention that he was not properly served in this proceeding. Section 1.147(c) of the Rules of Practice provides a document is deemed to be received by a party if it is sent by ordinary mail or personally served on a party, as follows:

> **§ 1.147 Filing; service; extensions of time; and computation of time.**
>
> . . . .
>
> (c) *Service on party other than the Secretary*. (1) Any complaint or other document initially served on a person to make that person a party respondent in a proceeding, proposed decision and motion for adoption thereof upon failure to file an answer or other admission of all material allegations of fact contained in a complaint, initial decision, final decision, appeal petition filed by the Department, or other document specifically ordered by the Judge to be served by certified or registered mail, shall be deemed to be received by any party to a proceeding, other than the Secretary or agent thereof, on the date of delivery by certified or registered mail to the last known principal place of business of such party, last known principal place of business of the attorney or representative of record of such party, or last known residence of such party if an individual, *Provided that*, if any such document or paper is sent by certified or registered mail but is returned marked by the postal service as unclaimed or refused, it shall be deemed to be received by such party on the date of remailing by ordinary mail to the same address.
>
> . . . .

> (3) Any document or paper served other than by mail, on any party to a proceeding, other than the Secretary or agent thereof, shall be deemed to be received by such party on the date of:
>
> (i) Delivery to any responsible individual at, or leaving in a conspicuous place at, the last known principal place of business of such party, last known principal place of business of the attorney or representative of record of such party, or last known residence of such party if an individual, or
>
> (ii) Delivery to such party if an individual, to an officer or director of such party if a corporation, or to a member of such party if a partnership, at any location.

7 C.F.R. § 1.147(c)(1), (c)(3).

The Hearing Clerk sent a copy of the Complaint, a copy of the Rules of Practice, and a service letter, dated February 20, 2002, by certified mail to Respondent. The United States Postal Service marked the certified mailing "unclaimed" and returned it to the Hearing Clerk.[6] On March 26, 2002, the Hearing Clerk properly served Respondent with the Complaint, the Rules of Practice, and the Hearing Clerk's February 20, 2002, service letter by ordinary mail in accordance with section 1.147(c)(1) of the Rules of Practice (7 C.F.R. § 1.147(c)(1)).[7] Moreover, on April 18, 2002, Deputy Sheriff Carl A. Munroe of the Bristol County Deputy Sheriffs' Office, New Bedford, Massachusetts, properly served Respondent with the Complaint, the Rules of Practice, and the Hearing Clerk's February 20, 2002, service letter by personal service in accordance with section 1.147(c)(3)(ii) of the Rules of Practice (7 C.F.R. § 1.147(c)(3)(ii)).[8] Respondent failed to file an answer to the Complaint within 20 days after service of the Complaint, as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)).

Sections 1.136(c) and 1.139 of the Rules of Practice clearly state the consequences of failing to file a timely answer, as follows:

> **§ 1.136 Answer.**
>
> . . . .

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[6] *See* envelope with certified mail number 7099 3400 0013 8805 8287.

[7] *See* note 1.

[8] *See* note 2.

> (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.

7 C.F.R. §§ 1.136(c), .139.

Moreover, the Complaint served on Respondent 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. §§ 1.130-1.151. 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 February 20, 2002, service letter, which accompanied the Complaint and the Rules of Practice, that a timely answer must be filed, as follows:

> CERTIFIED RECEIPT REQUESTED

February 20, 2002

Camara's New England
Commission Auction, Inc.
also doing business as
Camara's Auction Sales
275 Hortonville Road
Swansea, Massachusetts 02777

Gentlemen:

Subject: In re: Herman Camara, doing business as Camara's New England Commission Auction, Inc., and also doing business as Camara's Auction Sales, Respondent -
BPRA Docket No. 02-0002

Enclosed is a copy of the Complaint, which has been filed with this office under the Beef Promotion and Research Act of 1985.

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 three copies of your written and signed answer to the complaint.

It is necessary that your answer set forth any defense you wish to assert, and to specifically admit, deny or explain each allegation of the complaint. Your answer may include a request for an oral hearing. Failure to file an answer or filing an answer which does not deny the material allegations of the complaint, shall constitute an admission of those allegations and a waiver of your right to an oral hearing.

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.
>
> 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 on the last page of the complaint.
>
> Sincerely,
> /s/
> Joyce A. Dawson
> Hearing Clerk

Letter dated February 20, 2002, from Joyce A. Dawson, Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture, to Respondent (emphasis in original).

Based on the date the Hearing Clerk properly served Respondent with the Complaint by ordinary mail (March 26, 2002), Respondent's answer was due no later than April 15, 2002. Respondent's first filing in this proceeding is dated March 10, 2003, and was filed March 17, 2003, 11 months 2 days after Respondent's answer was due. Based on the date Deputy Sheriff Munroe properly served Respondent with the Complaint by personal service (April 18, 2002), Respondent's answer was due no later than May 8, 2002, and Respondent's first filing in the proceeding was filed 10 months 9 days after Respondent's answer was due. Respondent's failure to file a timely answer is deemed an admission of the allegations of the Complaint (7 C.F.R. § 1.136(a), (c)) and constitutes a waiver of hearing (7 C.F.R. § 1.139, .141(a)). Therefore, Respondent is deemed, for the purposes of this proceeding, to have admitted the allegations of the Complaint.

The Hearing Clerk sent a letter dated June 20, 2002, to Respondent informing him that his answer to the Complaint had not been received within

the allotted time.[9] Respondent failed to respond to the Hearing Clerk's June 20, 2002, letter.

On July 22, 2002, Complainant filed a Motion for Default Decision and a Proposed Default Decision. On September 12, 2002, the Hearing Clerk served Respondent with a copy of Complainant's Motion for Default Decision and a copy of Complainant's Proposed Default Decision by ordinary mail in accordance with section 1.147(c)(1) of the Rules of Practice (7 C.F.R. § 1.147(c)(1)).[10] Respondent's objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision were due no later than October 2, 2002. Respondent's first filing in this proceeding is dated March 10, 2003, and was filed March 17, 2003, 5 months 15 days after Respondent's objections were due.

On December 30, 2002, the ALJ issued the Initial Decision and Order in which the ALJ found Respondent admitted the allegations in the Complaint by reason of default.

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

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[9]*See* note 3.

[10]*See* note 4.

[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.* (continued...)

setting aside a default decision that is based upon a respondent's failure to file a timely answer.[12] The Rules of Practice clearly 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 filed 11 months 2 days after Respondent's answer was due. Respondent's failure to file a timely answer is deemed, for the purposes of this proceeding, an admission of the allegations of the Complaint (7 C.F.R. § 1.136(c)) and constitutes a waiver of hearing (7 C.F.R. § 1.139, .141(a)). Therefore, there are no issues of fact on which a meaningful hearing could be held in this proceeding, and the 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 Amendment to the Constitution of the United States.[13]

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[11](...continued)
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, e.g., In re Heartland Kennels,* Inc., 61 Agric. Dec. 492 (2002) (holding the default decision was properly issued where the respondents' answer was filed 3 months 9 days after the Hearing Clerk served the complaint on the respondents and 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 issued under the Animal Welfare Act alleged in the complaint); *In re Wayne W. Coblentz*, 61 Agric. Dec. 330 (2002) (holding the default decision was properly issued where the respondent's first and only filing in the proceeding was filed 7 months 8 days after the Hearing Clerk served the complaint on the respondent and the respondent is deemed, by his failure to file a timely answer, to have admitted the violations of the Packers and Stockyards Act alleged in the complaint); *In re Stephen Douglas Bolton* (Decision as to Stephen Douglas Bolton), 58 Agric. Dec. 254 (1999) (holding the default decision was properly issued where the respondent's first filing in the proceeding was filed 54 days after the Hearing Clerk served the complaint on the respondent and 34 days after the respondent's answer was due and the respondent is deemed, by his failure to file a timely answer, to have admitted violating 15 U.S.C. § 1824(2)(B), as alleged in the complaint).

[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 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.*
(continued...)

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

ORDER

1. Respondent is assessed an $11,000 civil penalty. The civil penalty shall be paid by certified check, cashier's check, or money order, made payable to the "Treasurer of the United States," and sent by a commercial carrier, such as FedEx or United Parcel Service, to:

Sharlene Deskins
United States Department of Agriculture
Office of the General Counsel
Marketing Division
1400 Independence Avenue, SW
Room 2343-South Building
Mail Stop 1417
Washington, DC 20250-1417

Respondent's payment of the civil penalty shall be sent to, and received by, Ms. Deskins within 60 days after service of this Order on Respondent. Respondent shall indicate on the certified check, cashier's check, or money order that payment is in reference to BPRA Docket No. 02-0002.

2. Respondent shall pay his past-due assessments and accrued late-payment charges to the Cattlemen's Beef Board. The amount of past-due assessments and late-payment charges totaled $37,732.46. This total includes amounts Respondent has failed to pay the Cattlemen's Beef Board from January 2000 to April 2002. The payment shall be made by certified check, cashier's check, or money order, payable to the "Cattlemen's Beef Board" and shall be sent to:

Cattlemen's Beef Board
P.O. Box 3316
Englewood, Colorado 80155

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[13](...continued)
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).

Respondent's payment of past-due assessments and late-payment charges shall be sent to, and received by, the Cattlemen's Beef Board within 60 days after service of this Order on Respondent.

3. Respondent, his agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the Beef Promotion Act, the Beef Promotion Order, and the Beef Promotion Regulations and, in particular, shall cease and desist from:

(a) failing to remit all assessments when due;

(b) failing to remit overdue assessments and late-payment charges on those assessments; and

(c) failing to submit mandatory reports and required information in mandatory reports.

The cease and desist provisions of this Order shall become effective on the day after service of this Order on Respondent.

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EQUAL ACCESS TO JUSTICE ACT

COURT DECISION

CHARLES DAVIDSON v. USDA.
No. 01-60573.
Filed January 22, 2003.

(Cite as: 317 F.3d 503).

EAJA – Substantially justified – Arbitrary and capricious, when not.

Plaintiff filed for attorney fees and interest after being successfully in litigation resulting in being awarded claims against the FSA. The agency resisted Plaintiff's claims for disaster relief for 1994 based on a novel, but reasonable, legal argument. The court denied Plaintiff EAJA claim because to found that the FSA legal position was substantially justified and not arbitrary and capricious. A formal three step inquiry for the FSA to meet the burden of substantial justification is not required

United States Court of Appeals,
Fifth Circuit.

Before KING, Chief Judge, and JONES and EMILIO M. GARZA, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:

This is the second appeal to this court by the plaintiff Charles Davidson, doing business as Davidson Farms (Davidson). Davidson previously appealed a grant of summary judgment in favor of the Farm Services Agency (FSA) that prohibited revision of his farm acreage report for 1994, thus preventing him from receiving disaster assistance from the FSA. *Davidson v. Glickman,* 169 F.3d 996 (5th Cir.1999). We vacated and remanded because the FSA based its position on a legislative rule that did not meet the notice and comment requirements of the Administrative Procedure Act (APA). *Id.* at 999. Davidson then filed a "motion for fees and other expenses and costs" in the district court. In addition, both parties moved to have the case remanded to the FSA for a revised administrative determination in light of our holding. The district court granted that motion and stayed Davidson's motion for fees and expenses pending the completion of the administrative proceedings.

On remand to the FSA, the agency paid Davidson's claims for 1994 Disaster

Assistance Program (DAP) payments based on the revised acreage report, but denied his request for attorney's fees and interest. Davidson next filed a "motion for summary judgment awarding interest" in the district court, as well as a supplemental motion for attorney's fees under the Equal Access to Justice Act (EAJA). The district court denied Davidson's motion for fees, holding that the Government's position was substantially justified, and Davidson appealed. While that appeal was pending, the district court denied Davidson's motion for summary judgment on the interest issue. The FSA did not file a cross-motion for summary judgment on the interest issue and the district court did not enter judgment for either party. In addition, Davidson did not file a second notice of appeal (NOA), but, within thirty days, the parties filed a joint motion to stay the first appeal, supplement the record on appeal, and revise the briefing schedule. The parties also sought approval to waive "any further notice of appeal." The clerk of this court granted the joint motion. The parties did not seek, nor did the district court enter, a separate, final judgment on the interest issue.

After hearing oral argument, we held that we did not have jurisdiction over the interest issue because the district court's denial of Davidson's "motion for summary judgment awarding interest," was not a final judgment under 28 U.S.C. § 1291. We then made a limited remand to the district court, directing it to decide the interest issue and enter a final judgment. On remand, the district court denied Davidson interest and rendered judgment for the Government on this issue. Now that the district court has disposed of all issues, and a final judgment has been entered, we have jurisdiction under § 1291.

I

[1] Davidson first appeals the district court's denial of attorney's fees. We employ an abuse of discretion standard to review a district court's decision under the EAJA that the Government's position was substantially justified, although underlying conclusions of law are subject to *de novo* review and factual conclusions are reviewed for clear error. *Aguilar-Ayala v. Ruiz,* 973 F.2d 411, 416 (5th Cir.1992) (citations omitted). After reviewing the circumstances of this case, we hold that the district court did not abuse its discretion in finding the Government was substantially justified in its position and we thus affirm the denial of attorney's fees.

[2] The EAJA, 28 U.S.C. § 2412(d)(1)(A), requires an award of attorney's fees to a claimant against the Government if: (1) the claimant is a "prevailing

party"; (2) the Government's position was not "substantially justified"; and (3) there are no special circumstances making the award unjust. *Sims v. Apfel,* 238 F.3d 597, 599-600 (5th Cir.2001). As a threshold matter, a plaintiff is a "prevailing party" under the EAJA "if [he] succeed[s] on any significant issue in litigation which achieves some of the benefit [he] sought in bringing suit." *Id.* (citation omitted). In the present case, the FSA's administrative award to Davidson renders him a prevailing party.

[3] Next, the Government's position is "substantially justified" if it is "justified in substance or in the main--that is, justified to a degree that could satisfy a reasonable person." *Id.* at 602 (citing *Pierce v. Underwood,* 487 U.S. 552, 565, 108 S.Ct. 2541, 101 L.Ed.2d 490 (1988)). Substantial justification is a higher burden then that of sanctions for frivolousness; the Government's position must have a "reasonable basis both in law and fact." *Pierce,* 487 U.S. at 565, 108 S.Ct. 2541, 101 L.Ed.2d 490. This standard is not overly stringent, however, and the position of the government will be deemed to be substantially justified "if there is a 'genuine dispute' ... or 'if reasonable people could differ as [to the appropriateness of the contested action].' " [1] *Id.*

[4] The burden of proving substantial justification falls to the Government. *Herron v. Bowen,* 788 F.2d 1127, 1130 (5th Cir.1986). It must show, based on the record (including the record with respect to the decisions of the agency upon which the civil action is based), that it acted reasonably at all stages of the litigation. 28 U.S.C. § 2412(d)(2)(D); *SEC v. Fox,* 855 F.2d 247, 248, 251-52 (5th Cir.1988); *Herron,* 788 F.2d at 1130.

[5] Davidson argues the district court's denial of fees was error because the FSA's refusal to allow him to revise his farm acreage report was arbitrary and capricious, and thus not substantially justified. In chief, he claims it was unreasonable for the Government to rely on an FSA Handbook provision that it knew conflicted with the applicable regulation and had not been adopted pursuant to the notice and comment requirements of the APA. A summary of the Government's position is necessary to evaluate this argument.

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[1]Davidson contends that, in order for the government to meet its burden of substantial justification, it must show: (a) a reasonable basis in truth for the facts alleged; (b) a reasonable basis in law for the theory it propounded; and (c) a reasonable connection between the facts alleged and theory propounded. *Hanover Potato Prods., Inc. v. Shalala,* 989 F.2d 123, 128 (3d Cir.1993). This formal three-step system has not been adopted by this circuit. Rather, the government is tasked simply with showing reasonableness, as defined by *Pierce. See Aguilar- Ayala,* 973 F.2d at 416.

At the time Davidson sought the disaster relief payments at issue, the federal regulation provided that reports of acreage could be revised "at any time for all crops and land uses." 7 C.F.R. § 718.24 (1994). Rule 2-CP § 83 of the FSA Handbook, however, prohibited revision when the farmer would benefit from the revised report, so the FSA denied Davidson's request for disaster assistance. *See Davidson,* 169 F.3d at 998. According to the Government, the regulation was designed to allow prospective revisions of acreage reports but was not intended to allow farmers to later reap the rewards of retrospective disaster assistance, and the Handbook provision was designed to prevent this outcome. Throughout the administrative appeal process and ensuing litigation, the Government consistently argued for the rule in the Handbook because it was the only interpretation that prevented farmers from receiving windfalls.

Davidson emphasizes that the Government did not cite any case holding that the Handbook prevails in a conflict with a regulation. He reasons the Government knew the regulation was dominant, and thus the Government could not have been substantially justified in enforcing the Handbook provision instead. In this regard, Davidson misunderstands the Government's position. In part, the Government maintained the FSA Handbook was not in conflict with the applicable regulation because it was instead only an interpretation of that regulation. Such an interpretation was practical and necessary, from the Government's perspective, to prevent farmers from filing revisions solely to qualify for disaster assistance. Moreover, interpretative rules are not required to meet the notice and comment provisions of the APA, 5 U.S.C. § 553(b)(A), so the method by which the Handbook was adopted does not undermine the Government's position. While we did not accept the Government's argument that the Handbook provision was interpretative, that does not mean the Government was unreasonable in its belief that there was no conflict between the Handbook and the regulation.[2]

Likewise, the Government was unable to cite a case in support of its

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[2]Davidson contends that our reversal of the district court's judgment in the first appeal shows that the government's position was arbitrary and capricious. Nowhere in our prior decision did we hold that the government acted in an arbitrary and capricious manner. Moreover, even if we had found the government's actions to be arbitrary and capricious, this would not "necessarily mean that the government acted without substantial justification." *Spawn v. W. Bank-Westheimer,* 989 F.2d 830, 840 (5th Cir.1993) (quoting *Griffon v. United States Dep't of Health & Human Servs.,* 832 F.2d 51, 52 (5th Cir.1987)). In fact, in *Spawn,* we explicitly rejected the argument that our interpretation of the law on appeal was dispositive on the issue of whether the Government was substantially justified. *Id.* at 840.

argument because the issue was one of first impression, and therefore novel. This fact alone weighs in favor of substantial justification. *See Baker v. Bowen,* 839 F.2d 1075, 1081 (5th Cir.1988); *Herron,* 788 F.2d at 1132. The substantial justification standard should not be used to prevent the government from making novel arguments. Rather, the "standard was designed to allow the government to advance 'in good faith ... novel but credible ... interpretations of the law that often underlie vigorous enforcement efforts.' " *Fox,* 855 F.2d at 252 (quoting *Russell v. Nat'l Mediation Bd.,* 775 F.2d 1284, 1290 (5th Cir.1985)).

The Government's success in the early stages of the dispute is also relevant. Although not all the administrative rulings were in the Government's favor, we note that at least two reviewing officers found for the Government on the basis of the Handbook. In addition, the district court granted the Government's motion for a summary judgment on this issue. Davidson is correct in arguing that the district court's judgment in favor of the Government is not sufficient, in and of itself, to show that the Government's position was substantially justified. Nonetheless, the district court's ruling is a factor weighing in favor of the Government. *Spawn,* 989 F.2d at 840.

In sum, nothing in the record indicates that the district court abused its discretion in finding the Government's position was reasonable. Because we affirm the district court's holding that the government was substantially justified, we need not address the "special circumstances" prong of the EAJA.

II

Davidson also challenges the district court's denial of his motion for summary judgment seeking an award of interest. We review a grant or denial of summary judgment *de novo,* using the same criteria employed by the district court. *Mongrue v. Monsanto Co.,* 249 F.3d 422, 428 (5th Cir.2001). Summary judgment is proper if, drawing all inferences in favor of the non-moving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.;* Fed.R.Civ.P. 56(c).

[6] Interest is not recoverable in suits against the United States unless there is an express waiver of sovereign immunity with regard to an award of interest. *Gore, Inc. v. Glickman,* 137 F.3d 863, 870 (5th Cir.1998). The Prompt Payment Act, 31 U.S.C. § 3902, operates as such a waiver in specific, enumerated circumstances. Under § 3902(h)(2)(A), a farmer is entitled to

interest for any delay of "a payment to which producers ... are entitled under the terms of an agreement entered into under the Agricultural Act of 1949 (7 U.S.C. § 1421 *et seq.*)." Davidson contends the 1994 DAP payments he sought fall within this provision because the payments were authorized by the Agricultural Act of 1949 ("the '49 Act"). It is undisputed that the source legislation for the payments was the Agricultural Rural Development and Related Agencies Appropriations Act of 1995, Pub.L. No. 103-330, 108 Stat. 2448 (1994) ("the '94 Act"). The '94 Act provides, in pertinent part:

[s]uch sums as may be necessary from the Commodity Credit Corporation shall be available, through July 15, 1995, to producers under the same terms and conditions authorized in chapter 3, subtitle B, title XXII of Public Law 101-624 for 1994 crops ... affected by natural disasters....

108 Stat. at 2448-49. The key inquiry is whether the '94 Act, through this language, creates a payment to which Davidson is entitled "under the terms of an agreement entered into" under the '49 Act.[3]

[7] The district court found that Davidson was not entitled to summary judgment on this issue because he failed to establish that the DAP payments fell within the '49 Act, as required by the Prompt Payment Act, and thus he was not entitled to interest as a matter of law. At this stage of the proceedings, Davidson makes a variety of arguments, some new and some recycled, to support his assertion that the '94 Act falls within the '49 Act, but we find none of them persuasive. First, Davidson argues that the disaster relief payments fall under the '49 Act because the relevant disaster relief statutes are cited in the notes to 7 U.S.C. § 1421, which is the initial provision of the codified version of the '49 Act. Davidson is correct that Congress officially designated various disaster relief bills as notes to this provision (the statutes were not codified because of their temporary nature), but it is unclear that Congress made that decision for anything other than organizational reasons and we decline to take that designation as proof positive of legislative intent.

Next, Davidson suggests that an 1987 appropriations bill, Pub.L. No. 100-202, 101 Stat. 1329 (1987), supports his case because it notes that the

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[3]Davidson argues that the Government is precluded from arguing that the '49 Act does not apply because it did not assert this argument at the administrative level. He cites *Christopher M. v. Corpus Christi Indep. Sch. Dist.,* 933 F.2d 1285 (5th Cir.1991), to support this proposition. In *Christopher M.,* we simply held that an amicus curiae cannot raise issues already waived by the parties or issues not raised by either party unless exceptional circumstances existed. *Id.* at 1292-93. *Christopher M.* is not apposite here.

Commodity Credit Corporation (CCC) must pay an interest penalty under the Prompt Payment Act on all payments for obligations incurred after January 1, 1998. Davidson reasons that since the DAP payments are administered by the CCC and were owed to him in 1994, they necessarily fell within the Prompt Payment Act. This argument ignores the actual language of the bill, however, which provides that the CCC "shall pay an interest penalty, *determined on the basis of the provisions of the Prompt Payment Act,* on ... all payments...." 101 Stat. at 1329-336. This wording does not suggest that Congress intended to modify the scope or conditions of the Prompt Payment Act; rather, it seems Congress was simply reiterating that the CCC was only obligated to pay interest when the terms of the Prompt Payment Act were met.

Davidson also cites *Doane v. Espy,* 873 F.Supp. 1277 (W.D.Wis.1995), and *Huntsman Farms, Inc. v. Espy,* 928 F.Supp. 1451 (E.D.Ark.1996), in support of his construction of the relevant laws. Neither decision is applicable to this case. In *Doane,* the court allowed interest under the Prompt Payment Act for corn deficiency payments, but noted, in *dictum,* that disaster relief payments made pursuant to the Disaster Assistance Act of 1988, Pub.L. No. 100-387, 102 Stat. 924 (1988) ("the '88 Act"), were not covered by § 3902(h) of the Prompt Payment Act. In other words, the court reasoned that at least some disaster relief payments are not covered by the very same provision of the Prompt Payment Act at issue in this case because the payments do *not* fall under the '49 Act. *Doane,* 873 F.Supp. at 1278-79. In *Huntsman Farms,* the payments at issue were deficiency payments, a type of agricultural price support clearly covered by the Prompt Payment Act. *Huntsman Farms,* 928 F.Supp. at 1453-54, 1462; *see also* 31 U.S.C. § 3902(h)(2)(B)(vi) (referring specifically to deficiency payments).[4]

Likewise, the legislative history to the Prompt Payment Act Amendments of 1988, Pub.L. No. 100-496, 102 Stat. 2455 (1988), does not clearly support Davidson's position. Although Congress refers to "payments under the various support programs of the CCC" and the "various agricultural support programs administered by the CCC," there is no clear indication that this general language encompasses disaster relief payments. *See* H.R.Rep. No. 100-784, at 21, 36 (1988), *reprinted in* 1990 U.S.C.C.A.N. 3036, 3049, 3064. In fact, if any meaning can be taken from this statute, the result cuts against Davidson's

[4]Davidson cites two other cases, *Doty v. United States,* 109 F.3d 746 (Fed.Cir.1997), and *Gutz v. United States,* 45 Fed.Cl. 291 (Fed.Cl.1999), but they are also inapplicable and we decline to discuss them in this opinion.

position. Prior to 1988, § 3902(h) of the Prompt Payment Act, the provision at issue here, did not exist. During the amendment process, Congress added this section, as well as specific provisions, codified at 31 U.S.C. § 3902(h)(2)(B)(i)-(vii), governing the calculation of interest for various types of agricultural price support payments. Land diversion payments, deficiency payments, and loan agreements are all explicitly mentioned, among others, but there is no provision governing the calculation of interest for DAP payments or any other type of disaster relief payment. To compensate for this gap, Davidson asserts that his period of interest should be governed by § 3902(h)(2)(B)(vi), which governs "deficiency payments," but offers no explanation as to why that is the appropriate provision. "Deficiency payments" are not simply untimely, or otherwise lacking, payments by the Government, but are a specific type of farm support payment, discussed in part at 7 U.S.C. § 1445j. We see no obvious connection between deficiency payments and disaster relief payments. To the extent Congress did not provide a formula for calculating interest on such *ad hoc* disaster relief payments, the obvious conclusion is that no such interest was intended.

Finally, Davidson cites 7 C.F.R. Part 777, noting that it refers to the '49 Act as the authorizing legislation for implementation of a USDA Disaster Payment Program. For example, 7 C.F.R. § 777.1 states that it implements

> a Disaster Payment Program for the 1990 crop year provided by section 201(k) of the Agricultural Act of 1949, as amended, and Dire Emergency Supplemental Appropriations Act for Fiscal year 1990. The purpose of the program is to make disaster payments to eligible producers ... who have suffered a loss of production ... as the result of a natural disaster in 1989.

Id. This language mirrors the language of the authorizing statute, the Dire Emergency Supplemental Appropriation and Disaster Assistance Spending Act of 1990, Pub.L. No. 101-302, 104 Stat. 213, 214 (1990) ("the '90 Spending Act"), and it does give us pause. Section 201(k), the provision of the '49 Act referred to, was originally created by the Food Security Act of 1985, Pub.L. No. 99-198, 99 Stat. 1354 (1985) ("the '85 Act"), and was codified at 7 U.S.C. § 1446(k). While it is clear that the '85 Act explicitly amended the '49 Act, the terms of the '85 Act only applied to the 1985 to 1990 crop years, not the 1994 crop at issue here. And the '90 Spending Act did nothing more than designate appropriations for this limited purpose and time period. Indeed, 7 U.S.C. § 1446(k) was dropped from the Code after it expired in 1990.

Furthermore, the '90 Spending Act is not a precursor of the '94 Act at issue in this case. The '94 Act, cited *supra,* refers explicitly to the Food, Agriculture,

Conservation, and Trace Act of 1990, Pub.L. No. 101-624, 104 Stat. 3359 (1990), which, in turn, states in § 2244 that disaster payments are available "to the extent that assistance was not made available under the Disaster Assistance Act of 1989." 104 Stat. at 3967. The relevant provisions of the Disaster Assistance Act of 1989, Pub.L. No. 101-82, 103 Stat. 564 (1989) ("the '89 Act"), including § 104, do not refer to any previous legislation, and, in particular, give no indication that they amend or supplement the '49 Act. In sum, the '90 Spending Act seems to fall outside of a chain of disaster relief legislation passed during that period, and we are unable to conclude that any of the links in that chain are substantively connected to the '49 Act.

In the absence of a clearer connection between the '49 Act and the DAP payments at issue here, we hold that the payments fall outside the limited terms of the Prompt Payment Act, as embodied in 31 U.S.C. § 3902(h). We cannot award interest unless there is an express waiver of sovereign immunity, and we find no such waiver for this type of payment. To conclude otherwise would be beyond our judicial authority.

For the foregoing reasons, we find that the district court properly ruled that Davidson was not entitled to attorney's fees under the EAJA or interest under the Prompt Payment Act and we AFFIRM.

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FEDERAL CROP INSURANCE ACT

DEPARTMENTAL DECISION

In re: CHARLES H. MCCLATCHEY, JR.
FCIA Docket No. 02-0004.
Decision and Order by Reason of Summary Judgment.
Filed March 26, 2003.

Donald McAmis, for Complainant.
Respondent Pro se.
Decision and Order by Jill S. Clifton, Administrative Law Judge.

FCIA – Summary Judgement – False information – Willful and intentional.

The ALJ determined that Respondent violated the Act based on his being convicted in a criminal court of charges of willful and intentional fraud relating to Federal Crop Insurance thus forming a basis for summary judgement upon his prior criminal conviction.

Decision

The Motion for Summary Judgment filed by the complainant, Federal Crop Insurance Corporation, is granted on the grounds that there are no genuine issues of material fact.

Findings of Fact

A jury for the U. S. District Court for the Northern District of Mississippi found on February 7, 2000 that the Respondent, Charles H. McClatchey, Jr., willfully and intentionally provided false information on or about January 11, 1995, to the Federal Crop Insurance Corporation or to the insurer with respect to an insurance plan or policy under the Federal Crop Insurance Act, as amended (7 U.S.C. §§ 1501 *et seq.*) (the "Act"). Respondent has admitted that he was found guilty of such an act by jury verdict in the U.S. District Court for the Northern District of Mississippi. Respondent's conviction was affirmed on appeal on April 19, 2001. 249 F.3d 348 (5th Cir. 2001). Certiorari was denied by the United States Supreme Court on October 1, 2001. 534 U.S. 896, 122 S.Ct. 217, 151 L.Ed. 2d 155 (2001).

Conclusion

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 Act (7 U.S.C. § 1506(n)).

Order

Pursuant to section 506 of the Act (7 U.S.C. § 1506), respondent, and any entity in which he retains a substantial beneficial interest after the period of disqualification has commenced, is disqualified from purchasing catastrophic risk protection for a period of two years and from receiving any other benefit under the Act for a period of ten 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 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 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.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties.

[This Decision and Order became effective on May 12, 2003. – Editor]

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FOOD STAMP PROGRAM

COURT DECISIONS

MOHAMED MOHAMED THABIT AND AMIRAH ATTAYED THABIT
v. USDA.
No. C-02-2329 SC.
Filed April 3, 2003.

(Cite as: 2003 WL 1798302 (N.D.Cal.)).

United States District Court,
N.D. California.

FSP – Innocent owner, no defense – Trafficking – Strict liability, owner's, for acts by authorized employees – Compliance policy, pre-existing, permits discretion in penalty.

Court granted summary judgement motion thus holding that store owner's employees engaged in prohibited food stamp program activities ("trafficking") on nine occasions. Owner's defense of innocence is ineffective regarding violations of the Food stamp program. In order to receive consideration to reduce civil penalties, the store owner must show credible evidence of pre-existing fraud prevention program. In order to avoid permanent disqualification, the store owner must demonstrate no personal participation, no knowledge in the trafficking violations, and an effective, pre-existing compliance policy.

CONTI, J.

ORDER RE: DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I. **INTRODUCTION**

On January 17, 2002, the United States Department of Agriculture's Food and Nutrition Service ("FNS" or "Defendant") disqualified Cilles Liquor, a food and convenience store owned by plaintiffs Mohamed Mohamed Thabit and Amirah Attayed Thabit ("Plaintiffs"), from participation in the food stamp program. After an unsuccessful administrative appeal, Plaintiffs appealed the disqualification to this Court. For the following reasons, the Court now grants Defendant's motion seeking summary judgment upholding the disqualification.

II. **BACKGROUND**

In 1998, Plaintiffs purchased Cilles Liquors, a liquor and convenience store in Oakland. The previous store owners had participated in the food stamp

program, and Plaintiffs applied to accept food stamps. In June 1998, FNS approved their application. Originally Mohamed Thabit and his brother Ahmed Attayib operated Cilles Liquors alone, but in January 1999, according to Mohamed Thabit, his son Mutahar began working with Ahmed Attayib on afternoon/evening shifts.

From October 11, 2000 until April 4, 2001, an FNS investigator made ten visits to Cilles Liquors. Her reports state that during those visits she attempted to buy ineligible items and/or traffic in food stamps with the store clerks. On the first two visits, Mutahar Thabit allowed the investigator to purchase both eligible and ineligible items using food stamps. AR at 109-14. On the third visit, Mohamed Thabit refused to sell ineligible items. AR at 115-17. On subsequent visits, the investigator again purchased ineligible items, including liquor, from Mutahar Thabit, and on the last three visits Mutahar Thabit allowed her to exchange food stamps for cash. AR at 118-40. According to the investigator, another clerk was present during two of these trafficking incidents.

The investigator's reports do not state that Mohamed Thabit ever sold ineligible items or trafficked. Likewise, they do not state that trafficking or ineligible sales ever occurred while Mohamed Thabit was in the store. They do state that Mutahar Thabit never refused her requests to make ineligible purchases or sell food stamps.

On July 26, 2001, following these visits, another FNS investigator visited Cilles Liquors and introduced herself to Mohamed Thabit. Her report states that she informed him of an investigation against him and described its nature; according to Thabit, she informed him that his son had sold an ineligible item--a "wet burrito"--to a customer using food stamps. AR at 141; Thabit Decl. at 15. She then told him he would receive a letter in approximately sixty to ninety days. Mr. Thabit, according to the investigator's report, appeared to become angry with his son; according to his declaration, Mr. Thabit responded by telling his son that he could no longer work at the store or live in his house.

On November 16, 2001, FNS sent Plaintiffs a certified letter documenting the investigation and informing them that they might face permanent disqualification from participation in the food stamp program, that they had ten days to respond, and that they might, upon demonstration that they had an adequate program to prevent illegal sales involving food stamps, seek to have the penalty reduced from permanent disqualification to a monetary fine. AR at 37-38.

Plaintiffs sought and received extensions of the deadline responding to this letter, and they filed their written response on December 28, 2002. In the response, Mohamed Thabit noted that he had found no overages (excess income, which might be expected if a food stamp had been traded for less than its full value in currency) in the cash registers on the days the alleged violations occurred. He urged that a monetary penalty was appropriate because he was personally unaware of and uninvolved in the alleged misconduct, because he was not warned by FNS of the alleged misconduct, because he had fully cooperated with the investigator, and because he had an effective program in place to prevent violations. AR at 28-33. Describing the program, Thabit stated: I have established a policy in the store regarding accepting food stamps, anybody working in the store has to have good knowledge about food stamp regulations. I do a walkthru with any new clerk pointing out all the items and whether it is eligible or not, and after a complete walkthru, I test the individual making sure that he knows all the regulations he is supposed to know. No one works the cash register without this training. AR at 33.

Thabit did not, however, submit any documentation of training or testing and did not produce any other evidence of the existence or nature of his compliance program.

Despite Thabit's response, FNS rejected his request for a civil penalty and disqualified his store from participation in the program. It found that the evidence presented by Thabit was insufficient to demonstrate that the compliance program was in place prior to the violations or that Thabit had implemented an effective personnel training program.

Thabit sought administrative review, but the review officer affirmed FNS's initial decision.[1] Following this denial, the Thabits filed this action.

III. **LEGAL STANDARD**

A. Summary Judgment

Summary judgment is proper only when there is no genuine issue of material

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[1]The review officer did note that FNS had incorrectly informed Thabit that he would be subject to a transfer penalty if he attempted to sell the store prior to receiving the FNS letter of disqualification. In fact, had he sold the store after receiving the charge letter but before receiving the letter of disqualification, he would not have been subject to a transfer penalty.

fact and, when viewing the evidence in the light most favorable to the nonmoving party, the movant is clearly entitled to prevail as a matter of law. Fed.R.Civ.P. 56(c); *Cleary v. News Corp.,* 30 F.3d 1255, 1259 (9th Cir.1994). Once a summary judgment motion is made and properly supported, the nonmoving party may not rest on the mere allegations of its pleadings, but must set forth specific facts showing that there is a genuine issue for trial. *See* Fed R. Civ. P. 56(e); *Celotex Corp. v. Myrtle Nell Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). In addition, to withstand a proper motion for summary judgment, the nonmoving party must show that there are "genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

B. The Food Stamp Program

Congress founded the food stamp program in an effort to combat poverty-caused malnutrition. 7 U.S.C. § 2011. The program allows participants to use stamps to purchase eligible food items at participating stores. The Food Stamp Act contains provisions designed to ensure that stamps will only be used for their proper purposes; in response to fears that food stamps were chronically being used to purchase non-food items, or were being traded for cash, Congress enacted a scheme of stringent penalties for stores that allow impermissible use of stamps. 7 U.S.C. § 2021; *see Kim v. United States,* 121 F.3d 1269, 1272-73 (9th Cir.1997).

Specifically, section 2021(a) states that "any approved retail food store or wholesale food concern may be disqualified for a specified period of time from participation in the food stamp program ... on a finding, made as specified in the regulations, that such store or concern has violated any of the provisions of this chapter." The regulations create a detailed penalty scheme, with the severity of the penalty depending upon a host of factors. *See* 7 C.F.R. § 278.6(e).

That scheme treats trafficking in food stamps with particular severity. 7 C.F.R. § 278.6(e) states that "[t]he FNS Regional Office . . . shall disqualify a firm permanently if . . . personnel of the firm have trafficked as defined in § 271.2."[2] Section 2021(b) states that even the first trafficking disqualification

[2] 7 C.F.R. § 271.2 states, in relevant part, "trafficking means the buying or selling of coupons, ATP cards or other benefit instruments for cash or consideration other than eligible food."
(continued...)

must be permanent unless "the Secretary determines that there is substantial evidence that such store or food concern had an effective policy and program in effect to prevent violations of the chapter and the regulations."[3]

The trafficking violation need not be committed by the store owner, or even with the knowledge of the store owner, to justify permanent disqualification. *Kim,* 121 F.3d at 1272-73. The store owner's innocent ignorance may be considered in reducing a penalty from disqualification to a monetary fine; Section 2021(b)(3)(B) indicates that, as a component of any demonstration of an effective compliance program, a store owner must show that he was unaware of and uninvolved in any trafficking violations. This requirement is merely one component of showing an effective compliance policy, however, and if he does not show the other elements of an effective policy, an ignorant owner may still be disqualified because of violations about which he had no knowledge.

C. Judicial Review of FNS Decisions

In the Ninth Circuit, FNS actions under the Food Stamp Act are reviewed using a bifurcated standard. "Whereas the FNS finding that a firm violated the Food Stamp Act is reviewed de novo, review of the sanction imposed by the FNS is governed by the arbitrary and capricious standard." *Wong v. United States,* 859 F.2d 129, 132 (9th Cir.1988); *Lopez v. United States,* 962 F.Supp. 1225, 1230 (N.D.Cal.1997).

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[2](...continued)

[3] Citing 7 C.F.R. § 278.6(e)(7), which allows FNS to send only a warning letter if "violations are too limited to warrant a disqualification," Plaintiffs argue that disqualification is not a necessary response to a trafficking violation. This argument is consistent with the language of 7 U.S.C. § 2021(b), which states that a trafficking disqualification must be permanent unless certain conditions are met, not that a trafficking violation always must lead to a diqualification. This argument may be inconsistent, however, with the text of 7 C.F.R. § 278.6(e)(1), which unequivocally states that a firm "shall" be disqualified upon a trafficking violation. The Court need not resolve this possible inconsistency, for regardless of whether disqualification is a mandatory or discretionary response to trafficking, the statute, regulations, and caselaw all agree that it certainly is a permitted response, and additionally indicate, through the severity of the penalties imposed, that trafficking is a rather serious violation. *See Kim v. United States,* 121 F.3d 1269, 1272-73 (9th Cir.1997) (discussing the evolution of the remedial scheme for trafficking violations). Accordingly, whether or not FNS is required to disqualify a store where trafficking took place, there is no doubt that it could do so.

In addition to applying to FNS's discretionary decisions about the severity of the penalty imposed, the arbitrary and capricious standard applies to the Court's review of FNS's decision regarding the adequacy of a firm's compliance program. The adequacy of such a program does appear to be a question of fact, and in *Wong* the Ninth Circuit clarified that underlying facts, even if relevant only to the severity of the penalty imposed, must be reviewed de novo. 859 F.2d at 132. The Food Stamp Act, however, specifically commits to FNS's discretion determinations about the adequacy of compliance programs. Section 2021(b)(3)(B) states that "the Secretary shall have discretion to impose a civil money penalty . . . if the Secretary determines that there is substantial evidence that such store or concern had an effective policy and program in effect . . ." Accordingly, this Court, in reviewing that determination, must ask only whether the Secretary was arbitrary or capricious in his assessment of the evidence before him regarding Plaintiffs' compliance program, and will not conduct de novo review of the program's adequacy.

IV. DISCUSSION

A. The Existence of Violations

Since this is only a motion for summary judgment, Plaintiffs need only show disputed issues of material fact, and do not yet need to demonstrate by a preponderance of the evidence that the violations in question did not occur. Plaintiffs fail to meet this standard. In response to the detailed, sworn statements of the FNS investigators, Plaintiffs produce only the generalized assertion that such violations were against policy and would not have occurred and the somewhat more specific assertion that they found no overages in the cash registers on the days in question. The former assertion is far too general and conclusory to create an issue of material fact, and the latter, while perhaps providing a scintilla of circumstantial evidence that the violations in question might not have occurred, does not directly rebut the specific statements and observations of the investigators. *See Wehab v. Yeutter,* 743 F.Supp. 1353 (N.D.Cal.1990).

B. The Severity of the Penalty

Likewise, Plaintiffs do not demonstrate the existence of any genuine issues of material fact regarding FNS's imposition of the penalty. The regulations clearly empower FNS to disqualify a firm upon a finding of trafficking, and empower FNS to determine whether the firm had produced substantial evidence of an

effective compliance policy. Here, FNS does not dispute Plaintiff's assertion that he provided a written statement describing his "walkthru" training, and Plaintiff does not dispute FNS's contention that he had provided no other documentation, other than his brief statement, of that policy or of the completion of that training. Based on that record, and on FNS's observations that trafficking was in fact occurring--sometimes when two of the three store employees were present--this Court cannot say that FNS was arbitrary and capricious in finding the compliance program inadequate.

Plaintiffs add a host of other implications of factual uncertainties and possible improprieties, but none persuade the Court that any genuine issues of material fact remain. Noting the agency's failure to warn Mr. Thabit, its withdrawal of what might have been a warning letter in favor of a charge letter, the somewhat odd "hot burrito" episode, the concurrence of its enforcement actions with the period shortly following the 9/11 bombings, and FNS's incorrect statement regarding the transfer penalty, Plaintiffs suggest that the severity of their penalty may arise out of an impermissible agency animus against persons of Middle Eastern descent. Plaintiffs have produced no other evidence of racial or religious animus, however, and together all of these facts show only an agency engaged in a lawful enforcement proceeding, albeit a proceeding marred by one incorrect explanation of the law, at a time of heightened prejudice against people of Middle Eastern descent. Such facts fall well short of creating a genuine issue of fact as to the legality of the agency's justifications for the harsh but lawful penalty it selected.

C. The Transfer of Ownership Penalty

At the end of their opposition brief, Plaintiffs assert that the Court also should deny summary judgment because factual issues remain regarding whether a transfer of ownership penalty is constitutional. According to Plaintiffs, FNS seeks to impose, pursuant to 7 U.S.C. § 2021(e)(1), a penalty of $75,248; Plaintiffs argue that this penalty is grossly disproportionate to the degree of the offense and thus violates the Eighth Amendment.

Before the Court may address this issue, it must be faced with a ripe dispute. Here, Plaintiffs have introduced no evidence that they intend to sell the store and have provided neither evidence nor discussion explaining when and how FNS attempted or is attempting to impose the penalty. Plaintiffs did not even hint at this contention in their original complaint, which ostensibly sought review only of the disqualification decision. Plaintiffs have not set forth a ripe

dispute, and the Court may not address this argument.

V. CONCLUSION

For the foregoing reasons, Defendant's Motion for Summary Judgment is GRANTED.

DAIFAH KASSEM, PRESIDENT AND SENECA STREET MINI MART v. USDA.
No. 02-CV-0546E(F).
Filed April 15, 2003.

(Cite as: 2003 WL 21382906 (W.D.N.Y.)).

FSP – Innocent owner, no defense as – Arbitrary and capricious, when not – Trafficking – Strict liability, owner's, for acts by authorized employees – Compliance policy, pre-existing, permits discretion in penalty.

Store owner's employees engaged in prohibited food stamp program activities on six occasions. Owner's defense of innocence is ineffective regarding violations of the Food Stamp program (trafficking). In order to receive consideration regarding civil penalties, the store store owner must show credible evidence of pre-existing fraud prevention program. The USDA sanction is not arbitrary and capricious when it is prescribed by regulation or statute.

United States District Court,
W.D. New York.

MEMORANDUM and ORDER[1]

ELFVIN, J.

Plaintiffs[2] commenced this action pursuant to 7 U.S.C. § 2023(a)(13) (1999 Supp.2003) on July 30, 2002 in order to challenge their disqualification by the U.S. Department of Agriculture ("USDA") from continued participation in the

[1] This decision may be cited in whole or in any part.

[2] Plaintiffs are Seneca Street Mini Mart and its President, Daifah Kassem. Plaintiffs will be collectively referred to as either "plaintiffs" or "Kassem."

Federal Food Stamp Program ("FFSP").[3] The USDA filed a motion for summary judgment October 28, 2002, to which plaintiffs made no reply.[4] The USDA's motion was submitted on the papers January 31, 2003.[5] For the reasons set forth below, defendant's motion for summary judgment will be granted.

Plaintiffs have not filed any papers in opposition to the USDA's motion for summary judgment. This Court must nonetheless determine whether the USDA has satisfied its burden under Rule 56 of the Federal Rules of Civil Procedure ("FRCvP") by "demonstrating that no material issue of fact remains for trial." *Amaker v. Foley,* 274 F.3d 677, 680-681 (2d Cir.2001); *Bon Supermarket & Deli v. U.S.,* 87 F.Supp.2d 593, 600 (E.D.Va.2000) (same). Inasmuch as plaintiffs have not refuted the USDA's LRCvP 56 Statement, the facts contained therein are deemed admitted. *See Bon,* at 600 n. 12; note 4 *supra.* Indeed, the facts of this case - which are primarily taken from the administrative record - are straightforward and undisputed.[6]

Kassem is the President of Seneca Street Mini Mart, a convenience store that participated in the FFSP until plaintiffs' disqualification in March 2002. By

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[3] The USDA and its sub-unit responsible for the FFSP - the Food and Nutrition Service ("FNS") - will be collectively referred to as the "USDA." Although its role has remained relatively unchanged, the FNS has been known by different names since the advent of the FFSP. *See Ahmed v. U.S.,* 47 F.Supp.2d 389, 390 n .1 (W.D.N.Y.1999) (noting that the "agency that administers the Food Stamp Program has undergone several changes in nomenclature" and discussing such changes).

[4] Plaintiff's counsel did, however, send this Court a letter dated January 31, 2003, which stated that "[w]ith respect to the defendant's motion for summary judgment, I have not been able to receive any assistance from my clients in preparing a response. Thus, I take no position on the motion and have submitted no papers."
Accordingly, plaintiffs violated Rule 56 of the Local Rules of Civil Procedure ("LRCvP") by failing to submit an opposing statement of material facts; they also violated LRCvP 7.1(e) by failing to submit a memorandum of law or any affidavit in opposition to the USDA's motion for summary judgment. *See Chase v. Kaufmann's,* 2003 WL 251949 at n. 5 (W.D.N.Y.2003); *see also Brainard v. Freightliner Corp.,* 2002 WL 31207467, at n. 7 (W.D.N .Y.2002) (discussing LRCvP 56 and LRCvP 7.1(e) and citing cases). Accordingly, the facts set forth in the USDA's Statement of Material Facts As To Which There Is No Genuine Issue To Be Tried ("LRCvP 56 Statement") are deemed admitted where not controverted by the record. *Ibid.*

[5] Plaintiff's counsel did not attend the oral argument scheduled for January 31, 2003 and defense counsel submitted its motion for summary judgment on the papers.

[6] Plaintiffs have produced no evidence whatsoever.

letter dated February 11, 2002, the USDA sent Kassem a letter outlining numerous violations stemming from thirteen transactions and informing plaintiffs that the USDA was considering disqualifying them from further participation in the FFSP and/or the imposition of a civil monetary penalty ("Violation Notice").[7] The Violation Notice indicated that employees of the store had accepted food stamps for ineligible items (i.e., beer and non- food items) and had trafficked food stamps (*i.e.,* bought food stamps at discounted prices) on six occasions.[8] The Violation Notice informed plaintiffs, *inter alia,* that they must submit a request for such penalty within ten days of their receipt of the Violation Notice in order to be *eligible* for *consideration* for the civil monetary penalty - as opposed to permanent disqualification.[9]

Plaintiffs' responded via counsel in a letter dated February 22, 2002.[10] Plaintiffs' response indicated that Kassem was out of the country and that Kassem's daughter, Kathy Hussein, was plaintiffs' agent. Hussein submitted an affidavit to the USDA that stated, *inter alia,* that "[w]hile I am not in a position to deny the allegations, I can assure the Department that any such lapses were not in accordance with store policy and training; that the employees involved have been trained and instructed in proper procedures for handling Food Stamps transaction [sic], and that they have been cautioned on pain of termination, not to repeat their behavior." Admin. Rec. at 58; Hussein Aff., at ¶ 4. Hussein also

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[7] The thirteen violations resulted from the USDA's investigation, which included undercover transactions by shoppers who were either agents of the USDA or cooperating witnesses. *See* Admin. Rec., at 9-45, 51-56.

[8] The Violation Notice charged plaintiffs with violation of 7 C.F .R. § 278.2(a), which prohibits stores from, *inter alia,* accepting food stamps in exchange for ineligible items or exchanging food stamps for cash (*i.e.,* trafficking). *See generally Bon,* at 601 (discussing trafficking); 7 C.F.R. § 271.2 (defining "trafficking" as "buying or selling [of benefits coupons] for cash or consideration other than eligible food"); *ibid* (defining "eligible food" as "any food or food product intended for human consumption except alcoholic beverages, tobacco,"). Plaintiffs accepted food stamps for ineligible items including laundry products, cleaning agents, beer and hard lemonade.

[9] *See* 7 U.S.C. § 2021(b)(3)(B); 7 C.F.R. § 278.6(i).

[10] Plaintiffs' response appears to have been timely inasmuch as it was sent within ten days of receipt - which occurred on February 19, 2003. In any event, the USDA does not claim otherwise and this Court deems plaintiffs' response to have been timely submitted.

requested a civil monetary penalty.

By letter dated March 15, 2002, the USDA informed plaintiffs, *inter alia,* that they were permanently disqualified from the FFSP and that they were deemed ineligible for a civil monetary penalty because plaintiffs failed to submit the requisite documentation. By letter dated March 28, 2002, Kassem requested an administrative review of plaintiffs' disqualification. Beverly King, an Administrative Review Officer at the USDA, reviewed plaintiffs' disqualification and in a letter dated June 20, 2002 sustained such disqualification. King's letter also informed plaintiffs of their right to file suit in federal court, which they did July 30, 2002.

Rule 56(c) of the Federal Rules of Civil Procedure ("FRCvP") states that summary judgment may be granted only if the record shows "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." In other words, after discovery and upon a motion, summary judgment is mandated "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). Summary judgment is thus appropriate where there is "no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986).[11]

With respect to the first prong of *Anderson,* a genuine issue of material fact exists if the evidence in the record "is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson,* at 248.[12] Stated another way, there is "no genuine issue as to any material fact" where there is a "complete failure of proof concerning an essential element of the nonmoving party's case." *Celotex,* at 323. Under the second prong of *Anderson,* the disputed fact must be

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[11] Of course, the moving party bears the burden of showing that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. *Goenaga v. March of Dimes Birth Defects Found.,* 51 F.3d 14, 18 (2d Cir.1995) (citing *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 157 (1970)). If the moving party makes such a showing, the non-moving party must then come forward with evidence of specific facts sufficient to support a jury verdict in order to survive the summary judgment motion. *Ibid.;* FRCvP 56(e).

[12] *See also Anderson,* at 252 ("The mere existence of a scintilla of evidence in support of the [movant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [movant].")

material, which is to say that it "might affect the outcome of the suit under the governing law." *Anderson,* at 248.

Furthermore, "[i]n assessing the record to determine whether there is a genuine issue as to any material fact, the district court is required to resolve all ambiguities and draw all factual inferences in favor of the party against whom summary judgment is sought." *St. Pierre v. Dyer,* 208 F.3d 394, 404 (2d Cir.2000) (citing *Anderson,* at 255). Nonetheless, mere conclusions, conjecture, unsubstantiated allegations or surmise on the part of the non- moving party are insufficient to defeat a well-grounded motion for summary judgment. *Goenaga,* at 18.[13] Indeed, "[s]ummary judgment has been held to be appropriate on *de novo* judicial review of a disqualification of a retail food store from participating in the food stamp program if no genuine issue of material fact exists." *Haskell v. United States Dep't of Agriculture,* 743 F.Supp. 765, 767 (D.Kan.1990), *aff'd,* 930 F.2d 816 (10th Cir.1991); *Nagi v. U.S. Dep't of Agriculture,* 1997 WL 252034, at (S.D.N.Y.1997) (granting summary judgment in favor of USDA and sustaining permanent disqualification).[14]

Turning to the merits, section 2023(a)(13) provides:

> "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."

7 U.S.C. § 2023(a)(13) (2003) (emphasis added).

Inasmuch as the USDA - as opposed to the United States - is the only named defendant, this action fails for lack of subject matter jurisdiction. *See De La Nueces v. U.S.,* 1992 WL 58851, at *1 (S.D.N.Y.1992) (dismissing suit against defendant USDA for lack of subject matter jurisdiction because complaint

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[13] *See* footnote 11.

[14] *See also Ruszczyk v. Secretary of U.S. Dept. of Agriculture*, 662 F.Supp. 295, 295 (W.D.N.Y.1986) (granting summary judgment in favor of USDA).

improperly named the USDA as a defendant).[15] Accordingly, this action will be dismissed.

In any event, this action also fails on the merits. As noted above, this Court must review *de novo* whether plaintiffs violated the FFSP. 7 U.S.C. § 2023(a)(15); *Ibrahim v. U.S.,* 834 F .2d 52, 53 (2d Cir.1987).[16] Plaintiffs do not deny that the alleged violations occurred. *See* Admin. Rec. at 58; Hussein Aff., at ¶ 4; Compl. at ¶¶ 7-9. This fact coupled with a *de novo* review of the Administrative Record leads this Court to conclude that the violations did occur as alleged.

Plaintiffs do, however, challenge the sanction of permanent disqualification. The sole issue to be determined is whether the sanction imposed by the USDA was arbitrary and capricious. *See Lawrence v. United States,* 693 F.2d 274, 276 (2d Cir.1982); *Willy's Grocery v. United States,* 656 F.2d 24 (2d Cir.1981), *cert. denied,* 454 U.S. 1148 (1982); *Nagi,* at *2. An agency's decision is arbitrary and capricious if it was "unwarranted in law or without justification in fact." *Willy's Grocery,* at 26. Where, however, the USDA has followed the applicable laws and regulations, its decision may not be overturned as arbitrary and capricious. *Ibid.*[17]

The USDA's decision to permanently disqualify plaintiffs was not arbitrary and capricious. Indeed, it is well-established that a store owner is responsible for *any* violations of the Food Stamp Act and regulations by the store's employees. *See* 7 C.F.R. § 278.6(e)(1)(i); *J.C.B. Super Markets Inc. v. United States,* 530 F.2d 1119, 1122 (2d Cir.1976) ("The abuse of [the FFSP] by

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[15]*See also Junel Food Ctr. Corp. v. U.S. Dep't of Agriculture,* 1997 WL 150998, at *2 (S.D.N.Y.1997) ("the USDA is not a suable entity under section 2023, as the statute provides that the complaint is to be filed against the *United States"*); *J.C .C. Food & Liquor v. United States et al.,* 1997 WL 55960 (N.D.Ill.1997) (dismissing case against USDA with prejudice for lack of subject matter jurisdiction).

[16]*See also Nagi,* at *2; *Bon,* at 599 n. 9 (noting that the FFSP had been amended, although the requirement of *de novo* review has remained substantively unchanged).

[17]*See also Nagi,* at *2; *Hernandez v. U.S. Dep't of Agriculture,* 961 F.Supp. 483, 488 (W.D.N.Y.1997); *Ai Hoa Supermarket, Inc. v. United States,* 657 F.Supp. 1207, 1208 (S.D.N.Y.1987).

employees authorized to act by [the corporation] suffices to inculpate the corporation.").[18] It is undisputed that plaintiffs' employees committed the alleged violations and that plaintiffs are responsible for such violations. Accordingly, in order to determine whether the sanction of permanent disqualification was arbitrary and capricious, this Court must examine 7 U.S.C. § 2021(b)(3)(B); 7 C.F.R. § 278.6(f).

The USDA's sanction was not arbitrary and capricious because the USDA was simply following the applicable regulations in imposing permanent disqualification. *See Willy's Grocery,* at 26 (finding that USDA sanction was not arbitrary and capricious because the USDA properly applied its regulations); *Lawrence,* at 277 (holding that a disqualification policy was not arbitrary and capricious because the USDA "(1) wrote it down and (2) uses it all the time and against everyone"). Under 7 U.S.C. § 2021(b)(3)(B), the USDA may impose permanent disqualification upon

> "the first occasion or any subsequent occasion of a disqualification based on the purchase of coupons or trafficking in coupons or authorization cards by a retail food store or wholesale food concern, except that the Secretary shall have the *discretion to impose a civil money penalty* of up to $20,000 for each violation (except that the amount of civil money penalties imposed for violations occurring during a single investigation may not exceed $40,000) in lieu of disqualification under this subparagraph, for such purchase of coupons or trafficking in coupons or cards that constitutes a violation of the provisions of this chapter or the regulations issued pursuant to this chapter, *if the Secretary determines* that there is *substantial evidence* that such store or food concern had an *effective policy* and program in effect *to prevent violations* of the chapter and the regulations." (emphasis added).

See also Nagi, (applying 7 U.S.C. § 2021(b)(3)(B) and sustaining the USDA's sanction of permanent disqualification because plaintiffs "failed to

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[18] *See also Kim v. U.S.,* 121 F.3d 1269, 1273 (9th Cir.1997) (holding that "innocent store owners whose stores lack [an effective policy to prevent trafficking] remain subject to permanent disqualification" and noting that this holding has been unanimously adopted by every circuit court of appeals to have addressed the issue); *Freedman v. U.S. Dep't of Agriculture,* 926 F.2d 252, 257-258 (3d Cir.1991) (holding that owners are strictly liable for trafficking violations by store personnel); *Bon,* at 601 (same); *Hernandez,* at 485-486 (noting that there is no "innocent owner" defense with respect to permanent disqualifications); *Four Star Grocery v. United States,* 607 F.Supp. 1375, 1376 (S.D.N.Y.1985) (holding store owner liable for employee's trafficking of food stamps).

allege, much less demonstrate, that [the store] had such a policy or program"). Likewise, plaintiffs have neither alleged nor demonstrated that they had "an effective policy and program in effect to prevent violations" of the FFSP and the applicable regulations. Indeed, the Complaint merely alleges that the violations "were not in accordance with store policy and training; that the employees involved have been trained and instructed in proper procedures for handling Food Stamps transaction [sic]." [19] The Complaint and Hussein's Affidavit,[20] however, are patently deficient under 7 C.F.R. § 278.6(i) because they fail to demonstrate, *inter alia,* that a compliance policy and program were in effect *prior to* the trafficking violations. *See* 7 C.F.R. § 278.6(i); *Traficanti v. U.S.,* 227 F.3d 170, 174-176 (4th Cir.2000) (affirming imposition of permanent disqualification because store owner failed to submit written documentation of an effective fraud prevention program).[21] Consequently, the USDA lacked the discretion to impose a civil monetary penalty on plaintiffs in lieu of permanent disqualification. *See* 7 U.S.C. § 2021(b)(3)(B); *Bon,* at 602- 603 (holding that the USDA lacked the discretion to impose civil monetary penalty because plaintiff had not submitted *supporting documentation* as required under 7 C.F.R.

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[19]Such allegations simply parrot the inadequate boilerplate contained in the Hussein Affidavit.

[20]Hussein's Affidavit is deficient because, *inter alia,* it is not based on personal knowledge. *See Kim,* at 1276-1277 (finding that affidavit failed to raise a genuine issue of material fact where it was not based upon personal knowledge).

[21]The Complaint and Hussein's Affidavit also fail to satisfy other requirements set forth by 7 C.F.R. § 278.6(i). Indeed, under 7 C.F.R. § 278.6(i) plaintiffs must demonstrate by substantial evidence the following four criteria: (1) the store "shall have developed an effective compliance policy as specified in § 278.6(i)(1) [which requires "written and dated statements of firm policy which reflect a commitment to ensure that the firm is operated in a manner consistent with this Part 278 of current FSP regulations and current FSP policy on the proper acceptance and handling of food coupons"]"; (2) the "firm shall establish that both its *compliance policy and program were in operation* at the location where the violation(s) occurred *prior to the occurrence of violations* cited in the charge letter sent to the firm" and that "such policy statements shall be *considered only if documentation* is supplied which establishes that the policy statements were provided to the violating employee(s) *prior to* the commission of the violation"; (3) the "firm had developed and instituted an effective personnel training program as specified in § 278.6(i)(2) [which requires the store to, *inter alia, "document its training activity* by submitting to FNS its dated training curricula and records of dates training sessions were conducted"]"; and (4) "Firm ownership was not aware of, did not approve, did not benefit from, or was not in any way involved in the conduct of or approval of trafficking violations". *See* 7 C.F.R. § 278.6(i) (emphasis added); *Traficanti,* at 174-176 (holding that 7 C.F.R. § 278.6(i) requires owners to provide "written documentation proving that it had [an effective compliance policy] and program before the violations"); *Bon,* at 602 n. 14.

§ 278.6(i)). Accordingly, the USDA's sanction was not arbitrary and capricious and will be sustained.[22]

Accordingly, it is hereby *ORDERED* that defendant's motion for summary judgment is granted, that the Complaint is dismissed, that plaintiffs shall reimburse the USDA for $1,320 in trafficked food coupons within thirty days of this Order and that the Clerk of the Court shall close this case.

IT IS SO ORDERED.

_____

[22]*See Bon,* at 600-603 (holding that the USDA was "required to impose permanent disqualification" because of plaintiff's failure to submit supporting documentation); *Haskell,* at 771-772; *Nagi,* at *3. Moreover, *Ahmed - supra* note 3 - is distinguishable because the Hussein affidavit did not describe plaintiffs' compliance program; it merely stated that one existed. Accordingly, there is no evidence whatsoever of whether plaintiff's compliance program - even assuming one existed - was *effective* or that it existed *prior to* the violations.

HORSE PROTECTION ACT

COURT DECISION

DERWOOD STEWART, RHONDA STEWART, d/b/a STEWART'S NURSERY, a/k/a STEWART'S FARM, STEWART'S FARM & NURSERY, THE DERWOOD STEWART FAMILY, AND STEWART'S NURSERY FARM STABLES v. USDA.
No. 01-4204.
Filed May 15, 2003.

(Cite as: 64 Fed. Appx. 941).

HPA – Entering –Timeliness, appeal – Penalties, reasonableness of.

Owner of a sore horse who personally participated in certain steps (but not all) involved in entering a horse in a show violated section 5(2)(B) of the Act. Allowing the Complainant to have additional time to file an appeal following a timely oral request to do so was within discretion of the Judicial Officer (JO). Unless "unwarranted in law" or "without justification in fact," the JO's determination of the length of sanction to be applied will not be disturbed.

United States Court of Appeals,
Sixth Circuit

Before NELSON and COLE, Circuit Judges, and ROSEN, District Judge.[*]

OPINION

COLE, Circuit Judge.

Petitioner Derwood Stewart petitions this Court for review of a decision of the Secretary of the United States Department of Agriculture ("USDA") finding that he violated the Horse Protection Act ("HPA"), 15 U.S.C. §§ 1821-31, when he entered his horse in a horse show while "sore."

For the reasons that follow, we DENY Stewart's petition for review.

I. BACKGROUND

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[*] The Honorable Gerald E. Rosen, United States District Judge for the Eastern District of Michigan, sitting by designation.

The HPA was enacted to prohibit the practice of deliberately inflicting pain on a horse to reproduce the high-stepping gait of a champion Tennessee Walking Horse. *See Baird v. United States Dep't of Agric.,* 39 F.3d 131, 132 n. 1 (6th Cir.1994). Soring occurs when an injury to or sensitization of a horse's legs, rather than training or breeding, is used to induce the desired gait. *Rowland v. United States Dep't of Agric.,* 43 F.3d 1112, 1113 (6th Cir.1995). A horse is presumed to be sore if it exhibits abnormal sensitivity in both of its forelimbs or both of its hindlimbs. 15 U.S.C. § 1825(d)(5). Managers of horse shows appoint Designated Qualified Persons ("DQPs") to inspect horses for compliance with the HPA. 15 U.S.C. § 1823; 9 C.F.R. §§ 11.1, 11.7. The showing, exhibiting, or entering into a show of any sore horse is prohibited by the HPA. 15 U.S.C. § 1824(2).

In 1988, Stewart owned seven Tennessee Walking Horses, including one named "JFK's O My Jackie O" ("Jackie O"). Stewart's horses were boarded with and trained by Don Milligan. At that time, Jessie Smith was working for Milligan as a horse trainer. In mid-1998, Stewart moved his horses to his own barn and hired Smith to train them. Stewart instructed Smith not to abuse his horses "in any shape, form, or fashion."

In late October 1998, Jackie O was entered in the 30th Annual National Walking Horse Trainers Show ("the Show") in Shelbyville, Tennessee. On October 28, 1998, as part of the pre-exhibition inspection, Jackie O was found to be sore. Stewart was not present at the examination of Jackie O. When Stewart learned that Jackie O had been found to be sore, he fired Smith.

The Administrator of the Animal and Plant Health Inspection Service ("APHIS"), an agency of the USDA, filed a complaint charging Stewart, his daughter Rhonda Stewart, and the additional respondents (together, the "family business"), with violating the HPA. Following an administrative hearing, the Chief Administrative Law Judge ("ALJ") dismissed the complaints against Rhonda Stewart and the family business, but determined that Stewart violated the HPA and assessed a $2,000 penalty against him. Both Stewart and the USDA appealed the decision to the Secretary, and a Judicial Officer to whom the Secretary delegated authority over the case generally adopted the ALJ's decision, but modified the decision to increase the penalty to $2,200 and to disqualify Stewart from showing horses for one year. Stewart now appeals that decision.

II. ANALYSIS

A. Violation of § 1824(2)(B)

Our review of an administrative decision regarding the HPA is limited to a determination of whether proper legal standards were used and whether substantial evidence exists to support the decision. *Bobo v. United States Dep't of Agric.,* 52 F.3d 1406, 1410 (6th Cir.1995). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, means more than a scintilla of evidence but less than a preponderance, and must be based on the record taken as a whole. *Id.*

Section 5(2)(A) of the HPA prohibits any person from showing or exhibiting, in any horse show or exhibition, any horse which is sore. *See* 15 U.S.C. § 1824(2)(A). Section 5(2)(B) prohibits any person from entering for the purpose of showing or exhibiting, in any horse show or exhibition, any horse which is sore. *See* 15 U.S.C. § 1824(2)(B). Section 5(2)(C) prohibits any person from selling, auctioning, or offering for sale, in any horse sale or auction, any horse which is sore. *See* 15 U.S.C. § 1824(2)(C). Section 5(2)(D) prohibits any horse owner from allowing another person to do one of the acts prohibited in sections 5(2)(A), 5(2)(B), and 5(2)(C). *See* 15 U.S.C. § 1824(2)(D). The amended complaint filed by the USDA alleged that Stewart violated section 5(2)(B) by entering a sore horse, and that Rhonda Stewart and the family business violated 5(2)(D) by allowing the entry of a sore horse. The ALJ found that Stewart violated section 5(2)(B), and dismissed the complaints against Rhonda Stewart and the family business.

[1] Stewart argues that he is not liable under section 5(2)(B) because Jackie O was entered into the show by Smith, and Stewart therefore did not enter a sore horse. Stewart contends that, for purposes of the HPA, "entry" has been held to encompass all requirements, including inspection and time necessary to complete these requirements. In support of this proposition, Stewart cites *Elliott v. Administrator, Animal and Plant Health Inspection Service,* 990 F.2d 140, 145 (8th Cir.1993). As the Judicial Officer noted, however, nothing in *Elliott* requires that all steps or any particular step in the process of entry must be personally completed by the owner of the horse, rather than by the trainer, in order to conclude that the owner entered the horse. Indeed, requiring an individual to have personally performed every step of the entry process in order to qualify as having entered the horse for HPA purposes would result in the untenable holding that if two individuals divide the entry responsibilities, both are able to escape liability under section 5(2)(B).

[2] In the present case, the Judicial Officer found, and the evidence in the record demonstrated, that Stewart decided to exhibit Jackie O at the Show, paid the entry fee to enter Jackie O, and provided the means to transport Jackie O there. Thus, substantial evidence existed to support the claim that Stewart entered Jackie O in the Show. Additionally, Stewart does not contest the finding that Jackie O was sore. Accordingly, we do not find error in the Judicial Officer's determination that Stewart entered Jackie O in the Show while sore.

Stewart also argues that this Court's decision in *Baird* requires a finding that he has no liability due to the fact that he was unaware that the horse was sore. Such a finding, Stewart contends, would result in a strict liability standard, which this Court held in *Baird* should not be imposed. The alleged violation in *Baird,* however, was of section 5(2)(D), where the owner allowed his horse to be entered in a show and was unaware that the horse was sore, but did not himself enter the horse. *See Baird,* 39 F.3d at 132. Here, the Judicial Officer found Stewart liable, not for allowing the entry of Jackie O, but for actually entering Jackie O, and the Judicial Officer was therefore correct in finding *Baird* to be inapposite.

B. Timeliness of USDA's Appeal to the Secretary

[3] Stewart also argues that the Judicial Officer erred in failing to dismiss the USDA's appeal as untimely. The administrative regulations governing these proceedings state that a party may file an appeal of the ALJ's decision within thirty days after receiving service of the decision. 7 C.F.R. § 1.145(a). The ALJ's decision was filed with the hearing clerk on May 31, 2001. On June 28, 2001, the USDA requested an extension of time for filing an appeal. The Judicial Officer granted this request, extending the time for filing until July 20, 2001. The USDA again requested an extension of time for filing an appeal on July 20, 2001, by leaving a voicemail at the Office of the Judicial Officer before 4:30 p.m., the time at which the hearing clerk's office closes. The request for an extension of time was granted on July 23, 2001, extending the time in which the appeal could be filed until July 23, 2001. The USDA's appeal was then filed on this date.

We review a federal agency's interpretation of an administrative regulation for an abuse of discretion. *See Oakland County Bd. of Comm'rs v. United States Dep't of Labor,* 853 F.2d 439, 442 (6th Cir.1988). In this case, the find that the Judicial Officer did not abuse his discretion in granting the extensions of time to the USDA, or in finding that the appeal by the USDA was timely filed.

C. One-Year Period of Disqualification

[4] Lastly, Stewart contends that there was not substantial evidence to support the Judicial Officer's decision to impose a one-year disqualification period.[1] "Determination of a sanction to be applied by an administrative agency, if within the bounds of its lawful authority, is subject to very limited judicial review." *Woodard v. United States,* 725 F.2d 1072, 1077 (6th Cir.1984). This Court must only determine whether the Judicial Officer's decision was "unwarranted in law" or "without justification in fact." *Butz v. Glover Livestock Comm'n Co., Inc.,* 411 U.S. 182, 186, 93 S.Ct. 1455, 36 L.Ed.2d 142 (1973). The period of disqualification imposed is authorized by 15 U.S.C. § 1825(c) and warranted by Stewart's violation of 15 U.S.C. § 1824(2)(B). Accordingly, the decision to impose the one-year disqualification period was proper.

III. CONCLUSION

For the foregoing reasons, we DENY Stewart's petition.

WILLIAM J. REINHART v. USDA.
No. 02-1261.
Filed April 21, 2003.

(Cite as: 123 S.Ct. 1802).

HPA – Certiorari denied.

Supreme Court of the United States

Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

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[1]The Judicial Officer not only imposed a one-year period of disqualification which had not been imposed by the ALJ, but also increased the fine from $2,000 to $2,200, pursuant to the Federal Civil Penalties Inflation Adjustment Act. 28 U.S.C. § 2461. While Stewart appeals the decision to impose the one-year disqualification, he does not appeal the increase in the monetary penalty.

HORSE PROTECTION ACT

DEPARTMENTAL DECISIONS

In re: WILLIAM J. REINHART AND REINHART STABLES.
HPA Docket No. 99-0013.
Rulings Denying Complainant's Motion to Lift Stay Order and Respondent's Motion to Amend Case Caption.
Filed February 4, 2003.

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

HPA – Stay order granted during appeal period.

The Judicial Officer (JO) granted Respondent's motion for Stay Order during the pendency of his appeal to the Supreme Court. JO declined to modify the case caption by adding a fictitious trade name as requested by Respondent since it did not affect Respondent's substantive rights during pendency of appeal stating that appeal courts should not be presented with a moving target such as a name change.

On November 9, 2000, I issued a Decision and Order concluding William J. Reinhart, d/b/a Reinhart Stables [hereinafter Respondent], violated the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) [hereinafter the Horse Protection Act]. *In re William J. Reinhart*, 59 Agric. Dec. 721 (2000). On May 30, 2001, Respondent requested a stay of the Order in *In re William J. Reinhart*, 59 Agric. Dec. 721 (2000), pending the outcome of proceedings for judicial review. The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], failed to file a timely response to Respondent's request for a stay. On June 20, 2001, I stayed the Order issued in *In re William J. Reinhart*, 59 Agric. Dec. 721 (2000), pending the outcome of proceedings for judicial review. *In re William J. Reinhart*, 60 Agric. Dec. 267 (2001) (Stay Order).

On December 30, 2002, Complainant requested that I lift the June 20, 2001, Stay Order on the ground that proceedings for judicial review have concluded (Motion to Lift Stay Order). On January 27, 2003, Respondent filed "Respondent's Response in Opposition to Motion to Lift Stay Order" stating he filed a petition for a writ of certiorari with the Supreme Court of the United

States on December 17, 2002, which petition is still pending in the Court.[*] Respondent asserts proceedings for judicial review are not concluded; therefore, Complainant's Motion to Lift Stay Order should be denied. On January 29, 2003, the Hearing Clerk transmitted the record to me for a ruling on Complainant's Motion to Lift Stay Order.

The Office of the Clerk of the Supreme Court of the United States informed the Office of the Judicial Officer that Respondent attempted to file a petition for a writ of certiorari with the Supreme Court of the United States in December 2002. However, the Supreme Court of the United States returned the petition to Respondent for correction with instructions that the corrected petition for a writ of certiorari must be filed within 60 days. The time for Respondent's filing a corrected petition for a writ of certiorari has not yet expired. Therefore, I deny Complainant's Motion to Lift Stay Order.

In addition to opposing Complainant's Motion to Lift Stay Order, Respondent moves to amend the case caption to eliminate the reference to "Reinhart Stables" on the ground that I did not conclude that Reinhart Stables violated the Horse Protection Act (Respondent's Response in Opposition to Motion to Lift Stay Order at 2). Complainant declined the opportunity to respond to Respondent's motion to amend the case caption.

My conclusion that Reinhart Stables did not violate the Horse Protection Act is not a basis for amending the case caption to eliminate the reference to "Reinhart Stables." However, I also concluded in the November 9, 2000, Decision and Order that Reinhart Stables was merely a name under which William J. Reinhart did business. *In re William J. Reinhart*, 59 Agric. Dec. 721, 731, 738, 766-68 (2000). Based on the conclusion that Reinhart Stables was merely a name under which William J. Reinhart was conducting business, Reinhart Stables may not be a proper party in this proceeding. Nonetheless, I am reluctant to disturb any decision and order while it may be the subject of judicial review. Generally, courts should not be presented with a "moving target" when reviewing a decision and order.[1] Therefore, I deny Respondent's motion to amend the case caption.

Based on my review of the record, I find that my ruling denying Respondent's motion to amend the case caption has no effect on Respondent. Respondent is free to renew his motion to amend the case caption after

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[*]*See* William J. Reinhart v. USDA, 123 S. Ct. 1802 preceding this page where certiorari was denied. – Editor

[1]*See In re Jerry Goetz*, 60 Agric. Dec. 234, 237-38 (2001) (Ruling Denying Complainant's Mot. to Lift Stay).

proceedings for judicial review are concluded.

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In re: DARRALL S. McCULLOCH, PHILLIP TRIMBLE, AND SILVERSTONE TRAINING, L.L.C.
HPA Docket No. 02-0002.
Decision and Order as to Phillip Trimble.
Filed March 27, 2003.

HPA – Default – Failure to file timely answer – Entering – Civil penalty – Disqualification – Due process service, last known address for – Actual notice, lack of, not always required for due process.

The Judicial Officer (JO) affirmed the Default Decision by Chief Administrative Law Judge James W. Hunt assessing Respondent a $2,200 civil penalty and disqualifying Respondent for one year because Respondent entered, for the purpose of showing or exhibiting in a horse show, a horse which was sore, as defined in 9 C.F.R. § 11.3(a), in violation of 15 U.S.C. § 1824(2)(B). The JO rejected Respondent's contention that he did not have notice of the complaint until February 3, 2003. The JO stated the Hearing Clerk properly served Respondent with the complaint on February 10, 2002, in accordance with 7 C.F.R. § 1.147(c)(1), by mailing the complaint by certified mail to Respondent's last known principal place of business where someone signed for the complaint. The JO stated, under these circumstances, Respondent is deemed to have had notice of the complaint on February 10, 2002. The JO also rejected Respondent's contention that he was denied due process. The JO stated the Rules of Practice are reasonably calculated to apprise parties of the pendency of an action and afford them an opportunity to be heard. Therefore, the Rules of Practice, which were followed in the proceeding, meets the requirements of due process.

Sharlene Deskins, for Complainant.
Brenda S. Bramlett, for Respondent.
Initial decision issued by James W. Hunt, Chief Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a "Complaint" on February 4, 2002. Complainant instituted the proceeding under the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) [hereinafter the Horse Protection Act]; the regulations issued under the Horse Protection Act (9 C.F.R. pt. 11) [hereinafter the Horse Protection Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges that on April 29, 2000, Phillip Trimble [hereinafter

Respondent],[1] in violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)), entered, for the purpose of showing or exhibiting, a horse known as "Pushover The Top" as entry number 186 in class number 48 at the 2nd Annual Gulf Coast Charity Celebration Walking Horse Show, in Panama City Beach, Florida, while the horse was *sore* as defined in section 11.3(a) of the Horse Protection Regulations (9 C.F.R. § 11.3(a)) (Compl. ¶ II(6)).

The Hearing Clerk served Respondent with a copy of the Complaint, a copy of the Rules of Practice, and a service letter on February 10, 2002.[2] Respondent failed to file an answer to the Complaint within 20 days after service of the Complaint, as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). On March 11, 2002, the Hearing Clerk sent a letter to Respondent informing him that his answer to the Complaint had not been filed within the time required in the Rules of Practice.[3]

On October 11, 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" [hereinafter Proposed Default Decision]. On November 19, 2002, the Hearing Clerk served Respondent with Complainant's Motion for Default Decision and Complainant's Proposed Default Decision.[4] Respondent failed to file objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision within 20 days after service, as required by section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

On December 30, 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 as to Phillip Trimble and Silverstone Training, L.L.C. Upon Admission of Facts by Reason of Default"

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[1]Some of the filings in this proceeding indicate the correct spelling of Respondent's name may be "Philip Trimble" (See February 10, 2003, Affidavit of Philip Sebastian Trimble). References in this Decision and Order as to Phillip Trimble to "Phillip Trimble" and to "Philip Trimble" are to Respondent.

[2]*See* Domestic Return Receipt for Article Number 7099 3400 0014 4584 7816.

[3]*See* letter dated March 11, 2002, from Joyce A. Dawson, Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture, to Respondent.

[4]*See* Memorandum to the File dated November 19, 2002, signed by Lolita Ellis, Assistant Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture.

[hereinafter Initial Decision and Order]: (1) finding that on April 29, 2000, Respondent entered a horse known as "Pushover The Top" for the purpose of showing or exhibiting the horse as entry number 186 in class number 48 at the 2nd Annual Gulf Coast Charity Celebration Walking Horse Show, in Panama City Beach, Florida, while the horse was sore; (2) concluding Respondent violated section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) by entering "Pushover The Top" while the horse was *sore* as defined in section 11.3(a) of the Horse Protection Regulations (9 C.F.R. § 11.3(a)); (3) assessing Respondent a $2,200 civil penalty; and (4) disqualifying Respondent for 1 year from showing, exhibiting, or entering any horse and from judging, managing, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction (Initial Decision and Order at 2-3).

On February 20, 2003, Respondent appealed to the Judicial Officer. On March 17, 2003, Complainant filed "Opposition to Respondents' Motion to Set Aside the Decision and Order as to Phillip Trimble" [hereinafter Response to Appeal Petition]. On March 18, 2003, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record and pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt the Chief ALJ's Initial Decision and Order as it relates to Respondent as the final Decision and Order as to Phillip Trimble.[5] Additional conclusions by the Judicial Officer follow the Chief ALJ's findings of fact and conclusions of law, as restated.

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

15 U.S.C.:

TITLE 15—COMMERCE AND TRADE

. . . .

CHAPTER 44—PROTECTION OF HORSES

§ 1821. Definitions

As used in this chapter unless the context otherwise requires:

. . . .

(3) The term "sore" when used to describe a horse means that—

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[5]The Initial Decision and Order relates to both Respondent and Silverstone Training, L.L.C. Silverstone Training, L.L.C., did not appeal the Initial Decision and Order. Therefore, this final Decision and Order only relates to Respondent.

(A) an irritating or blistering agent has been applied, internally or externally, by a person to any limb of a horse,

(B) any burn, cut, or laceration has been inflicted by a person on any limb of a horse,

(C) any tack, nail, screw, or chemical agent has been injected by a person into or used by a person on any limb of a horse, or

(D) any other substance or device has been used by a person on any limb of a horse or a person has engaged in a practice involving a horse,

and, as a result of such application, infliction, injection, use, or practice, such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving, except that such term does not include such an application, infliction, injection, use, or practice in connection with the therapeutic treatment of a horse by or under the supervision of a person licensed to practice veterinary medicine in the State in which such treatment was given.

§ 1824. Unlawful acts

The following conduct is prohibited:

. . . .

(2) The (A) showing or exhibiting, in any horse show or horse exhibition, of any horse which is sore, (B) entering for the purpose of showing or exhibiting in any horse show or horse exhibition, any horse which is sore, (C) selling, auctioning, or offering for sale, in any horse sale or auction, any horse which is sore, and (D) allowing any activity described in clause (A), (B), or (C) respecting a horse which is sore by the owner of such horse.

§ 1825. Violations and penalties

. . . .

(b) Civil penalties; review and enforcement

(1) Any person who violates section 1824 of this title shall be liable to the United States for a civil penalty of not more than $2,000 for each violation. No penalty shall be assessed unless such person is given notice and opportunity for a hearing before the Secretary with respect to such violation. The amount of such civil penalty shall be assessed by

the Secretary by written order. In determining the amount of such penalty, the Secretary shall take into account all factors relevant to such determination, including the nature, circumstances, extent, and gravity of the prohibited conduct and, with respect to the person found to have engaged in such conduct, the degree of culpability, any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

. . . .

(c) Disqualification of offenders; orders; civil penalties applicable; enforcement procedures

In addition to any fine, imprisonment, or civil penalty authorized under this section, any person who was convicted under subsection (a) of this section or who paid a civil penalty assessed under subsection (b) of this section or is subject to a final order under such subsection assessing a civil penalty for any violation of any provision of this chapter or any regulation issued under this chapter may be disqualified by order of the Secretary, after notice and an opportunity for a hearing before the Secretary, from showing or exhibiting any horse, judging or managing any horse show, horse exhibition, or horse sale or auction for a period of not less than one year for the first violation and not less than five years for any subsequent violation.

15 U.S.C. §§ 1821(3), 1824(2), 1825(b)(1), (c).

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 [20 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 [bracketed material in original]; 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*. . . .

. . . .

(vii) Civil penalty for a violation of Horse Protection Act, codified

at 15 U.S.C. 1825(b)(1), has a maximum of $2,200[.]

7 C.F.R. § 3.91(a), (b)(2)(vii).

9 C.F.R.:

TITLE 9—ANIMALS AND ANIMAL PRODUCTS

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

SUBCHAPTER A—ANIMAL WELFARE

. . . .

PART 11—HORSE PROTECTION REGULATIONS

§ 11.1 Definitions.

For the purpose of this part, unless the context otherwise requires, the following terms shall have the meanings assigned to them in this section. The singular form shall also impart the plural and the masculine form shall also impart the feminine. Words of art undefined in the following paragraphs shall have the meaning attributed to them by trade usage or general usage as reflected by definition in a standard dictionary, such as "Webster's."

Act means the Horse Protection Act of 1970 (Pub. L. 91-540) as amended by the Horse Protection Act Amendments of 1976 (Pub. L. 94-360), 15 U.S.C. 1821 *et seq*., and any legislation amendatory thereof.

. . . .

Sore when used to describe a horse means:

(1) An irritating or blistering agent has been applied, internally or externally, by a person to any limb of a horse,

(2) Any burn, cut, or laceration has been inflicted by a person on any limb of a horse,

(3) Any tack, nail, screw, or chemical agent has been injected by a person into or used by a person on any limb of a horse, or

(4) Any other substance or device has been used by a person on any limb of a horse or a person has engaged in a practice involving a horse, and, as a result of such application, infliction, injection, use, or practice,

such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving, except that such term does not include such an application, infliction, injection, use, or practice in connection with the therapeutic treatment of a horse by or under the supervision of a person licensed to practice veterinary medicine in the State in which such treatment was given.

. . . .

§ 11.3 Scar rule.

The scar rule applies to all horses born on or after October 1, 1975. Horses subject to this rule that do not meet the following scar rule criteria shall be considered to be "sore" and are subject to all prohibitions of section 5 of the Act. The scar rule criteria are as follows:

(a) The anterior and anterior-lateral surfaces of the fore pasterns (extensor surface) must be free of bilateral granulomas, other bilateral pathological evidence of inflammation, and, other bilateral evidence of abuse indicative of soring including, but not limited to, excessive loss of hair.

9 C.F.R. §§ 11.1, .3(a) (footnote omitted).

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

Respondent failed to file an answer within the time prescribed in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the failure to file a timely answer constitutes a waiver of hearing. Accordingly, the material allegations of the Complaint that relate to Respondent are adopted as Findings of Fact, and this Decision and Order as to Phillip Trimble is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent is an individual whose mailing address is 1825 41A,

Shelbyville, Tennessee 37160. At all times material to this Decision and Order as to Phillip Trimble, Respondent was the trainer of a horse known as "Pushover The Top."

2. Respondent entered "Pushover The Top" for the purpose of showing or exhibiting the horse as entry number 186 in class number 48, on April 29, 2000, at the 2nd Annual Gulf Coast Charity Celebration Walking Horse Show in Panama City Beach, Florida, while the horse was sore.

Conclusions of Law

1. The Secretary of Agriculture has jurisdiction in this matter.

2. By reason of the facts set forth in the Findings of Fact in this Decision and Order as to Phillip Trimble, Respondent has violated section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) by entering "Pushover The Top" while the horse was *sore* as defined in section 11.3(a) of the Horse Protection Regulations (9 C.F.R. § 11.3(a)).

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent raises two issues in his "Motion to Set Aside the Decision and Order as to Philip Trimble" [hereinafter Appeal Petition]. First, Respondent asserts he had no notice that the Complaint had been filed until February 3, 2003, when Paul Warren, a United States Department of Agriculture representative, personally served Respondent with the Initial Decision and Order, Complainant's Motion for Default Decision, and a cover letter from the Hearing Clerk (Appeal Pet.; Affidavit of Philip Sebastian Trimble ¶¶ 3-5).

On February 5, 2002, the Hearing Clerk sent a copy of the Complaint, a copy of the Rules of Practice, and a service letter by certified mail to Respondent at 1825 41A, Shelbyville, Tennessee 37160. Alfonso Avila signed the Domestic Return Receipt attached to the envelope containing the Complaint, Rules of Practice, and service letter and indicated on the Domestic Return Receipt that the United States Postal Service delivered the certified mailing on February 10, 2002.[6] Respondent asserts: (1) he has not lived at 1825 41A, Shelbyville, Tennessee, since January 16, 2001, when he was employed by Silverstone Stables; and (2) from January 16, 2001, to the present, he has resided at 335 Malone Road, Pulaski, Tennessee, where he is employed by Trimble Stables. Respondent argues, based on these facts, the Hearing Clerk

[6] *See* note 2.

failed to properly serve him with the Complaint. (Appeal Pet.; Affidavit of Philip Sebastian Trimble ¶¶ 1-2; Official Mail Forwarding Change of Address Form.)

Complainant responds that the Hearing Clerk properly served Respondent with the Complaint because, at the time the Hearing Clerk mailed the Complaint to Respondent, Respondent's last known principal place of business was 1825 41A, Shelbyville, Tennessee 37160 (Response to Appeal Pet. at 3). In support of this response, Complainant attached to the Response to Appeal Petition, an affidavit given by Michael K. Nottingham, a United States Department of Agriculture investigator, on June 15, 2000, in which he states he interviewed Respondent on June 15, 2000, at Silverstone Stables, Shelbyville, Tennessee. Complainant also attached to the Response to Appeal Petition an unsigned statement, which Respondent gave to Michael K. Nottingham on June 15, 2000, in which Respondent states his address is 1825 41A, Shelbyville, Tennessee, 37160, where he has been employed by Silverstone Training Center as a horse trainer for 2 years (Affidavit of Michael K. Nottingham; Unsigned Statement of Phillip Trimble).

Section 1.147(c)(1) of the Rules of Practice provides that a complaint is deemed to be received by a party on the date of delivery by certified mail to the last known principal place of business of the party, as follows:

> **§ 1.147 Filing; service; extensions of time; and computation of time.**
>
> . . . .
>
> (c) *Service on party other than the Secretary*. (1) Any complaint or other document initially served on a person to make that person a party respondent in a proceeding, proposed decision and motion for adoption thereof upon failure to file an answer or other admission of all material allegations of fact contained in a complaint, initial decision, final decision, appeal petition filed by the Department, or other document specifically ordered by the Judge to be served by certified or registered mail, shall be deemed to be received by any party to a proceeding, other than the Secretary or agent thereof, on the date of delivery by certified or registered mail to the last known principal place of business of such party, last known principal place of business of the attorney or representative of record of such party, or last known residence of such party if an individual, *Provided that*, if any such document or paper is sent by certified or registered mail but is returned marked by the postal service as unclaimed or refused, it shall be deemed to be received by such party on the date of remailing by ordinary mail to the same address.

7 C.F.R. § 1.147(c)(1).

Based on the record before me, I conclude the United States Postal Service delivered the Complaint by certified mail on February 10, 2002, to Respondent's last known principal place of business. Alfonso Avila signed the Domestic Return Receipt attached to the envelope containing the Complaint.[7] The Hearing Clerk properly serves a document in accordance with the Rules of Practice when a party to a proceeding, other than the Secretary, is served with a certified mailing at the party's last known principal place of business and someone signs for the document.[8] Therefore, the Hearing Clerk properly served Respondent with the Complaint in accordance with section 1.147(c)(1) of the Rules of Practice (7 C.F.R. § 1.147(c)(1)) on February 10, 2002, and Respondent is deemed to have had notice of the Complaint on February 10, 2002.

Sections 1.136(c) and 1.139 of the Rules of Practice clearly state the consequences of failing to file a timely answer, as follows:

> **§ 1.136 Answer.**
>
> . . . .
>
> (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

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[7] *See* note 2.

[8] *In re Roy Carter*, 46 Agric. Dec. 207, 211 (1987); *In re Carl D. Cuttone*, 44 Agric. Dec. 1573, 1576 (1985), *aff'd per curiam*, 804 F.2d 153 (D.C. Cir. 1986) (unpublished); *In re Joseph Buzun*, 43 Agric. Dec. 751, 754-56 (1984).

> the Hearing Clerk. Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.

7 C.F.R. §§ 1.136(c), .139.

Moreover, the Complaint served on Respondent on February 10, 2002, informs Respondent 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 3.

Similarly, the Hearing Clerk informed Respondent in the service letter, which accompanied the Complaint and Rules of Practice, that a timely answer must be filed, as follows:

> CERTIFIED RECEIPT REQUESTED
>
> February 5, 2002
>
> Darrall S. McCulloch
> 288 Kent Road
> Tallassee, Alabama 36078
>
> Phillip Trimble
> Silverstone Training, L.L.C.
> 1825 41A
> Shelbyville, Tennessee 37160
>
> Dear Messrs. McCulloch and Trimble:
>
> Subject: In re: Darrall S. McCulloch, Phillip Trimble and Silverstone Training, L.L.C.; Respondents - HPA Docket No. 02-0002
>
> Enclosed is a copy of the Complaint, which has been filed with this

office under the Horse Protection Act.

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 three copies of your written and signed Answer to the Complaint.

It is necessary that your answer set forth any defense you wish to assert, and to specifically admit, deny or explain each allegation of the Complaint. Your Answer may include a request for an oral hearing. Failure to file an Answer or filing an Answer which does not deny the material allegations of the Complaint, shall constitute an admission of those allegations and a waiver of your right to an oral hearing.

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.

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 on the last page of the Complaint.

Sincerely,

/s/
Joyce A. Dawson
Hearing Clerk

Letter dated February 5, 2002, from Joyce A. Dawson, Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture, to Respondent (emphasis in original).

Respondent's answer was due no later than March 4, 2002.[9] Respondent's first filing in this proceeding is dated February 13, 2003, and was filed February 20, 2003, 1 year 10 days after the Hearing Clerk served Respondent with the Complaint and 11 months 16 days after Respondent's answer was due. Respondent's failure to file a timely answer is deemed an admission of the allegations of the Complaint (7 C.F.R. § 1.136(a), (c)) and constitutes a waiver of hearing (7 C.F.R. § 1.139, .141(a)). Therefore, Respondent is deemed, for the purposes of this proceeding, to have admitted the allegations of the Complaint.

On March 11, 2002, the Hearing Clerk sent a letter to Respondent informing him that his answer to the Complaint had not been received within the allotted time.[10] Respondent failed to respond to the Hearing Clerk's March 11, 2002, letter. On October 11, 2002, Complainant filed a Motion for Default Decision

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[9]Section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) provides that an answer must be filed within 20 days after service of the complaint. Twenty days after February 10, 2002, was March 2, 2002. However, March 2, 2002, was a Saturday, and section 1.147(h) of the Rules of Practice provides that when the time for filing expires on a Saturday, the time for filing shall be extended to the next business day, as follows:

> **§ 1.147 Filing; service; extensions of time; and computation of time.**
>
> . . . .
>
> (h) *Computation of time.* Saturdays, Sundays and Federal holidays shall be included in computing the time allowed for the filing of any document or paper: *Provided*, That, when such time expires on a Saturday, Sunday, or Federal holiday, such period shall be extended to include the next following business day.

7 C.F.R. § 1.147(h).

The next business day after Saturday, March 2, 2002, was Monday, March 4, 2002. Therefore, Respondent was required to file his answer no later than March 4, 2002.

[10]*See* note 3.

and a Proposed Default Decision. On November 19, 2002, the Hearing Clerk served Respondent with a copy of Complainant's Motion for Default Decision and a copy of Complainant's Proposed Default Decision by ordinary mail in accordance with section 1.147(c)(1) of the Rules of Practice (7 C.F.R. § 1.147(c)(1)).[11] Respondent failed to file objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision within 20 days after service, as provided in section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

On December 30, 2002, the Chief ALJ issued the Initial Decision and Order in which the Chief ALJ found Respondent admitted the allegations in the Complaint by reason of default.

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,[12] generally there is no basis for setting aside a default decision that is based upon a respondent's failure to file

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[11] *See* note 4.

[12] *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).

a timely answer.[13] The Rules of Practice clearly 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 filed 1 year 10 days after the Hearing Clerk served Respondent with the Complaint and 11 months 16 days after Respondent's answer was due. Respondent's failure to file a timely answer is deemed, for the purposes of this proceeding, an admission of the allegations of the Complaint (7 C.F.R. § 1.136(c)) and constitutes a waiver of hearing (7 C.F.R. § 1.139, .141(a)). Therefore, 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.

Second, Respondent contends his constitutional right to due process has been violated and requests the opportunity to answer the Complaint (Appeal Pet.; Affidavit of Philip Sebastian Trimble ¶ 5).

To meet the requirement of due process of law, it is only necessary that notice of a proceeding be sent in a manner "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central*

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[13]*See generally In re Stephen Douglas Bolton* (Decision and Order as to Stephen Douglas Bolton), 58 Agric. Dec. 254 (1999) (holding the default decision was properly issued where the respondent's first filing in the proceeding was filed 54 days after the complaint was served on the respondent and 34 days after the respondent's answer was due and the respondent is deemed, by his failure to file a timely answer, to have admitted violating 15 U.S.C. § 1824(2)(B)); *In re Dean Byard*, 56 Agric. Dec. 1543 (1997) (holding the default decision was properly issued where the respondent failed to file an answer and the respondent is deemed, by his failure to file an answer, to have admitted violating 15 U.S.C. § 1824(2)(B)); *In re Gerald Funches*, 56 Agric. Dec. 517 (1997) (holding the default decision was properly issued where the respondent's first and only filing in the proceeding was filed 94 days after the complaint was served on the respondent and the respondent is deemed, by his failure to file a timely answer, to have admitted violating 15 U.S.C. §§ 1824(1) and 1824(2)(B)); *In re Billy Jacobs, Sr.*, 56 Agric. Dec. 504 (1996) (holding the default decision was properly issued where the response to the complaint was filed more than 9 months after service of the complaint on the respondent and the respondent is deemed, by his failure to file a timely answer, to have admitted violating 15 U.S.C. § 1825(c)), *appeal dismissed*, No. 96-7124 (11th Cir. June 16, 1997); *In re Donald D. Richards*, 52 Agric. Dec. 1207 (1993) (holding the default decision was properly issued where a timely answer was not filed and the respondent is deemed, by his failure to file a timely answer, to have admitted violating 15 U.S.C. § 1824(2)(B)); *In re A.P. Holt* (Decision as to A.P. Holt), 50 Agric. Dec. 1612 (1991) (holding the default decision was properly issued where the respondent was given an extension of time to file an answer, but the answer was not filed until 69 days after the extended date for filing the answer and the respondent is deemed, by his failure to file a timely answer, to have admitted violating 15 U.S.C. § 1824(2)(B)); *In re Jerry Seal*, 39 Agric. Dec. 370 (1980) (holding the default decision was properly issued where a timely answer was not filed and the respondent is deemed, by his failure to file a timely answer, to have admitted violating 15 U.S.C. § 1824 and section 11.2 of the Horse Protection Regulations (9 C.F.R. § 11.2)).

Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).[14] The Rules of Practice, which provides for service by certified mail to a respondent's last known principal place of business or last known residence, which procedure was followed in this proceeding, meets the requirements of due process of law. As held in *Stateside Machinery Co., Ltd. v. Alperin*, 591 F.2d 234, 241-42 (3d Cir. 1979):

> Whether a method of service of process accords an intended recipient with due process depends on "whether or not the form of . . . service [used] is *reasonably calculated* to give him actual notice of the proceedings and an opportunity to be heard." *Milliken*, 311 U.S. at 463, 61 S. Ct. at 343 (emphasis added); *see Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315, 70 S. Ct. 652, 94 L.Ed. 865 (1950). As long as a method of service is reasonably certain to notify a person, the fact that the person nevertheless fails to receive process does not invalidate the service on due process grounds. In this case, Alperin attempted to deliver process by registered mail to defendant's last known address. That procedure is a highly reliable means of providing notice of pending legal proceedings to an adverse party. That Speigel nevertheless failed to receive service is irrelevant as a matter of constitutional law. [Omission and emphasis in original.]

Similarly, in *Fancher v. Fancher*, 8 Ohio App. 3d 79, 455 N.E. 2d 1344, 1346 (1982), the court held:

> It is immaterial that the certified mail receipt was signed by the defendant's brother, and that his brother was not specifically authorized to do so. The envelope was addressed to the defendant's address and was there received; this is sufficient to comport with the requirements of due process that methods of service be reasonably calculated to reach interested parties. *See Mullane v. Central Hanover Bank & Trust Co.* (1950), 339 U.S. 306, 314, 70 S. Ct. 652, 94 L.Ed. 865. [Footnote omitted.]

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[14] *See also Weigner v. City of New York*, 852 F.2d 646, 649-51 (2d Cir. 1988), *cert. denied*, 488 U.S. 1005 (1989) (the reasonableness and hence constitutional validity of any chosen method of providing notice may be defended on the ground that it is in itself reasonably certain to inform those affected; the state's obligation to use notice "reasonably certain to inform those affected" does not mean that all risk of non-receipt must be eliminated); *NLRB v. Clark*, 468 F.2d 459, 463-65 (5th Cir. 1972) (due process does not require receipt of actual notice in every case).

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 Amendment to the United States Constitution.[15]

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

ORDER

1. Respondent is assessed a civil penalty of $2,200. The civil penalty shall be paid by certified check or money order, made payable to the "Treasurer of the United States" and sent to:

Sharlene Deskins
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 civil penalty shall be forwarded to, and received by, Ms. Deskins within 60 days after service of this Order on Respondent. Respondent shall indicate on the certified check or money order that payment is in reference to HPA Docket No. 02-0002.

2. Respondent is disqualified for 1 year from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, corporation, partnership, or other device, and from judging, managing, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction. "Participating" means engaging in any activity beyond that of a spectator, and includes, without limitation: (1) transporting, or arranging for the transportation of, horses to or from equine events; (2) personally giving

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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 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).

instructions to exhibitors; (3) being present in the warm-up or inspection areas or in any area where spectators are not allowed; and (4) financing the participation of others in equine events. This disqualification shall continue until the civil penalty assessed in paragraph 1 of this Order and any costs associated with collecting the civil penalty are paid in full.

The disqualification of Respondent shall become effective on the 60th day after service of this Order on Respondent.

3. Respondent has the right to obtain review of this Order in the court of appeals of the United States for the circuit in which he resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit. Respondent must file a notice of appeal in such court within 30 days from the date of this Order and must simultaneously send a copy of the notice of appeal by certified mail to the Secretary of Agriculture.[16] The date of this Order is March 27, 2003.

_____

In re: DARRALL S. McCULLOCH, PHILLIP TRIMBLE, AND SILVERSTONE TRAINING, L.L.C.
HPA Docket No. 02-0002.
Stay Order as to Phillip Trimble.
Filed April 25, 2003.

Sharlene Deskins, for Complainant.
Brenda S. Bramlett, for Respondent.
Order issued by William G. Jenson, Judicial Officer.

HPA – Stay order.

On March 27, 2003, I issued a Decision and Order as to Phillip Trimble: (1) concluding that Phillip Trimble [hereinafter Respondent] violated 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 Darrall S. McCulloch* (Decision as to Phillip Trimble), 62 Agric. Dec. ___ (Mar. 27, 2003).

[16]*See* 15 U.S.C. § 1825(b)(2), (c).

On April 18, 2003, Respondent filed a notice of appeal and petition for review of *In re Darrall S. McCulloch* (Decision as to Phillip Trimble), 62 Agric. Dec. ___ (Mar. 27, 2003), in the United States Court of Appeals for the Sixth Circuit.[1] On April 22, 2003, Respondent filed "Motion for Stay of Order" [hereinafter Motion for Stay] requesting a stay of the Order in *In re Darrall S. McCulloch* (Decision as to Phillip Trimble), 62 Agric. Dec. ___ (Mar. 27, 2003), pending judicial review. On April 23, 2003, Sharlene Deskins, counsel for the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], by telephone, informed Gloria Derobertis, a legal technician employed by the Office of the Judicial Officer, 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.

ORDER

The Order issued in *In re Darrall S. McCulloch* (Decision as to Phillip Trimble), 62 Agric. Dec. ___ (Mar. 27, 2003), is stayed pending the outcome of proceedings for judicial review. This Stay Order as to Phillip Trimble shall remain effective until the Judicial Officer lifts it or a court of competent jurisdiction vacates it.

_____

[1] *Trimble v. United States Dep't of Agric.*, No. 03-3568 (6th Cir. Apr. 18, 2003).

INSPECTION AND GRADING ACT

COURT DECISION

AMERICAN RAISIN PACKERS, INC. v USDA.
No. 02-15602.
Filed May 29, 2003.

(Cite as: D.C. No. CV-01-05606, (9th Cir.(Cal.))).

I&G – Negligent misconduct – Debarment – Unintentional misrepresentation.

The debarment of a Raisin processor by the USDA from participating in government contracts due to mis-labeling incident was reasonable even though intentional mislabeling was not shown. Negligent misconduct involving the mis-labeling was shown.

United States Court of Appeals,
Ninth Circuit

Before HAWKINS and W. FLETCHER, Circuit Judges, and BREYER,[*] District Judge.

MEMORANDUM[**]

The decision of the United States Department of Agriculture ("USDA") to debar American Raisin Packers ("American Raisin") for the unintentional misrepresentation of samples submitted for inspection was reasonable. The USDA's interpretation of 7 C.F.R. § 52.54(a)(1)(ii) as encompassing both innocent and willful misrepresentation was both rational and consistent with the purpose of the regulation. *See Alhambra Hosp. v. Thompson,* 259 F.3d 1071, 1074 (9th Cir.2001).

American Raisin's contention that 7 U.S.C. § 1622(h) prohibits debarment for innocent or negligent misconduct is unavailing. Section 1622(h) provides ample authority for the promulgation of Section 52.54, in addition to

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[*]Honorable Charles R. Breyer, United States District Judge for the Northern District of California, sitting by designation.

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

establishing penalties for other abuses. American Raisin's claim that 5 U.S.C. § 558 requires that a party be given an opportunity to cure its misrepresentation before it is debarred also fails because Section 558 applies only to the revocation of a license and is not otherwise applicable to the facts of this case.

Accordingly, we affirm the district court's summary judgment grant to USDA.

AFFIRMED.

PLANT VARIETY PROTECTION ACT

DEPARTMENTAL DECISION

In re: J.R. SIMPLOT COMPANY.
PVPA Docket No. 02-0001.
Decision and Order.
Filed April 14, 2003.

PVPA – Plant variety protection – Assignment of plant variety protection application – Disavowal of statement – Delegation of authority to judicial officer.

The Judicial Officer (JO) dismissed with prejudice Petitioner's appeal of the Commissioner of the Plant Variety Protection Office's refusal to record the assignment of Lofts L-93 from AgriBioTech, Inc. to Petitioner, and refusal to disavow a statement attributed to a Plant Variety Protection Office employee. The JO stated that, under the Plant Variety Protection Act, he had only been delegated authority to perform the functions of the Secretary of Agriculture under 7 U.S.C. § 2443 to hear appeals by applicants of the Commissioner's refusal to grant their applications for plant variety protection.

Robert A. Ertman, for Commissioner.
Richard G. Stoll and Richard C. Peet, for Petitioner.
Initial decision issued by Paul M. Zankowski, Commissioner, Plant Variety Protection Office, Science and Technology Programs, AMS, USDA.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

J.R. Simplot Company [hereinafter Petitioner] requested that: (1) the Plant Variety Protection Office record the assignment of Lofts L-93[1] from AgriBioTech, Inc. to Petitioner; (2) the Plant Variety Protection Office recognize Petitioner as the owner of the application for a certificate of plant variety protection for Lofts L-93;[2] and (3) the Plant Variety Protection Office and Dr. Thomas Salt, a senior plant variety plant examiner employed by the Plant Variety Protection Office, disavow the statement "[a]nybody is free to grow and market the turfgrass" attributed to Dr. Salt in the April 5, 2002, issue

[1]Lofts L-93, also referred to a "L-93," is the varietal name of a variety of creeping bentgrass.

[2]The application for a certificate of plant variety protection for Lofts L-93 is identified by the Plant Variety Protection Office as PVP Application No. 9600256.

of *Golf Week's Superintendent News*.[3] The Commissioner denied Petitioner's request to record the assignment of PVP Application No. 9600256 and denied Petitioner's request that the Plant Variety Protection Office disavow the statement attributed to Dr. Salt in the April 5, 2002, issue of *Golf Week's Superintendent News*.[4]

On July 15, 2002, Petitioner filed "Petition Under 7 C.F.R. § 97.300 For Recording PVP Application No. 9600256 in the Name of J.R. Simplot Company" [hereinafter Petition] pursuant to the Plant Variety Protection Act, as amended (7 U.S.C. §§ 2321-2582) [hereinafter the Plant Variety Protection Act] and the regulations promulgated pursuant to the Plant Variety Protection Act (7 C.F.R. pt. 97) [hereinafter the Regulations] (Pet. at 3). Petitioner seeks reversal of the Commissioner's denial of Petitioner's requests that: (1) the Plant Variety Protection Office record the assignment of Lofts L-93 from AgriBioTech, Inc. to Petitioner; and (2) the Plant Variety Protection Office and Dr. Salt disavow the statement "[a]nybody is free to grow and market the turfgrass" attributed to Dr. Salt in the April 5, 2002, issue of *Golf Week's Superintendent News* (Pet. at 3).

On August 23, 2002, the Commissioner filed "Answer to Petition for Recording Abandoned Application" [hereinafter Answer] contending I have no jurisdiction to consider Petitioner's Petition and, if I conclude I do have jurisdiction to consider Petitioner's Petition, the Petition should be denied (Answer at 2-4). 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."

Petitioner requested an informal conference pursuant to section 97.300(d) of the Regulations (7 C.F.R. § 97.300(d)). On January 2, 2003, I held an informal conference.[5] Richard G. Stoll and Richard C. Peet, Foley & Lardner, Washington, DC, represented Petitioner. Joel Barker and Gray Young also appeared on behalf of Petitioner. Robert A. Ertman, Office of the General Counsel, United States Department of Agriculture, represented the

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[3]*See* letter dated April 17, 2002, from Gary M. Zinkgraf, to Paul M. Zankowski, Commissioner, Plant Variety Protection Office, Science and Technology Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Commissioner].

[4]*See* letter dated May 13, 2002, from the Commissioner to Gary M. Zinkgraf.

[5]The January 2, 2003, informal conference was also held in connection with a related proceeding, *In re J.R. Simplot Company*, PVPA Docket No. 02-0002.

Commissioner.

On February 18, 2003, pursuant to section 63 of the Plant Variety Protection Act (7 U.S.C. § 2443), I requested that the Plant Variety Protection Board provide me with written advice regarding Petitioner's Petition. During its March 5 and 6, 2003, meeting, the Plant Variety Protection Board held a hearing to consider the Petition.[6] Richard G. Stoll and Joel Barker appeared on behalf of Petitioner. Robert A. Ertman appeared on behalf of the Commissioner. At the conclusion of the hearing, the Plant Variety Protection Board voted 10 to 1 in favor of a motion to advise me that the procedures followed by the Plant Variety Protection Office with respect to *In re J.R. Simplot Company*, PVPA Docket No. 02-0001, and *In re J.R. Simplot Company*, PVPA Docket No. 02-0002, "were fair and consistent with their [sic] handling of PVP applications" and to recommend that PVP Application No. 9600256 for Lofts L-93 "should not be revived" (Transcript of the March 5, 2003, Plant Variety Protection Board Hearing at 78-80). On April 11, 2003, the Plant Variety Protection Board provided me with a copy of the transcript containing its advice and recommendation.

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.

TITLE 7—AGRICULTURE

. . . .

CHAPTER 57—PLANT VARIETY PROTECTION

. . . .

SUBCHAPTER II—PROTECTABILITY OF PLANT VARIETIES AND CERTIFICATES OF PROTECTION

. . . .

PART F—EXAMINATIONS; RESPONSE TIME; INITIAL APPEALS

§ 2441. Examination of application

> The Secretary shall cause an examination to be made of the application and if on such examination it is determined that the applicant is entitled to plant variety protection under the law, the Secretary shall issue a notice of allowance of plant variety protection therefore as

[6]The Plant Variety Protection Board also considered a related petition filed by Petitioner in *In re J.R. Simplot Company*, PVPA Docket No. 02-0002.

hereinafter provided.

§ 2442. Notice of refusal; reconsideration

(a) Whenever an application is refused, or any objection or requirement made by the examiner, the Secretary shall notify the applicant thereof, stating the reasons therefore, together with such information and references as may be useful in judging the propriety of continuing the prosecution of the application; and if after receiving such notice the applicant requests reconsideration, with or without amendment, the application shall be reconsidered.

(b) For taking appropriate action after the mailing to an applicant of an action other than allowance, the applicant shall be allowed at least 30 days, and not more than 180 days, or such other time as the Secretary shall set in the refusal, or such time as the Secretary may allow as an extension. Without such extension, action may be taken up to three months late by paying an additional fee to be prescribed by the Secretary.

§ 2443. Initial appeal

When an application for plant variety protection has been refused by the Plant Variety Protection Office, the applicant may appeal to the Secretary. The Secretary shall seek the advice of the Plant Variety Protection Board on all appeals, before deciding the appeal.

7 U.S.C. §§ 2441-2443.

7 C.F.R.:

TITLE 7—AGRICULTURE

. . . .

SUBTITLE B—REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

CHAPTER I—AGRICULTURAL MARKETING SERVICE (STANDARDS, INSPECTIONS, MARKETING PRACTICES), DEPARTMENT OF AGRICULTURE

. . . .

SUBCHAPTER E—COMMODITY LABORATORY

TESTING PROGRAMS

. . . .

PART 97—PLANT VARIETY AND PROTECTION

SCOPE

§ 97.1 General.

Certificates of protection are issued by the Plant Variety Protection Office for new, distinct, uniform, and stable varieties of sexually reproduced or tubor propogated plants. Each certificate of plant variety protection certifies that the breeder has the right, during the term of the protection, to prevent others from selling the variety, offering it for sale, reproducing it, importing or exporting it, conditioning it, stocking it, or using it in producing a hybrid or different variety from it, as provided by the Act.

DEFINITIONS

§ 97.2 Meaning of words.

Words used in the regulations in this part in the singular form will import the plural, and vice versa, as the case may demand. The definitions of terms contained in the Act shall apply to such terms when used in this part. As used throughout the regulations in this part, unless the context requires otherwise, the following terms will be considered to mean:

Abandoned application. An application which has not been pursued to completion within the time allowed by the Office or has been voluntarily abandoned.

Act. The Plant Variety Protection Act (7 U.S.C. 2321 et seq.).

. . . .

Applicant. The person who applied for a certificate of plant variety protection.

Application. An application for plant variety protection under the Act.

Assignee. A person to whom an owner assigns his/her rights in whole or in part.

. . . .

Certificate. A certificate of plant variety protection issued under the

Act by the Office.

. . . .

Commissioner. The Examiner in Chief of the Office.

. . . .

Office or Plant Variety Protection Office. The Plant Variety Protection Office, Science and Technology Division, AMS, USDA.

. . . .

Owner. A breeder who developed or discovered a variety for which plant variety protection may be applied for under the Act, or a person to whom the rights to such variety have been assigned or transferred.

. . . .

THE APPLICATION

. . . .

§ 97.18 Applications handled in confidence.

. . . .

(c) Decisions of the Commissioner on abandoned applications not otherwise open to public inspection (see paragraph (b) of this section) may be published or made available for publication at the Commissioner's discretion. When it is proposed to release such a decision, the applicant shall be notified directly or through the attorney or agent of record, and a time, not less than 30 days, shall be set for presenting objections.

. . . .

EXAMINATIONS, ALLOWANCES, AND DENIALS

. . . .

§ 97.107 Reconsideration and final action.

If, upon reconsideration, the application is denied by the Commissioner, the applicant shall be notified by the Commissioner of the reason or reasons for denial in the same manner as after the first examination. Any such denial shall be final unless appealed by the applicant to the Secretary within 60 days from the date of denial, in accordance with §§ 97.300-97.303. If the denial is sustained by the Secretary on appeal, the denial shall be final subject to appeal to the courts, as provided in § 97.500.

. . . .

PROTEST PROCEEDINGS

. . . .

§ 97.201 Protest proceedings.

. . . .

(e) As soon as practicable after the petition or the petition and answer are filed, or after the expiration of any period for filing sworn statements or affidavits, the Commissioner shall issue a decision as to whether the protests are upheld or denied. The Commissioner may, following the protest proceeding, cancel any certificate issued and may grant another certificate for the same variety to a person who proves to the satisfaction of the Commissioner, that he or she is the breeder or discoverer. The decision shall be served upon the parties in the manner provided in § 97.403.

. . . .

PRIORITY CONTEST

§ 97.220 Decision by the Commissioner.

(a) When a priority contest is concluded on the basis of preliminary statements, or proposed findings of fact, conclusions and notice of priority shall be issued by the Commissioner to the interested parties, giving them a specified period, not less than 30 days, to show cause why such proposed findings of fact, conclusions, and notice of priority should not be made final. Any response made during the specified period will be considered by the Commissioner. Additional affidavits or exhibits will not be considered, unless accompanied by a showing of good cause acceptable to the Commissioner. Thereafter, final findings of act, conclusions, and notice of priority shall be issued by the Commissioner.

(b) The decision shall be entered by the Commissioner against a party whose preliminary statement alleges a date of determination later than the filing date of the other party's application.

. . . .

APPEAL TO THE SECRETARY

§ 97.300 Petition to the Secretary.

(a) Petition may be made to the Secretary from any final action of the Commissioner denying an application or refusing to allow a certificate to be issued, or from any adverse decision of the Commissioner made under §§ 97.18(c), 97.107, 97.201(e), and 97.220.

7 C.F.R. §§ 97.1, .2, .18(c), .107, .201(e), .220, .300(a) (footnote omitted).

Discussion

Effective December 1, 1977, the Secretary of Agriculture delegated to the Judicial Officer authority to exercise the functions of the Secretary of Agriculture "where an appeal is filed under section 63 of the Plant Variety Protection Act (7 U.S.C. 2443)."[7] Section 63 of the Plant Variety Protection Act (7 U.S.C. § 2443) provides that an applicant for plant variety protection may appeal to the Secretary of Agriculture the Plant Variety Protection Office's refusal to grant the applicant's application for plant variety protection.

In this proceeding, Petitioner appeals the Commissioner's denial of Petitioner's requests that: (1) the Plant Variety Protection Office record the assignment of Lofts L-93 from AgriBioTech, Inc. to Petitioner; and (2) the Plant Variety Protection Office and Dr. Salt disavow the statement "[a]nybody is free to grow and market the turfgrass" attributed to Dr. Salt in the April 5, 2002, issue of *Golf Week's Superintendent News* (Pet. at 3). The Commissioner's refusal to record an assignment is not a refusal to grant an application for plant variety protection which may be appealed under section 63 of the Plant Variety Protection Act (7 U.S.C. § 2443). The Commissioner's refusal to disavow a statement attributed to a Plant Variety Protection Office employee is not a refusal to grant an application for plant variety protection which may be appealed under section 63 of the Plant Variety Protection Act (7 U.S.C. § 2443). Therefore, I have no authority to entertain Petitioner's Petition.

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

ORDER

Petitioner's Petition is dismissed with prejudice. This Order shall become effective on the day after service of this Order on Petitioner.

In re: J.R. SIMPLOT COMPANY.
PVPA Docket No. 02-0002.
Decision and Order.
Filed June 2, 2003.

PVPA – Plant variety protection – Abandoned application – Revival of application – Appeal – Procedural rule – Substantive rule – Waiver of procedural rule – Authority – Basis for rule – Legal authority for rule – Recusal.

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[7] 42 Fed. Reg. 61,029-30 (Dec. 1, 1977).

The Judicial Officer (JO) affirmed Commissioner Paul M. Zankowski's denial of Petitioner's request for revival of an abandoned application for plant variety protection for a variety of creeping bentgrass known as "Lofts L-93." The JO agreed with the Commissioner that Petitioner's request for revival of the abandoned application was not filed within 3 months of abandonment as required by 7 C.F.R. § 97.22. The Judicial Officer rejected Petitioner's contentions that: (1) equity and justice required waiver of the 3-month deadline in 7 C.F.R. § 97.22; (2) the 3-month deadline in 7 C.F.R. § 97.22 was contrary to the Plant Variety Protection Act; (3) the Secretary of Agriculture had no authority to issue 7 C.F.R. § 97.22; (4) the United States Department of Agriculture did not explain the basis for or reference the legal authority for 7 C.F.R. § 97.22 in the relevant rulemaking documents; (5) 7 C.F.R. § 97.22 is so unclear that it cannot be enforced; and (6) Dr. Virginia Lehman, a member of the Plant Variety Protection Board and a person involved with the development of Lofts L-93, did not recuse herself from the Plant Variety Protection Board hearing conducted to provide advice to the Judicial Officer regarding Petitioner's Petition. It is a well established principal that agencies must follow their own regulations.

Robert A. Ertman, for Commissioner.
Richard G. Stoll and Richard C. Peet, for Petitioner.
Initial decision issued by Paul M. Zankowski, Commissioner, Plant Variety Protection Office, Science and Technology Programs, AMS, USDA.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

In June 2002, J.R. Simplot Company [hereinafter Petitioner] requested revival of an abandoned application for plant variety protection that had previously been filed with the Plant Variety Protection Office, Science and Technology Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Plant Variety Protection Office].[1] The application for plant variety protection that is the subject of Petitioner's request is for a variety of creeping bentgrass known as "Lofts L-93." The Plant Variety Protection Office designated the application as "PVP Application No. 9600256." Petitioner made its request pursuant to the Plant Variety Protection Act, as amended (7 U.S.C. §§ 2321-2582) [hereinafter the Plant Variety Protection Act], and the regulations issued under the Plant Variety Protection Act (7 C.F.R. pt. 97) [hereinafter the Regulations]. In July 2002, the Commissioner denied Petitioner's request stating PVP Application No. 9600256 had been abandoned on November 15, 2000, and the 3-month period for revival of abandoned plant variety protection applications, provided in 7 C.F.R. §

[1]Letter dated June 28, 2002, from Richard C. Peet, to Paul M. Zankowski, Commissioner, Plant Variety Protection Office [hereinafter the Commissioner].

97.22, had expired on February 16, 2001.[2]

On September 20, 2002, Petitioner filed a "Petition Under 7 C.F.R. § 97.300 for Revival of PVP Application No. 9600256 in the Name of J.R. Simplot Company" [hereinafter Petition]. Petitioner requests that I: (1) waive the 3-month bar for revival of plant variety protection applications in 7 C.F.R. § 97.22 because the application of the bar under the facts in this proceeding would be unjust and inequitable; (2) grant Petitioner's request for a revival of PVP Application No. 9600256 as a pending application; (3) direct the Commissioner to arrange a schedule with Petitioner's representatives for the completion of the examination of PVP Application No. 9600256; and (4) direct the Commissioner to amend the public record to reflect that PVP Application No. 9600256 is still pending (Pet. at 30-31).

On December 4, 2002, the Commissioner filed an "Answer to Petition for Revival of Abandoned Application" [hereinafter Answer] requesting that I deny the Petition (Answer at 11). On December 10, 2002, Petitioner filed "Simplot's Reply to Commissioner's Answer to Simplot's Petition for Revival of Application No. 9600256."

Petitioner requested an informal conference pursuant to 7 C.F.R. § 97.300(d). On January 2, 2003, I held an informal conference in connection with the instant proceeding and a related proceeding captioned *In re J.R. Simplot Company*, PVPA Docket No. 02-0001. Richard G. Stoll and Richard C. Peet, Foley & Lardner, Washington, DC, represented Petitioner. Joel Barker and Gray Young also appeared on behalf of Petitioner. Robert A. Ertman, Office of the General Counsel, United States Department of Agriculture, represented the Commissioner.

On February 18, 2003, pursuant to 7 U.S.C. § 2443, I requested that the Plant Variety Protection Board provide me with written advice regarding the Petition. During its March 5 and 6, 2003, meeting, the Plant Variety Protection Board held a hearing to advise the Judicial Officer on the Petition filed in the instant proceeding and Petitioner's "Petition Under 7 C.F.R. § 97.300 for Recording PVP Application No. 9600256 in the Name of J.R. Simplot Company" filed in *In re J.R. Simplot Company*, PVPA Docket No. 02-0001. Richard G. Stoll and Joel Barker appeared on behalf of Petitioner. Robert A. Ertman appeared on behalf of the Commissioner. At the conclusion of the hearing, the Plant Variety Protection Board voted 10 to 1 in favor of a motion to advise me that the procedures followed by the Plant Variety Protection Office with respect to *In re J.R. Simplot Company*, PVPA Docket No. 02-0001, and *In*

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[2]Letter dated July 25, 2002, from the Commissioner to Richard C. Peet (Ex. B, attached to Pet.).

re J.R. Simplot Company, PVPA Docket No. 02-0002, "were fair and consistent with their [sic] handling of PVP applications" and to recommend that PVP Application No. 9600256 "should not be revived" (Transcript of the Plant Variety Protection Board Hearing at 78-80). On April 11, 2003, the Plant Variety Protection Board provided me with a copy of the transcript containing its advice and recommendation.

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.

TITLE 7—AGRICULTURE

. . . .

CHAPTER 57—PLANT VARIETY PROTECTION

SUBCHAPTER I—PLANT VARIETY PROTECTION OFFICE

PART A—ORGANIZATION AND PUBLICATIONS

§ 2321. Establishment

There is hereby established in the Department of Agriculture an office to be known as the Plant Variety Protection Office, which shall have the functions set forth in this chapter.

. . . .

§ 2326. Regulations

The Secretary may establish regulations, not inconsistent with law, for the conduct of proceedings in the Plant Variety Protection Office after consultations with the Plant Variety Protection Board.

§ 2327. Plant Variety Protection Board

(a) Appointment

The Secretary shall appoint a Plant Variety Protection Board. The Board shall consist of individuals who are experts in various areas of varietal development covered by this chapter. Membership of the Board shall include farmer representation and shall be drawn approximately equally from the private or seed industry sector and from the sector of

government or the public. The Secretary or the designee of the Secretary shall act as chairperson of the Board without voting rights except in the case of ties.

(b) Functions of Board

The functions of the Plant Variety Protection Board shall include:

(1) Advising the Secretary concerning the adoption of Rules and Regulations to facilitate the proper administration of this chapter;

(2) Making advisory decisions on all appeals from the examiner. The Board shall determine whether to act as a full Board or by panels it selects; and whether to review advisory decisions made by a panel. For service on such appeals, the Board may select, as temporary members, experts in the area to which the particular appeal relates; and

(3) Advising the Secretary on all questions under section 2404 of this title.

(c) Compensation of Board

The members of the Plant Variety Protection Board shall serve without compensation except for standard government reimbursable expenses.

. . . .

SUBCHAPTER II—PROTECTABILITY OF PLANT VARIETIES AND CERTIFICATES OF PROTECTION

PART D—PROTECTABILITY OF PLANT VARIETIES

. . . .

§ 2402. Right to plant variety protection; plant varieties protectable

(a) In general

The breeder of any sexually reproduced or tuber propagated plant variety (other than fungi or bacteria) who has so reproduced the variety, or the successor in interest of the breeder, shall be entitled to plant variety protection for the variety, subject to the conditions and requirements of this chapter, if the variety is–

(1) new, in the sense that, on the date of filing of the application for plant variety protection, propagating or harvested material of the

variety has not been sold or otherwise disposed of to other persons, by or with the consent of the breeder, or the successor in interest of the breeder, for purposes of exploitation of the variety–

(A) in the United States, more than 1 year prior to the date of filing; or

(B) in any area outside of the United States–

(i) more than 4 years prior to the date of filing, except that in the case of a tuber propagated plant variety the Secretary may waive the 4-year limitation for a period ending 1 year after April 4, 1996; or

(ii) in the case of a tree or vine, more than 6 years prior to the date of filing;

(2) distinct, in the sense that the variety is clearly distinguishable from any other variety the existence of which is publicly known or a matter of common knowledge at the time of the filing of the application;

(3) uniform, in the sense that any variations are describable, predictable, and commercially acceptable; and

(4) stable, in the sense that the variety, when reproduced, will remain unchanged with regard to the essential and distinctive characteristics of the variety with a reasonable degree of reliability commensurate with that of varieties of the same category in which the same breeding method is employed.

. . . .

PART F—EXAMINATIONS; RESPONSE TIME; INITIAL APPEALS

§ 2441. Examination of application

The Secretary shall cause an examination to be made of the application and if on such examination it is determined that the applicant is entitled to plant variety protection under the law, the Secretary shall issue a notice of allowance of plant variety protection therefore as hereinafter provided.

§ 2442. Notice of refusal; reconsideration

(a) Whenever an application is refused, or any objection or requirement made by the examiner, the Secretary shall notify the applicant thereof, stating the reasons therefore, together with such information and references as may be useful in judging the propriety of

continuing the prosecution of the application; and if after receiving such notice the applicant requests reconsideration, with or without amendment, the application shall be reconsidered.

(b) For taking appropriate action after the mailing to an applicant of an action other than allowance, the applicant shall be allowed at least 30 days, and not more than 180 days, or such other time as the Secretary shall set in the refusal, or such time as the Secretary may allow as an extension. Without such extension, action may be taken up to three months late by paying an additional fee to be prescribed by the Secretary.

§ 2443. Initial appeal

When an application for plant variety protection has been refused by the Plant Variety Protection Office, the applicant may appeal to the Secretary. The Secretary shall seek the advice of the Plant Variety Protection Board on all appeals, before deciding the appeal.

PART G—APPEALS TO COURTS AND OTHER REVIEW

§ 2461. Appeals

From the decisions made under sections 2404, 2443, 2501, and 2568 of this title appeal may, within sixty days or such further times as the Secretary allows, be taken under the Federal Rules of Appellate Procedure. The United States Court of Appeals for the Federal Circuit shall have jurisdiction of any such appeal.

§ 2462. Civil action against Secretary

An applicant dissatisfied with a decision under section 2443 or 2501 of this title, may, as an alternative to appeal, have remedy by civil action against the Secretary in the United States District Court for the District of Columbia. Such action shall be commenced within sixty days after such decision or within such further time as the Secretary allows. The court may, in the case of review of a decision by the Secretary refusing plant variety protection, adjudge that such applicant is entitled to receive a certificate of plant variety protection for the variety as specified in the application as the facts of the case may appear, on compliance with the requirements of this chapter.

PART H—CERTIFICATES OF PLANT VARIETY PROTECTION

. . . .

§ 2483. Contents and term of plant variety protection

(a) Certificate

(1) Every certificate of plant variety protection shall certify that the breeder (or the successor in interest of the breeder), has the right, during the term of the plant variety protection, to exclude others from selling the variety, or offering it for sale, or reproducing it, or importing it, or exporting it, or using it in producing (as distinguished from developing) a hybrid or different variety therefrom, to the extent provided by this chapter.

(2) If the owner so elects, the certificate shall—

(A) specify that seed of the variety shall be sold in the United States only as a class of certified seed; and

(B) if so specified, conform to the number of generations designated by the owner.

(3) An owner may waive a right provided under this subsection, other than a right that is elected by the owner under paragraph (2)(A).

(4) The Secretary may at the discretion of the Secretary permit such election or waiver to be made after certificating and amend the certificate accordingly, without retroactive effect.

(b) Term

(1) In general

Except as provided in paragraph (2), the term of plant variety protection shall expire 20 years from the date of issue of the certificate in the United States, except that—

(A) in the case of a tuber propagated plant variety subject to a waiver granted under section 2402(a)(1)(B)(i) of this title, the term of the plant variety protection shall expire 20 years after the date of the original grant of the plant breeder's rights to the variety outside the United States; and

(B) in the case of a tree or vine, the term of the plant variety protection shall expire 25 years from the date of issue of the certificate.

(2) Exceptions

If the certificate is not issued within three years from the effective filing date, the Secretary may shorten the term by the amount of delay in the prosecution of the application attributed by the Secretary to the applicant.

(c) Expiration upon failure to comply with regulations; notice

The term of plant variety protection shall also expire if the owner fails to comply with regulations, in force at the time of certificating, relating to replenishing seed in a public repository, or requiring the submission of a different name for the variety, except that this expiration shall not occur unless notice is mailed to the last owner recorded as provided in section 2531(d) of this title and the last owner fails, within the time allowed thereafter, not less than three months, to comply with said regulations, paying an additional fee to be prescribed by the Secretary.

7 U.S.C. §§ 2321, 2326-2327, 2402(a), 2441-2443, 2461-2462, 2483 (footnote omitted).

7 C.F.R.:

TITLE 7—AGRICULTURE

. . . .

SUBTITLE B—REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

CHAPTER I—AGRICULTURAL MARKETING SERVICE (STANDARDS, INSPECTIONS, MARKETING PRACTICES), DEPARTMENT OF AGRICULTURE

. . . .

SUBCHAPTER E—COMMODITY LABORATORY TESTING PROGRAMS

. . . .

PART 97—PLANT VARIETY AND PROTECTION

SCOPE

§ 97.1 General.

Certificates of protection are issued by the Plant Variety Protection office for new, distinct, uniform, and stable varieties of sexually reproduced or tubor propagated plants. Each certificate of plant variety protection certifies that the breeder has the right, during the term of the protection, to prevent others from selling the variety, offering it for sale, reproducing it, importing or exporting it, conditioning it, stocking it, or using it in producing a hybrid or different variety from it, as provided by the Act.

DEFINITIONS

§ 97.2 Meaning of words.

Words used in the regulations in this part in the singular form will import the plural, and vice versa, as the case may demand. The definitions of terms contained in the Act shall apply to such terms when used in this part. As used throughout the regulations in this part, unless the context requires otherwise, the following terms will be considered to mean:

Abandoned application. An application which has not been pursued to completion within the time allowed by the Office or has been voluntarily abandoned.

Act. The Plant Variety Protection Act (7 U.S.C. 2321 et seq.).

. . . .

Applicant. The person who applied for a certificate of plant variety protection.

Application. An application for plant variety protection under the Act.

Assignee. A person to whom an owner assigns his/her rights in whole or in part.

. . . .

Certificate. A certificate of plant variety protection issued under the Act by the Office.

. . . .

Commissioner. The Examiner in Chief of the Office.

. . . .

Examiner. An employee of the Plant Variety Protection Office who determines whether a certificate is entitled to be issued. The term shall,

in all cases, include the Commissioner.

. . . .

Office or Plant Variety Protection Office. The Plant Variety Protection Office, Science and Technology Division, AMS, USDA.

. . . .

Owner. A breeder who developed or discovered a variety for which plant variety protection may be applied for under the Act, or a person to whom the rights to such variety have been assigned or transferred.

ADMINISTRATION

§ 97.3 Plant Variety Protection Board.

(a) The Plant Variety Protection Board shall consist of 14 members appointed for a 2-year term. The Board shall be appointed every 2 years and shall consist of individuals who are experts in various areas of varietal development. The membership of the Board, which shall include farmer representation, shall be drawn approximately equally from the private or seed industry sector and from the government or public sector. No member shall be eligible to act on any matter involving any appeal or questions under section 44 of the Act, in which the member or his or her employer has a direct financial interest.

(b) The functions of the Board are to:

(1) Advise the Secretary concerning adoption of rules and regulations to facilitate the proper administration of the Act;

(2) Make advisory decisions on all appeals from the examiner or Commissioner;

(3) Advise the Secretary on the declaration of a protected variety open to use in the public interest; and

(4) Advise the Secretary on any other matters under the regulations in this part.

(c) The proceedings of the Board shall be conducted in accordance with the Federal Advisory Committee Act, Administrative Regulations of the U.S. Department of Agriculture (7 CFR part 25), and such additional operating procedures as are adopted by members of the Board.

. . . .

THE APPLICATION

. . . .

§ 97.20 Abandonment for failure to respond within the time limit.

(a) Except as otherwise provided in § 97.104, if an applicant fails to advance actively his or her application within 30 days after the date when the last request for action was mailed to the applicant by the Office, or within such longer time as may be fixed by the Commissioner, the application shall be deemed abandoned. The application fee in such cases will not be refunded.

(b) The submission of an amendment to the application, not responsive to the last request by the Office for action, and any proceedings relative thereto, shall not operate to save the application from abandonment.

(c) When the applicant makes a bona fide attempt to advance the application, and is in substantial compliance with the request for action, but has inadvertently failed to comply with some procedural requirement, opportunity to comply with the procedural requirement shall be given to the applicant before the application shall be deemed abandoned. The Commissioner may set a period, not less than 30 days, to correct any deficiency in the application.

§ 97.21 Extension of time for reply.

The time for reply by an applicant to a request by the Office for certain action, shall be extended by the Commissioner only for good and sufficient cause, and for a specified reasonable time. A request for extension and appropriate fee shall be filed on or before the specified time for reply. In no case shall the mere filing of a request for extension require the granting of an extension or state the time for reply.

§ 97.22 Revival of an application abandoned for failure to reply.

An application abandoned for failure on the part of the applicant to advance actively his or her application to its completion, in accordance with the regulations in this part, may be revived as a pending application within 3 months of such abandonment, upon a finding by the Commissioner that the failure was inadvertent or unavoidable and without fraudulent intent. A request to revive an abandoned application shall be accompanied by a written statement showing the cause of the failure to respond, a response to the last request for action, and by the specified fee.

§ 97.23 Voluntary withdrawal and abandonment of an application.

(a) An application may be voluntarily withdrawn or abandoned by submitting to the Office a written request for withdrawal or abandonment, signed by the applicant or his or her attorney of record, if any, or the assignee of record, if any.

(b) An application which has been voluntarily abandoned may be revived within 3 months of such abandonment by the payment of the prescribed fee and a showing that the abandonment occurred without fraudulent intent.

(c) An original application which has been voluntarily withdrawn shall be returned to the applicant and may be reconsidered only by refiling and payment of a new application fee.

. . . .

APPEAL TO THE SECRETARY

§ 97.300 Petition to the Secretary.

(a) Petition may be made to the Secretary from any final action of the Commissioner denying an application or refusing to allow a certificate to be issued, or from any adverse decision of the Commissioner made under §§ 97.18(c), 97.107, 97.201(e), and 97.220.

. . . .

(d) Upon request, an opportunity to present data, views, and arguments orally, in an informal manner or in a formal hearing, shall be given to interested persons. If a formal hearing is requested, the proceeding shall be conducted in accordance with the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under various Statutes set forth in §§ 1.130 through 1.151 of this title.

. . . .

§ 97.302 Decision by the Secretary.

(a) The Secretary, after receiving the advice of the Board, may affirm or reverse the decision of the Commissioner, in whole or in part.

(b) Should the decision of the Secretary include an explicit statement that a certificate be allowed, based on an amended application, the applicant shall have the right to amend his or her application in conformity with such statement and such decision shall be binding on the Commissioner.

. . . .

REVIEW OF DECISIONS BY COURT

§ 97.500 Appeal to U.S. Courts.

Any applicant dissatisfied with the decision of the Secretary on appeal may appeal to the U.S. Court of Customs and Patent Appeals or the U.S. Courts of Appeals, or institute a civil action in the U.S. District Court as set forth in the Act. In such cases, the appellant or plaintiff shall give notice to the Secretary, state the reasons for appeal or civil action, and obtain a certified copy of the record. The certified copy of the record shall be forwarded to the Court by the Plant Variety Protection Office on order of, and at the expense of the appellant or plaintiff

7 C.F.R. §§ 97.1-.3, .20-23(a)-(c), .300(a), (d), .302, .500.

PETITIONER'S RIGHT TO APPEAL UNDER 7 U.S.C. § 2443 AND 7 C.F.R. § 97.300(a)

Prior to addressing the merits, Petitioner's right to appeal the Commissioner's denial of Petitioner's request for revival of PVP Application No. 9600256 under 7 U.S.C. § 2443 and 7 C.F.R. § 97.300(a) and my authority to consider Petitioner's appeal, should be briefly addressed.

Section 63 of the Plant Variety Protection Act (7 U.S.C. § 2443) provides, when the Plant Variety Protection Office refuses an application for plant variety protection, the applicant may appeal to the Secretary of Agriculture. Effective December 1, 1977, the Secretary of Agriculture delegated to the Judicial Officer authority to exercise the functions of the Secretary of Agriculture where an appeal from a refusal of an application for plant variety protection is filed under 7 U.S.C. § 2443.[3] The Commissioner's denial of Petitioner's request for revival of PVP Application No. 9600256 is not literally a refusal of an application for plant variety protection. Nonetheless, the Commissioner's denial of Petitioner's request for revival of PVP Application No. 9600256 as a pending application has the same effect as a refusal of an application for plant variety protection. Therefore, while not free from doubt, I conclude: (1) Petitioner properly instituted its appeal of the Commissioner's denial of Petitioner's request for revival under 7 U.S.C. § 2443 and 7 C.F.R. § 97.300(a); and (2) Petitioner's appeal of the Commissioner's denial of Petitioner's request for revival falls within the authority delegated to the Judicial Officer by the Secretary of

[3] 68 Fed. Reg. 27,431-50 (May 20, 2003) (to be codified at 7 C.F.R. § 2.35(a)(8)). *See also* 42 Fed. Reg. 61,029-30 (Dec. 1, 1977).

Agriculture to hear appeals filed under 7 U.S.C. § 2443.

INTRODUCTION

Section 97.300(d) of the Regulations (7 C.F.R. § 97.300(d)) provides parties to a proceeding instituted under 7 C.F.R. § 97.300(a) the right to present their positions in an informal manner or in a formal hearing conducted in accordance with the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151). Petitioner chose the opportunity to present its position in an informal manner rather than in a formal hearing. Consequently, the record contains no exhibits that have been received into evidence and no testimony given under oath or affirmation and subject to cross-examination. Instead, the record consists of, and my findings of fact are based upon, the filings by Petitioner and the Commissioner and the presentations given by Petitioner and the Commissioner at the January 2, 2003, informal conference and the March 5, 2003, Plant Variety Protection Board hearing. A review of the filings and transcripts of the presentations by Petitioner and the Commissioner reveals that the salient facts are not in dispute. Instead, Petitioner and the Commissioner dispute the conclusions that should be drawn from those facts.

FINDINGS OF FACT

1. Petitioner is an agribusiness headquartered in Boise, Idaho. One of Petitioner's business lines is turf and horticulture. Petitioner's Jacklin Seed Division is a producer and marketer of grass seed for golf course and other uses. (Pet. at 3.)

2. One variety of golf course grass is a creeping bentgrass known as "Lofts L-93." Lofts Seed, Inc. originally developed the Lofts L-93 variety. Dr. Virginia Lehman, a member of the Plant Variety Protection Board, is one of the scientists who developed Lofts L-93 on behalf of Lofts Seed, Inc. On May 8, 1996, Lofts Seed, Inc. filed an application for a certificate of plant variety protection for Lofts L-93 with the Plant Variety Protection Office. The Plant Variety Protection Office designated the application "PVP Application No. 9600256." (Pet. at 3-4.)

3. In a letter dated January 21, 1999, to Dr. Virginia Lehman, the Plant Variety Protection Office requested that Lofts Seed, Inc. provide additional information regarding PVP Application No. 9600256 on or before April 21, 1999, as follows:

> All requested information must be in the Plant Variety Protection Office on or before **April 21, 1999**, or this application will be deemed abandoned. A proposal for an extension of time to supply the requested information may be made on or before the deadline specified above. Such a request must be accompanied by a $50 fee and an explanation of why additional time is necessary, the amount of time required, as well as a detailed plan explaining how the information will be obtained if the extension is granted. See sections 97.20 through 97.23, 97.104, and 97.175 of the Regulations and Rules of Practice under the Plant Variety Protection Act for information on extensions and abandoned applications.

Ex. A, Tab 9 at 2, attached to Pet. (emphasis in original).

4. Dr. Virginia Lehman requested that the Plant Variety Protection Office extend the time for providing the requested additional information to November 15, 2000. The Plant Variety Protection Office extended the time for receipt of the requested additional information to November 1, 2000. Subsequently, the Plant Variety Protection Office extended the time for receipt of the requested additional information to November 15, 2000. (Ex. A, Tabs 10 and 12, attached to Pet.)

5. In 1999, AgriBioTech, Inc. acquired Lofts Seed, Inc. and thereby obtained an ownership interest in Lofts L-93. In December 1999, AgriBioTech, Inc. notified the Plant Variety Protection Office of its interest in Lofts L-93 and PVP Application No. 9600256 and stated Dr. Virginia Lehman was authorized to deal with all of AgriBioTech, Inc.'s Plant Variety Protection Act "grass applications." (Pet. at 4-5; Ex. A, Tabs 2-3, attached to Pet.)

6. On January 25, 2000, AgriBioTech, Inc. filed for bankruptcy protection in the United States Bankruptcy Court for the District of Nevada. Petitioner, Budd Seed, and ProSeeds Marketing, Inc. purchased the majority of AgriBioTech, Inc.'s turf-seed assets, including the rights to Lofts L-93 and the rights to PVP Application No. 9600256. Petitioner, Budd Seed, and ProSeeds Marketing, Inc. split the assets which they purchased out of the AgriBioTech, Inc. bankruptcy, and on July 31, 2000, Petitioner became the sole owner of Lofts L-93. (Pet. at 5; Ex. A at 2, attached to Pet.; Ex. A, Tab 4, attached to Pet.; Transcript of the Informal Conference at 10-12.)

7. In a letter dated December 8, 2000, the Plant Variety Protection Office informed Dr. Virginia Lehman that, as the November 15, 2000, deadline for providing the Plant Variety Protection Office with additional information had passed, PVP Application No. 9600256 was considered abandoned, as follows:

> We have not received the information requested by the extended deadline of November 15, 2000. Since the information requested was not received within the extended time period, the subject application is considered permanently abandoned as of November 16, 2000.

Ex. A, Tab 12, attached to Pet.

8. Until approximately late March 2001, Petitioner was unaware of the November 15, 2000, deadline for providing the Plant Variety Protection Office with additional information and the abandoned status of PVP Application No. 9600256 that took effect beginning November 16, 2000. The Plant Variety Protection Office website listed the PVP Application No. 9600256 applicant as "AgriBioTech, Inc." and the status of PVP Application No. 9600256 as "Application Pending" at least until March 22, 2001. During the period following Petitioner's acquisition of Lofts L-93, Petitioner used the Plant Variety Protection Office website to track the status of PVP Application No. 9600256. (Pet. at 6; Ex. A at 5, attached to Pet.; Ex. A, Tab 17, attached to Pet.)

9. Petitioner first contacted the Plant Variety Protection Office regarding Lofts L-93 by letter dated March 22, 2001. In that letter, Petitioner requested that the Plant Variety Protection Office record the assignment from AgriBioTech, Inc. to Petitioner of various plant varieties, including Lofts L-93. Dr. A. Douglas Brede, Research Director at Petitioner's Jacklin Seed Division, learned that the Plant Variety Protection Office considered PVP Application No. 9600256 abandoned, and in a letter dated March 29, 2001, requested that the Plant Variety Protection Office "lift the abandonment of the 'L-93' PVP application." (Pet. at 6; Ex. A at 7, attached to Pet.; Ex. A, Tabs 4, 19, and 32, attached to Pet.)

10. In a letter dated April 20, 2001, the Plant Variety Protection Office responded to Petitioner's March 29, 2001, letter stating the Plant Variety Protection Office had declared PVP Application No. 9600256 permanently abandoned, as follows:

> On November 16, 2000, in accordance with section 97.20(a) of the Regulations and Rules of Practice under the Plant Variety Protection Act (PVPA), application for [Lofts L-93] was declared abandoned. In accordance with section 97.22, the applicant was given 3 months to revive the abandoned application. This Office, having received no request from the applicant's representative, declared the application permanently abandoned.

Ex. A, Tab 33, attached to Pet.

11. In a letter dated May 13, 2002, the Commissioner denied Petitioner's request to record the assignment of Lofts L-93 from AgriBioTech, Inc. to Petitioner. In that letter, the Commissioner states the denial of Petitioner's request to record the assignment is not a determination of Petitioner's right to revive PVP Application No. 9600256 as a pending application, as follows:

> This is not a determination that Simplot does not possess some residual interest in the abandoned application, including the right to pursue its revival as a pending application. The procedure for the revival of an application abandoned for failure to advance the application is to submit a request to the Commissioner showing the cause of the failure to respond, a response to the last request for action, and the required fee (7 CFR 97.22). Such a request must be timely.

Ex. A, Tab 1, attached to Pet.

12. In June 2002, Petitioner requested revival of PVP Application No. 9600256 (Ex. A, attached to Pet.). The Commissioner denied Petitioner's request for revival of PVP Application No. 9600256 as a pending application in a letter dated July 25, 2002, which states as follows:

> Upon reconsideration, the request of J.R. Simplot Company ("Simplot") to revive the abandoned application for 'Lofts L-93' is denied.
>
> The revival of an abandoned application is governed by Section 97.22 of the regulations (7 C.F.R. 97.22), which provides as follows:
>
> 97.22 Revival of an application abandoned for failure to reply.
>
> An application abandoned for failure on the part of the applicant to advance actively his or her application to its completion, in accordance with the regulations in this part, may be revived as a pending application within 3 months of such abandonment, upon a finding by the Commissioner that the failure was inadvertent or unavoidable and without fraudulent intent. A request to revive an abandoned application shall be accompanied by a written statement showing the cause of the failure to respond, a response to the last request for action, and by the specified fee.

The Plant Variety Protection Office ("PVPO") recognizes Simplot as the successor in interest to AgriBioTech, Inc. (the successor to the original applicant) and entitled to pursue the revival of the abandoned application.

On March 22, 2001, Simplot wrote to the PVPO, requesting that the assignment of various certificates of protection and applications, including the application at issue, be recorded. This was the first communication from Simplot regarding the application. Within a few days, Simplot was informed that the application had been abandoned and on March 29, 2001, Simplot wrote asking for a waiver of the time limits. It is undisputed that the application was abandoned by Simplot's predecessor on November 15, 2000, by failing to respond to a request for information from the PVPO by that deadline.

Simplot contends that the abandoned application should be revived because the failure to actively advance the certificate is not attributable to Simplot and because the delay in responding to the communication was inadvertent and without fraudulent intent attributable to Simplot. In particular, Simplot contends that it faced "numerous roadblocks" in its attempt to actively advance the application. These included the negligence of its predecessor (and its predecessor's agents) in allowing the abandonment, the general disarray of its predecessor's records and property, and "the unwillingness of the PVPO to allow Simplot access to the property purchased subject to the Bankruptcy Court's order." (Petition, p. 3)

In retrospect, PVPO should have provided Simplot access to a copy of the abandoned application and related correspondence. Simplot was the successor in interest to the applicant of record and the matter of the recognition of the assignment should have been distinguished from the question of the recordability of an abandoned application. However, this delay played no part in the permanent abandonment of the application. The application was abandoned on November 15, 2000. The time for the possible revival of the application expired three months later, on February 16, 2001, before Simplot's first communication with the PVPO.

As stated in the letter of May 13, 2002, denying the request that the abandoned application be recorded, any request to revive an abandoned

application must be timely. It is unfortunate that the application was not actively advanced by Simplot's predecessors and was abandoned. Nonetheless, the time for the possible revival of the abandoned certificate expired before Simplot attempted to revive it.

Accordingly, the request to return application no. 9600256 for the variety 'Lofts L-93' to pending status must be denied.

Ex. B, attached to Pet.

13. During its March 5 and 6, 2003, meeting, the Plant Variety Protection Board held a hearing to advise the Judicial Officer on the Petition. At the conclusion of the hearing, the Plant Variety Protection Board voted 10 to 1 in favor of a motion to advise the Judicial Officer that the procedures followed by the Plant Variety Protection Office with respect to *In re J.R. Simplot Company*, PVPA Docket No. 02-0002, "were fair and consistent" with its handling of plant variety protection applications and to recommend that PVP Application No. 9600256 "should not be revived." (Transcript of the Plant Variety Protection Board Hearing at 78-80.)

CONCLUSIONS OF LAW

Based on the Findings of Fact in this Decision and Order, I conclude:

1. Petitioner properly instituted its appeal of the Commissioner's denial of its request for revival of PVP Application No. 9600256 under 7 U.S.C. § 2443 and 7 C.F.R. § 97.300(a);

2. The Secretary of Agriculture has jurisdiction to hear Petitioner's appeal from the Commissioner's denial of its request for revival of PVP Application No. 9600256 under 7 U.S.C. § 2443 and 7 C.F.R. § 97.300(a);

3. Petitioner's appeal of the Commissioner's denial of its request for revival of PVP Application No. 9600256 falls within the authority delegated to the Judicial Officer by the Secretary of Agriculture to hear appeals filed under 7 U.S.C. § 2443;

4. The failure to advance PVP Application No. 9600256 was not "unavoidable" as that term is used in 7 C.F.R. § 97.22;

5. The failure to advance PVP Application No. 9600256 was "inadvertent" and "without fraudulent intent" as those terms are used in 7 C.F.R. § 97.22;

6. PVP Application No. 9600256 was abandoned effective November 16, 2000;

7. PVP Application No. 9600256 was not revived as a pending application

within 3 months following abandonment as required by 7 C.F.R. § 97.22; and

8. The Commissioner's denial of Petitioner's request to revive PVP Application No. 9600256 as a pending application, which Petitioner submitted after the 3-month period for revival provided in 7 C.F.R. § 97.22 had expired, was not error.

DISCUSSION

Petitioner's Petition

Section 97.22 of the Regulations (7 C.F.R. § 97.22) provides that an application abandoned for failure on the part of an applicant to advance the application may be revived as a pending application within 3 months of the abandonment, upon a finding by the Commissioner that the failure to advance the application was inadvertent or unavoidable and without fraudulent intent. The filings and presentations by the parties establish that PVP Application No. 9600256 was not advanced and was abandoned effective November 16, 2000; thus, the 3-month period for revival of PVP Application No. 9600256 as a pending application expired February 16, 2001. Neither the applicant of record, AgriBioTech, Inc. nor Petitioner requested revival of PVP Application No. 9600256 as a pending application during the 3-month period for revival provided in 7 C.F.R. § 97.22. Petitioner first communicated with the Plant Variety Protection Office regarding PVP Application No. 9600256 in a letter dated March 22, 2001, 1 month 6 days after the 3-month period for revival provided in 7 C.F.R. § 97.22 had expired. Petitioner requested revival of PVP Application No. 9600256 in a letter dated June 28, 2002. The Commissioner denied Petitioner's request for revival of PVP Application No. 9600256 because the time for possible revival expired before Petitioner attempted to revive PVP Application No. 9600256. Petitioner appeals the Commissioner's denial of its request to revive PVP Application No. 9600256 as a pending application.

Petitioner raises seven issues in its Petition. First, Petitioner contends the 3-month period for revival of abandoned applications in 7 C.F.R. § 97.22 is a procedural rule that the United States Department of Agriculture may waive when justice requires. Petitioner argues that justice requires a waiver of the deadline for revival of PVP Application No. 9600256. (Pet. at 13-17.) The Commissioner apparently agrees that 7 C.F.R. § 97.22 is a procedural rule but states: "No case has held that an agency cannot issue procedural rules and then follow them. Procedural rules are rules, not suggestions." (Answer at 8.)

I agree with Petitioner's contention that the 3-month revival period in 7 C.F.R. § 97.22 is a procedural rule. However, once an applicant abandons an

application for plant variety protection and the period for reviving the application has expired, the abandoned application is permanently abandoned and the Commissioner then has no application before him. With no application before him, the Commissioner cannot change the status of the application from "permanently abandoned" to "pending."

Moreover, even if I found the Commissioner could have waived the deadline for revival of PVP Application No. 9600256 after February 16, 2001, I would not find that the Commissioner erred by failing to waive the deadline. Petitioner, relying on *American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532 (1970), contends a long-established principle of administrative law permits agencies to waive procedural regulations when justice requires (Pet. at 13). However, equally well-established is the principle that ordinarily agencies must follow their own regulations.[4]

Petitioner cites three cases in which agencies waived procedural regulations and on judicial review each agency waiver was upheld (Pet. at 13-15).[5] While these cases support Petitioner's general point that an agency may, under limited circumstances, waive procedural rules, the cases are not applicable to the instant proceeding in which the Commissioner did not waive 7 C.F.R. § 97.22 but, instead, followed the regulation.

Petitioner cites one case, *Spitzer Great Lakes Ltd. v. EPA*, 173 F.3d 412 (6th Cir. 1999), in which the Court held the Environmental Protection Agency abused its discretion by refusing to waive a procedural regulation where an appellant in an agency proceeding relied upon and complied with materially misleading information provided by the agency. However, the facts in the instant proceeding are not similar to those in *Spitzer Great Lakes Ltd*. In the instant proceeding, Petitioner first contacted the Commissioner regarding Lofts L-93 in a letter dated March 22, 2001, 1 month 6 days after the period for reviving PVP Application No. 9600256 had expired. Therefore, unlike *Spitzer Great Lakes Ltd.*, there was no agency communication to Petitioner that could

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[4] *St. Anthony Hospital v. HHS*, 309 F.3d 680, 709 (10th Cir. 2002); *Nelson v. INS*, 232 F.3d 258, 262 (1st Cir. 2000); *Gonzalez v. Reno*, 212 F.3d 1338, 1349 (11th Cir.), *cert. denied*, 530 U.S. 1270 (2000); *Bergamo v. CFTC*, 192 F.3d 78, 79 (2d Cir. 1999); *Cherokee Nation of Oklahoma v. Babbitt*, 117 F.3d 1489, 1499 (D.C. Cir. 1997); *Oy v. United States*, 61 F.3d 866, 871 (2d Cir. 1995); *Adams Telcom, Inc. v. FCC*, 38 F.3d 576, 582 (D.C. Cir. 1994); *Florida Institute of Technology v. FCC*, 952 F.2d 549, 553 (D.C. Cir. 1992); *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989); *Reuters Ltd. v. FCC*, 781 F.2d 946, 950 (D.C. Cir. 1986).

[5] Specifically, Petitioner cites *American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532 (1970); *Fried v. Hinson*, 78 F.3d 688 (D.C. Cir. 1996); and *Oy v. United States*, 61 F.3d 899 (Fed. Cir. 1995).

have caused or contributed to Petitioner's failure to revive PVP Application No. 9600256 prior to the expiration of the revival period. The record establishes the Commissioner did not know and did not have reason to know that Petitioner had any interest in Lofts L-93 or PVP Application No. 9600256 until after the period for revival of the abandoned application had expired. The record also establishes the Commissioner provided accurate information regarding the status of PVP Application No. 9600256 to AgriBioTech, Inc. the applicant of record.

Petitioner asserts a number of facts illustrate the injustice that follows from the Commissioner's refusal to waive the deadline for revival of PVP Application No. 9600256. Petitioner contends AgriBioTech, Inc. only provided Petitioner with limited access to its chaotic and uninformative business records regarding Lofts L-93 and other purchases; AgriBioTech, Inc. and Dr. Virginia Lehman failed to cooperate with Petitioner regarding Lofts L-93 and PVP Application No. 9600256; AgriBioTech, Inc. and Dr. Virginia Lehman allowed PVP Application No. 9600256 to become abandoned; and neither AgriBioTech, Inc. nor Dr. Virginia Lehman informed Petitioner of the status of PVP Application No. 9600256 (Pet. at 15-17). I find the purported lack of communication and cooperation between Petitioner and AgriBioTech, Inc. unfortunate. However, the Commissioner did not cause the lack of communication and cooperation between Petitioner and AgriBioTech, Inc. and prior to the expiration of the revival period, the Commissioner did not know or have reason to know about the lack of communication and cooperation between Petitioner and AgriBioTech, Inc. I do not find Petitioner's business relationships with AgriBioTech, Inc. and with Dr. Virginia Lehman compel the Commissioner to waive the deadline for revival of PVP Application No. 9600256.

Petitioner also contends the Commissioner's refusal is unjust because of purportedly confusing Plant Variety Protection Office communications provided Petitioner. Petitioner references two letters, one dated April 20, 2001, from the Plant Variety Protection Office to Dr. A. Douglas Brede, the other dated May 13, 2002, from the Commissioner to Gary M. Zinkgraf (Pet. at 17; Ex. A, Tabs 1 and 33, attached to Pet.), which Petitioner found confusing. The Plant Variety Protection Office and the Commissioner sent Petitioner these letters after the period for revival of PVP Application No. 9600256 had expired; thus, the letters could not have caused or contributed to Petitioner's failure to request revival of PVP Application No. 9600256 within the 3-month period provided in 7 C.F.R. § 97.22. Therefore, I do not find the letters dated April 20, 2001, and May 13, 2002, support Petitioner's contention that justice requires that the Commissioner waive the deadline for revival of PVP Application No. 9600256.

Finally, Petitioner asserts the Plant Variety Protection Office website listed PVP Application No. 9600256 as "'pending' well into March of 2001." (Pet. at 16.) I find the Commissioner's inaccurate website troubling. However, the website contains information for the public and the Commissioner also communicates directly with the applicant of record (Transcript of the Informal Conference at 59). The Commissioner communicated with the applicant of record, AgriBioTech, Inc. regarding the status of PVP Application No. 9600256. The record establishes that the Commissioner accurately informed AgriBioTech, Inc. of the status of PVP Application No. 9600256, the date on which PVP Application No. 9600256 became abandoned, and the date on which the period for revival of PVP Application No. 9600256 as a pending application would expire. Petitioner became sole owner of Lofts L-93 on July 31, 2000, and could have become the applicant of record at any time after July 31, 2000, merely by submitting a request to the Commissioner (Transcript of the Informal Conference at 59). Petitioner did not request to become the applicant of record prior to the expiration of the period for revival of PVP Application No. 9600256, and the Commissioner, as he was required to do, continued to communicate with AgriBioTech, Inc. I do not find, under these circumstances, that the inaccurate Plant Variety Protection Office website supports Petitioner's contention that justice requires that the Commissioner waive the deadline for revival of PVP Application No. 9600256.

Second, Petitioner contends the Plant Variety Protection Act explicitly addresses delay caused by an applicant in a manner directly contrary to the 3-month revival period in 7 C.F.R. § 97.22. Petitioner correctly points out that 7 U.S.C. § 2483(b) limits the term of a certificate of plant variety protection to 20 years from the date of issuance of the certificate in the United States[6] and provides, if the certificate is not issued within 3 years from the effective filing date of the application for the certificate, the Secretary of Agriculture may shorten the term of the certificate by the amount of delay in prosecution of the application attributable to the applicant. Petitioner states, rather than authorizing the Secretary of Agriculture to declare an application abandoned, Congress authorized the Secretary of Agriculture to reduce the period of plant variety protection afforded by a certificate for delay the Secretary of Agriculture determines is attributable to the applicant. (Pet. at 19-20.) The Commissioner

[6]In the case of a tuber propagated plant variety subject to a waiver granted under 7 U.S.C. § 2402(a)(1)(B)(i), the term of a certificate of plant variety protection is 20 years after the date of the original grant of the plant breeder's rights to the variety outside the United States. In the case of a tree or vine, the term of a certificate of plant variety protection is 25 years from the date of issuance of the certificate. 7 U.S.C. § 2483(b)(1)(A), (B).

did not respond to this issue in his Answer.

I find nothing in the Plant Variety Protection Act to indicate that Congress intended 7 U.S.C. § 2483(b) as a limitation on the Secretary of Agriculture's authority in 7 U.S.C. § 2326 to establish regulations for the conduct of proceedings in the Plant Variety Protection Office or that Congress intended 7 U.S.C. § 2483(b)(2) to be the exclusive mechanism to discourage applicant delay in the prosecution of an application for a certificate of plant variety protection.[7] Therefore, I reject Petitioner's contention that the Secretary of Agriculture is not authorized to promulgate regulations to provide for abandonment of an application when an applicant fails to advance the application and to limit the period during which an abandoned application may be revived as a pending application.

Third, Petitioner contends the 3-month revival deadline is inconsistent with the Plant Variety Protection Act. Citing 7 U.S.C. § 2402(a), Petitioner states Congress established only four criteria for obtaining plant variety protection. The applicant must show the variety that is the subject of the application is: (1) new, (2) distinct, (3) uniform, and (4) stable. Petitioner contends a regulation that cuts off an applicant's right to demonstrate a plant variety meets these four criteria solely because an administrative deadline is missed violates this statutory provision. (Pet. at 18-22, 29-30.) The Commissioner responds that 7 C.F.R. § 97.22 is authorized by the Plant Variety Protection Act and, in particular, by 7 U.S.C. § 2442(b) (Answer at 2-5).

Entitlement to plant variety protection is subject to the conditions and requirements of the Plant Variety Protection Act.[8] The Plant Variety Protection Act does not provide that the only condition for obtaining plant variety protection is the applicant's showing that the variety that is the subject of the application is new, distinct, uniform, and stable. Congress explicitly provided other conditions and requirements necessary to obtain a certificate of plant variety protection. For example, 7 U.S.C. § 2421(a) requires an applicant to file a signed written application accompanied by a fee and 7 U.S.C. § 2481(b) requires the payment of a fee and deposit in a public repository of a viable sample of basic seed necessary for the propagation of the variety, prior to the

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[7]If 7 U.S.C. § 2483(b)(2) were the exclusive mechanism to discourage applicant delay in the prosecution of an application for a certificate of plant variety protection, an applicant could delay the disposition of an application for years without jeopardizing the applicant's opportunity to obtain plant variety protection albeit for a shorter period than the maximum period provided in 7 U.S.C. § 2483(b)(1).

[8]7 U.S.C. § 2402(a).

issuance of a certificate of plant variety protection. As for limitations on the time for applicant action, Congress explicitly authorized the Secretary of Agriculture to establish a time for applicant action after the Secretary of Agriculture mails the applicant notice of an action other than an allowance of plant variety protection.[9] An applicant that fails to take action within the time set by the Secretary of Agriculture has failed to comply with the conditions and requirements of the Plant Variety Protection Act. Moreover, Congress explicitly authorized the Secretary of Agriculture to establish regulations for the conduct of proceedings in the Plant Variety Protection Office.[10] The process for the examination of an application for plant variety protection is a proceeding conducted in the Plant Variety Protection Office, and 7 C.F.R. § 97.22 is a regulation for the conduct of that proceeding. Therefore, I reject Petitioner's contention that the 3-month period for revival of an abandoned application in 7 C.F.R. § 97.22, is inconsistent with the Plant Variety Protection Act.

Fourth, Petitioner asserts the Secretary of Agriculture is only authorized by the Plant Variety Protection Act to issue procedural rules for the conduct of proceedings within the Plant Variety Protection Office. Petitioner contends, as construed by the Commissioner, 7 C.F.R. § 97.22 is an absolute unwaivable bar to revival of an abandoned application and does not operate as a procedural rule; therefore, as construed by the Commissioner, the Secretary of Agriculture has no authority to issue 7 C.F.R. § 97.22. (Pet. at 22-23.)

Section 6 of the Plant Variety Protection Act (7 U.S.C. § 2326) authorizes the Secretary of Agriculture to promulgate regulations for the conduct of proceedings in the Plant Variety Protection Office. The process for the examination of an application for plant variety protection is a proceeding conducted in the Plant Variety Protection Office. Section 97.22 of the Regulations (7 C.F.R. § 97.22), which limits the time for revival of abandoned applications for plant variety protection, is a regulation for the conduct of those proceedings; thus, the Secretary of Agriculture is authorized by 7 U.S.C. § 2326 to promulgate 7 C.F.R. § 97.22.

As discussed in this Decision and Order, *supra*, I agree with Petitioner's and the Commissioner's position that 7 C.F.R. § 97.22 is a procedural rule. Therefore, even if I found the Secretary of Agriculture is only authorized to promulgate procedural rules under 7 U.S.C. § 2326, as Petitioner contends, I would not find that 7 C.F.R. § 97.22 is beyond the authority granted to the Secretary of Agriculture.

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[9] 7 U.S.C. § 2442(b).

[10] 7 U.S.C. § 2326.

Petitioner appears to take the position that since 7 C.F.R. § 97.22, as construed by the Commissioner, prohibits Petitioner from obtaining a certificate of plant variety protection for Lofts L-93, 7 C.F.R. § 97.22 is a substantive rule. I disagree. A procedural rule is a rule that itself does not alter the rights or interests of the parties although it may alter the manner in which the parties present themselves to the agency.[11] A substantive rule, in contrast, puts a stamp of agency approval or disapproval on a given type of behavior.[12] Section 97.22 of the Regulations (7 C.F.R. § 97.22) does not itself alter rights or place a stamp of approval or disapproval on a given type of behavior. Instead, 7 C.F.R. § 97.22 limits the time during which an applicant may request revival of an abandoned application for plant variety protection and requires that the request for revival be accompanied by a fee and a written statement addressing issues pertinent to the abandonment of the application. I find 7 C.F.R. § 97.22 is at the procedural end of the spectrum running from "procedural" to "substantive." Even unambiguously procedural rules can affect the outcome of an agency proceeding.[13] Section 97.22 of the Regulations (7 C.F.R. § 97.22) is not changed from a procedural rule to a substantive rule merely because the time limit in 7 C.F.R. § 97.22 affects Petitioner's right to obtain a certificate of plant variety protection for Lofts L-93.

Fifth, Petitioner contends 7 C.F.R. § 97.22 is invalid because the United

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[11]*Chamber of Commerce of the United States v. United States Dep't of Labor*, 174 F.3d 206, 211 (D.C. Cir. 1999).

[12]*Chamber of Commerce of the United States v. United States Dep't of Labor*, 174 F.3d 206, 211 (D.C. Cir. 1999); *American Hospital Ass'n v. Bowen*, 834 F.2d 1037, 1047 (D.C. Cir. 1987).

[13]*See generally Freund v. Nycomed Amersham*, 326 F.3d 1070, 1079 n.9 (9th Cir. 2003) (stating the fact that a procedural rule may affect the outcome of an appeal does not make the rule substantive); *Chamber of Commerce of the United States v. United States Dep't of Labor*, 174 F.3d 206, 211 (D.C. Cir. 1999) (stating even a purely procedural rule can affect the substantive outcome of an agency proceeding); *JEM Broadcasting Co. v. FCC*, 22 F.3d 320, 326 (D.C. Cir. 1994) (citing with approval *Ranger v. FCC*, 294 F.2d 240 (D.C. Cir. 1961), in which the court held a rule was procedural even though failure to observe the rule might cause the loss of substantive rights); *American Hospital Ass'n v. Bowen*, 834 F.2d 1037, 1047 (D.C. Cir. 1987) (stating our circuit, in applying the 5 U.S.C. § 553 exemption for procedural rules, has gradually shifted focus from asking whether a given procedure has a substantial impact on the parties to inquiring whether the agency action also encodes a substantive value judgment or puts a stamp of approval or disapproval on a given type of behavior; the gradual move away from looking solely into the substantiality of the impact reflects a recognition that even unambiguously procedural measures affect parties to some degree); *Ranger v. FCC*, 294 F.2d 240, 244 (D.C. Cir. 1961) (stating all procedural requirements may and do occasionally affect substantive rights, but this possibility does not make a procedural regulation a substantive one).

States Department of Agriculture did not explain the rationale for the 3-month deadline for revival of an abandoned application (Pet. at 24-28).

The Administrative Procedure Act requires that general notice of proposed rulemaking include either the terms or substance of the proposed rule or a description of the subjects and issues involved and that the final rulemaking document contain a concise general statement of the basis and purpose of the final rule.[14] However, these rulemaking requirements do not apply to rules of agency organization, procedure, or practice.[15] As discussed in this Decision and Order, *supra*, I agree with Petitioner's and the Commissioner's position that 7 C.F.R. § 97.22 is a procedural rule. Therefore, the United States Department of Agriculture was not required to include in the pertinent rulemaking documents an explanation of the basis and purpose for the 3-month period for revival in 7 C.F.R. § 97.22.

Moreover, the United States Department of Agriculture did explain the basis for the 3-month period during which an applicant may revive an application abandoned for failure to advance the application. In April 1972, the United States Department of Agriculture issued a notice of proposed rulemaking in which it proposed regulations to implement the Plant Variety Protection Act.[16] On October 28, 1972, the United States Department of Agriculture published a final rulemaking document adopting the proposed regulations.[17] The October 1972 final rule has separate provisions for revival of applications abandoned for failure to advance the applications to completion and for revival of applications voluntarily abandoned. The final regulation includes a 3-month period for the revival of voluntarily abandoned applications but provides no limitation on the time for the revival of applications abandoned for failure to advance the applications to completion.[18]

The United States Department of Agriculture published a notice of proposed rulemaking in 1976, in which, *inter alia*, it proposed to provide the same

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[14]5 U.S.C. § 553(b)(3), (c).

[15]5 U.S.C. § 553(b)(A).

[16]37 Fed. Reg. 7672 (Apr. 18, 1972).

[17]37 Fed. Reg. 23,140 (Oct. 28, 1972). These final regulations were codified in 7 C.F.R. pt. 180. In 1993, the Plant Variety Protection Regulations were codified in 7 C.F.R. pt. 97, where they can currently be found (58 Fed. Reg. 42,435 (Aug. 9, 1993)).

[18]37 Fed. Reg. 23,144 (Oct. 28, 1972); 7 C.F.R. §§ 180.22, .23 (1973).

3-month period for revival of applications abandoned for failure to advance the applications to completion as it provided for revival of voluntarily abandoned applications. The preamble in the notice of proposed rulemaking states: in order to make the provisions for revival of an application "consistent, it is proposed that an application abandoned for either reason, if revived, must be revived within 3 months."[19] The United States Department of Agriculture adopted the proposed regulation and the preamble of the final rulemaking document provides the same reason for the amendment as was previously provided in the notice of proposed rulemaking.[20]

Petitioner contends there is no rational basis for making the two revival provisions consistent. However, the adoption of consistent time limits is important when viewed in light of the Plant Variety Protection Act. Section 62(b) of the Plant Variety Protection Act (7 U.S.C. § 2442(b)) provides time limits for an applicant's taking "appropriate action" after the Secretary of Agriculture mails a notice of an action other than an allowance. The Plant Variety Protection Act does not provide different time limits for "appropriate action" depending on the applicant's reasons for failure to take appropriate action.

Sixth, Petitioner contends 7 C.F.R. § 97.22 is invalid because the United States Department of Agriculture failed to reference the legal authority under which it proposed the regulation (Pet. at 28).

The Administrative Procedure Act requires that general notice of proposed rulemaking include reference to the legal authority under which the rule is proposed;[21] however, the requirement that notice of proposed rulemaking reference legal authority under which the rule is proposed does not apply to rules of agency organization, procedure, or practice.[22] As discussed in this Decision and Order, *supra*, I agree with Petitioner's and the Commissioner's position that 7 C.F.R. § 97.22 is a procedural rule. Therefore, the United States Department of Agriculture was not required to reference the legal authority under which 7 C.F.R. § 97.22 was proposed.

Moreover, when the United States Department of Agriculture first proposed the Regulations, including the proposed procedure for reviving an application

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[19]41 Fed. Reg. 54,492 (Dec. 14, 1976).

[20]42 Fed. Reg. 9157 (Feb. 15, 1977).

[21]5 U.S.C. § 553(b)(2).

[22]5 U.S.C. § 553(b)(A).

abandoned for failure to advance the application, the United States Department of Agriculture stated in the notice of proposed rulemaking the "Plant Variety Protection Act (84 Stat. 1542)" is the legal authority under which the rule is proposed.[23] Again, when the United States Department of Agriculture proposed to amend a number of provisions in the Regulations, including the procedure for reviving an application abandoned for failure to advance the application, the United States Department of Agriculture stated in the notice of proposed rulemaking the "Plant Variety Protection Act (7 U.S.C. 2321, et seq.)" is the legal authority under which the rule is proposed.[24]

Petitioner contends the references to the Plant Variety Protection Act in these notices of proposed rulemaking are not sufficiently specific. Petitioner suggests the United States Department of Agriculture should have specifically identified 7 U.S.C. § 2326 as the legal authority for the procedure for reviving abandoned applications. (Pet. at 28.)

Even if I were to conclude that 7 C.F.R. § 97.22 is a substantive rule required to be promulgated in accordance with 5 U.S.C. § 553(b)(2), I would reject Petitioner's contention that the references to the Plant Variety Protection Act in the relevant notices of proposed rulemaking were not sufficiently specific. The legislative history applicable to the Administrative Procedure Act and the *Attorney General's Manual on the Administrative Procedure Act* (1947) indicate that the purpose of the requirement that each notice of proposed rulemaking contain reference to the legal authority under which the rule is proposed is to provide interested persons with a fair opportunity to comment on the agency's authority to promulgate the proposed rule.[25] The final rulemaking documents related to the two notices of proposed rulemaking in question discuss the comments received but make no mention of any person who submitted a comment indicating that he or she was denied an opportunity to comment on the notices of proposed rulemaking.[26] I find the references to the legal authority in the two notices of proposed rulemaking in question were sufficiently specific to provide interested parties with a fair opportunity to comment on the Secretary

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[23] 37 Fed. Reg. 7672 (Apr. 18, 1972).

[24] 41 Fed. Reg. 54,492 (Dec. 14, 1976).

[25] *See Global Van Lines, Inc. v. ICC*, 714 F.2d 1290, 1298 (5th Cir. 1983) (quoting S. Rep. No. 79-752 (1945), H.R. Rep. No. 79-1980 (1945), and the *Attorney General's Manual on the Administrative Procedure Act* at 29 (1947)).

[26] 37 Fed. Reg. 23,140 (Oct. 28, 1972); 42 Fed. Reg. 9157 (Feb. 15, 1977).

of Agriculture's authority to promulgate procedures an applicant must follow in order to revive a plant variety protection application abandoned for failure to advance the application.

Petitioner cites *Global Van Lines, Inc. v. ICC*, 714 F.2d 1290 (5th Cir. 1983), and *Georgetown University Hospital v. Bowen*, 821 F.2d 750 (D.C. Cir. 1987), in support of its position that the references to the Plant Variety Protection Act in the two notices of proposed rulemaking in question are not sufficiently specific. Neither *Global Van Lines* nor *Georgetown University Hospital* concern a failure to sufficiently specify the legal authority under which a rule was proposed. In each case, the Court set aside the rulemaking proceeding because the agency involved failed to reference the proper legal authority for the rule. In *Global Van Lines*, the Interstate Commerce Commission promulgated a rule which allowed freight forwarders to petition to remove restrictions from their existing certificates without having to complete new licensing procedures. In both the notice of proposed rulemaking and the final rule, the Interstate Commerce Commission referenced provisions of the Interstate Commerce Act which the Court concluded did not provide authority for the rule. Similarly, in *Georgetown University Hospital*, the Secretary of Health and Human Services promulgated a medicare reimbursable cost-limit rule and gave it retroactive effect. The Secretary of Health and Human Services referenced section 223 of the Social Security Amendments of 1972 as the legal authority for the retroactive application of the rule. The Court concluded that section 223 of the Social Security Amendments of 1972 did not authorize retroactive cost-limit rules but, instead, authorized prospective cost-limit rules. I find *Georgetown University Hospital* and *Global Van Lines* inapposite.

Seventh, Petitioner contends 7 C.F.R. § 97.22 is not clearly written. Petitioner states:

> It is totally unclear what is supposed to happen within three months of abandonment: is the applicant under an obligation to file a request for revival within three months, or does the finding of the Commissioner have to occur within three months? The most natural English reading is that the finding of the Commissioner must occur within three months. However, this would be a ludicrous outcome as it would mean than [sic] an applicant who files a revival request within a few days of an initial abandonment is at the mercy of the Commissioner's schedule no matter how meritorious the applicant's position regarding inadvertence and non-fraudulent intent.

Pet. at 27.

The Commissioner did not respond to this issue in his Answer. However, based upon correspondence from the Plant Variety Protection Office to Petitioner, it appears the Commissioner's position is that an applicant must make a request for revival within the 3-month period provided in 7 C.F.R. § 97.22.[27]

Petitioner suggests there are two possible ways to construe 7 C.F.R. § 97.22: (1) the applicant is required to request revival within the 3-month period following abandonment or (2) the Commissioner is required to make the required findings within the 3-month period following abandonment (Pet. at 27). But, Petitioner's two suggested constructions do not assist Petitioner. PVP Application No. 9600256 was abandoned effective November 16, 2000, and the 3-month period for revival expired February 16, 2001. Petitioner did not request revival within the 3-month period following the November 16, 2000, abandonment, and the Commissioner did not make the required findings within the 3-month period following the November 16, 2000, abandonment. Therefore, I reject Petitioner's suggestion that the lack of clarity in 7 C.F.R. § 97.22 constitutes a basis for waiving the 3-month time limit for revival.

Petitioner's March 2003 Letters

Petitioner also raises two issues in letters dated March 14, 2003, and March 27, 2003, which Petitioner sent to me. On April 17, 2003, the

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[27]In a letter dated April 21, 2001, from the Plant Variety Protection Office to Dr. A. Douglas Brede, the Plant Variety Protection Office states "[t]his office, *having received no request from the applicant's representative*, declared the application permanently abandoned." (Ex. A, Tab 33 at 1, attached to Pet. (emphasis added).) In a letter dated July 25, 2002, from the Commissioner to Richard C. Peet, the Commissioner states:

> The application was abandoned on November 15, 2000. The time for the possible revival of the application expired three months later, on February 16, 2001, before Simplot's first communication with the PVPO.
>
> As stated in the letter of May 13, 2002, denying the request that the abandoned application be recorded, *any request to revive an abandoned application must be timely*. It is unfortunate that the application was not actively advanced by Simplot's predecessors and was abandoned. *Nonetheless, the time for the possible revival of the abandoned certificate expired before Simplot attempted to revive it*.

Ex. B at 2, attached to Pet. (emphasis added).

I agree with the Commissioner's apparent position that an applicant must request revival within the 3-month period provided in 7 C.F.R. § 97.22.

Commissioner filed a response to Petitioner's March 14 and 27, 2003, letters (Response to Petitioner's Letters).

First, Petitioner encourages me to consider the advice provided by the Plant Variety Protection Board regarding the disposition of this proceeding for what it is: purely advisory (Petitioner's letter dated Mar. 14, 2003, at 1-2). Section 63 of the Plant Variety Protection Act (7 U.S.C. § 2443) requires that I seek the advice of the Plant Variety Protection Board before deciding Petitioner's appeal from the Commissioner's denial of Petitioner's request for revival of PVP Application No. 9600256. Section 97.302 of the Regulations (7 C.F.R. § 97.302) provides that I may issue a decision after receiving advice from the Plant Variety Protection Board. I agree with Petitioner that the Plant Variety Protection Board's role in this proceeding is merely advisory. While I must consider any advice offered by the Plant Variety Protection Board, I am not required to follow the Plant Variety Protection Board's advice. In this proceeding, I sought and received advice from the Plant Variety Protection Board. I have considered the advice given by the Plant Variety Protection Board. My decision to follow the Plant Variety Protection Board's advice is based upon my agreement with the Plant Variety Protection Board, not upon a belief that I am required to follow the Plant Variety Protection Board's advice.

Second, Petitioner asserts Dr. Virginia Lehman did not recuse herself from the Plant Variety Protection Board's March 5, 2003, hearing, as I suggested she do in a memorandum I sent to Plant Variety Protection Board members on February 18, 2003 (Petitioner's letter dated Mar. 14, 2003, at 2-4; Petitioner's letter dated Mar. 27, 2003).

The transcript of the March 5, 2003, Plant Variety Protection Board hearing establishes that Dr. Virginia Lehman was present during the Plant Variety Protection Board's hearing and answered questions from other members of the Plant Variety Protection Board (Transcript of the Plant Variety Protection Board Hearing at 1, 65-68).[28] However, Dr. Virginia Lehman abstained from voting on the motion regarding the Petition filed in the instant proceeding and Petitioner's petition filed in *In re J.R. Simplot Company*, PVPA Docket No. 02-0001 (Transcript of the Plant Variety Protection Board Hearing at 80). Recusal is "[r]emoval of oneself as a judge or policy-maker in a particular matter."[29] I find Dr. Virginia Lehman's abstention from voting on the motion

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[28]Dr. Virginia Lehman is identified as "Inventor" on pages 65 through 68 of the transcript of the Plant Variety Protection Board hearing.

[29]Black's Law Dictionary 1281 (7th ed. 1999).

regarding the Petition filed in the instant proceeding and Petitioner's petition filed in *In re J.R. Simplot Company*, PVPA Docket No. 02-0001, is a recusal.

Petitioner's Right to Judicial Review

Petitioner has the right to judicial review of this Decision and Order in accordance with 7 U.S.C. § 2461 or, in the alternative, 7 U.S.C. § 2462. Appeal under 7 U.S.C. § 2461 must be taken "within sixty days or such further times as the Secretary [of Agriculture] allows," and civil action under 7 U.S.C. § 2462 must be "commenced within sixty days after [the Secretary of Agriculture's] decision or within such further time as the Secretary [of Agriculture] allows." On May 30, 2003, I held a conference call with Richard G. Stoll and Robert A. Ertman. During the conference call, Richard G. Stoll requested that I allow Petitioner 120 days for any appeal that it may take under 7 U.S.C. § 2461 or any civil action that it may commence under 7 U.S.C. § 2462. Robert A. Ertman stated the Commissioner had no objection to Petitioner's request. Therefore, any appeal under 7 U.S.C. § 2461 must be taken within 120 days after the date of this Decision and Order and any civil action under 7 U.S.C. § 2462 must be commenced within 120 days after the date of this Decision and Order. The date of this Decision and Order is June 2, 2003.

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

ORDER

I affirm the Commissioner's July 25, 2002, determination that PVP Application No. 9600256 cannot be revived as a pending application. This Order shall become effective on the day after service on Petitioner.

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MISCELLANEOUS DECISIONS

In re: CARUTHERS RAISIN PACKING CO.
2002 AMA Docket No. F&V 989-3.
Order Dismissing Petition.
Filed April 15, 2003.

Colleen Carroll, for Respondent.
Petitioner, Pro se.
Order issued by Jill S. Clifton, Administrative Law Judge.

Petitioner withdrew its Petition, by FAX dated April 15, 2003.

Accordingly, this case is hereby ordered CLOSED.

Copies of this Order, and Petitioner's FAX dated April 15, 2003, shall be served by the Hearing Clerk upon each of the parties.

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In re: CARUTHERS RAISIN PACKING CO.
2002 AMA Docket No. F&V 989-4.
Order Closing Case.
Filed April 17, 2003.

Colleen Carroll, for Respondent.
Petitioner, Pro se.
Order issued by Jill S. Clifton, Administrative Law Judge.

Petitioner withdrew its Petition, by FAX dated April 14, 2003.

Previously, Chief Judge Hunt indicated:

"The docket number for both the Petition filed on August 13, 2002, and the Amended Petition filed on November 12, 2002, shall be 2002 AMA Docket No. F&V 989-3."

Order dated December 20, 2002.

Chief Judge Hunt has referred Petitioner's FAX dated April 14, 2003 to me for action, as I am the assigned judge in 2002 AMA Docket No. F&V 989-3.

Just as I ordered 2002 AMA Docket No. F&V 989-3 CLOSED on April 15, 2003, I hereby order 2002 AMA Docket No. F&V 989-4 CLOSED.

Closed of this Order, and Petitioner's FAX dated April 14, 2003, shall be served by the Hearing Clerk upon each of the parties.

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In re: LION RAISINS, INC., A CALIFORNIA CORPORATION.
2002 AMA Docket No. F&V 989-1.
Remand Order.
Filed May 12, 2003.

AMAA – Raisins – Petition contents – "Petition" defined – "Shall" defined – Judicial Officer bound by rules of practice – Administrative law judges bound by the rules of practice.

The Judicial Officer (JO) remanded the proceeding to Administrative Law (ALJ) Judge Jill S. Clifton to issue an order in accordance with the Rules of Practice. The JO found the ALJ's Order Denying Respondent's Motion to Dismiss But Requiring Petitioner to File Verification of Petitioner's Date of Incorporation did not conform to the Rules of Practice (7 C.F.R. §§ 900.52(c)(2), .52a(a)). The JO stated the Rules of Practice are binding on administrative law judges. A conclusion by the ALJ that a petition does not conform to 7 C.F.R. § 900.52(b) requires that the ALJ dismiss the petition or a portion of the petition and permit the Petitioner to file an amended petition within 20 days following service on the Petitioner of the ALJ's dismissal, as provided in 7 C.F.R. § 900.52(c)(2). The Respondent must be permitted to file an answer to any amended petition in accordance with 7 C.F.R. § 900.52a(a).

Colleen A. Carroll, for Respondent.
Brian C. Leighton, for Petitioner.
Initial decision issued by Jill S. Clifton, Administrative Law Judge.
Remand Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

Lion Raisins, Inc., a California corporation [hereinafter Petitioner], instituted this proceeding by filing a Petition[1] on August 5, 2002. Petitioner instituted the proceeding under section 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. § 608c(15)(A)); the federal marketing order regulating the handling of "Raisins Produced From Grapes Grown In California" (7 C.F.R. pt. 989); and the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Marketing Orders (7 C.F.R. §§ 900.50-.71) [hereinafter the Rules of Practice].

On October 22, 2002, the Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], filed a "Motion to Dismiss Petition." Respondent contends the Petition does not contain Petitioner's date of incorporation as required by section 900.52(b)(1) of

[1]Petitioner entitles its Petition "Petition To Modify Raisin Marketing Order Provisions/Regulations And/Or Petition To The Secretary Of Agriculture To Set Aside Reserve Percentages Of Other Seedless Raisins Pursuant To 7 C.F.R. § 989 *Et Seq*. And To Exempt Petitioner From Various Provisions Of The Raisin Marketing Order And/Or Any Obligations Imposed In Connection Therewith That Are Not In Accordance With Law" [hereinafter Petition].

the Rules of Practice (7 C.F.R. § 900.52(b)(1)), does not contain an affidavit by an officer of Petitioner as required by section 900.52(b)(6) of the Rules of Practice (7 C.F.R. § 900.52(b)(6)), and should be dismissed (Mot. to Dismiss Pet.). On November 4, 2002, Petitioner filed "Petitioner's Opposition to Respondent's Motion to Dismiss Petition," which, *inter alia*, contains Petitioner's date of incorporation.

On March 10, 2003, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] issued an "Order Denying Respondent's Motion to Dismiss But Requiring Petitioner to File Verification of Petitioner's Date of Incorporation" in which the ALJ: (1) found the Petition did not contain the date of Petitioner's incorporation as required by section 900.52(b)(1) of the Rules of Practice (7 C.F.R. § 900.52(b)(1)); (2) found the Petition substantially complies with the affidavit requirement in section 900.52(b)(6) of the Rules of Practice (7 C.F.R. § 900.52(b)(6)); (3) denied Respondent's Motion to Dismiss Petition; (4) ordered Petitioner to file a verification of the date of Petitioner's incorporation within 20 days after Petitioner received the ALJ's order; and (5) ordered Respondent to file a response to the Petition no later than March 28, 2003.

On March 13, 2003, in accordance with the ALJ's Order Denying Respondent's Motion to Dismiss But Requiring Petitioner to File Verification of Petitioner's Date of Incorporation, Petitioner filed a verification of the date of Petitioner's incorporation. Respondent did not file a response to Petitioner's Petition in accordance with the ALJ's Order Denying Respondent's Motion to Dismiss But Requiring Petitioner to File Verification of Petitioner's Date of Incorporation. Instead, on March 28, 2003, Respondent appealed to the Judicial Officer. On April 24, 2003, Petitioner filed "Petitioner's Response to Respondent's Appeal Petition." On April 25, 2003, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent contends the ALJ, having found the Petition did not contain the date of Petitioner's incorporation, as required by section 900.52(b)(1) of the Rules of Practice (7 C.F.R. § 900.52(b)(1)), should have dismissed the Petition (Respondent's Appeal Pet. at 2).

Section 900.52(b)(1) of the Rules of Practice requires that a petition filed by a corporate petitioner must contain the date of incorporation, as follows:

§ 900.52 Institution of proceeding.

. . . .

> (b) *Contents of petition*. A petition shall contain:
>
> (1) The correct name, address, and principal place of business of the petitioner. If petitioner is a corporation, such fact shall be stated, together with the name of the State of incorporation, the date of incorporation, and the names, addresses, and respective positions held by its officers[.]

7 C.F.R. § 900.52(b)(1).

Petitioner admits, and the ALJ found, the Petition did not contain Petitioner's date of incorporation as required by section 900.52(b)(1) of the Rules of Practice (7 C.F.R. § 900.52(b)(1)). The ALJ denied Respondent's Motion to Dismiss Petition because Petitioner provided the date of its incorporation in Petitioner's Opposition to Respondent's Motion to Dismiss Petition filed November 4, 2002, as follows:

> The Petition failed to contain Petitioner's date of incorporation, as required under 7 C.F.R. § 900.52(b)(1). Petitioner's Opposition to Respondent's Motion to Dismiss Petition, filed November 4, 2002, supplies Petitioner's date of incorporation but is not verified or otherwise authenticated.

Order Denying Respondent's Mot. to Dismiss But Requiring Petitioner to File Verification of Petitioner's Date of Incorporation at 1.

The ALJ's Order Denying Respondent's Motion to Dismiss But Requiring Petitioner to File Verification of Petitioner's Date of Incorporation is a rational disposition of Respondent's Motion to Dismiss Petition; however, the ALJ's order is not in accord with the Rules of Practice. Section 900.52(b) of the Rules of Practice (7 C.F.R. § 900.52(b)) states the *petition*[2] (not some other filing) *shall* contain the information, references, statements, prayers for relief, and affidavit described in section 900.52(b)(1)-(6) of the Rules of Practice (7 C.F.R. § 900.52(b)(1)-(6)). The word *shall* is ordinarily the language of command and

[2]The *petition* is a document which a handler files with the Hearing Clerk to institute a proceeding under the Rules of Practice and includes an amended petition (7 C.F.R. §§ 900.51(p), .52(a)).

leaves no room for discretion.[3] Thus, Petitioner is required by section 900.52(b)(1) of the Rules of Practice (7 C.F.R. § 900.52(b)(1)) to include in its Petition the date of Petitioner's incorporation. The Rules of Practice are binding on administrative law judges and the Judicial Officer,[4] and administrative law judges and the Judicial Officer have very limited authority to modify the Rules

[3] *See generally Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (stating the word "shall" normally creates an obligation impervious to judicial discretion); *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947) (stating the word "shall" is ordinarily the language of command); *Escoe v. Zerbst*, 295 U.S. 490, 493 (1935) (stating the word "shall" is ordinarily the language of command); *Ex parte Jordan*, 94 U.S. 248, 251 (1876) (indicating the word "shall" means "must"); *Firebaugh Canal Co. v. United States*, 203 F.3d 568, 573-74 (9th Cir. 2000) (stating the term "shall" is usually regarded as making a provision mandatory, and the rules of statutory construction presume that the term is used in its ordinary sense unless there is clear evidence to the contrary); *United States v. Hughes*, 414 F.2d 1330, 1334 (9th Cir. 1969) (referring to the word "shall" as "imperative"); *In re PMD Produce Brokerage Corp.*, 60 Agric. Dec. 364, 369-70 (2001) (Order Denying Pet. to Reopen Hearing and Remand Order) (stating the word "shall" is ordinarily the language of command and leaves no room for administrative law judge discretion); *In re David Harris*, 50 Agric. Dec. 683, 703 (1991) (stating the word "shall" is ordinarily the language of command); *In re Borden, Inc.*, 46 Agric. Dec. 1315, 1460 (1987) (stating the word "shall" is ordinarily the language of command), *aff'd*, No. H-88-1863 (S.D. Tex. Feb. 13, 1990), *printed in* 50 Agric. Dec. 1135 (1991); *In re Haring Meats and Delicatessen, Inc.*, 44 Agric. Dec. 1886, 1899 (1985) (stating the word "shall" is ordinarily the language of command); *In re Great Western Packing Co.*, 39 Agric. Dec. 1358, 1366 (1980) (stating the word "shall" is the language of command), *aff'd*, No. CV 81-0534 (C.D. Cal. Sept. 30, 1981); *In re Ben Gatz Co.*, 38 Agric. Dec. 1038, 1043 (1979) (stating the word "shall" is ordinarily the language of command).

[4] *In re Sequoia Orange Co.*, 41 Agric. Dec. 1062, 1064 (1982) (stating the Judicial Officer has no authority to depart from the Rules of Practice). *Cf. In re William J. Reinhart*, 59 Agric. Dec. 721, 740-41 (2000) (stating the Judicial Officer and the administrative law judges are bound by the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes), *aff'd per curiam*, 39 Fed. Appx. 954, 2002 WL 1492097 (6th Cir. July 10, 2002), *cert. denied*, 123 S. Ct. 1802 (2003); *In re Jack Stepp*, 59 Agric. Dec. 265, 269 n.2 (2000) (Ruling Denying Respondents' Pet. for Recons. of Order Lifting Stay) (stating the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes are binding on the Judicial Officer, and the Judicial Officer cannot deem the respondents' late-filed Reply to Motion to Lift Stay to have been timely filed); *In re Far West Meats*, 55 Agric. Dec. 1033, 1036 n.4 (1996) (Ruling on Certified Question) (stating the Judicial Officer and the administrative law judges are bound by the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes); *In re Hermiston Livestock Co.*, 48 Agric. Dec. 434 (1989) (stating the Judicial Officer and the administrative law judges are bound by the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes).

of Practice in a proceeding.[5]

I conclude the ALJ should have: (1) dismissed all or a portion of Petitioner's Petition as provided in section 900.52(c)(2) of the Rules of Practice (7 C.F.R. § 900.52(c)(2)); (2) permitted Petitioner to file an amended petition within 20 days following service on Petitioner of the ALJ's dismissal as provided in section 900.52(c)(2) of the Rules of Practice (7 C.F.R. § 900.52(c)(2)); and (3) permitted Respondent to file an answer to any amended petition as provided in section 900.52a(a) of the Rules of Practice (7 C.F.R. § 900.52a(a)). Therefore, I vacate the ALJ's Order Denying Respondent's Motion to Dismiss But Requiring Petitioner to File Verification of Petitioner's Date of Incorporation and remand the proceeding to the ALJ to issue an order in accordance with the Rules of Practice.

The ALJ issued an "Order Scheduling Oral Hearing" on March 18, 2003. Respondent filed a "Motion to Cancel Oral Hearing" on April 4, 2003. On April 25, 2003, Petitioner filed "Petitioner's Opposition to Respondent's Motion to Cancel the Oral Hearing."

Section 900.59(a)(2) of the Rules of Practice provides administrative law judges are authorized to rule upon motions filed prior to the time the Hearing Clerk transmits the record of the proceeding to the Judicial Officer and the Judicial Officer is required to rule upon motions filed after that transmittal, as follows:

§ 900.59 Motions and requests.

(a) *General*. . . .

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[5]*See In re Kinzua Resources, LLC*, 57 Agric. Dec. 1165, 1179-80 (1998) (stating generally administrative law judges and the Judicial Officer are bound by the rules of practice, but they may modify the rules of practice to comply with statutory requirements, such as the deadline for agency approval or disapproval of sourcing area applications set forth in section 490(c)(3)(A) of the Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. § 620b(c)(3)(A)); and holding the chief administrative law judge did not err when he modified the Rules of Practice Governing Adjudication of Sourcing Area Applications and Formal Review of Sourcing Areas Pursuant to the Forest Resources Conservation and Shortage Relief Act of 1990); *In re Stimson Lumber Co.*, 56 Agric. Dec. 480, 489 (1997) (stating generally administrative law judges and the Judicial Officer are bound by the rules of practice, but they may modify the rules of practice to comply with statutory requirements, such as the deadline for agency approval or disapproval of sourcing area applications set forth in section 490(c)(3)(A) of the Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. § 620b(c)(3)(A)); and holding the chief administrative law judge did not err when he modified the Rules of Practice Governing Adjudication of Sourcing Area Applications and Formal Review of Sourcing Areas Pursuant to the Forest Resources Conservation and Shortage Relief Act of 1990).

> (2) The judge is authorized to rule upon all motions and requests filed or made prior to the transmittal by the hearing clerk to the Secretary of the record as provided in this subpart.[6] The Secretary shall rule upon all motions and requests filed after that time.

7 C.F.R. § 900.59(a)(2) (footnote added).

Respondent filed the Motion to Cancel Oral Hearing 3 weeks prior to the date the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer. Therefore, the ALJ is authorized to rule on Respondent's Motion to Cancel Oral Hearing and the Judicial Officer is not required to rule on Respondent's Motion to Cancel Oral Hearing. Therefore, I remand the Motion to Cancel Oral Hearing to the ALJ for a ruling.

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

ORDER

1. The ALJ's Order Denying Respondent's Motion to Dismiss But Requiring Petitioner to File Verification of Petitioner's Date of Incorporation, issued March 10, 2003, is vacated.
2. The proceeding is remanded to the ALJ to:
   (a) issue an order in accordance with the Rules of Practice; and
   (b) rule on Respondent's Motion to Cancel Oral Hearing.

In re: BOGHOSIAN RAISIN PACKING CO., INC.
2002 AMA Docket No. F&V 989-6.
Remand Order.
Filed May 13, 2003.

AMAA – Raisins – Order dismissing petition – Judicial Officer bound by rules of practice – Administrative law judges bound by the rules of practice.

The Judicial Officer (JO) remanded the proceeding to Administrative Law Judge (ALJ) Jill S. Clifton to issue an order in accordance with the Rules of Practice. The JO found the ALJ's Order Granting in Part and Denying in Part Respondent's Motion to Dismiss Petition did not conform to

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[6]The subpart (7 C.F.R. §§ 900.50-.71) requires the Hearing Clerk to transmit the record of the proceeding to the Secretary after an appeal is filed by a party to the proceeding. (7 C.F.R. § 900.65(d).)

the Rules of Practice (7 C.F.R. §§ 900.52(c)(2), .52a(a)). The JO stated the Rules of Practice are binding on administrative law judges. A conclusion by the ALJ that a petition does not conform to 7 C.F.R. § 900.52(b) requires that the ALJ dismiss the petition or a portion of the petition and permit the Petitioner to file an amended petition within 20 days following service on the Petitioner of the ALJ's dismissal as provided in 7 C.F.R. § 900.52(c)(2). The Respondent must be permitted to file an answer to any amended petition in accordance with 7 C.F.R. § 900.52a(a).

Colleen A. Carroll, for Respondent.
Brian C. Leighton, for Petitioner.
Initial decision issued by Jill S. Clifton, Administrative Law Judge.
Remand Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

Boghosian Raisin Packing Co., Inc. [hereinafter Petitioner], instituted this proceeding by filing a Petition[1] on December 2, 2002. Petitioner instituted the proceeding under section 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. § 608c(15)(A)); the federal marketing order regulating the handling of "Raisins Produced From Grapes Grown In California" (7 C.F.R. pt. 989); and the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Marketing Orders (7 C.F.R. §§ 900.50-.71) [hereinafter the Rules of Practice].

On March 3, 2003, the Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], filed a "Motion to Dismiss Petition." Respondent contends the Petition does not comply with section 900.52(b) of the Rules of Practice (7 C.F.R. § 900.52(b)) and should be dismissed (Mot. to Dismiss Pet.). On April 2, 2003, Petitioner filed "Petitioner's Opposition to Respondent's Motion to Dismiss Petition."

On April 7, 2003, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] issued an "Order Granting in Part and Denying in Part Respondent's Motion to Dismiss Petition" in which she agreed with Respondent's contention that the Petition does not comply with section 900.52(b) of the Rules of Practice (7 C.F.R. § 900.52(b)).

On April 15, 2003, Respondent appealed to the Judicial Officer. On May 9, 2003, Petitioner filed "Response of Boghosian Raisin Packing Co., Inc. to Respondent's Appeal Petition." On May 9, 2003, the Hearing Clerk transmitted

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[1]Petitioner entitles its Petition "Petition To Modify Raisin Marketing Order Provisions/Regulations And/Or Petition To The Secretary Of Agriculture To Set Aside Reserve Percentages Of All Varieties Of Raisins Established For The 2002-2003 Crop Year, Pursuant To 7 C.F.R. § 989.1 *Et Seq*. And To Exempt Petitioner From Various Provisions Of The Raisin Marketing Order And/Or Any Obligations Imposed In Connection Therewith With Respect To The Reserve Requirements, That Are Not In Accordance With Law" [hereinafter Petition].

the record to the Judicial Officer for consideration and decision.

CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent's one issue in "Respondent's Appeal Petition" is that the ALJ, having granted in part Respondent's Motion to Dismiss Petition, should have: (1) dismissed all or a portion of the Petition; (2) permitted Petitioner to file an amended petition within 20 days following service on Petitioner of the ALJ's dismissal; and (3) permitted Respondent to file an answer to any amended petition in accordance with section 900.52a(a) of the Rules of Practice (7 C.F.R. § 900.52a(a)) (Respondent's Appeal Pet. at 3).

Section 900.52(c)(2) of the Rules of Practice provides if an administrative law judge dismisses a petition or a portion of the petition, the petitioner shall be permitted to file an amended petition and section 900.52a(a) of the Rules of Practice provides the time for the respondent's filing an answer to the amended petition, as follows:

> **§ 900.52 Institution of proceeding.**
>
> . . . .
>
> (c) *Motion to dismiss petition*—. . . .
>
> (2) *Decision by the Judge*. The Judge, after due consideration, shall render a decision upon the motion stating the reasons for his action. Such decision shall be in the form of an order and shall be filed with the hearing clerk who shall cause a copy thereof to be served upon the petitioner and a copy thereof to be transmitted to the Administrator. Any such order shall be final unless appealed pursuant to § 900.65: *Provided*, That within 20 days following the service upon the petitioner of a copy of the order of the Judge dismissing the petition, or any portion thereof, on the ground that it does not substantially comply in form and content with the act or with paragraph (b) of this section, the petitioner shall be permitted to file an amended petition.
>
> **§ 900.52a Answer to petition.**
>
> (a) *Time of filing*. Within 30 days after the filing of the petition,[2] the Administrator shall file an answer thereto: *Provided*, That, if a motion to dismiss the petition, in whole or in part, is made pursuant to §

[2]"The term *petition* includes an amended petition." (7 C.F.R. § 900.51(p).)

> 900.52(c), the answer shall be filed within 15 days after the service of an order of the Judge denying the motion or granting the motion with respect to only a portion of the petition. The answer shall be filed with the hearing clerk who shall cause a copy thereof to be served promptly upon the petitioner.

7 C.F.R. §§ 900.52(c)(2), .52a(a) (footnote added).

The ALJ agreed with Respondent's contention that the Petition did not comply with section 900.52(b) of the Rules of Practice (7 C.F.R. § 900.52(b)) (Order Granting in Part and Denying in Part Respondent's Mot. to Dismiss Pet.). However, instead of dismissing the Petition or a portion of the Petition, permitting Petitioner to file an amended petition within 20 days following service on Petitioner of the ALJ's dismissal, and permitting Respondent to file an answer to any amended petition in accordance with section 900.52a(a) of the Rules of Practice (7 C.F.R. § 900.52a(a)), the ALJ directed Petitioner and Respondent, as follows:

> . . . I direct the parties as follows: (1) By Tuesday, April 22, 2003, Petitioner shall supplement its Petition with the particulars as to why the procedure and percentage calculations and other RAC actions were not in accordance with the Raisin Marketing Order or the Act. (2) Within 20 days after service of those particulars, Respondent shall answer or otherwise respond to the Petition as supplemented. (3) Both parties shall construe the Petition as a request for relief for Petitioner. (4) If, by the date on which Respondent's response is to be prepared, the RAC recommendation of which Petitioner complains is not yet effective and cannot impact handlers, the Respondent may file an affidavit or declaration to that effect, **rather than an Answer**.

Order Granting in Part and Denying in Part Respondent's Mot. to Dismiss Pet. at 1-2 (emphasis in original).

The ALJ's Order Granting in Part and Denying in Part Respondent's Motion to Dismiss Petition is a rational disposition of Respondent's Motion to Dismiss Petition; however, the ALJ's order is not in accord with the Rules of Practice. The Rules of Practice are binding on administrative law judges and the Judicial

Officer,[3] and administrative law judges and the Judicial Officer have very limited authority to modify the Rules of Practice in a proceeding.[4] A conclusion by the ALJ that the Petition does not conform to section 900.52(b) of the Rules of Practice (7 C.F.R. § 900.52(b)) requires that the ALJ dismiss the Petition or a portion of the Petition and permit Petitioner to file an amended petition within 20 days following service on Petitioner of the ALJ's dismissal. Respondent must be permitted to file an answer to any amended petition in accordance with section 900.52a(a) of the Rules of Practice (7 C.F.R. § 900.52a(a)). Therefore, I vacate the ALJ's Order Granting in Part and Denying in Part Respondent's Motion to Dismiss Petition and remand the proceeding to the ALJ to issue an order in accordance with the Rules of Practice.

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[3]*In re Sequoia Orange Co.*, 41 Agric. Dec. 1062, 1064 (1982) (stating the Judicial Officer has no authority to depart from the Rules of Practice). *Cf. In re William J. Reinhart*, 59 Agric. Dec. 721, 740-41 (2000) (stating the Judicial Officer and the administrative law judges are bound by the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes), *aff'd per curiam*, 39 Fed. Appx. 954, 2002 WL 1492097 (6th Cir. July 10, 2002), *cert. denied*, 123 S. Ct. 1802 (2003); *In re Jack Stepp*, 59 Agric. Dec. 265, 269 n.2 (2000) (Ruling Denying Respondents' Pet. for Recons. of Order Lifting Stay) (stating the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes are binding on the Judicial Officer, and the Judicial Officer cannot deem the respondents' late-filed Reply to Motion to Lift Stay to have been timely filed); *In re Far West Meats*, 55 Agric. Dec. 1033, 1036 n.4 (1996) (Ruling on Certified Question) (stating the Judicial Officer and the administrative law judges are bound by the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes); *In re Hermiston Livestock Co.*, 48 Agric. Dec. 434 (1989) (stating the Judicial Officer and the administrative law judges are bound by the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes).

[4]*See In re Kinzua Resources, LLC*, 57 Agric. Dec. 1165, 1179-80 (1998) (stating generally administrative law judges and the Judicial Officer are bound by the rules of practice, but they may modify the rules of practice to comply with statutory requirements, such as the deadline for agency approval or disapproval of sourcing area applications set forth in section 490(c)(3)(A) of the Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. § 620b(c)(3)(A)); and holding the chief administrative law judge did not err when he modified the Rules of Practice Governing Adjudication of Sourcing Area Applications and Formal Review of Sourcing Areas Pursuant to the Forest Resources Conservation and Shortage Relief Act of 1990); *In re Stimson Lumber Co.*, 56 Agric. Dec. 480, 489 (1997) (stating generally administrative law judges and the Judicial Officer are bound by the rules of practice, but they may modify the rules of practice to comply with statutory requirements, such as the deadline for agency approval or disapproval of sourcing area applications set forth in section 490(c)(3)(A) of the Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. § 620b(c)(3)(A)); and holding the chief administrative law judge did not err when he modified the Rules of Practice Governing Adjudication of Sourcing Area Applications and Formal Review of Sourcing Areas Pursuant to the Forest Resources Conservation and Shortage Relief Act of 1990).

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

ORDER

1. The ALJ's Order Granting in Part and Denying in Part Respondent's Motion to Dismiss Petition, issued April 7, 2003, is vacated.

2. The proceeding is remanded to the ALJ to issue an order in accordance with the Rules of Practice.

In re: LION RAISINS, INC., A CALIFORNIA CORPORATION.
2002 AMA Docket No. F&V 989-5.
Remand Order and Ruling Denying Request for Extension of Time.
Filed May 13, 2003.

AMAA – Raisins – Order dismissing petition – Judicial Officer bound by rules of practice – Administrative law judges bound by the rules of practice – "Vacate" defined.

The Judicial Officer (JO) remanded the proceeding to Administrative Law Judge (ALJ) Jill S. Clifton to issue an order in accordance with the Rules of Practice. The JO found the ALJ's Order Granting in Part and Denying in Part Respondent's Motion to Dismiss Petition did not conform to the Rules of Practice (7 C.F.R. §§ 900.52(c)(2), .52a(a)). The JO stated the Rules of Practice are binding on administrative law judges. A conclusion by the ALJ that a petition does not conform to 7 C.F.R. § 900.52(b) requires that the ALJ dismiss the petition or a portion of the petition and permit the Petitioner to file an amended petition within 20 days following service on the Petitioner of the ALJ's dismissal as provided in 7 C.F.R. § 900.52(c)(2). The Respondent must be permitted to file an answer to any amended petition in accordance with 7 C.F.R. § 900.52a(a).

Colleen A. Carroll, for Respondent.
Brian C. Leighton, for Petitioner.
Initial decision issued by Jill S. Clifton, Administrative Law Judge.
Remand Order and Ruling Denying Request for Extension of Time issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

Lion Raisins, Inc., a California corporation [hereinafter Petitioner], instituted this proceeding by filing a Petition[1] on December 4, 2002. Petitioner

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[1]Petitioner entitles its Petition "Petition To Modify Raisin Marketing Order Provisions/Regulations And/Or Petition To The Secretary Of Agriculture To Set Aside Reserve Percentages Of All Varieties Of Raisins Established For The 2002-2003 Crop Year, Pursuant To (continued...)

instituted the proceeding under section 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. § 608c(15)(A)); the federal marketing order regulating the handling of "Raisins Produced From Grapes Grown In California" (7 C.F.R. pt. 989); and the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Marketing Orders (7 C.F.R. §§ 900.50-.71) [hereinafter the Rules of Practice].

On March 3, 2003, the Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], filed a "Motion to Dismiss Petition." Respondent contends the Petition does not comply with section 900.52(b) of the Rules of Practice (7 C.F.R. § 900.52(b)) and should be dismissed (Mot. to Dismiss Pet.). On March 25, 2003, Petitioner filed "Petitioner's Opposition to Respondent's Motion to Dismiss Petition."

On April 1, 2003, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] issued an "Order Granting in Part and Denying in Part Respondent's Motion to Dismiss Petition" in which she agreed with Respondent's contention that the Petition does not comply with section 900.52(b) of the Rules of Practice (7 C.F.R. § 900.52(b)).

On April 7, 2003, Respondent appealed to the Judicial Officer. On April 25, 2003, Petitioner filed "Petitioner's Response to Respondent's Appeal Petition." On April 28, 2003, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision. On May 6, 2003, Respondent filed a "Request for Extension of Time to File Response to Petition."

CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent's one issue in "Respondent's Appeal Petition" is that the ALJ, having granted in part Respondent's Motion to Dismiss Petition, should have: (1) dismissed all or a portion of the Petition; (2) permitted Petitioner to file an amended petition within 20 days following service on Petitioner of the ALJ's dismissal; and (3) permitted Respondent to file an answer to any amended petition in accordance with section 900.52a(a) of the Rules of Practice (7 C.F.R. § 900.52a(a)) (Respondent's Appeal Pet. at 3).

Section 900.52(c)(2) of the Rules of Practice provides if an administrative law judge dismisses a petition or a portion of the petition, the petitioner shall be permitted to file an amended petition and section 900.52a(a) of the Rules of

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[1](...continued)
7 C.F.R. § 989.1 *Et Seq*. And To Exempt Petitioner From Various Provisions Of The Raisin Marketing Order And/Or Any Obligations Imposed In Connection Therewith With Respect To The Reserve Requirements, That Are Not In Accordance With Law" [hereinafter Petition].

Practice provides the time for the respondent's filing an answer to the amended petition, as follows:

> **§ 900.52 Institution of proceeding.**
>
> . . . .
>
> (c) *Motion to dismiss petition*—. . . .
>
> (2) *Decision by the Judge*. The Judge, after due consideration, shall render a decision upon the motion stating the reasons for his action. Such decision shall be in the form of an order and shall be filed with the hearing clerk who shall cause a copy thereof to be served upon the petitioner and a copy thereof to be transmitted to the Administrator. Any such order shall be final unless appealed pursuant to § 900.65: *Provided*, That within 20 days following the service upon the petitioner of a copy of the order of the Judge dismissing the petition, or any portion thereof, on the ground that it does not substantially comply in form and content with the act or with paragraph (b) of this section, the petitioner shall be permitted to file an amended petition.
>
> **§ 900.52a Answer to petition.**
>
> (a) *Time of filing*. Within 30 days after the filing of the petition,[2] the Administrator shall file an answer thereto: *Provided*, That, if a motion to dismiss the petition, in whole or in part, is made pursuant to § 900.52(c), the answer shall be filed within 15 days after the service of an order of the Judge denying the motion or granting the motion with respect to only a portion of the petition. The answer shall be filed with the hearing clerk who shall cause a copy thereof to be served promptly upon the petitioner.

7 C.F.R. §§ 900.52(c)(2), .52a(a) (footnote added).

The ALJ agreed with Respondent's contention that the Petition did not comply with section 900.52(b) of the Rules of Practice (7 C.F.R. § 900.52(b)) (Order Granting in Part and Denying in Part Respondent's Mot. to Dismiss Pet.). However, instead of dismissing the Petition or a portion of the Petition, permitting Petitioner to file an amended petition within 20 days following service on Petitioner of the ALJ's dismissal, and permitting Respondent to file

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[2]"The term *petition* includes an amended petition." (7 C.F.R. § 900.51(p).)

an answer to any amended petition in accordance with section 900.52a(a) of the Rules of Practice (7 C.F.R. § 900.52a(a)), the ALJ directed Petitioner and Respondent, as follows:

> . . . I direct the parties as follows: (1) By Tuesday, April 15, 2003, Petitioner shall supplement its Petition with the particulars as to why the procedure and percentage calculations and other RAC actions were not in accordance with the Raisin Marketing Order or the Act. (2) Within 20 days after service of those particulars, Respondent shall answer or otherwise respond to the Petition as supplemented. (3) Both parties shall construe the Petition as a request for relief for Petitioner. (4) If, by the date on which Respondent's response is to be prepared, the RAC recommendation of which Petitioner complains is not yet effective and cannot impact handlers, the Respondent may file an affidavit or declaration to that effect, **rather than an Answer**.

Order Granting in Part and Denying in Part Respondent's Mot. to Dismiss Pet. at 2 (emphasis in original).

The ALJ's Order Granting in Part and Denying in Part Respondent's Motion to Dismiss Petition is a rational disposition of Respondent's Motion to Dismiss Petition; however, the ALJ's order is not in accord with the Rules of Practice. The Rules of Practice are binding on administrative law judges and the Judicial Officer,[3] and administrative law judges and the Judicial Officer have very

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[3]*In re Sequoia Orange Co.*, 41 Agric. Dec. 1062, 1064 (1982) (stating the Judicial Officer has no authority to depart from the Rules of Practice). *Cf. In re William J. Reinhart*, 59 Agric. Dec. 721, 740-41 (2000) (stating the Judicial Officer and the administrative law judges are bound by the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes), *aff'd per curiam*, 39 Fed. Appx. 954, 2002 WL 1492097 (6th Cir. July 10, 2002), *cert. denied*, 123 S. Ct. 1802 (2003); *In re Jack Stepp*, 59 Agric. Dec. 265, 269 n.2 (2000) (Ruling Denying Respondents' Pet. for Recons. of Order Lifting Stay) (stating the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes are binding on the Judicial Officer, and the Judicial Officer cannot deem the respondents' late-filed Reply to Motion to Lift Stay to have been timely filed); *In re Far West Meats*, 55 Agric. Dec. 1033, 1036 n.4 (1996) (Ruling on Certified Question) (stating the Judicial Officer and the administrative law judges are bound by the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes); *In re Hermiston Livestock Co.*, 48 Agric. Dec. 434 (1989) (stating the Judicial Officer and the administrative law judges are bound by the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes).

limited authority to modify the Rules of Practice in a proceeding.[4] A conclusion by the ALJ that the Petition does not conform to section 900.52(b) of the Rules of Practice (7 C.F.R. § 900.52(b)) requires that the ALJ dismiss the Petition or a portion of the Petition and permit Petitioner to file an amended petition within 20 days following service on Petitioner of the ALJ's dismissal. Respondent must be permitted to file an answer to any amended petition in accordance with section 900.52a(a) of the Rules of Practice (7 C.F.R. § 900.52a(a)). Therefore, I vacate the ALJ's Order Granting in Part and Denying in Part Respondent's Motion to Dismiss Petition and remand the proceeding to the ALJ to issue an order in accordance with the Rules of Practice.

RULING DENYING MOTION FOR EXTENSION OF TIME

On May 6, 2003, after the Hearing Clerk transmitted the record to me, Respondent requested an extension of time to comply with the ALJ's Order Granting in Part and Denying in Part Respondent's Motion to Dismiss Petition. Section 900.69(c) of the Rules of Practice authorizes the Judicial Officer to rule on requests for extensions of time after transmittal of the record to the Judicial Officer, as follows:

> **§ 900.69 Filing; service; extensions of time; effective date of filing; and computation of time.**
>
> . . . .
>
> (c) *Extensions of time*. The time for the filing of any documents or papers required or authorized in this subpart to be filed may be extended

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[4]*See In re Kinzua Resources, LLC*, 57 Agric. Dec. 1165, 1179-80 (1998) (stating generally administrative law judges and the Judicial Officer are bound by the rules of practice, but they may modify the rules of practice to comply with statutory requirements, such as the deadline for agency approval or disapproval of sourcing area applications set forth in section 490(c)(3)(A) of the Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. § 620b(c)(3)(A)); and holding the chief administrative law judge did not err when he modified the Rules of Practice Governing Adjudication of Sourcing Area Applications and Formal Review of Sourcing Areas Pursuant to the Forest Resources Conservation and Shortage Relief Act of 1990); *In re Stimson Lumber Co.*, 56 Agric. Dec. 480, 489 (1997) (stating generally administrative law judges and the Judicial Officer are bound by the rules of practice, but they may modify the rules of practice to comply with statutory requirements, such as the deadline for agency approval or disapproval of sourcing area applications set forth in section 490(c)(3)(A) of the Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. § 620b(c)(3)(A)); and holding the chief administrative law judge did not err when he modified the Rules of Practice Governing Adjudication of Sourcing Area Applications and Formal Review of Sourcing Areas Pursuant to the Forest Resources Conservation and Shortage Relief Act of 1990).

> upon (1) a written stipulation between the parties, or (2) upon the request of a party, by the judge before the transmittal of the record to the Secretary, or by the Secretary at any other time if, in the judgment of the Secretary or the judge, as the case may be, there is good reason for the extension.

7 C.F.R. § 900.69(c).

As stated in this Remand Order and Ruling Denying Request for Extension of Time, *supra*, I vacate the ALJ's Order Granting in Part and Denying in Part Respondent's Motion to Dismiss Petition. Therefore, the ALJ's Order Granting in Part and Denying in Part Respondent's Motion to Dismiss Petition is void and neither Respondent nor Petitioner is required to comply with the order.[5] I find no good reason to grant Respondent's request for an extension of time to comply with an order that is vacated. Therefore, Respondent's Request for Extension of Time to File Response to Petition is denied.

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

ORDER

1. The ALJ's Order Granting in Part and Denying in Part Respondent's Motion to Dismiss Petition, issued April 1, 2003, is vacated.

2. The proceeding is remanded to the ALJ to issue an order in accordance with the Rules of Practice.

3. Respondent's Request for Extension of Time to File Response to Petition is denied.

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[5] *See Inmates of Suffolk County Jail v. Rouse*, 129 F.3d 649, 662 (1st Cir. 1997) (citing with approval the definition of *vacate* in Black's Law Dictionary 1548 (6th ed. 1990): "vacate" means "to annul" or "to render . . . void"), *cert. denied*, 524 U.S. 951 (1998); *Alabama Power Co. v. EPA*, 40 F.3d 450, 456 (D.C. Cir. 1994) (stating to *vacate* means to annul; to cancel or rescind; to declare, to make, or to render void; to defeat; to deprive of force; to make of no authority or validity; to set aside); *Mobil Oil Corp. v. EPA*, 35 F.3d 579, 584 (D.C. Cir. 1994) (stating to *vacate* means to annul; to cancel or rescind; to declare, to make, or to render void; to defeat; to set aside); *Action on Smoking and Health v. CAB*, 713 F.2d 795, 797 (D.C. Cir. 1983) (per curiam) (stating to *vacate* means to annul; to cancel or rescind; to declare, to make, or to render void; to defeat; to deprive of force; to make of no authority or validity; to set aside); *Stewart v. Oneal*, 237 F. 897, 906 (6th Cir. 1916) (stating *vacate* means to annul, set aside, or render void), *cert. denied*, 243 U.S. 645 (1917).

In re: BOGHOSIAN RAISIN PACKING CO., INC.
2002 AMA Docket No. F&V 989-6.
Order Dismissing Petition.
Filed May 14, 2003.

Colleen Carroll, for Respondent.
Howard A. Sagaser for Petitioner.
Order issued by Jill S. Clifton, Administrative Law Judge.

The Petition filed on December 2, 2002 is hereby DISMISSED, for the reasons stated in the Judicial Officer's Remand Order issued May 13, 2003.

Respondent's Request for Extension filed May 12, 2003, is MOOT, as no response is necessary.

Copies of this Order shall be served by the Hearing Clerk upon each of the parties.

[Petitioner re-filed this Complaint under AMA Docket No. F & V 989-7. – Editor]

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In re: LION RAISINS, INC.
2002 AMA Docket No. F&V 989-1.
Order Canceling Oral Hearing and Dismissing Petition.
Filed May 14, 2003.

Colleen Carroll, for Respondent.
Brian C. Leighton, for Petitioner.
Order issued by Jill S. Clifton, Administrative Law Judge.

The oral hearing scheduled to begin on Monday, June 23, 2003 in Fresno, California, is hereby CANCELED,[1] and the Petition filed on August 5, 2002 is hereby DISMISSED, for the reasons stated in the Judicial Officer's Remand Order issued May 12, 2003.

Copies of this Order shall be served by the Hearing Clerk upon each of the parties.

[1]The hearing remains scheduled at that time and place in 2002 AMA F&V 989-2, regarding In re: Boghosian Raisin Packing Co., Inc.

[Petitioner re-filed this Complaint under AMA Docket No. F & V 989-7. – Editor]

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In re: LION RAISINS, INC.
2002 AMA Docket No. F&V 989-5.
Order Dismissing Petition.
Filed May 14, 2003.

Colleen Carroll, for Respondent
Brian C. Leighton, for Petitioner.
Order issued by Jill S. Clifton, Administrative Law Judge.

The Petition filed on December 4, 2002 is hereby DISMISSED, for the reasons stated in the Judicial Officer's Remand Order issued May 13, 2003.

Copies of this Order shall be served by the Hearing Clerk upon each of the parties.

[Petitioner re-filed this Complaint under AMA Docket No. F & V 989-5. – Editor]

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In re: E&A PRODUCE, INC., EDUARDO and ANITA ANTONIO.
AMAA Docket No. 02-0004.
Dismissal Without Prejudice.
Filed May 5, 2003.

Brian T. Hill, for Complainant.
Respondent, Pro se.
Order issued by Jill S. Clifton, Administrative Law Judge.

Complainant withdrew the Complaint, by notice filed May 1, 2003.

Accordingly, this case is hereby dismissed without prejudice.

Copies of this Order shall be served by the Hearing Clerk upon each of the parties.

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In re: MICHAEL R. THOMAS.
DNS-RD Docket No. 03-0001.
Order of Dismissal.
Filed March 18, 2003.

Donald McAmis, for Complainant.
Daniel I. Prywes, for Respondent.
Order issued by Jill S. Clifton, Administrative Law Judge.

In consideration of the parties' Consent Motion, and the entire record of these proceedings,

IT IS HEREBY ORDERED:

1. The November 14, 2002 notice of final debarment of Respondent Michael R. Thomas is vacated *nunc pro tunc,* as if said debarment had never been issued.
2. USDA shall immediately remove Respondent Michael R. Thomas from the federal government's list of debarred persons.
3. This appeal is dismissed.

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In re: SAM'S BAKERY.
FMIA Docket No. 03-0001.
Order Dismissing Complaint.
Filed June 20, 2003.

Margaret A. Burns, for Complainant.
Daniel A. Swensen,, for Respondent.
Order issued by James W. Hunt, Administrative Law Judge.

Complainant moves to withdraw the complaint filed November 21, 2002. Complainant's motion is granted. The complaint is dismissed.

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In re: NICHOLAS W. EIGSTI.
FSA Docket No. 03-0001.
Dismissal Without Prejudice.
Filed June 27, 2003.

Complainant. Pro se.
Robert Ertman, for Respondent.
Order issued by Jill S. Clifton, Administrative Law Judge.

For the reasons stated in the Response to Order of Administrative Law Judge, received June 11, 2003, I find that the Complaint should be and hereby is DISMISSED, without prejudice.

Copies of this Dismissal shall be served by the Hearing Clerk upon Complainant and upon the Administrator of the Agricultural Marketing Service.

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In re: STATE OF WISCONSIN, DEPARTMENT OF HEALTH AND FAMILY SERVICES.
FSP Docket No. 02-0003.
Order Canceling Hearing and Dismissing Case.
Filed June 6, 2003.

Angela M. Kline, for Appellant.
Shelley F. Malofsky, for Appellee.
Order issued by Jill S. Clifton, Administrative Law Judge.

By Settlement Agreement received June 6, 2003, the Wisconsin State agency, Appellant, withdrew it Petition.

Accordingly, the hearing scheduled for December 15, 2003, in Washington, D.C., is hereby canceled, and this case is hereby dismissed.

Copies of this Order shall be served by the Hearing Clerk upon each of the parties.

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In re: SAM'S BAKERY.
PPIA Docket No. 03-0001.
Order Dismissing Complaint.
Filed June 20, 2003.

Margaret A. Burns, for Complainant.
Daniel A. Swensen,, for Respondent.
Order issued by James W. Hunt, Administrative Law Judge.

Complainant moves to withdraw the complaint filed November 21, 2002. Complainant's motion is granted. The complaint is dismissed.

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DEFAULT DECISIONS

ANIMAL QUARANTINE ACT

In re: WILLIAM HARGROVE.
A.Q. Docket No. 01-0012.
Decision and Order.
Filed October 21, 2002.

AQ – Default – Quarantine – Importation of meat products.

James D. Holt, for Complainant.
Respondent, Pro se.
Decision and Order issued by Jill S. Clifton, Administrative Law Judge.

The Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture [herein the complainant], instituted this administrative proceeding under the Act of February 2, 1903, as amended (21 U.S.C. § 111) [herein the Act], the regulations promulgated thereunder (9 C.F.R. § 94.11), and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statues (7 C.F.R. §§ 1.130-1.151) [herein the Rules of Practice], by filing a complaint on September 24, 2001.

The complaint alleges that on November 21, 2000, respondent shipped by mail from Germany to the United States salami, soup mixes containing beef fat, and gravy mixes containing beef in violation of 9 C.F.R. § 94.11 because the importation of fresh, chilled, or frozen beef from a Germany without a certificate is prohibited

The Hearing Clerk, Office of Administrative Law Judges, [herein Hearing Clerk] mailed the complaint to the respondent by certified mail on September 24, 2001. On March 7, 2002, a copy of the complaint was mailed to respondent by regular mail. On April 25, 2002, the hearing clerk notified the respondent that his answer to the complaint had not been received within the allotted time. The failure to file a timely answer constitutes a waiver of hearing. 7 C.F.R. §1.139.

On August 26, 2002, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), complainant filed a proposed decision, along with a motion for the adoption thereof, both which were served upon the respondent by the Hearing Clerk. There having been no meritorious objections filed, the material allegations alleged in the complaint, and admitted to by the absence of a timely

answer, are adopted and set forth herein as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. 7 C.F.R. § 1.139.

Finding of Fact

1. The mailing address of William Hargrove is CMR 4 Box 204, APO AE 09173-0204. 2. On November 21, 2000, respondent shipped by mail from Germany to the United States salami, soup mixes containing beef fat, and gravy mixes containing beef.

Conclusion

It is a well established policy that "the sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose." *S.S. Farms Linn County, Inc.,* 50 Agric. Dec. 476 (1991).

The success or failure of the programs designed to protect America's agriculture by the prevention, control and eradication of animal diseases and plant pests is dependent upon the compliance of individuals such as the respondent. Without the adherence of these individuals to Federal regulations concerned with the prevention of the spread of animal diseases, the risk of the undetected introduction and spread of animal diseases is greatly increased. The sanctions must be substantial enough to be meaningful. This is important not only to insure that a particular respondent will not again violate the regulations, but that the sanction will also deter others in similar situations. These proceedings address a violation of the Act. A single violation of the Act could cause losses of billions of dollars and eradication expenses of tens of millions of dollars. This suggests the need for a severe sanction to serve as an effective deterrent to violations.

Complainant believes that compliance and deterrence can now be achieved only with the imposition of the two hundred and fifty dollar ($250.00) civil penalty requested. Complainant's recommendation "as to the appropriate sanction is entitled to great weight, in view of the experience gained by the [Complainant] during [his] day-to-day supervision of the regulated industry." *In re: S.S. Farms Linn County, Inc. et al.*, 50 Agric. Dec. 476 (1991).

Complainant also seeks as a primary goal the deterrence of other persons

similarly situated to the respondent. *In re: Indiana Slaughtering Co*., 35 Agric. Dec. 1822, 1831 (1976). "The civil penalties imposed by the Secretary for violations of his quarantine regulations should be sufficiently large to serve as an effective deterrent not only to the respondent but also to other potential violators." *In re Kaplinsky*, 47 Agric. Dec. 629 (1988). Furthermore, "if the person cannot pay the penalty imposed, arrangements can be made to pay the civil penalty over a period of time." *Id*. at 633.

Under USDA's sanction policy "great weight is given to the recommendation of the officials charge with the responsibility for administering the regulatory program." *In re Spencer Livestock Commission Co*., 46 Agric. Dec. 268, 447, *aff'd*, 841 F.2d 1451 (9th Cir. 1988). "In order to achieve the congressional purpose and to prevent the importation into the United States of items that could be disastrous to the United States agricultural community, it is necessary to take a hard-nosed approach and hold violators responsible for any violation irrespective of lack of evil motive or intent to violate the quarantine laws." *In re Capistrano*, 45 Agric. Dec. 2196, 2198 (1986). *Accord, In re Vallata*, 45 Agric. Dec. 1421 (1986).

Therefore, by reason of the facts contained in the Findings of Fact above, I find that the respondent has violated the Act and the regulation promulgated pursuant to those regulations (9 C.F.R. § 94.11).

Therefore, the following Order is issued.

Order

William Hargrove is hereby assessed a civil penalty of two hundred and fifty dollars ($250.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to:

United States Department of Agriculture
APHIS
Accounts Receivable
P.O. Box 3334
Minneapolis, Minnesota 55403

within thirty (30) days from the effective date of this Order. The certified check or money order should include the docket number of this proceeding.

This Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Decision and Order upon the respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the rules of practice applicable to

this proceeding (7 C.F.R. § 1.145).

[This Decision and Order became final January 6, 2003. - Editor]

In re: CHRISTINE L. SHAH.
A.Q. Docket No. 01-0011.
Decision and Order.
Filed October 23, 2002.

AQ – Default – Importation of meat products.

Tracey Manoff, for Complainant.
Respondent, Pro se.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the importation of meat and meat products into the United States (9 C.F.R. Part 94 *et seq*.), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. sections 1.130 *et seq*. and 9 C.F.R. sections 70.1 *et seq*..

This proceeding was instituted by a complaint filed on August 31, 2001, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. This complaint alleged that on or about August 8, 2000, the respondent shipped by mail one (1) salami from Germany into the United States in violation of 9 C.F.R. section 94.11, because the salami was not accompanied by a health certificate as required.

The respondent failed to file an answer to the complaint within the time prescribed in 7 C.F.R. section 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. section 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. section 1.136(a) shall be deemed an admission of the allegations in the complaint. The failure to file an answer also constitutes a waiver of hearing. 7 C.F.R. section 1.139. Accordingly, the material allegations in the complaint are adopted and set forth herein as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. 7 C.F.R. section 1.139.

Findings of Fact

1. Christine L. Shah, respondent herein, is an individual whose mailing address is 317th MC, Unit 27502, APO AE 09139.

2. On or about August 8, 2000, respondent shipped salami by mail from Germany to the United States, in violation of section 94.11 of the regulations (9 C.F.R. section 94.11) because the salami was not accompanied by a certificate, as required.

Conclusion

By reason of the facts contained in the Finding of Fact above, the respondent has violated 9 C.F.R. section 94.11. 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 55403
Minneapolis, Minnesota 55403

Respondents shall indicate that payment is in reference to A.Q. Docket No. 01-0011.

This Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Decision and Order upon 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. section 1.145.

[This Decision and Order became final January 17, 2003. - Editor]

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DEFAULT DECISIONS

ANIMAL WELFARE ACT

In re: BOB ZUBIC d/b/a PORTAGE PET CENTER.
AWA Docket No. 02-0018.
Decision and Order upon Admission of Facts by Reason of Default.
Filed October 16, 2002.

AWA – Default – Exhibitor, unlicensed.

Donald A. Tracy, for Complainant.
Respondent, Pro se.
Decision and Order 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.

A copy of the complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130-1.151, was served on the respondent Bob Zubic on May 28, 2002. The letter of service informed respondent that he must file an answer pursuant to the Rules of Practice and that a failure to answer any allegation in the complaint would constitute an admission of that allegation.

Respondent Bob Zubic 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. Bob Zubic, hereinafter referred to as respondent, is an individual doing business as Portage Pet Center, whose address is 5003 US Highway 6, Portage, Indiana 46368.

B. The respondent, at all times material herein, was operating as an exhibitor as defined in the Act and the regulations.

II

On or about December 15, 2000, the respondent 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 $550.00, which shall be paid by a certified check or money order made payable to the Treasurer of United States.

The provisions of this order shall become effective on the first day after this decision becomes final.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in section 1.142 and 1.145 of the Rules of Practice, 7 C.F.R. §§ 1.142 and 1.145.

Copies of this decision shall be served upon the parties.

[This Decision and Order became final December 27, 2002. – Editor]

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In re: DEVA EXOTICS, INC., DEVA EXOTICS'INC., LLC., MICHAEL V. DEMMER, JOANNE VASSALLO.
AWA Docket. No. 02-0027.
Decision and Order as to Respondent Exotics, Inc. by Reason of Admission of Facts.
Filed January 14, 2003.

AWA – Default – Veterinary care, inadequate.

Colleen A. Carroll, for Complainant.
Respondent, Pro se.
Decision and Order issue by James W. Hunt, Administrative Law Judge.

This proceeding was instituted under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et. seq.*)(the "Act"), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondents willfully violated the Act.

On August 30, 2002, the Hearing Clerk sent to respondent Deva Exotics, Inc., by certified mail, return receipt requested, copies of the complaint and the Rules of Practice governing proceedings under the Act (7 C.F.R. §§ 1.130-1.151). The package was mailed to the respondent's current mailing address, which respondent had provided to complainant. Respondent Deva Exotics, Inc., 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. Respondent Deva Exotics, Inc., actually received the complaint on September 3, 2002. Said respondent has failed to file an answer to the complaint.

The material facts alleged in the complaint, which are all admitted by said respondent's failure to file an answer or to deny, 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 Deva Exotics, Inc., is a Wisconsin corporation whose principal business address is 3983 County Highway O, Potosi, Wisconsin 53820, and whose agent for service of process is respondent Michael V. Demmer, located at the same address. Respondent Deva Exotics, Inc., is the successor-in-interest to Deva Exotics, LLC, a Wisconsin limited liability company, whose principal business address was 3983 County Highway O,

Potosi, Wisconsin 53820, whose registered agent was respondent Michael V. Demmer. At all times mentioned herein respondent Deva Exotics, Inc., and/or Deva Exotics, LLC, operated as an exhibitor, as that term is defined in the Act and the Regulations. Deva Exotics, LLC was dissolved on July 11, 2001. Deva Exotics, Inc. was incorporated on July 11, 2001.

2. Respondent Deva Exotics, Inc., owns and exhibits to the public for compensation approximately 22 animals, including big cats, wolves and wolf-hybrids. As part of the exhibition, said respondent allows members of the public to handle the animals, specifically the two felines, an adult Siberian Tiger named "Pounce" and a lion named "Pandora."

3. On or about February 3, 2000, respondent Deva Exotics, Inc., exhibited "Pounce" to the public, and allowed the animal to be handled directly by members of the public, without distance or barriers. During that exhibition, "Pounce" scratched Dan J. Lehnherr on the neck.

On May 3, 2000, respondent Deva Exotics, Inc., exhibited approximately eight animals ("Pounce," "Pandora," and several wolves and/or wolf-dog hybrids), to several members of the public and allowed the members of the public to directly handle the animals without any distance or barriers between the animals and the people. Specifically, respondent allowed members of the public to wrestle with both "Pounce" and "Pandora."

On May 7, 2000, respondent Deva Exotics, Inc., exhibited approximately eight animals ("Pounce," "Pandora," and several wolves) to five members of the public, and allowed the members of the public to directly handle the animals without any distance or barriers between the animals and the people. During that exhibition, "Pounce" bit Rebecca Barrette, an individual who was handling the animal. As Ms. Barrette was leaving the enclosure, "Pandora" jumped on her back.

4. On May 7, 2000, respondent Deva Exotics, Inc., failed to have appropriate equipment available, and specifically, used inadequate equipment to restrain lions, tigers, and wolves.

5. On or about February 3, 2000, respondent Deva Exotics, Inc., failed to establish and maintain programs of adequate veterinary care that included the use of appropriate methods to prevent injuries, and, specifically, allowed an unsupervised and untrained member of the public to handle an adult Siberian tiger.

6. On May 3, 2000, respondent Deva Exotics, Inc., failed to establish and maintain programs of adequate veterinary care that included the use of appropriate methods to prevent injuries, and, specifically, allowed unsupervised and untrained members of the public to handle lions, tigers, and wolves and/or wolf-dog hybrids.

7. On May 7, 2000, respondent Deva Exotics, Inc., failed to establish and maintain programs of adequate veterinary care that included the use of appropriate methods to prevent injuries, and, specifically, allowed unsupervised and untrained members of the public to handle lions, tigers, and wolves.

8. On May 7, 2000, respondent Deva Exotics, Inc., failed to handle a Siberian tiger as carefully as possible in a manner that did not cause trauma and unnecessary discomfort to the animal.

9. On or about February 3, 2000, respondent Deva Exotics, Inc., failed to handle a Siberian tiger as carefully as possible in a manner that did not cause unnecessary discomfort to the animal.

10. On May 3, 2000, respondent Deva Exotics, Inc., failed to handle a female lion, a male Siberian tiger, and approximately six wolves or wolf-dog hybrids during public exhibition so there was minimal risk of harm to the public and to the animals, with sufficient distance or barriers between the animal and the public so as to ensure the safety of the animal and the public.

11. On May 7, 2000, respondent Deva Exotics, Inc., failed to handle a female lion, a male Siberian tiger, and approximately six wolves during public exhibition so there was minimal risk of harm to the public and to the animals, with sufficient distance or barriers between the animal and the public so as to ensure the safety of the animal and the public.

12. On or about February 3, 2000, respondent Deva Exotics, Inc., exhibited a female lion and a male Siberian tiger under conditions that were inconsistent with their good health and well-being.

13. On May 3, 2000, respondent Deva Exotics, Inc., exhibited a female lion, a male Siberian tiger, and approximately six wolves or wolf-dog hybrids under conditions that were inconsistent with their good health and well-being.

14. On May 7, 2000, respondent Deva Exotics, Inc., exhibited a female lion, a male Siberian tiger, and approximately six wolves under conditions that were inconsistent with their good health and well-being.

CONCLUSIONS OF LAW

1. On May 7, 2000, respondent Deva Exotics, Inc., willfully violated the attending veterinarian and veterinary care regulations by failing to have appropriate equipment available, and specifically, used inadequate equipment to restrain lions, tigers, and wolves. 9 C.F.R. § 2.40(b)(1).

2. On or about February 3, 2000, respondent Deva Exotics, Inc., willfully violated the attending veterinarian and veterinary care regulations by failing to establish and maintain programs of adequate veterinary care that included the use of appropriate methods to prevent injuries, and, specifically, allowed an

unsupervised and untrained member of the public to handle an adult Siberian tiger. 9 C.F.R. § 2.40(b)(2).

3. On May 3, 2000, respondent Deva Exotics, Inc., willfully violated the attending veterinarian and veterinary care regulations by failing to establish and maintain programs of adequate veterinary care that included the use of appropriate methods to prevent injuries, and, specifically, allowed unsupervised and untrained members of the public to handle lions, tigers, and wolves and/or wolf-dog hybrids. 9 C.F.R. § 2.40(b)(2).

4. On May 7, 2000, respondent Deva Exotics, Inc., willfully violated the attending veterinarian and veterinary care regulations by failing to establish and maintain programs of adequate veterinary care that included the use of appropriate methods to prevent injuries, and, specifically, allowed unsupervised and untrained members of the public to handle lions, tigers, and wolves. 9 C.F.R. § 2.40(b)(2).

5. On May 7, 2000, respondent Deva Exotics, Inc., willfully violated the handling regulations by failing to handle a Siberian tiger as carefully as possible in a manner that did not cause trauma and unnecessary discomfort to the animal. 9 C.F.R. § 2.131(a)(1).

6. On or about February 3, 2000, respondent Deva Exotics, Inc., willfully violated the handling regulations by failing to handle a Siberian tiger as carefully as possible in a manner that did not cause unnecessary discomfort to the animal. 9 C.F.R. § 2.131(a)(1).

7. On May 3, 2000, respondent Deva Exotics, Inc., willfully violated the handling regulations by failing to handle a female lion, a male Siberian tiger, and approximately six wolves or wolf-dog hybrids during public exhibition so there was minimal risk of harm to the public and to the animals, with sufficient distance or barriers between the animal and the public so as to ensure the safety of the animal and the public. 9 C.F.R. § 2.131(b)(1).

8. On May 7, 2000, respondent Deva Exotics, Inc., willfully violated the handling regulations by failing to handle a female lion, a male Siberian tiger, and approximately six wolves during public exhibition so there was minimal risk of harm to the public and to the animals, with sufficient distance or barriers between the animal and the public so as to ensure the safety of the animal and the public. 9 C.F.R. § 2.131(b)(1).

9. On or about February 3, 2000, respondent Deva Exotics, Inc., willfully violated the handling regulations, by exhibiting a female lion and a male Siberian tiger under conditions that were inconsistent with their good health and well-being. 9 C.F.R. § 2.131(c)(1).

10. On May 3, 2000, respondent Deva Exotics, Inc., willfully violated the handling regulations, by exhibiting a female lion, a male Siberian tiger, and

approximately six wolves or wolf-dog hybrids under conditions that were inconsistent with their good health and well-being. 9 C.F.R. § 2.131(c)(1).

11. On May 7, 2000, respondent Deva Exotics, Inc., willfully violated the handling regulations, by exhibiting a female lion, a male Siberian tiger, and approximately six wolves under conditions that were inconsistent with their good health and well-being. 9 C.F.R. § 2.131(c)(1).

ORDER

1. Respondent Deva Exotics, Inc., its agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the Regulations and Standards.

2. Respondent Deva Exotics, Inc., is assessed a civil penalty of $11,000.

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 March 6, 2003.- Editor]

In re: DEVA EXOTICS, INC., DEVA EXOTICS'INC., LLC., MICHAEL V. DEMMER, JOANNE VASSALLO.
AWA Docket No. 02-0027.
Decision and Order as to Respondent Joanne Vassallo by Reason of Admission of Facts.
Filed January 14, 2003.

AWA – Default – Veterinary care, inadequate.

Colleen A. Carroll, for Complainant.
Respondent, Pro se.
Decision and Order issue by James W. Hunt, Administrative Law Judge.

ADMISSION OF FACTS

This proceeding was instituted under the Animal Welfare Act, as amended (7 U.S.C. § 2131 et al)(the "Act"), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondents willfully violated the Act.

On August 30, 2002, the Hearing Clerk sent to respondent Joanne Vassallo,

by certified mail, return receipt requested, copies of the complaint and the Rules of Practice governing proceedings under the Act (7 C.F.R. §§ 1.130-1.151). The package was mailed to the respondent's current mailing address, which respondent had provided to complainant. Respondent Joanne Vassallo 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. Respondent Joanne Vassallo actually received the complaint on September 3, 2002. Said respondent has failed to file an answer to the complaint.

The material facts alleged in the complaint, which are all admitted by said respondent's failure to file an answer or to deny, 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 Joanne Vassallo is an individual whose business address is 3983 County Highway O, Potosi, Wisconsin 53820. At all times mentioned herein, said respondent was licensed and operating as an exhibitor, as that term is defined in the Act and the Regulations, under Animal Welfare Act license number 35-C-0199, issued under the name "MIKE DEMMER AND JOANNE VASSALLO, doing business as Deva Exotics," and was a principal in respondent Deva Exotics, Inc. Said respondent previously held licenses 21-A-005 and 21-C-021.

2. Respondent Joanne Vassallo owns and exhibits to the public for compensation approximately 22 animals, including big cats, wolves and wolf-hybrids. As part of the exhibition, said respondent allows members of the public to handle the animals, specifically the two felines, an adult Siberian Tiger named "Pounce" and a lion named "Pandora."

3. On or about February 3, 2000, respondent Joanne Vassallo exhibited "Pounce" to the public, and allowed the animal to be handled directly by members of the public, without distance or barriers. During that exhibition, "Pounce" scratched Dan J. Lehnherr on the neck.

On May 3, 2000, respondent Joanne Vassallo exhibited approximately eight animals ("Pounce," "Pandora," and several wolves and/or wolf-dog hybrids), to several members of the public and allowed the members of the public to directly handle the animals without any distance or barriers between the animals and the people. Specifically, respondent allowed members of the public to wrestle with both "Pounce" and "Pandora."

On May 7, 2000, respondent Joanne Vassallo exhibited approximately eight

animals ("Pounce," "Pandora," and several wolves) to five members of the public, and allowed the members of the public to directly handle the animals without any distance or barriers between the animals and the people. During that exhibition, "Pounce" bit Rebecca Barrette, an individual who was handling the animal. As Ms. Barrette was leaving the enclosure, "Pandora" jumped on her back.

4. On May 7, 2000, respondent Joanne Vassallo failed to have appropriate equipment available, and specifically, used inadequate equipment to restrain lions, tigers, and wolves.

5. On or about February 3, 2000, respondent Joanne Vassallo failed to establish and maintain programs of adequate veterinary care that included the use of appropriate methods to prevent injuries, and, specifically, allowed an unsupervised and untrained member of the public to handle an adult Siberian tiger.

6. On May 3, 2000, respondent Joanne Vassallo failed to establish and maintain programs of adequate veterinary care that included the use of appropriate methods to prevent injuries, and, specifically, allowed unsupervised and untrained members of the public to handle lions, tigers, and wolves and/or wolf-dog hybrids.

7. On May 7, 2000, respondent Joanne Vassallo failed to establish and maintain programs of adequate veterinary care that included the use of appropriate methods to prevent injuries, and, specifically, allowed unsupervised and untrained members of the public to handle lions, tigers, and wolves.

8. On May 7, 2000, respondent Joanne Vassallo failed to handle a Siberian tiger as carefully as possible in a manner that did not cause trauma and unnecessary discomfort to the animal.

9. On or about February 3, 2000, respondent Joanne Vassallo failed to handle a Siberian tiger as carefully as possible in a manner that did not cause unnecessary discomfort to the animal.

10. On May 3, 2000, respondent Joanne Vassallo failed to handle a female lion, a male Siberian tiger, and approximately six wolves or wolf-dog hybrids during public exhibition so there was minimal risk of harm to the public and to the animals, with sufficient distance or barriers between the animal and the public so as to ensure the safety of the animal and the public.

11. On May 7, 2000, respondent Joanne Vassallo failed to handle a female lion, a male Siberian tiger, and approximately six wolves during public exhibition so there was minimal risk of harm to the public and to the animals, with sufficient distance or barriers between the animal and the public so as to ensure the safety of the animal and the public.

12. On or about February 3, 2000, respondent Joanne Vassallo exhibited

a female lion and a male Siberian tiger under conditions that were inconsistent with their good health and well-being.

13. On May 3, 2000, respondent Joanne Vassallo exhibited a female lion, a male Siberian tiger, and approximately six wolves or wolf-dog hybrids under conditions that were inconsistent with their good health and well-being. 14

On May 7, 2000, respondent Joanne Vassallo exhibited a female lion, a male Siberian tiger, and approximately six wolves under conditions that were inconsistent with their good health and well-being.

CONCLUSIONS OF LAW

1. On May 7, 2000, respondent Joanne Vassallo willfully violated the attending veterinarian and veterinary care regulations by failing to have appropriate equipment available, and specifically, used inadequate equipment to restrain lions, tigers, and wolves. 9 C.F.R. § 2.40(b)(1).

2. On or about February 3, 2000, respondent Joanne Vassallo willfully violated the attending veterinarian and veterinary care regulations by failing to establish and maintain programs of adequate veterinary care that included the use of appropriate methods to prevent injuries, and, specifically, allowed an unsupervised and untrained member of the public to handle an adult Siberian tiger. 9 C.F.R. § 2.40(b)(2).

3. On May 3, 2000, respondent Joanne Vassallo willfully violated the attending veterinarian and veterinary care regulations by failing to establish and maintain programs of adequate veterinary care that included the use of appropriate methods to prevent injuries, and, specifically, allowed unsupervised and untrained members of the public to handle lions, tigers, and wolves and/or wolf-dog hybrids. 9 C.F.R. § 2.40(b)(2).

4. On May 7, 2000, respondent Joanne Vassallo willfully violated the attending veterinarian and veterinary care regulations by failing to establish and maintain programs of adequate veterinary care that included the use of appropriate methods to prevent injuries, and, specifically, allowed unsupervised and untrained members of the public to handle lions, tigers, and wolves. 9 C.F.R. § 2.40(b)(2).

5. On May 7, 2000, respondent Joanne Vassallo willfully violated the handling regulations by failing to handle a Siberian tiger as carefully as possible in a manner that did not cause trauma and unnecessary discomfort to the animal. 9 C.F.R. § 2.131(a)(1).

6. On or about February 3, 2000, respondent Joanne Vassallo willfully violated the handling regulations by failing to handle a Siberian tiger as carefully as possible in a manner that did not cause unnecessary discomfort to

the animal. 9 C.F.R. § 2.131(a)(1).

7. On May 3, 2000, respondent Joanne Vassallo willfully violated the handling regulations by failing to handle a female lion, a male Siberian tiger, and approximately six wolves or wolf-dog hybrids during public exhibition so there was minimal risk of harm to the public and to the animals, with sufficient distance or barriers between the animal and the public so as to ensure the safety of the animal and the public. 9 C.F.R. § 2.131(b)(1).

8. On May 7, 2000, respondent Joanne Vassallo willfully violated the handling regulations by failing to handle a female lion, a male Siberian tiger, and approximately six wolves during public exhibition so there was minimal risk of harm to the public and to the animals, with sufficient distance or barriers between the animal and the public so as to ensure the safety of the animal and the public. 9 C.F.R. § 2.131(b)(1).

9. On or about February 3, 2000, respondent Joanne Vassallo willfully violated the handling regulations, by exhibiting a female lion and a male Siberian tiger under conditions that were inconsistent with their good health and well-being. 9 C.F.R. § 2.131(c)(1).

10. On May 3, 2000, respondent Joanne Vassallo willfully violated the handling regulations, by exhibiting a female lion, a male Siberian tiger, and approximately six wolves or wolf-dog hybrids under conditions that were inconsistent with their good health and well-being. 9 C.F.R. § 2.131(c)(1).

11. On May 7, 2000, respondent Joanne Vassallo willfully violated the handling regulations, by exhibiting a female lion, a male Siberian tiger, and approximately six wolves under conditions that were inconsistent with their good health and well-being. 9 C.F.R. § 2.131(c)(1).

ORDER

1. Respondent Joanne Vassallo, 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.

2. Respondent Joanne Vassallo is assessed a civil penalty of $2,750.

3. Respondent Joanne Vassallo's animal welfare license (number 35-C-0199) is hereby revoked.

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 March 6, 2003.- Editor]

In re: JAMES R. ANDERSON, d/b/a WIZARD OF CL'OZ
AWA Docket No. 02-0017.
Decision and Order.
Filed March 11, 2003.

AWA – Default – Records, inadequate – Veterinary care, inadequate.

Sharlene A. Deskins, Attorney 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 May 29, 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, and are adopted 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. James R. Anderson, hereinafter referred to as the respondent, is an individual whose address is 3441 S W 27th Street, Fort Lauderdale, FL 33312.

B. The respondent, at all times material herein, was licensed and operating

as a dealer as defined in the Act and the regulations. The respondent operates under the business name of Wizard of Cl'Oz.

C. When the respondent became licensed and annually thereafter, he received copies of the Act and the regulations and standards issued thereunder and agreed in writing to comply with them.

II

On July 9, 1998, APHIS inspected respondent's premises and records and found that the respondent had failed to maintain complete records showing the acquisition, disposition, and identification of animals, in willful 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)).

III

A. On November 28, 2000, APHIS inspected respondent's premises and records and found that the respondent had failed to maintain complete records showing the acquisition, disposition, and identification of animals, in willful 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)).

B. On November 28, 2000, APHIS inspected respondent's premises and records and found that the respondent had failed to individually identify at least 13 bengal kittens in willful violation of section 11 of the Act (7 U.S.C. § 2141) and section 2.50 of the regulations (9 C.F.R. § 2.50).

C. On November 28, 2000, APHIS inspected respondent's premises and found that respondent had failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine because the Respondent had no written program for veterinarian care. The Respondent further failed to provide adequate veterinary care by not having a veterinarian examine animals that appeared to be ill. The above stated actions of the Respondent were willful violation of section 2.40 of the regulations (9 C.F.R. § 2.40).

D. On November 28, 2000, APHIS inspected the 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 specified below:

1. Outdoor housing facilities for tamarins were not enclosed by a perimeter fence of sufficient height to keep animals and unauthorized persons out as required in the standards (9 C.F.R. 3.127(d)); and

2. The premises including buildings and surrounding grounds, were not

kept in good repair, and clean and free of trash, junk, waste, and discarded matter, in order to protect the animals from injury, and facilitate the required husbandry practices (9 C.F.R § 3.11(c)). The enclosure for a female doberman and her ten puppies contained lawn equipment and other materials.

IV

A. On October 6, 2000, the respondent failed to maintain complete records showing the acquisition, disposition, and identification of at least 9 kittens, in willful 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)).

B. On October 6, 2000, the respondent's failed to individually identify at least 9 kittens in willful violation of section 11 of the Act (7 U.S.C. § 2141) and section 2.50 of the regulations (9 C.F.R. § 2.50).

V

A. On or about October 12, 2000, the respondent failed to maintain complete records showing the acquisition, disposition, and identification of kittens, in willful 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)).

B. On or about October 12, 2000, the respondent's failed to individually identify at least 4 bengal kittens in willful violation of section 11 of the Act (7 U.S.C. § 2141) and section 2.50 of the regulations (9 C.F.R. § 2.50).

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 or through any corporate or other device, shall cease and desist from violating the Act and the regulations and standards issued thereunder, and in particular, shall cease and desist from:

(a) Failing to provide proper veterinary care;

(b) Failing to maintain complete records as required by the regulations;

(c) Failing to identify animals as required by the regulations;

(d) Failing to provide animals with a perimeter fence which is of a sufficient height to keep animals and unauthorized persons out of the respondent's facility;

(e) Failing to maintain the facilities and enclosures for animals free of equipment, junk or other materials; and

(f) Transporting, selling or offering for sale animals that are less than eight weeks of age.

2. The Respondent is assessed a civil penalty of $4,600 which shall be paid by a certified check or money order made payable to the Treasurer of United States.

3. The Respondent, his agents, partners, employees, successors and assigns, directly or through any corporate or other device are disqualified from applying for a license under the Animal Welfare Act until the civil penalty assessed in this case and any costs associated with collecting the civil penalty are paid in full.

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 April 21, 2003.- Editor]

PLANT QUARANTINE ACT

In re: MARIA MAURICIO LOPEZ.
P.Q. Docket No. 02-0004.
Decision and Order by Reason of Default.
Filed December 20, 2002.

PQ – Default – Importation, prohibited, of mangos.

James D. Holt, for Complainant.
Respondent, Pro se.
Decision and Order by Jill S. Clifton, Administrative Law Judge.

Preliminary Statement

The Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture [herein the complainant], instituted this administrative proceeding under the Plant Protection Act (7 C.F.R. §§ 7701-7772) [herein the Act], the regulations promulgated thereunder (7 C.F.R. § 319.56 *et seq.*), and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statues (7 C.F.R. §§ 1.130-1.151) [herein the Rules of Practice], by filing a complaint on December 27, 2001.

The complaint alleges that on June 24, 2000, the respondent imported approximately ten (10) mangoes from Mexico into the United States at Los Angeles, California, in violation of 7 C.F.R. § 319.56-2(e), because the mangoes were not imported under permit, as required.

The Hearing Clerk, Office of Administrative Law Judges, [herein Hearing Clerk] mailed the complaint to the respondent by certified mail on December 28, 2001. On February 26, 2002, a copy of the complaint was mailed to respondent by regular mail. On April 24, 2002, the hearing clerk notified the respondent that his answer to the complaint had not been received within the allotted time. The failure to file a timely answer constitutes a waiver of hearing. 7 C.F.R. §1.139.

On September 23, 2002, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), complainant filed a proposed decision, along with a motion for the adoption thereof, both which were served upon the respondent by the Hearing Clerk. There having been no meritorious objections filed, the material allegations alleged in the complaint, and admitted to by the absence of a timely

answer, are adopted and set forth herein as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. 7 C.F.R. § 1.139.

Finding of Fact

1. The mailing address of Maria Mauricio Lopez is 8862 Van Nuys, Apartment 22, Panorama City, California 91402.

2. On June 24, 2000, the respondent imported approximately ten (10) mangoes from Mexico into the United States without the required permit.

Conclusion

It is a well established policy that "the sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose." *S.S. Farms Linn County, Inc*., 50 Agric. Dec. 476 (1991).

The success or failure of the programs designed to protect America's agriculture by the prevention, control and eradication of animal diseases and plant pests is dependent upon the compliance of individuals such as the respondent. Without the adherence of these individuals to Federal regulations concerned with the prevention of the spread of animal diseases, the risk of the undetected introduction and spread of animal diseases is greatly increased. The sanctions must be substantial enough to be meaningful. This is important not only to insure that a particular respondent will not again violate the regulations, but that the sanction will also deter others in similar situations. These proceedings address a violation of the Act. A single violation of the Act could cause losses of billions of dollars and eradication expenses of tens of millions of dollars. This suggests the need for a severe sanction to serve as an effective deterrent to violations.

Complainant believes that compliance and deterrence can now be achieved only with the imposition of the two hundred and fifty dollar ($250.00) civil penalty requested. Complainant's recommendation "as to the appropriate sanction is entitled to great weight, in view of the experience gained by the [Complainant] during [his] day-to-day supervision of the regulated industry." *In re S.S. Farms Linn County, Inc. et al.*, 50 Agric. Dec. 476 (1991).

Complainant also seeks as a primary goal the deterrence of other persons

similarly situated to the respondent. *In re Indiana Slaughtering Co.*, 35 Agric. Dec. 1822, 1831 (1976). "The civil penalties imposed by the Secretary for violations of his quarantine regulations should be sufficiently large to serve as an effective deterrent not only to the respondent but also to other potential violators." *In re Kaplinsky*, 47 Agric. Dec. 629 (1988). Furthermore, "if the person cannot pay the penalty imposed, arrangements can be made to pay the civil penalty over a period of time." *Id.* at 633.

Under USDA's sanction policy "great weight is given to the recommendation of the officials charge with the responsibility for administering the regulatory program." *In re Spencer Livestock Commission Co.,* 46 Agric. Dec. 268, 447, *aff'd,* 841 F.2d 1451 (9th Cir. 1988). "In order to achieve the congressional purpose and to prevent the importation into the United States of items that could be disastrous to the United States agricultural community, it is necessary to take a hard-nosed approach and hold violators responsible for any violation irrespective of lack of evil motive or intent to violate the quarantine laws." *In re Capistrano*, 45 Agric. Dec. 2196, 2198 (1986). *Accord, In re Vallata*, 45 Agric. Dec. 1421 (1986).

Therefore, by reason of the facts contained in the Findings of Fact above, I find that the respondent has violated the Act and the regulation promulgated pursuant to those regulations (7 C.F.R. § 319.56-2(e)).

Therefore, the following Order is issued.

Order

Maria Mauricio Lopez is hereby assessed a civil penalty of two hundred and fifty dollars ($250.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to:

United States Department of Agriculture
APHIS
Accounts Receivable
P.O. Box 3334
Minneapolis, Minnesota 55403

within thirty (30) days from the effective date of this Order. The certified check or money order should include the docket number of this proceeding.

This Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Decision and Order upon the respondent, unless there is an appeal to the

Judicial Officer within thirty (30) days 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 effective on February 3, 2003. – Editor]

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CONSENT DECISIONS

(Not published herein-Editor)

AGRICULTURAL MARKETING AGREEMENT ACT

Golden Sun Gem, Inc., a California corporation formerly known as Sun Fruit Inc.; and Jasbir Purewal, an individual. AMAA Docket No. 01-0002. 3/3/03.

Golden Sun Gem, Inc., a California corporation formerly known as Sun Fruit Inc.; Jasbir Purewal, an individual; Baljinder Purewal, an individual; and JBM Farms, a general partnership. AMAA Docket No. 01-0003. 3/3/03.

Gerrald's Vidalia Sweet Onion, Inc. AMAA Docket No. 03-0001. 3/25/03.

ANIMAL QUARANTINE ACT

FRS Farms, Incorporated. A.Q. Docket No. 01-0007. 3/17/03.

Valley Pride Pack, Incorporated. A.Q. Docket No. 01-0007. 3/17/03.

ANIMAL WELFARE ACT

Tom Harvey d/b/a Safari Zoological Park. AWA Docket No. 00-0024. 1/14/03.

Gerald Wensmann and Angeline Wensmann d/b/a Highdarling Cattery aka Highland Hills Kennel. AWA Docket No. 01-0052. 1/16/03.

Delta Air Lines, Inc., a Georgia corporation. AWA Docket No. 01-0036. 2/3/03.

Michael G. Powell, d/b/a Miami Reptile. AWA Docket No. 00-0041. 2/3/03.

Delta Air Lines, Inc., a Georgia corporation. AWA Docket No. 00-0041. 2/3/03.

Delta Air Lines, Inc., a Georgia corporation. AWA Docket No. 01-0015. 2/3/03.

Delta Air Lines, Inc., a Georgia corporation. AWA Docket No. 01-0037. 2/3/03.

Brandon Tuckett and Larry L. Tuckett d/b/a Tuckett's Family Farm. AWA Docket No. 02-0029. 2/12/03.

Matt Bennett. AWA Docket No. 99-0034. 2/26/03.

David J. Harris. AWA Docket No. 02-0025. 2/27/03.

Billy R. Holman. AWA Docket No. 02-0009. 3/27/03.

Tigers-R-Us, Bobby Hranicky, and Kelly Hranicky. AWA Docket No. 00-0026. 3/14/03.

University of Massachusetts at Amherst. AWA Docket No. 01-0038. 3/14/03.

Bax Global, Inc. AWA Docket No. 01-0038. 4/21/03.

Norisa Harris, Donald Harris, Dog-Gone Kennel. AWA Docket No. 01-0014. 4/22/03.

Michael S. Sandlin and Tiger Truck Stop, Inc. AWA Docket No. 02-0021. 4/25/03.

Breck Wakefield, Derek Werner, d/b/a Branson West Reptile Garden. AWA Docket No. 03-0004. 5/8/03.

Thomas M. Thompson AWA Docket No. 03-0023. 5/15/03.

Daniel Shonka. AWA Docket No. 01-0019. 5/20/03.

Joe Estes d/b/a Safari Joe's Wildlife Rescue, aka Safari Joe's Exotic Wildlife Rescue and Safari Joe's Zoological Park. AWA Docket No. 02-0026. 6/11/03.

Wendell Sandlin and Truckers Village, Inc., d/b/a Tiger Travel Plaza. AWA Docket No. 02-0024. 6/27/03.

FEDERAL MEAT INSPECTION ACT

Nebraska Beef, Ltd. FMIA Docket No. 03-0002. 1/27/03.

Robert Winner Sons, Inc., d/b/a Winner's Quality Meats, a/k/a Winner's Meats. FMIA Docket No. 03-0003. 2/7/03.

Salem Packing Company, Inc., Anthony S. Bonaccurso, and Samuel Bonaccurso. FMIA Docket No. 02-0001. 4/22/03.

HORSE PROTECTION ACT

Bill C. Cantrell. HPA Docket No. 01-0003. 1/31/03.

Steve Dunn. HPA Docket No. 00-0014. 3/7/03.

POULTRY PRODUCTS INSPECTION ACT

Robert Winner Sons, Inc., d/b/a Winner's Quality Meats, a/k/a Winner's Meats. PPIA Docket No. 03-0002. 2/7/03.

AGRICULTURE DECISIONS

Volume 62

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Part Two (P & S)
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UNITED STATES DEPARTMENT OF AGRICULTURE

AGRICULTURE DECISIONS

AGRICULTURE DECISIONS is an official publication by the Secretary of Agriculture consisting of decisions and orders issued in adjudicatory administrative proceedings conducted for the Department under various statutes and regulations. Selected court decisions concerning the Department's regulatory programs are also included. The Department is required to publish its rules and regulations in the *Federal Register* and, therefore, they are not included in AGRICULTURE DECISIONS.

Beginning in 1989, AGRICULTURE DECISIONS is comprised of three Parts, each of which is published every six months. Part One is organized alphabetically by statute and contains all decisions and orders other than those pertaining to the Packers and Stockyards Act and the Perishable Agricultural Commodities Act, which are contained in Parts Two and Three, respectively.

The published decisions and orders may be cited by giving the volume number, page number and year, e.g., 1 Agric. Dec. 472 (1942). It is unnecessary to cite a decision's docket number, e.g., AWA Docket No. 99-0022, and the use of such references generally indicates that the decision has not been published in AGRICULTURE DECISIONS.

Consent decisions entered subsequent to December 31, 1986, are no longer published. However, a list of consent decisions is included. Consent decisions are on file and may be inspected upon request made to the Hearing Clerk, Office of Administrative Law Judges.

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. Volumes 39 (circa 1980) through Volume 58 (circa 1999) have been scanned and will appear in portable document format (pdf) on the same OALJ website. Beginning on July 1, 2003, current ALJ Decisions will be displayed in pdf format on the OALJ website in chronological order.

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

PACKERS AND STOCKYARDS ACT

DEPARTMENTAL DECISIONS

MISCELLANEOUS ORDER

DEFAULT DECISIONS

PACKERS AND STOCKYARDS ACT

DEPARTMENTAL DECISION

In re: EXCEL CORPORATION.
P. & S. Docket No. 99-0010.
Decision and Order.
Filed January 30, 2003.

P&S – Unfair or deceptive practice – Livestock purchase – Carcass merit basis – Purposes of the Packers and Stockyards Act – Broad authority conferred by the Packers and Stockyards Act – Notification to sellers of details of purchase contract – Notification to sellers of grading to be used – "Grading" defined – Advisory rules – Substantive rules – Sanction – Cease and desist order – Discovery of witness names – Arbitration order – Vague regulation – Credibility determinations – Cross appeal – Second appeal petition.

The Judicial Officer (JO) affirmed the decision of Chief Administrative Law Judge (ALJ) James W. Hunt: (1) concluding Respondent failed to make known to hog producers the change in the formula to estimate lean percent prior to purchase of hogs on a carcass merit basis from those producers in violation of 7 U.S.C. § 192(a) and 9 C.F.R. § 201.99(a); and (2) ordering Respondent to cease and desist from failing to comply with 7 C.F.R. § 201.99(a). The JO rejected Respondent's contention that the Packers and Stockyards Act must be narrowly construed stating the Packers and Stockyards Act is remedial legislation that should be liberally construed to effectuate its purposes. The JO stated two of the primary purposes of the Packers and Stockyards Act are to prevent economic harm to livestock producers and to maintain open and free competition. Respondent impeded competition by failing to make known to producers the change in the formula it used to estimate lean percent of hogs, a factor that affected the amount Respondent paid for hogs. The JO also rejected Respondent's contention that 7 C.F.R. § 201.99 was an advisory regulation that did not have the force and effect of law. Further, the JO rejected Respondent's contention that 7 C.F.R. § 201.99(a) was vague, stating the regulation put Respondent on notice that it is required to make known to hog producers a change in the formula to estimate lean percent. The JO stated the formula to estimate lean percent is part of the grading process and the regulation explicitly requires packers to notify producers of "the grading to be used." The JO agreed with Complainant's contention that, under the Rules of Practice (7 C.F.R. § 1.140(a)(1)(iv)), Complainant was not required to provide Respondent the names of anticipated witnesses. The JO found the Chief ALJ's cease and desist order did not bear a reasonable relation to the unlawful practice the Chief ALJ found to exist and the Chief ALJ's order that Respondent agree to submit the matter to arbitration with hog producers was not a sanction authorized by the Packers and Stockyards Act. However, the JO rejected Complainant's contention that the Chief ALJ's failure to assess a severe civil penalty was error. The JO rejected Respondent's request that he reverse the Chief ALJ's credibility determination with respect to one of the witnesses, stating the JO gives great weight to the credibility determinations of administrative law judges and there was no basis to reverse the Chief ALJ's credibility determination. Finally, the JO refused to consider the new issues raised in Respondent's response to Complainant's appeal petition stating, under the Rules of Practice (7 C.F.R. § 1.145(b)), a party who has previously filed an appeal petition must limit the response to supporting or opposing the other party's appeal petition.

Patrice H. Harps and Eric Paul, for Complainant.
John R. Fleder and Brett T. Schwemer, and Jeff P. DeGraffenreid, for Respondent.

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

PROCEDURAL HISTORY

Harold W. Davis, Deputy Administrator, Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a "Complaint and Notice of Hearing" on April 9, 1999. Complainant instituted this proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §§ 181-229) [hereinafter the Packers and Stockyards Act]; the regulations issued under the Packers and Stockyards Act [hereinafter the Regulations] (9 C.F.R. §§ 201.1-.200); 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]. On April 21, 1999, Complainant filed an "Amended Complaint and Notice of Hearing" [hereinafter Amended Complaint].

Complainant alleges that, during the period between October 23, 1997, and June 1, 1998, Excel Corporation [hereinafter Respondent] violated section 202(a) of the Packers and Stockyards Act (7 U.S.C. § 192(a)) and section 201.99 of the Regulations (9 C.F.R. § 201.99) by failing to make known to hog producers a change in the formula used to estimate lean percent in hogs, prior to Respondent's purchasing hogs on a carcass grade, carcass weight, or carcass grade and weight basis. Complainant alleges that, as a result of the change in the formula to estimate lean percent in hogs, Respondent paid hog producers approximately $1,839,000 less for approximately 19,942 lots of hogs than Respondent would have paid if Respondent had not changed the formula. (Amended Compl. ¶¶ II-III.) On May 18, 1999, Respondent filed an "Answer" denying the material allegations of the Amended Complaint.[1]

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[1]On March 29, 2001, Complainant moved to revise the Amended Complaint to conform to the evidence (Tr. 2260). Chief Administrative Law Judge James W. Hunt [hereinafter the Chief ALJ] granted Complainant's motion in part allowing Complainant to revise the period during which Respondent's violations of the Packers and Stockyards Act and the Regulations allegedly occurred and Complainant's alleged estimated harm to hog producers caused by Respondent's change in the formula used to estimate lean percent in hogs (Tr. 2260-87). The revised Amended Complaint alleges Respondent violated section 202(a) of the Packers and Stockyards Act (7 U.S.C. § 192(a)) and section 201.99 of the Regulations (9 C.F.R. § 201.99) during the period between October 23, 1997, and July 20, 1998, and alleges additional economic harm incurred by hog producers as a result of Respondent's change of the formula used to estimate lean percent in hogs. On May 7, (continued...)

The Chief ALJ presided over a hearing on July 18-21 and July 25-28, 2000, in Wichita, Kansas; September 25-27, 2000, in Chicago, Illinois; and March 27-29, 2001, in Wichita, Kansas. Patrice H. Harps and Eric Paul, Office of the General Counsel, United States Department of Agriculture, represented Complainant. John R. Fleder, Brett T. Schwemer, and Jeff P. DeGraffenreid represented Respondent.

On July 16, 2001, Complainant filed "Complainant's Proposed Findings of Fact, Conclusions of Law, and Proposed Order" [hereinafter Complainant's Post-Hearing Brief] and Respondent filed "Excel Corporation's Post-Hearing Opening Brief" [hereinafter Respondent's Post-Hearing Brief]. On September 4, 2001, Complainant filed "Complainant's Brief in Reply to Respondent's Post-Hearing Opening Brief" [hereinafter Complainant's Post-Hearing Reply Brief] and Respondent filed "Excel Corporation's Post-Hearing Reply Brief" [hereinafter Respondent's Post-Hearing Reply Brief].

On February 7, 2002, the Chief ALJ issued a "Decision and Order" [hereinafter Initial Decision and Order]: (1) finding Respondent failed to notify hog producers of an October 1997 change in the formula Respondent used to estimate lean percent in hogs prior to changing the formula; (2) concluding Respondent violated section 202(a) of the Packers and Stockyards Act (7 U.S.C. § 192(a)) and section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)) when Respondent failed to notify hog producers of the change in the formula used to estimate lean percent in hogs; (3) ordered Respondent to cease and desist from failing to notify livestock sellers of any change in the formula used to estimate lean percent; and (4) ordered Respondent to submit to arbitration with hog producers who sold hogs to Respondent between October 1997 and July 1998 under Respondent's changed formula to estimate lean percent, who may have received less money for their hogs than the hog producers would have received under the old formula, and who have not otherwise been compensated or resolved the matter by agreement with Respondent (Initial Decision and Order at 26-27).

On March 13, 2002, Complainant filed "Complainant's Appeal of Certain Procedural Rulings Issued by Chief Administrative Law Judge Hunt" [hereinafter Complainant's Appeal of Procedural Rulings], "Complainant's Petition of Appeal" [hereinafter Complainant's Appeal Petition], and "Complainant's Brief in Support of Its Petition of Appeal" [hereinafter

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[1](...continued)
2001, Respondent filed "Excel Corporation's Answer to Revised Amended Complaint" which denies the material allegations of Complainant's revised Amended Complaint.

Complainant's Appeal Brief]. On March 13, 2002, Respondent filed "Excel Corporation's Appeal Petition and Brief" [hereinafter Respondent's Appeal Petition]. On June 6, 2002, Complainant filed "Complainant's Response to Excel Corporation's Appeal Petition and Brief" [hereinafter Complainant's Response]. On June 6, 2002, Respondent filed "Excel Corporation's Response to Complainant's Appeal Petition" [hereinafter Respondent's Response to Complainant's Appeal]. On June 28, 2002, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I disagree with the Chief ALJ's finding that Respondent violated a new duty established in this proceeding and the Chief ALJ's order that Respondent submit to arbitration. However, I agree with many of the Chief ALJ's findings of fact, the Chief ALJ's conclusion that Respondent violated section 202(a) of the Packers and Stockyards Act (7 U.S.C. § 192(a)) and section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)), and the Chief ALJ's imposition of a cease and desist order. Therefore, except for significant modifications to the Chief ALJ's discussion and other minor modifications, pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt the Chief ALJ's Initial Decision and Order as the final Decision and Order. Additional conclusions by the Judicial Officer follow the Chief ALJ's discussion of sanction, as restated.

Complainant's exhibits are designated by "CX." Respondent's exhibits are designated by "RX." Transcript references are designated by "Tr."

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 9—PACKERS AND STOCKYARDS

. . . .

SUBCHAPTER II—PACKERS GENERALLY

PART A—GENERAL PROVISIONS

§ 191. "Packer" defined

When used in this chapter the term "packer" means any person engaged in the business (a) of buying livestock in commerce for purposes of slaughter, or (b) of manufacturing or preparing meats or

meat food products for sale or shipment in commerce, or (c) of marketing meats, meat food products, or livestock products in an unmanufactured form acting as a wholesale broker, dealer, or distributor in commerce.

§ 192. Unlawful practices enumerated

It shall be unlawful for any packer with respect to livestock, meats, meat food products, or livestock products in unmanufactured form, or for any live poultry dealer with respect to live poultry, to:

(a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device[.]

. . . .

§ 193. Procedure before Secretary for violations

(a) Complaint; hearing; intervention

Whenever the Secretary has reason to believe that any packer has violated or is violating any provision of this subchapter, he shall cause a complaint in writing to be served upon the packer, stating his charges in that respect, and requiring the packer to attend and testify at a hearing at a time and place designated therein, at least thirty days after the service of such complaint; and at such time and place there shall be afforded the packer a reasonable opportunity to be informed as to the evidence introduced against him (including the right of cross-examination), and to be heard in person or by counsel and through witnesses, under such regulations as the Secretary may prescribe. . . .

(b) Report and order; penalty

If, after such hearing, the Secretary finds that the packer has violated or is violating any provisions of this subchapter covered by the charges, he shall make a report in writing in which he shall state his findings as to the facts, and shall issue and cause to be served on the packer an order requiring such packer to cease and desist from continuing such violation. The testimony taken at the hearing shall be reduced to writing and filed in the records of the Department of Agriculture. The Secretary may also assess a civil penalty of not more than $10,000 for each such violation. In determining the amount of the civil penalty to be assessed under this

section, the Secretary shall consider the gravity of the offense, the size of the business involved, and the effect of the penalty on the person's ability to continue in business. If, after the lapse of the period allowed for appeal or after the affirmance of such penalty, the person against whom the civil penalty is assessed fails to pay such penalty, the Secretary may refer the matter to the Attorney General who may recover such penalty by an action in the appropriate district court of the United States.

. . . .

SUBCHAPTER V—GENERAL PROVISIONS

. . . .

§ 223. Responsibility of principal for act or omission of agent

When construing and enforcing the provisions of this chapter, the act, omission, or failure of any agent, officer, or other person acting for or employed by any packer, any live poultry dealer, stockyard owner, market agency, or dealer, within the scope of his employment or office, shall in every case also be deemed the act, omission, or failure of such packer, any live poultry dealer, stockyard owner, market agency, or dealer, as well as that of such agent, officer, or other person.

§ 228. Authority of Secretary

(a) Rules, regulations, and expenditures; appropriations

The Secretary may make such rules, regulations, and orders as may be necessary to carry out the provisions of this chapter and may cooperate with any department or agency of the Government, any State, Territory, District, or possession, or department, agency, or political subdivision thereof, or any person[.]

7 U.S.C. §§ 191, 192(a), 193(a)-(b), 223, 228(a).

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 [20 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 [bracketed material in original]; 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–*. . . .

. . . .

(6) *Grain Inspection Service, Packers and Stockyards Administration*. (i) Civil penalty for a packer violation, codified at 7 U.S.C. 193(b), has a maximum of $11,000.

7 C.F.R. § 3.91(a), (b)(6)(i).

9 C.F.R.:

TITLE—ANIMALS AND ANIMAL PRODUCTS

. . . .

CHAPTER II—GRAIN INSPECTION, PACKERS AND STOCKYARDS ADMINISTRATION (PACKERS AND STOCKYARDS PROGRAMS), DEPARTMENT OF AGRICULTURE

. . . .

PART 201—REGULATION UNDER THE PACKERS AND STOCKYARDS ACT

. . . .

GENERAL

. . . .

§ 201.99 Purchase of livestock by packers on a carcass grade, carcass weight, or carcass grade and weight basis.

(a) Each packer purchasing livestock on a carcass grade, carcass weight, or carcass grade and weight basis shall, prior to such purchase, make known to the seller, or to his duly authorized agent, the details of the purchase contract. Such details shall include, when applicable, expected date and place of slaughter, carcass price, condemnation terms, description of the carcass trim, grading to be used, accounting, and any special conditions.

. . . .

(e) Settlement and final payment for livestock purchased by a packer on a USDA carcass grade shall be on an official (final—not preliminary) grade. If settlement and final payment are based upon any grades other than official USDA grades, such other grades shall be set forth in detailed written specifications which shall be made available to the seller

or his duly authorized agent.

9 C.F.R. § 201.99(a), (e).

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

Statement of the Case

Respondent, a packer, buys livestock for slaughter which Respondent then manufactures into meat products for sale in commerce. Respondent's corporate address is P.O. Box 2519, Wichita, Kansas 67201. Respondent is estimated to be the fourth or fifth largest hog slaughterer in the United States. (Answer ¶ 2; Tr. 2329.)

Respondent acquires hogs from approximately 2,000 hog producers (Tr. 1548). The record does not indicate the total number of hogs processed by Respondent, but at one of its three facilities, Respondent slaughters up to 10,000 hogs a day (RX 55 at 1; Tr. 132). Respondent buys some animals on a "spot" market basis, that is, the price is negotiated for that particular lot of hogs. Respondent obtains other hogs through short-term and long-term contracts whereby producers agree to sell a given number of hogs to Respondent for a set base price. Not all contracts are in writing. (Tr. 128.)

Most hogs are sold to Respondent under its "carcass merit" program which rewards producers who raise hogs having a high percent of lean meat. Hogs with a high percent of lean meat have a higher market value than hogs with a low percent of lean meat. The process by which Respondent purchases hogs under its carcass merit program starts with a hog producer delivering hogs to one of Respondent's buying stations where the hogs are put into a holding pen, tattooed for identification, given a lot number, weighed, and inspected. The hogs are then transported to one of Respondent's slaughtering facilities. Respondent's hog slaughtering facilities are located in Beardstown, Illinois, Ottumwa, Iowa, and Marshall, Missouri. After a hog is killed, bled, eviscerated, de-haired, washed, and inspected, the carcass is evaluated for its estimated percentage of lean (red) meat. Respondent then applies this percentage figure to a pricing table called the "lean percent matrix" to determine whether the hog producer receives a discount for the carcass -- a deduction from the base price -- or a premium -- an addition to the base price. The higher the estimated lean percent the higher the premium.

Lean percent may be estimated by various methods. No industry standard

exists for estimating lean percent. (Tr. 947.) The most accurate method (but also the most impractical method for large slaughtering operations) is to dissect a carcass and examine it for fat and lean meat content (Tr. 654, 671, 1500). Other less accurate methods of estimating lean percent are Ultrasound, ToBEC, AutoFom, and the Fat-O-Meat'er (RX 20). The method used by Respondent is the Fat-O-Meat'er (Tr. 61).

The Fat-O-Meat'er, developed in Denmark from a study of European hogs, has been used by Respondent for about 10 years. The Fat-O-Meat'er is a hand-held device with a probe that is inserted in the carcass. A light measures the difference between the loin-eye and back fat depth. A regression formula or equation embedded in the Fat-O-Meat'er, commonly referred to as the "Danish formula" (Lean Meat = 58.86 - 0.61 x Back Fat + 0.12 x Loineye Depth), then uses this measurement to estimate the lean percent of the carcass. (CX 4 at 12.) A representative for SFK Technology, the company which manufactures the Fat-O-Meat'er, testified that the device is used worldwide and that it is a United States Department of Agriculture approved grading system. The SFK Technology representative said the Fat-O-Meat'er is used by 32 United States packers, but he did not know how many rely solely on the Danish formula to estimate lean percent. He said the Fat-O-Meat'er provides data to a packer and the packer then determines how the information is used. Formulas vary from packer to packer with at least three packers using the Danish formula. Some packers use a hog's hot carcass weight (the weight after the slaughtering process is completed but before chilling) together with the Danish formula to estimate lean percent. (Tr. 60, 63, 76-77, 80, 1187-88.)

Scott Eilert, research director for Respondent's Pork Division, and Gary Kohake, former president of Respondent's Pork Division, testified that they considered the Fat-O-Meat'er to be a grading system (Tr. 104-05, 948-49). Steve Meyer, an economist with the National Pork Producers Council,[2] testified that grading is a system to categorize carcasses and that an equation to estimate lean percent is part of the grading process (Tr. 654-79). David Meisinger, an assistant vice president with the National Pork Producers Council, opined that grading includes all carcass evaluation systems (Tr. 1498). The United States Department of Agriculture no longer has a grading system. Packers use their

[2]The National Pork Producers Council is a contractor with the National Pork Board which is funded under a United States Department of Agriculture program through an assessment on each hog sold. The mission of the National Pork Producers Council is to improve the profitability of hog producers and provide consumers with a lean, wholesome, and nutritious product. The National Pork Producers Council believes that accuracy in the evaluation and estimation of the lean percent of carcasses leads to better pricing for hog producers. (Tr. 668, 673, 1202, 1456, 1487-88, 1513-14.)

own grading systems to evaluate carcasses which, as discussed in this Decision and Order, *infra*, must be disclosed to producers.

After a producer's lot of hogs is evaluated for lean percent, a computer determines the payment the hog producer will receive. The check sent to the hog producer is accompanied by a "kill sheet." The kill sheet contains such pertinent information as the date and number of hogs purchased, trim loss, lean percent, and value of each hog. (CX 6 at 30; Tr. 252.) Hog producers benefit economically by raising and selling hogs with a high lean percent, and, as one of Respondent's representatives testified, the kill sheet tells a hog producer how his or her hogs "performed" (Tr. 140, 994, 1487).

Producers selling hogs to Respondent on a carcass merit basis were aware that Respondent used the Fat-O-Meat'er to estimate lean percent and that, based on the lean percent, the matrix determined the price the producers received (Tr. 430, 927, 1552). Respondent provided its buyers with an explanation of the formula that they could use to explain the formula to hog producers, and some hog producers were told the formula. However, Respondent did not generally inform hog producers of the details of the formula. (Tr. 314, 441, 769, 1071-72, 1084, 1208, 1481, 1522, 1604, 1648.)

Complainant was aware prior to 1997 that Respondent did not tell hog producers the formula. Complainant's May 12, 1993, audit report on Respondent's use of the Fat-O-Meat'er stated: "The formula to convert probe millimeter readings to percentage of lean is not relayed to producers." (RX 55 at 2; Tr. 441, 445-46, 1604-05.) The record further indicates that other packers in the industry that used the Fat-O-Meat'er also did not tell producers about their formulas to estimate lean percent (Tr. 672, 1214, 1345, 1371-72, 1647-48, 2455). One packer developed a brochure explaining its formula but the record does not establish that the brochure had been prepared prior to the year 2000 or distributed to producers (Tr. 985-86).

In 1997, Respondent began an effort to improve the accuracy of the Fat-O-Meat'ers' Danish formula to estimate lean percent. Respondent estimated the Fat-O-Meat'ers' Danish formula was only about 72-73 percent accurate. (Tr. 909-10, 1633.) After studying various methods, Respondent adopted a formula developed by Purdue University and promoted by the National Pork Producers Council [hereinafter the Purdue formula]. The Purdue formula uses hot carcass weight as a variable with the Danish formula to estimate lean percent (2.827 + (.469*Hot Carcass Weight) - (18.47*Backfat Depth*.0393701) + (9.824*Loineye Depth*.0393701)/Hot Carcass Weight) (CX 6 at 13). The Purdue formula was estimated to improve the accuracy of the measurement of lean percent to about 90 percent (Tr. 910, 1771).

Respondent, knowing the formula change could affect the price it paid for

hogs, considered the economic effect on hog producers of the use of the Purdue formula (Tr. 114-15). Respondent concluded, based on a study of 1.5 million hogs, that there would be only a "minimal impact" on hog producers (Tr. 910-12, 969, 1644-45, 1843). Dr. Eilert testified that, overall, "[s]ome hogs would receive a higher lean percent as measured by our new equation, and some hogs would receive a lower lean percent as measured by the new equation, and some would not change" (Tr. 966).

Respondent decided not to tell hog producers about the change in the formula because, while it was not a secret, company officials believed that the formula, like the processing methods and technology it used, was not a factor that interested hog producers or formed a basis for whether they sold hogs to Respondent (Tr. 1645-46, 1649, 1724-25). One of Respondent's procurement managers equated the formula change with using a more accurate scale (Tr. 1547-48). Another consideration was the corporate belief that hog producers who received more because of a change to a more accurate formula would be unhappy because they had been selling in the past under an inaccurate formula, while hog producers who received less because of the change would be upset (RX 47 at 2; Tr. 1689-93). Donald Brandt, formerly an assistant procurement manager at Respondent's Ottumwa, Iowa, slaughtering facility, testified that sometime in the fall of 1997 he overheard a telephone conversation between Gary Baack, the procurement manager at Respondent's Ottumwa, Iowa, slaughtering facility, Ted Fritz, the Beardstown, Illinois, procurement manager, and Richard Gallant, Respondent's vice president for procurement. Donald Brandt testified that, after the call, Baack told Brandt that hog producers were not to be told about the formula change. (Tr. 145-46.) Baack, however, testified that he was never told by Gallant not to tell hog producers about the formula change (Tr. 1044). Fritz testified Gallant had told him that there was no need to tell hog producers about the formula change but that he was never told to refrain from telling hog producers about the formula change (Tr. 1521). Gallant said he had called all his procurement managers in the fall of 1997 about the formula change, except for Baack, who was on vacation at the time (Tr. 1852).

Before implementing the formula change, Respondent examined its written contracts with hog producers to determine if any of the contracts required Respondent to provide notice of the formula change. Respondent concluded that none of the contracts that it reviewed required Respondent to notify hog producers of the formula change (Tr. 1396-98, 1848-50). However, Respondent's contract with Tyson Foods, which supplied the majority of the hogs for Respondent's Marshall, Missouri, slaughtering facility, provided that, while Respondent had the right to change its method of carcass evaluation,

Respondent had to conduct statistically sound tests to verify that Tyson Foods did not suffer any adverse economic effects from the change. Further, the contract provided that, if Tyson Foods did suffer adverse economic effects, Tyson Foods could terminate the contract. (CX 10 at 283-84.) Respondent notified Tyson Foods of the formula change. When Tyson Foods objected to the change, Respondent did not use the Purdue formula to estimate the lean percent of Tyson Foods' hogs. (Tr. 746-51.) Respondent's contracts with some of the other hog producers, including Heartland Pork Enterprises, Inc., and Hog, Inc., contained a provision that was similar to the provision in Respondent's contract with Tyson Foods, except that these hog producers, while having the right to have the matter submitted to arbitration, did not have the option to terminate the contract. (CX 11 at 7, CX 12 at 11.) Respondent did not notify these hog producers or the others of its intention to change the formula (Tr. 314, 1075). Respondent implemented the formula change at its Ottumwa, Iowa, and Beardstown, Illinois, slaughtering facilities in October 1997 and at the Marshall, Missouri, slaughtering facility in April 1998 (Tr. 126).

About 50 percent of the producers supplying hogs to Respondent always sold to Respondent (Tr. 1588-89). Others sold trial lots to Respondent and to other packers to determine where they could get the best price (Tr. 662, 1179-80, 1192, 1379, 1587). Hog producers who sold hogs to Respondent were in locations which enabled them to sell hogs to a number of packers, including Respondent (Tr. 1068, 1186, 1240-41, 1368-69). All packers appear to base the prices they pay for hogs on base price, lean percent, and a matrix (Tr. 1103-04, 1379-80, 1589-90). The result for a hog producer, as one testified, was that "[u]nfortunately, it's not straightforward and it's not really an apples and oranges comparison within the industry. Every packer has a slightly different grading program. They use slightly different means of getting to the same point for the end value. And so it's just not a cut and dry answer, yes or no, that one pays more than the other. It depends on the base price and the grade premiums, and you add all those together to determine where is the best place to market the hogs." (Tr. 1103.) Thus, for a hog producer, "net dollars per hog is [the] main concern." (Tr. 1380.)

Beginning in late 1997, after the formula change was implemented, some hog producers noticed a difference in the prices they were receiving for the hogs they sold to Respondent. They discovered this difference in price by comparing Respondent's prices with those of other packers or even with the price they received at Respondent's Marshall, Missouri, slaughtering facility, which did not change to the Purdue formula until April 1998. Hog producers who kept records from information on their kill sheets for past sales also knew the price they should receive for the quality of their hogs. (Tr. 141-43, 148, 406, 772,

1074-76, 1328, 1361-63, 1379, 1591, 1593-95.)

One hog producer estimated the change to be a deficiency of about $1.25 a head (Tr. 1086-87). Hog producers initially thought the change might be attributable to a seasonal fluctuation or a change in operations (Tr. 319, 1075). Hog producers also began asking Respondent's managers at its slaughtering facilities about the matter (Tr. 141-43, 1075-77, 1201). The record indicates that hog producers who asked were told about the formula change (Tr. 402, 1202). Hog producers who were told about the formula change included Hog, Inc., a cooperative with over 100 members. Respondent faxed Hog, Inc., a copy of the Purdue formula in February 1998 after Hog, Inc., contacted Respondent. (CX 11 at 21; Tr. 1075-77, 1411.) Gene Fangmann, the procurement manager at Respondent's Marshall, Missouri, slaughtering facility, testified that he notified all the hog buyers under his supervision by telephone of the formula change in April 1998 after the change was implemented at that slaughtering facility (Tr. 1619).

Also, in April 1998, the Grain Inspection, Packers and Stockyards Administration [hereinafter GIPSA], initiated what appears to have been a routine investigation of Respondent's use of the Fat-O-Meat'er. The record indicates that the Packers and Stockyards Administration[3] had started these Fat-O-Meat'er investigations, or audits, of the industry in 1993 at the National Pork Producers Council's request. A National Pork Producers Council representative testified that, prior to 1992, the Packers and Stockyards Administration lacked a working knowledge of the Fat-O-Meat'er which, while relatively new, was a device the industry was beginning to use as part of the purchasing process. The National Pork Producers Council requested in 1992 that the Packers and Stockyards Administration develop a program to monitor the use of the Fat-O-Meat'er and that hog producers be made aware of the way lean percent is estimated. (Tr. 1307-13, 1496.)

In 1993, the Packers and Stockyards Administration instituted a program to monitor the use of the Fat-O-Meter (Tr. 2459-60). The Packers and Stockyards Administration conducted its first investigation of Respondent that year to "review the accuracy of Excel's Fat-o-Meat'er; proper application of the payment formula; and the proper application of the Fat-o-Meat'er" (RX 55 at 1). As noted in this Decision and Order, *supra*, the Packers and Stockyards

[3]Pursuant to title II of the Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994 (7 U.S.C. §§ 6901-7014), effective October 20, 1994, the Secretary of Agriculture: (1) abolished the Packers and Stockyards Administration; and (2) established GIPSA which was assigned responsibility for all programs and activities formerly performed by the Packers and Stockyards Administration (59 Fed. Reg. 66,517-19 (Dec. 27, 1994)).

Administration's report of the 1993 audit states that the Fat-O-Meat'er formula used by Respondent was not relayed to hog producers (RX 55 at 2). The Packers and Stockyards Administration made a similar comment in its 1994 report (RX 57 at 3). Gene Fangmann, the manager at Respondent's Ottumwa, Iowa, facility at that time, testified that when asked by investigators in 1994 if hog producers were told the formula and he replied that hog producers had not been told of the formula, the investigators responded that their audit indicated that "everything was up to snuff" and "looks fine" (Tr. 1604-05). The Packers and Stockyards Administration and GIPSA conducted four audits between 1993 and 1997. Bryice Wilke, one of the investigators in 1994, testified that neither the Packers and Stockyards Administration nor GIPSA found violations as a result of these Fat-O-Meat'er investigations. (Tr. 217, 288.)

Bryice Wilke, while conducting the 1998 audit, found the prices that hog producers should have been paid using the Danish formula were not those that appeared on the kill sheets. Richard Gallant, Respondent's vice president for procurement, told Bryice Wilke that Respondent had changed the formula. (Tr. 255-56, 403, 1856.) Bryice Wilke then learned from some hog producers that they had not been told that the formula had been changed (Tr. 441).

Bryice Wilke stated he believed that, under the Regulations, Respondent was required to disclose its formula for lean percent to hog producers and he was of the same belief when he prepared the report in 1994 which noted that Respondent had not disclosed the formula to hog producers (Tr. 439-41). He did not tell Respondent at the time that he believed the failure to disclose the formula was a violation of the Regulations (Tr. 441, 1604-05). Bryice Wilke explained that, as an investigator, he is an information gatherer and prepares reports and that his superiors have the responsibility to determine whether a violation was committed (Tr. 446). When asked about the 1994 report, Bryice Wilke's superior, Jay Johnson, supervisor of the GIPSA Des Moines Regional Office, testified that "[t]here are many times that we may find a violation and not file a formal administrative action. I do not know if the conclusion was made that there were no violations." (Tr. 2456.)

In 1997, Respondent was unaware of any requirement to notify hog producers of the formula or its change when not requested (Tr. 1653, 1861-64). The National Pork Producers Council was also unaware of any requirement to notify hog producers of the formula or its change when not requested (Tr. 1481-82). Complainant argued that the Packers and Stockyards Administration had given Respondent such notice in a 1992 letter that stated "Regulation 201.99 issued under the provisions of the Packers and Stockyards Act (1921, as amended) requires that a packer make known to the seller, prior to the purchase the details of the purchase contract, and then provide a true

written account of such purchase including all information affecting final payment and accounting." This letter relates to a matter of accounting for lost or misidentified hog carcasses rather than to the Fat-O-Meat'er. (CX 17.)

As a result of the 1998 investigation, Complainant decided that Respondent's failure to disclose its change of the formula to hog producers prior to the purchase of hogs from those producers, was a violation of section 201.99 of the Regulations (9 C.F.R. § 201.99). Respondent was told of the alleged violation in June 1998 (Tr. 1857-58). In July 1998, Respondent sent a letter to hog producers notifying them that the formula had been changed (Tr. 1400). Respondent also adjusted the matrix so that hog producers received the same price under the Purdue formula as they would have received had Respondent used the Danish formula. Respondent said that it received no complaints from hog producers and that no hog producer stopped selling hogs to Respondent because of the formula change (Tr. 1045-46, 1586-88, 1601-03). However, among hog producers there was a mixed reaction. Some hog producers favored the change to a more accurate formula, some hog producers were indifferent, and some hog producers were upset with Respondent's failure to notify them of the change in the formula. (Tr. 1046-47, 1084-85, 1091, 1099-1101, 1158-61, 1203-07, 1365-67.)

Respondent reached a settlement with Heartland Pork Enterprises, Inc., and Hog, Inc., on their contract dispute relating to the formula change. Respondent sent checks to other hog producers in amounts Respondent calculated were the differences between what the hog producers received under the Purdue formula and what they would have received under the Danish formula from the time of the formula change to the date they were notified of the formula change. Respondent did not try to recover from those hog producers who were paid more because of the formula change. (RX 51; Tr. 1006-07.)

Complainant determined that the difference in the estimate of lean percent between the Purdue formula and the Danish formula was about 1 percent (CX 9 at 160; Tr. 735). Complainant estimated that 87 percent of the hog producers received less and 13 percent of the hog producers received more because of the formula change. Complainant also estimated that Respondent paid hog producers $1,841,585.34 less using the Purdue formula than Respondent would have paid hog producers had it continued to use the Danish formula, or an average of approximately $90.20 less per lot. (CX 9; Tr. 814-21.)

When Respondent responded that it had paid hog producers $3,093,581 (including interest at 5.85 percent) as the difference between the Purdue formula and the Danish formula (RX 51), Complainant recalculated its estimate and determined that Respondent had still underpaid hog producers by $635,345.52 and that some hog producers had not received a payment (Tr. 2051).

Complainant seeks a cease and desist order and the assessment of an $8,000,000 civil penalty against Respondent (Complainant's Post-Hearing Brief at 96-98).

Discussion

The issues in this proceeding are: (1) whether Respondent had a duty under section 202(a) of the Packers and Stockyards Act (7 U.S.C. § 192(a)) and section 201.99 of the Regulations (9 C.F.R. § 201.99) to notify hog producers when it changed its formula for estimating lean percent; and (2) if Respondent had a duty to notify hog producers when it changed its formula for estimating lean percent, what sanction is appropriate for a violation of that duty. The salient facts are not in dispute. The parties are in agreement that Respondent did not tell all hog producers when it changed the formula to estimate lean percent and did not disclose details of the formula to all hog producers.

Complainant's theory expressed in the Amended Complaint is that the Fat-O-Meat'er's formula to estimate lean percent is a method to calculate the purchase price of hogs and that Respondent violated section 201.99 of the Regulations (9 C.F.R. § 201.99) when it failed to notify hog producers of the changed formula because "every packer must make known to sellers the details of purchase contracts, including the calculation of price, prior to purchasing hogs on a carcass grade, carcass weight, or carcass grade and weight (i.e., carcass merit) basis (9 C.F.R. § 201.99)" (Amended Compl. ¶ III). Complainant argues that the formula, as a method to estimate lean percent, is an "essential element" of the "grading to be used" by Respondent and that "it is extremely important that the producer know the process and elements involved in estimating the lean percent of each hog. The price depends on it. Without this information the price cannot be 'discovered' by the producer . . . ; the producer cannot determine or estimate the price offered by one packer in order to compare it to the price offered by another packer." (Complainant's Post-Hearing Brief at 42, 44.)

Complainant further contends Respondent had a contractual good faith duty to tell hog producers of any changes in the formula and Respondent had the duty under section 201.99(e) of the Regulations (9 C.F.R. § 201.99(e)) to provide hog producers, on request, detailed written specifications about the grades which are the bases for settlement and payment. Complainant alleges Respondent's action constitutes an unfair and deceptive practice in violation of section 202(a) of the Packers and Stockyards Act (7 U.S.C. § 192(a)) and caused hog producers to suffer substantial economic harm. (Complainant's Post-Hearing Brief at 44-56.)

Respondent denies it violated the Packers and Stockyards Act and the Regulations. Respondent contends: (1) Complainant has not met its burden of proving Respondent violated the Packers and Stockyards Act; (2) the Complaint was politically motivated; (3) Complainant's interpretation of the Packers and Stockyards Act is not entitled to deference; (4) the Packers and Stockyards Act must be narrowly construed; (5) section 201.99 of the Regulations (9 C.F.R. § 201.99) is not a substantive regulation and lacks the force and effect of law; (6) section 201.99 of the Regulations (9 C.F.R. § 201.99) is vague and does not refer to formulas to estimate lean percent or define "grading to be used"; (7) notice to hog producers of the formula change was a contractual matter; (8) hog producers did not care whether the formula was changed; (9) Respondent did not have a legal duty to notify hog producers of the formula change; (10) Respondent was not given prior warning or notice of Complainant's interpretation of the Packers and Stockyards Act and the Regulations or the penalty Complainant seeks; (11) the Packers and Stockyards Act does not authorize a penalty for a violation of the Regulations; (12) Complainant's proposed civil penalty is excessive and violates the Eighth Amendment to the Constitution of the United States; and (13) Complainant's proposed cease and desist order is not appropriate (Respondent's Post-Hearing Brief).

The sponsors of the bill later enacted as the Packers and Stockyards Act (H.R. 6230) described the bill as one of the most comprehensive regulatory measures ever considered.[4] Similarly, the House Report applicable to the bill describes the bill as giving the Secretary of Agriculture broad authority, as follows:

> A careful study of the bill, will, I am sure, convince one that it, and existing laws, give the Secretary of Agriculture complete inquisitorial, visitorial, supervisory, and regulatory power over the packers,

[4] 61 Cong. Rec. 1801 (1921) (By Mr. Haugen: "Undoubtedly it is a most far-reaching measure and extends further than any previous law into the regulation of private business, with the exception of war emergency measures, and possibly the interstate commerce act."); 61 Cong. Rec. 4783 (1921) (By Mr. Haugen: "It gives the Secretary of Agriculture complete visitorial, inquisitorial, supervisory, and regulatory power over the packers and stockyards. It extends over every ramification of the packers and stockyard transactions in connection with the packing business. It provides for ample court review. The bill is designed to supervise and regulate and thus safeguard the public and all elements of the packing industry, from the producer to the consumer, without injury or to destroy any unit in it. It is the most far-reaching measure and extends further than any previous law into the regulation of private business—with few exceptions, the war emergency measure and possibly the interstate commerce act.").

> stockyards and all activities connected therewith; that it is a most comprehensive measure and extends farther than any previous law in the regulation of private business, in time of peace, except possibly the interstate commerce act.

H.R. Rep. No. 67-77, at 2 (1921).

The Conference Report applicable to H.R. 6230 states "Congress intends to exercise, in the bill, the fullest control of packers and stockyards which the Constitution permits[.]" H.R. Conf. Rep. No. 67-324, at 3 (1921).

Further, Congress has repeatedly broadened the Secretary of Agriculture's authority under the Packers and Stockyards Act.[5] The primary purpose of the Packers and Stockyards Act was described in a House Report, in connection with a major amendment of the Packers and Stockyards Act enacted in 1958, as follows:

> The Packers and Stockyards Act was enacted by Congress in 1921. The primary purpose of this Act is to assure fair competition and fair trade practices in livestock marketing and in the meatpacking industry. The objective is to safeguard farmers and ranchers against receiving less than the true market value of their livestock and to protect consumers against unfair business practices in the marketing of meats, poultry, etc. Protection is also provided to members of the livestock marketing and meat industries from unfair, deceptive, unjustly discriminatory, and monopolistic practices of competitors, large or small.[6]

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[5]For example, in 1924, the Packers and Stockyards Act was broadened to authorize the Secretary of Agriculture to suspend registrants and require bonds of registrants (Act of June 5, 1924, Pub. L. No. 201, 43 Stat. 460 (codified at 7 U.S.C. § 204)). The Packers and Stockyards Act was broadened to cover live poultry dealers or handlers in 1935 (Act of Aug. 14, 1935, Pub. L. No. 272, § 503, 49 Stat. 649 (codified at 7 U.S.C. §§ 192, 218b, 221, 223)). In 1958, the Packers and Stockyards Act was broadened to give the Secretary of Agriculture "jurisdiction over all livestock marketing involved in interstate commerce including country buying of livestock and auction markets, regardless of size" (H.R. Rep. No. 85-1048, at 5 (1957), *reprinted in* 1958 U.S.C.C.A.N. 5212, 5216). In 1976, the Packers and Stockyards Act was broadened to authorize packer-bonding, temporary injunctions, and civil penalties; to require prompt payment of packers, market agencies, and dealers; and to eliminate the requirement that the Secretary of Agriculture prove that each violation occurred "in commerce" (Act of Sept. 13, 1976, Pub. L. No. 94-410, 90 Stat. 1249).

[6]*Accord In re Arizona Livestock Auction, Inc.*, 55 Agric. Dec. 1121, 1130-31 (1996); *In re Chatham Area Auction, Cooperative, Inc.*, 49 Agric. Dec. 1043, 1056-57 (1990); *In re Ozark*

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H.R. Rep. No. 85-1048, at 1 (1957), *reprinted in* 1958 U.S.C.C.A.N. 5213.

Courts that have examined the Packers and Stockyards Act have uniformly described the Packers and Stockyards Act as constituting a broader grant of authority to regulate than previous legislation.[7] Moreover, the Packers and Stockyards Act is remedial legislation and should be liberally construed to effectuate its purposes.[8] The purposes of the Packers and Stockyards Act are

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[6](...continued)
County Cattle Co., 49 Agric. Dec. 336, 360 (1990); *In re Victor L. Kent & Sons, Inc.*, 47 Agric. Dec. 692, 717 (1988); *In re Gary Chastain*, 47 Agric. Dec. 395, 420 (1988), *aff'd per curiam*, 860 F.2d 1086 (8th Cir. 1988) (unpublished), *printed in* 47 Agric. Dec. 1395 (1988); *In re Floyd Stanley White*, 47 Agric. Dec. 229, 299 (1988), *aff'd per curiam*, 865 F.2d 262, 1988 WL 133292 (6th Cir. 1988); *In re Sterling Colorado Beef Co.*, 39 Agric. Dec. 184, 233-34 (1980), *appeal dismissed*, No. 80-1293 (10th Cir. Aug. 11, 1980); Donald A. Campbell, The Packers and Stockyards Act Regulatory Program, in 1 Davidson, *Agricultural Law*, ch. 3 (1981 and 1989 Cum. Supp.)

[7]*See, e.g., Swift & Co. v. United States*, 393 F.2d 246, 253 (7th Cir. 1968) (stating the statutory prohibitions of section 202 of the Packers and Stockyards Act are broader and more far-reaching than the Sherman Antitrust Act or even section 5 of the Federal Trade Commission Act); *Swift & Co. v. United States*, 308 F.2d 849, 853 (7th Cir. 1962) (stating the legislative history shows Congress understood that section 202 of the Packers and Stockyards Act is broader in scope than antecedent legislation, such as the Sherman Antitrust Act, section 2 of the Clayton Act, section 5 of the Federal Trade Commission Act, and section 3 of the Interstate Commerce Act); *Wilson & Co. v. Benson*, 286 F.2d 891, 895 (7th Cir. 1961) (stating from the legislative history it is a fair inference that, in the opinion of Congress, section 2 of the Clayton Act, section 5 of the Federal Trade Commission Act, and the prohibitions in the Sherman Antitrust Act were not broad enough to the meet the public needs as to business practices of packers; section 202(a) and (b) of the Packers and Stockyards Act was enacted for the purpose of going further than prior legislation in the prohibiting of certain trade practices which Congress considered were not consonant with the public interest).

[8]*Farrow v. United States Dep't of Agric.*, 760 F.2d 211, 214 (8th Cir. 1985); *Rice v. Wilcox*, 630 F.2d 586, 589 (8th Cir. 1980); *Travelers Indem. Co. v. Manley Cattle Co.*, 553 F.2d 943, 945 (5th Cir. 1977); *Central Coast Meats v. United States Dep't of Agric.*, 541 F.2d 1325, 1328 (9th Cir. 1976); *Glover Livestock Comm'n Co. v. Hardin*, 454 F.2d 109, 111 (8th Cir. 1972), *rev'd on other grounds*, 411 U.S. 182 (1973); *Bruhn's Freezer Meats of Chicago, Inc. v. United States Dep't of Agric.*, 438 F.2d 1332, 1336 (8th Cir. 1971); *Swift & Co. v. United States*, 393 F.2d 247, 253 (7th Cir. 1968); *Bowman v. United States Dep't of Agric.*, 363 F.2d 81, 85 (5th Cir. 1966); *Lich v. Cornhusker Casualty Co.*, 774 F. Supp. 1216, 1221 (D. Neb. 1991); *Cook v. Hartford Accident & Indem, Co.*, 657 F. Supp. 762, 767 (D. Neb. 1987) (memorandum opinion); *Gerace v. Utica Veal Co.*, 580 F. Supp. 1465, 1470 (N.D.N.Y. 1984) (memorandum decision); *Pennsylvania Agric. Coop. Mktg. Ass'n v. Ezra Martin Co.*, 495 F. Supp. 565, 570 (M.D. Pa. 1980) (memorandum opinion); *Arnold Livestock Sales Co. v. Pearson*, 383 F. Supp. 1319, 1323 (D. Neb. 1974) (memorandum opinion); *Folsom-Third Street Meat Co. v. Freeman*, 307 F. Supp. 222, 225 (N.D. Cal. 1969); *In re Frosty Morn Meats, Inc.*, 7 B.R. 988, 1013 (Bankr. M.D. Tenn. 1980); *In re Arizona Livestock*
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varied. Two of the primary purposes of the Packers and Stockyards Act are to prevent economic harm to livestock producers and to maintain open and free competition.[9]

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[8](...continued)
Auction, Inc., 55 Agric. Dec. 1121, 1132 (1996); *In re ITT Continental Baking Co.*, 44 Agric. Dec. 748, 799 (1985).

[9]*See Mahon v. Stowers*, 416 U.S. 100, 106 (1974) (per curiam) (stating the chief evil at which the Packers and Stockyards Act is aimed is the monopoly of the packers, enabling them unduly and arbitrarily to lower prices to the shipper who sells and unduly and arbitrarily to increase the price to the consumer who buys); *Denver Union Stock Yard Co. v. Producers Livestock Mktg. Ass'n*, 356 U.S. 282, 289 (1958) (stating the Packers and Stockyards Act is aimed at all monopoly practices, of which discrimination is one); *Jackson v. Swift Eckrich, Inc.*, 53 F.3d 1452, 1460 (8th Cir. 1995) (stating the Packers and Stockyards Act has its origins in antecedent antitrust legislation and primarily prevents conduct which injures competition); *Farrow v. United States Dep't of Agric.*, 760 F.2d 211, 214 (8th Cir. 1985) (stating the Packers and Stockyards Act gives the Secretary of Agriculture broad authority to deal with any practices that inhibit the fair trading of livestock by stockyards, marketing agencies, and dealers); *Rice v. Wilcox*, 630 F.2d 586, 590 (8th Cir. 1980) (stating one purpose of the Packers and Stockyards Act is to protect the owner and shipper of livestock and to free the owner from fear that the channels through which his product passed, through discrimination, exploitation, overreaching, manipulation, or other unfair practices, might not return to him a fair return for his product); *Van Wyk v. Bergland*, 570 F.2d 701, 704 (8th Cir. 1978) (stating one purpose of the Packers and Stockyards Act is to assure fair trade practices in the livestock marketing industry in order to safeguard farmers and ranchers against receiving less than the true market value of their livestock); *Solomon Valley Feedlot, Inc. v. Butz*, 557 F.2d 717, 718 (10th Cir. 1977) (stating one purpose of the Packers and Stockyards Act is to make sure that farmers and ranchers receive true market value for their livestock and to protect consumers from unfair practices in the marketing of meat products); *Pacific Trading Co. v. Wilson & Co.*, 547 F.2d 367, 369 (7th Cir. 1976) (stating the Packers and Stockyards Act is a statute prohibiting a variety of unfair business practices which adversely affect competition); *Hays Livestock Comm'n Co. v. Maly Livestock Comm'n Co.*, 498 F.2d 925, 927 (10th Cir. 1974) (stating the chief evil sought to be prevented or corrected by the Packers and Stockyards Act is monopolistic practices in the livestock industry); *Glover Livestock Comm'n Co. v. Hardin*, 454 F.2d 109, 111 (8th Cir. 1972) (stating the purpose of the Packers and Stockyards Act is to prevent economic harm to producers and consumers), *rev'd on other grounds*, 411 U.S. 182 (1973); *Bruhn's Freezer Meats of Chicago, Inc. v. United States Dep't of Agric.*, 438 F.2d 1332, 1337-38 (8th Cir. 1971) (stating the purpose of the Packers and Stockyards Act is to assure fair trade practices in the livestock-marketing and meat-packing industry in order to safeguard farmers and ranchers against receiving less than the true market value of their livestock and to protect consumers against unfair business practices in the marketing of meats and other products); *Swift & Co. v. United States*, 393 F.2d 247, 253 (7th Cir. 1968) (stating the purpose of the Packers and Stockyards Act is to prevent economic harm to producers and consumers); *United States Fidelity & Guaranty Co. v. Quinn Brothers of Jackson, Inc.*, 384 F.2d 241, 245 (5th Cir. 1967) (stating one of the basic objectives of the Packers and Stockyards Act is to impose upon stockyards the nature of public utilities, including the protection for the consuming public that inheres in the nature of a public utility); *Safeway Stores, Inc. v.*
(continued...)

[9](...continued)
Freeman, 369 F.2d 952, 956 (D.C. Cir. 1966) (stating the purpose of the Packers and Stockyards Act is to prevent economic harm to the growers and consumers through the concentration in a few hands of the economic function of the middle man); *Bowman v. United States Dep't of Agric.*, 363 F.2d 81, 85 (5th Cir. 1966) (stating one of the purposes of the Packers and Stockyards Act is to ensure proper handling of shipper's funds and their proper transmission to the shipper); *United States v. Donahue Bros., Inc.*, 59 F.2d 1019, 1023 (8th Cir. 1932) (stating one purpose of the Packers and Stockyards Act is to protect the owner and shipper of livestock and to free the owner from fear that the channels through which his product passed, through discrimination, exploitation, overreaching, manipulation, or other unfair practices, might not return to him a fair return for his product); *Philson v. Cold Creek Farms, Inc.*, 947 F. Supp. 197, 200 (E.D.N.C. 1996) (stating the Packers and Stockyards Act was enacted to regulate the business of packers by forbidding them from engaging in unfair, discriminatory, or deceptive practices in interstate commerce, subjecting any person to unreasonable prejudice in interstate commerce, or doing any of a number of acts to control prices or establish a monopoly in the business); *Pennsylvania Agric. Coop. Mktg. Ass'n v. Ezra Martin Co.*, 495 F. Supp. 565, 570 (M.D. Pa. 1980) (memorandum opinion) (stating one purpose of the Packers and Stockyards Act is to give all possible protection to suppliers of livestock); *United States v. Hulings*, 484 F. Supp. 562, 567 (D. Kan. 1980) (memorandum opinion) (stating one purpose of the Packers and Stockyards Act is to protect farmers and ranchers from receiving less than fair market value for their livestock and to protect consumers from unfair practices); *Guenther v. Morehead*, 272 F. Supp. 721, 725-26 (S.D. Iowa 1967) (stating the thrust of the Packers and Stockyards Act is in the direction of stemming monopolistic tendencies in business; the unrestricted free flow of livestock is to be preserved by the elimination of certain unjust and deceptive practices disruptive to such traffic; the Packers and Stockyards Act deals with undesirable modes of business conduct by livestock concerns which are made possible by the disproportionate bargaining position of such businesses); *De Vries v. Sig Ellingson & Co.*, 100 F. Supp. 781, 786 (D. Minn. 1951) (stating the Packers and Stockyards Act was passed for the purposes of eliminating evils that had developed in marketing livestock in the public stockyards of the nation; controlling prices to prevent monopoly; eliminating unfair, discriminatory, and deceptive practices in the meat industry; and regulating rates for services rendered in connection with livestock sales), *aff'd*, 199 F.2d 677 (8th Cir. 1952), *cert. denied*, 344 U.S. 934 (1953); *Midwest Farmers, Inc. v. United States*, 64 F. Supp. 91, 95 (D. Minn. 1945) (stating by the Packers and Stockyards Act, Congress sought to eliminate the unfair and monopolistic practices that existed; one of the chief objectives of the Packers and Stockyards Act is to stop collusion of packers and market agencies; Congress made an effort to provide a market where farmers could sell livestock and where they could obtain actual value as determined by prices established at competitive bidding); *Bowles v. Albert Glauser, Inc.*, 61 F. Supp. 428, 429 (E.D. Mo. 1945) (stating government supervision of public stockyards has for one of its purposes the maintenance of open and free competition among buyers, aided by sellers' representatives); *In re Petersen*, 51 B.R. 486, 488 (Bankr. D. Kan. 1985) (memorandum opinion) (stating one purpose of the Packers and Stockyards Act is to ensure proper handling of shippers' funds and their proper transmission to shippers); *In re Farmers & Ranchers Livestock Auction, Inc.*, 46 B.R. 781, 793 (Bankr. E.D. Ark. 1984) (memorandum opinion) (stating one of the primary purposes of the Packers and Stockyards Act and its regulations is to protect the welfare of the public by assuring that the sellers and buyers who are customers of the market agencies and dealers are not victims of unfair trade practices); *In re Ozark County Cattle Co.*, 49 Agric. Dec. 336, 360 (1990) (stating the primary objective of the Packers and Stockyards Act (continued...)

The Secretary of Agriculture has authority under the Packers and Stockyards Act to issue regulations to implement the Packers and Stockyards Act.[10] In 1967, the Packers and Stockyards Administration published in the *Federal Register* a notice of proposed rulemaking relating to the purchase of livestock by packers on a carcass grade, carcass weight, or carcass grade and weight basis (32 Fed. Reg. 7858 (May 30, 1967)). After receiving and considering comments from interested parties, the Packers and Stockyards Administration adopted the proposed rule as section 201.99 of the Regulations (9 C.F.R. § 201.99) (33 Fed. Reg. 2760 (Feb. 9, 1968)).

Section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)) provides that prior to purchasing livestock a packer shall make known to the seller "details of the purchase contract" such as "carcass price" and the "grading to be used." Section 201.99(e) of the Regulations (9 C.F.R. § 201.99(e)) provides the added requirement that if payment is based on any grade other than official United States Department of Agriculture grades, the packer shall make available to the seller detailed written specifications of such grades.

The Packers and Stockyards Administration provided answers to questions by industry members on the new regulations. On the matter of the details about grading a packer was to provide to producers (sellers), it said:

> *Q. Does the buyer have to furnish the seller on each transaction a set of written specifications for his house grades if they agree to use*

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[9](...continued)
is to safeguard farmers and ranchers against receiving less than the true value of their livestock); *In re Victor L. Kent & Sons, Inc.*, 47 Agric. Dec. 692, 717 (1988) (stating the primary purpose of the Packers and Stockyards Act is to assure not only fair competition, but also, fair trade practices in livestock marketing and meat packing); Harold M. Carter, The Packers and Stockyards Act, 10 Harl, *Agricultural Law* § 71.05 (1983) (stating among the more important purposes of the Packers and Stockyards Act are to prohibit particular circumstances which might result in a monopoly and to induce healthy competition; prevent potential injury by stopping unlawful practices in their incipiency; prevent economic harm to livestock and poultry producers and consumers and to protect them against certain deleterious practices of middlemen; assure fair trade practices in order to safeguard livestock producers against receiving less than the true value of livestock as well as to protect consumers against unfair meat marketing practices; insure proper handling of funds due sellers for the sale of their livestock; assure reasonable rates and charges by stockyard owners and market agencies in connection with the sale of livestock; and assure free and unburdened flow of livestock through the marketing system unencumbered by monopoly or other unfair, unjustly discriminatory, or deceptive practices).

[10]7 U.S.C. § 228(a).

house grades?

A. A set of detailed written standards must be established for each house grade used in this type of marketing. These must be kept on file by the packer and made available to the seller or his duly authorized agent for review upon request. It is not necessary to furnish a copy of these standards to each seller or his duly authorized agent, but they must be available for their inspection.

RX 50 at 71.

The Packers and Stockyards Administration also announced that section 201.99 of the Regulations (9 C.F.R. § 201.99) "sets forth the official position of the Packers and Stockyards Administration that to engage in the practices prohibited by the regulation is a violation of the statute." (RX 50 at 35.)

However, at the time section 201.99 of the Regulations (9 C.F.R. § 201.99) took effect in 1968, regulations promulgated under the Packers and Stockyards Act were advisory only.[11] Then, in 1974, the Packers and Stockyards Administration stated that it could issue substantive regulations (i.e., regulations having the force and effect of law) as well as advisory regulations and that whether a particular regulation was advisory or substantive was to be determined on a case-by-case basis.[12] In 1984, the Packers and Stockyards Administration reviewed section 201.99 of the Regulations (9 C.F.R. § 201.99), and stated that, except for a proviso in section 201.99(d) of the Regulations (9 C.F.R. § 201.99(d)) (not relevant to this proceeding), it was retaining section 201.99 of the Regulations (9 C.F.R. § 201.99) because the reasons in 1968 for adopting the section "remain equally valid today." (49 Fed. Reg. 37,371 (Sept. 24, 1984).)

Complainant contends section 201.99 of the Regulations (9 C.F.R. § 201.99) is a substantive rule that the Packers and Stockyards Administration and GIPSA have enforced many times. Complainant states that, since 1986, the Packers and Stockyards Administration and GIPSA have filed 30 complaints alleging violations of section 201.99 of the Regulations (9 C.F.R. § 201.99), with most dealing with false weighing. (Complainant's Post-Hearing Brief at 56-61.) Respondent contends that because section 201.99 of the Regulations (9 C.F.R. § 201.99) was adopted in 1968, when such regulations were considered

[11] *In re Finger Lakes Livestock Exchange, Inc.*, 48 Agric. Dec. 390, 400 n.3 (1989).

[12] *In re Wilkes County Stock Yard, Inc.*, 48 Agric. Dec. 1015, 1039-40 (1989).

advisory, the regulation continues to be advisory and therefore non-binding (Respondent's Post-Hearing Brief at 47).

Although promulgated in 1968, section 201.99 of the Regulations (9 C.F.R. § 201.99) was adopted after notice of proposed rulemaking was published in the *Federal Register* as required by the Administrative Procedure Act. Section 201.99 of the Regulations (9 C.F.R. § 201.99) "legislates" a new standard of conduct for packers relating to disclosure of information rather than merely explaining the meaning of the Packers and Stockyards Act. Non-compliance with section 201.99 of the Regulations (9 C.F.R. § 201.99) is a violation of the Packers and Stockyards Act, and the Packers and Stockyards Administration considered and specifically retained the regulation in 1984. In these circumstances, I find section 201.99 of the Regulations (9 C.F.R. § 201.99) is a substantive rule having the force and effect of law.

Respondent argues the Packers and Stockyards Act was not designed to upset the traditional principles of freedom of contract and contends notice of the formula change was a contractual rather than a legal matter between Respondent and hog producers who sold hogs to Respondent (Respondent's Post-Hearing Brief at 22-23).

Congress intended the Packers and Stockyards Act to provide the Secretary of Agriculture with broad authority to regulate private business, as follows:

> [The Packers and Stockyards Act] gives the Secretary complete inquisitorial, visitorial, supervisory, and regulatory power over the packers, stockyards, and all activities connected therewith.
>
> . . . .
>
> Undoubtedly, [the Packers and Stockyards Act] is a most far-reaching measure and extends further than any previous law into the regulation of private business, with the exception of war emergency measures, and possibly the interstate commerce act.

61 Cong. Rec. 1801 (1921).

I find nothing in the Packers and Stockyards Act, the legislative history connected with the Packers and Stockyards Act, or the cases cited by Respondent to indicate that traditional principles of freedom of contract limit the Secretary of Agriculture's broad authority to regulate packers under the Packers and Stockyards Act. Thus, packers have the freedom to contract provided the terms of their contracts do not violate the Packers and Stockyards Act or the Regulations. Packers cannot avoid statutory or regulatory obligations by contract. Section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a))

requires each packer purchasing livestock on a carcass merit basis, prior to the purchase, to make known to the seller the details of the purchase contract, including the grading to be used. The formula Respondent uses to estimate lean percent is a part of "grading" within the meaning of section 201.99 of the Regulations (9 C.F.R. § 201.99) as it is an element of Respondent's carcass evaluation process. Respondent's legal obligation under section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)) and section 202(a) of the Packers and Stockyards Act (7 U.S.C. § 192(a)) is not affected by Respondent's contracts with hog producers.

Respondent also argues that institution of the Complaint was politically motivated (Respondent's Post-Hearing Brief at 18-19; Respondent's Post-Hearing Reply Brief at 61-62). Complainant has discretion, regardless of motive, to be selective in the enforcement of the Packers and Stockyards Act. Complainant's motives are immaterial as long as Complainant's action is not arbitrary.[13] I do not find that institution of this proceeding was arbitrary. Rather, I find Complainant's stated concern for the impact on hog producers of technological changes that affect the prices hog producers receive consistent with Complainant's congressionally mandated mission to prevent economic harm to producers and to maintain open and free competition.

Respondent further argues section 201.99 of the Regulations (9 C.F.R. § 201.99) is too vague to be enforceable. Respondent contends section 201.99 of the Regulations (9 C.F.R. § 201.99) does not define formula, grading, or calculation of price, and Respondent was entitled to notice from Complainant that Respondent had a duty to tell hog producers that it was changing the formula Respondent used to estimate lean percent. (Respondent's Post-Hearing Brief at 38-44.)

Section 201.99 of the Regulations (9 C.F.R. § 201.99) is not vague or ambiguous. The record is clear that all parties considered the Fat-O-Meat'er to be a form of grading. The formula Respondent used to estimate lean percent was also a part of the "grading" within the meaning of section 201.99 of the Regulations (9 C.F.R. § 201.99) as it was an element of Respondent's carcass evaluation process. Section 201.99 of the Regulations (9 C.F.R. § 201.99) explicitly provides that packers purchasing livestock on a carcass merit basis must make known to the seller the grading to be used prior to the purchase.

Sanction

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[13] *In re American Fruit Purveyors, Inc.,* 38 Agric. Dec. 1372, 1385 (1979), *aff'd per curiam*, 630 F.2d 370 (5th Cir. 1980), *cert. denied*, 450 U.S. 997 (1981).

Complainant seeks an $8,000,000 civil penalty. Complainant contends this civil penalty is necessary because of the great economic harm done to hog producers when Respondent "unilaterally" changed the formula for estimating lean percent (Tr. 2323). Complainant contends the measure of economic harm is the difference between the amount hog producers were paid when Respondent used the Purdue formula and the amount hog producers would have been paid had Respondent continued to use the Danish formula. However, Complainant's method of measuring economic harm to hog producers is not necessarily the most accurate method of measuring the harm caused by Respondent's failure to notify hog producers of the change in the formula.

Respondent has the right (unless a contract provides otherwise) to "unilaterally" change the formula to estimate lean percent as long as Respondent notifies hog producers of the formula change prior to purchasing hogs on a carcass merit basis from those producers. Since Respondent, or any other packer, has the right, after notice, to alter the price it pays by changing its formula for estimating lean percent, hog producers would not be legally harmed by the change.

Hog producers can compare prices and choose to continue to sell to Respondent or sell to Respondent's competitors. However, Respondent impeded that choice in this case when it made an unannounced change in the formula. Respondent altered the price it offered hog producers without the hog producers knowing that the price structure had changed. Had hog producers been alerted to the change, they could have shopped their hogs to other packers to determine if they could obtain a better price for their hogs than Respondent's price under its changed formula. As Complainant states, the purpose of section 201.99 of the Regulations (9 C.F.R. § 201.99) "is to provide some basic level of similarity to allow sellers to evaluate different purchase offers" (Complainant's Post-Hearing Brief at 91). The assessment of economic harm to hog producers because of the change would therefore have been whatever higher market price they might have been able to obtain from Respondent's competitors. Complainant, however, offered no evidence on the prices that hog producers could have received from other packers. The true extent of the economic harm to hog producers who sold hogs to Respondent on a carcass merit basis is therefore unknown. However, at the very least, Respondent's failure to notify hog producers of the change in the formula to estimate lean percent impeded competition.

Even assuming the measure of economic harm to hog producers is, as Complainant maintains, the difference in the price Respondent paid to hog producers when Respondent used the Purdue formula and the price Respondent would have paid these same producers had Respondent used the Danish

formula, this harm was still minimized. Respondent has paid the difference to many of the hog producers, with interest. Furthermore, Respondent voluntarily sought to come into compliance with section 201.99 of the Regulations (9 C.F.R. § 201.99) immediately after GIPSA brought the violations to Respondent's attention. I accordingly find that a monetary penalty is not appropriate in the circumstances of this case.

Complainant argues Respondent also violated section 201.99(e) of the Regulations (9 C.F.R. § 201.99(e)) when Respondent failed to tell Heartland Pork Enterprises, Inc., of the "when and why" of the formula change. Although Complainant did not specifically allege this violation in the Amended Complaint or the revised Amended Complaint, I consider the argument under the general allegation in the revised Amended Complaint that Respondent violated section 201.99 of the Regulations (9 C.F.R. § 201.99) when Respondent failed to notify hog producers of the change in the formula to estimate lean percent. Complainant, however, does not specify in its allegation what details of the "when and why" Respondent failed to disclose. The allegation is therefore too ambiguous to serve as a basis for a finding of a violation.

Complainant also contends Respondent's agreement with Tyson Foods to exempt Tyson Foods from the formula change constituted disparate treatment of other hog producers who had agreements with Respondent similar to Respondent's agreement with Tyson Foods. Complainant did not allege disparate treatment in the Amended Complaint or the revised Amended Complaint. I therefore do not find this to be a violation. I also do not find that Respondent's use of the Purdue formula, which the record indicates more accurately estimates lean percent than the Danish formula, constitutes a false statement.

Complainant further contends Respondent's failure to notify hog producers of the formula change violated its good faith duty to hog producers to notify them of changes in the terms of their contracts. However, Complainant acknowledges that he did not allege in the Amended Complaint that a breach of contract was a violation of the Packers and Stockyards Act (Complainant's Post-Hearing Reply Brief at 15). Accordingly, as it was not alleged in the Amended Complaint or the revised Amended Complaint, I do not find a violation based on an alleged breach of contract.

Complainant seeks a "broad" cease and desist order. An order must bear a "reasonable relation to the unlawful practice found to exist." *Swift & Company v. United States*, 317 F.2d 53, 56 (7th Cir. 1963). The Order therefore reflects the conduct found unlawful in this Decision and Order.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Complainant's Appeal of Procedural Rulings

Complainant raises two issues in Complainant's Appeal of Procedural Rulings. First, Complainant contends the Chief ALJ erred when he ordered Complainant to provide Respondent with the names of Complainant's potential producer witnesses prior to the scheduled hearing date (Complainant's Appeal of Procedural Rulings at 1-3).

On July 10, 2000, the Chief ALJ issued a ruling requiring Complainant to provide Respondent with the names of all of Complainant's "proposed witnesses by Monday, August 10" (Summary of Teleconferences and Rulings at 2). The Chief ALJ does not identify the year in which Complainant is required to provide Respondent with the names of Complainant's proposed witnesses. The first year, after the Chief ALJ issued the July 10, 2000, Summary of Teleconferences and Rulings, in which August 10 falls on a Monday is 2009. However, based on the record before me, I do not find the Chief ALJ required Complainant to provide Respondent with the names of Complainant's proposed witnesses by Monday, August 10, 2009. Instead, I infer the Chief ALJ ordered Complainant to provide Respondent with the names of all Complainant's proposed witnesses either by Monday, August 7, 2000, or by Thursday, August 10, 2000.

The July 10, 2000, Summary of Teleconferences and Rulings establishes that the scheduled date of hearing was July 18, 2000 (Summary of Teleconferences and Rulings at 1), and the transcripts establish that the hearing was conducted on July 18, 19, 20, 21, 25, 26, 27, and 28, 2000; September 25, 26, and 27, 2000; and March 27, 28, and 29, 2001. Therefore, the Chief ALJ required Complainant to provide Respondent with the names of Complainant's proposed witnesses after 8 days of the 14-day hearing had been completed.

Section 1.140(a)(1)(iv) of the Rules of Practice provides that an administrative law judge may order the parties to furnish a list of anticipated witnesses, but a party need not furnish the names of anticipated witnesses, as follows:

> **§ 1.140 Conferences and procedure.**
>
> (a) *Purpose and scope.* (1) Upon motion of a party or upon the Judge's own motion, the Judge may direct the parties or their counsel to attend a conference at any reasonable time, prior to or during the course of the hearing, when the Judge finds that the proceeding would be

> expedited by a conference. Reasonable notice of the time, place, and manner of the conference shall be given. The Judge may order each of the parties to furnish at or subsequent to the conference any or all of the following:
>
> . . . .
>
> (iv) A list of anticipated witnesses who will testify on behalf of the party. At the discretion of the party furnishing such list of witnesses, the names of the witnesses need not be furnished if they are otherwise identified in some meaningful way such as a short statement of the type of evidence they will offer.

7 C.F.R. § 1.140(a)(1)(iv).

Under section 1.140(a)(1)(iv) of the Rules of Practice (7 C.F.R. § 1.140(a)(1)(iv)), each party has discretion to identify anticipated witnesses in any way the party deems appropriate so long as the anticipated witnesses are identified in some meaningful way. A party need not provide a reason for refusing to furnish the name of an anticipated witness. Under the Rules of Practice, an administrative law judge may not order a party to name anticipated witnesses who will testify on behalf of the party; an administrative law judge may merely order a party to identify anticipated witnesses in a meaningful way.

On August 25, 1999, Administrative Law Judge Edwin S. Bernstein ordered Complainant to provide Respondent's attorneys with a witness list, "including brief summaries of the witnesses' proposed testimonies" (August 25, 1999, Summary of Telephone Conference at 1). On November 16, 1999, Complainant filed Complainant's List of Anticipated Witnesses which identifies by name, position, and address 19 of Complainant's anticipated witnesses and provides a statement of the testimony to be given by these 19 anticipated witnesses. In addition, Complainant lists unnamed anticipated witnesses, as follows:

> **Pork Producers**
>
> Various Locations In Illinois, Iowa and Missouri
>
> These unnamed witnesses consist of a group of approximately seven (7) to fifteen (15) pork producers from whom Respondent purchased hogs during the period of alleged violations. These producers are expected to testify regarding their business dealings with Respondent, including when each became aware of the formula change, and the effect of Respondent's formula change on their businesses.

Complainant's List of Anticipated Witnesses at 5.

I find Complainant identified these unnamed anticipated witnesses in a meaningful way. Therefore, I conclude the Chief ALJ erred when he ordered Complainant to provide Respondent with the names of these anticipated witnesses. However, I find the Chief ALJ's error harmless.

Second, Complainant contends the Chief ALJ erroneously denied Complainant's "Motion for Ruling that Respondent Failed to Comply with the Presiding ALJ's *Subpoena Duces Tecum*" on the ground that Complainant did not file the motion timely (Complainant's Appeal of Procedural Rulings at 3-4).

On July 16, 2001, Complainant filed a "Motion for Ruling that Respondent Failed to Comply with the Presiding ALJ's *Subpoena Duces Tecum*" requesting that the Chief ALJ find Respondent failed to comply with a *subpoena duces tecum* issued by the Chief ALJ on September 13, 2000. On January 28, 2002, the Chief ALJ denied Complainant's "Motion for Ruling that Respondent Failed to Comply with the Presiding ALJ's *Subpoena Duces Tecum*" stating Complainant filed the motion almost 4 months after the close of the hearing and concluding Complainant did not file the motion timely (Order Granting in Part and Denying in Part Complainant's Procedural Motions--Order Correcting Transcript at 2).

The Rules of Practice contain no restriction on the time for filing motions, except motions concerning the complaint.[14] Complainant's "Motion for Ruling that Respondent Failed to Comply with the Presiding ALJ's *Subpoena Duces Tecum*" does not concern the Complaint, the Amended Complaint, or the revised Amended Complaint. Therefore, I agree with Complainant's contention that the Chief ALJ's basis for denying Complainant's "Motion for Ruling that Respondent Failed to Comply with the Presiding ALJ's *Subpoena Duces Tecum*" is error. However, I find the Chief ALJ's error harmless.

Complainant requests that I consider Complainant's "Motion for Ruling that Respondent Failed to Comply with the Presiding ALJ's *Subpoena Duces Tecum*" on the merits (Complainant's Appeal of Procedural Rulings at 4). Complainant's only request in Complainant's "Motion for Ruling that Respondent Failed to Comply with the Presiding ALJ's *Subpoena Duces Tecum*" is that the Chief ALJ find Respondent failed to comply with the September 13, 2000, *subpoena duces tecum* (Motion for Ruling that Respondent Failed to Comply with the Presiding ALJ's *Subpoena Duces Tecum* at 7).

Randy Krueger, one of Respondent's employees assigned to respond to the

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[14]*See* 7 C.F.R. § 1.143(b)(2).

September 13, 2000, *subpoena duces tecum*, testified that Respondent inadvertently failed to provide Complainant one file that was responsive to the September 13, 2000, *subpoena duces tecum* (Tr. 2215-16). Based on Randy Krueger's testimony, I find Respondent failed to provide all of the documents responsive to the September 13, 2000, *subpoena duces tecum*.

Complainant's Appeal Petition

Complainant raises five issues in Complainant's Appeal Petition. First, Complainant contends the Chief ALJ erroneously failed to conclude that Respondent's failure, prior to the purchase of hogs on a carcass merit basis, to notify hog producers of the change in the grading to be used in purchase transactions is a violation of section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)) (Complainant's Appeal Brief at 7-11).

I disagree with Complainant's contention that the Chief ALJ failed to conclude that Respondent violated section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)). The Chief ALJ found the Fat-O-Meat'er, the Danish formula, and the Purdue formula are all "grading to be used" as that term is used in section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)) (Initial Decision and Order at 26). Moreover, the Chief ALJ concluded Respondent violated section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)), as follows:

> Respondent, Excel Corporation, violated section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)[)] and section 202(a) of the Packers and Stockyards Act, as amended (7 U.S.C. § 192(a)), when it failed to notify producers of the change in the formula to estimate lean percent.

Initial Decision and Order at 27.

Second, Complainant contends the Chief ALJ's conclusion that Respondent violated a new duty, established in this proceeding, to disclose the lean percent formula to hog producers prior to purchase, whether requested or not, is not warranted in the facts of this case (Complainant's Appeal Brief at 11-17).

I agree with Complainant's contention that the Chief ALJ erroneously found that Respondent violated a new duty, established in this proceeding. Section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)) provides that each packer purchasing livestock on a carcass merit basis shall, prior to the purchase, make known to the seller the details of the purchase contract, including the grading to be used. The Chief ALJ found the Fat-O-Meat'er, the Danish formula, and the Purdue formula are all "grading to be used" as that term is used in section

201.99(a) of the Regulations (9 C.F.R. § 201.99(a)) (Initial Decision and Order at 26).

The Packers and Stockyards Administration adopted section 201.99 of the Regulations (9 C.F.R. § 201.99) in 1968 (33 Fed. Reg. 2760 (Feb. 9, 1968)). The Packers and Stockyards Administration also announced that section 201.99 of the Regulations (9 C.F.R. § 201.99) "sets forth the official position of the Packers and Stockyards Administration that to engage in the practices prohibited by the regulation is a violation of the statute." (RX 50 at 35.)

However, at the time section 201.99 of the Regulations (9 C.F.R. § 201.99) took effect in 1968, regulations promulgated under the Packers and Stockyards Act were advisory only.[15] Then, in 1974, the Packers and Stockyards Administration stated that it could issue substantive regulations (i.e., regulations having the force and effect of law) as well as advisory regulations and that whether a particular regulation was advisory or substantive was to be determined on a case-by-case basis.[16] In 1984, the Packers and Stockyards Administration reviewed section 201.99 of the Regulations (9 C.F.R. § 201.99), and stated that, except for a proviso in section 201.99(d) of the Regulations (9 C.F.R. § 201.99(d)) (not relevant to this proceeding), it was retaining section 201.99 of the Regulations (9 C.F.R. § 201.99) because the reasons in 1968 for adopting the section "remain equally valid today." (49 Fed. Reg. 37,371 (Sept. 24, 1984).) Therefore, I disagree with the Chief ALJ's finding that Respondent violated a new duty established in this proceeding. Instead, I find Respondent's duty to disclose to hog producers that it was changing the formula used to estimate lean percent, prior to Respondent's purchase of hogs on a carcass merit basis, was embodied in a regulation in 1968, which regulation has had the force and effect of law at least since 1984.

Third, Complainant contends the Chief ALJ's cease and desist order does not bear a reasonable relation to the unlawful practice the Chief ALJ found to exist, as follows:

> The ALJ found that respondent violated a new duty by failing to provide the details of grading, (i.e., the formula) to producers prior to purchase. To properly address the violation that the ALJ states Respondent committed, the Order should require Respondent to cease and desist from failing to provide the details of any change in the formula used to estimate lean percent. As issued, the first sentence of the Order does not

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[15] *See* note 11.

[16] *See* note 12.

> relate to the ALJ's finding that the Respondent violated a new duty to disclose the formula.

Complainant's Appeal Brief at 18 (emphasis in original).

A cease and desist order must bear a reasonable relation to the unlawful practice found to exist.[17] The Chief ALJ states "[d]etailed specifications about grading (i.e., the formula) must now be provided to producers pursuant to section 201.99(a)" of the Regulations (9 C.F.R. § 201.99(a)) (Initial Decision and Order at 20). The Chief ALJ ordered Respondent to "cease and desist from failing to notify livestock sellers . . . of the details of any change in the formula used to estimate lean meat percent." (Initial Decision and Order at 27.) I do not find that the Chief ALJ's cease and desist order bears a reasonable relation to the unlawful practice the Chief ALJ found to exist. I find Respondent's unlawful practice was Respondent's failure to make known to hog sellers that it was changing the formula to estimate lean percent prior to purchasing hogs on a carcass merit basis from those sellers. I have framed a cease and desist order which bears a reasonable relation to Respondent's unlawful practice.

Fourth, Complainant contends the Chief ALJ's order "seeks to impose requirements upon Respondent that are beyond the scope of the Secretary's authority" (Complainant's Appeal Brief at 17-19).

The Chief ALJ's states in the Order:

Order

> Upon receipt from Complainant of the names of sellers who sold hogs to Respondent between October 1997 and July 1998 under Respondent's changed formula and who may have received less than they would have received under the formula before it was changed and who have not otherwise been compensated or who otherwise have not resolved the matter through agreement with Respondent, Respondent shall promptly notify such sellers in writing that Respondent agrees to allow such sellers to submit the matter to arbitration for resolution.

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[17] *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 394-95 (1965); *FTC v. National Lead Co.*, 352 U.S. 419, 429 (1957); *Standard Oil Company of California v. FTC*, 577 F.2d 653, 662 (9th Cir. 1978); *Thiret v. FTC*, 512 F.2d 176, 180-81 (10th Cir. 1975); *Spiegel, Inc. v. FTC*, 411 F.2d 481, 484-85 (7th Cir. 1969); *Swift & Co. v. United States*, 317 F.2d 53, 56 (7th Cir. 1963); *Gellman v. FTC*, 290 F.2d 666, 670 (8th Cir. 1961); *Carter Products, Inc. v. FTC*, 268 F.2d 461, 498 (9th Cir.), *cert. denied*, 361 U.S. 884 (1959).

Initial Decision and Order at 27.

Section 203(b) of the Packers and Stockyards Act (7 U.S.C. § 193(b)) sets forth the sanctions the Secretary of Agriculture may impose upon a packer found to have violated subchapter II of the Packers and Stockyards Act (7 U.S.C. §§ 191-198b). Section 203(b) of the Packers and Stockyards Act (7 U.S.C. § 193(b)) provides the Secretary of Agriculture shall issue an order requiring the packer to cease and desist from continuing the violation. Moreover, the Secretary of Agriculture may assess the packer a civil penalty of not more than $10,000 for each violation of subchapter II of the Packers and Stockyards Act (7 U.S.C. §§ 191-198b). Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), the Secretary of Agriculture, by regulation effective September 2, 1997, adjusted the civil monetary penalty that may be assessed a packer under section 203(b) of the Packers and Stockyards Act (7 U.S.C. § 193(b)) by increasing the maximum civil penalty from $10,000 to $11,000.[18]

Section 203(b) of the Packers and Stockyards Act (7 U.S.C. § 193(b)) does not authorize restitution to hog producers as a sanction for violation of the Packers and Stockyards Act or the Regulations. Therefore, I agree with Complainant's contention that the Chief ALJ is not authorized by section 203(b) of the Packers and Stockyards Act (7 U.S.C. § 193(b)) to require Respondent to provide restitution to hog producers for the costs incurred by hog producers because of Respondent's violations of section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)). Accordingly, I do not adopt the portion of the Chief ALJ's Order that requires Respondent to notify sellers that Respondent agrees to allow sellers to submit the matter to arbitration for resolution.

Fifth, Complainant contends the Chief ALJ's failure to assess a severe civil penalty is error (Complainant's Appeal Brief at 19-25).

Section 203(b) of the Packers and Stockyards Act (7 U.S.C. § 193(b)) provides that when assessing a civil penalty for violations of subchapter II of the Packers and Stockyards Act (7 U.S.C. §§ 191-198b), the Secretary of Agriculture must consider the gravity of the offense, the size of the business involved, and the effect of the penalty on the person's ability to continue in business.

One of the fundamental purposes of the Packers and Stockyards Act is to protect sellers of livestock from unfair or deceptive practices of packers. Section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)) is designed "to

[18]62 Fed. Reg. 40,924-28 (July 31, 1997); 7 C.F.R. § 3.91(b)(6)(i).

provide safeguards which are necessary in order to protect the interests of producers selling livestock to packers on a carcass grade, carcass weight, or carcass grade and weight basis" (33 Fed. Reg. 2760 (Feb. 9, 1968)) and "to assure that producers selling on a carcass basis are fully informed of the terms and conditions which apply to the sale and fairly treated" (48 Fed. Reg. 42,826 (Sept. 20, 1983)). Respondent violated section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)) by failing to notify hog producers, prior to Respondent's purchase of hogs on a carcass merit basis, that it changed the formula used to estimate lean percent. Hog producers had agreed to sell hogs to Respondent knowing Respondent used the Fat-O-Meat'er as the grading system to estimate lean percent. The Danish formula was embedded in the Fat-O-Meat'er. When Respondent abandoned the Danish formula and adopted the Purdue formula, it changed the grading to be used and the manner in which payment to hog producers would be determined without informing hog producers. The record establishes that many hog producers who sold hogs to Respondent on a carcass merit basis during the period between October 23, 1997, and July 20, 1998, received less money for their hogs than they would have received had Respondent not changed the formula to estimate lean percent.

Respondent has the right to change the formula to estimate lean percent as long as Respondent notifies hog producers of the formula change prior to purchasing hogs on a carcass merit basis from those producers. Since Respondent has the right, after notice, to alter the price it pays by changing its formula for estimating lean percent, hog producers would not be legally harmed by the change itself.

Hog producers can compare prices and choose to continue to sell to Respondent or sell to Respondent's competitors. However, Respondent impeded that choice when it made an unannounced change in the formula. Respondent thereby altered the price it offered hog producers without the hog producers knowing that the price structure had changed. Had hog producers been alerted to the change, they could have shopped their hogs to other packers to determine if they could obtain a better price for their hogs than Respondent's price under its changed formula. Respondent's failure to notify hog producers of the change in the formula to estimate lean percent impeded competition. As Complainant states, the purpose of section 201.99 of the Regulations (9 C.F.R. § 201.99) "is to provide some basic level of similarity to allow sellers to evaluate different purchase offers" (Complainant's Post-Hearing Brief at 91). The assessment of harm to hog producers because of the change would therefore have been whatever higher market price they might have been able to obtain from Respondent's competitors. Therefore, I find Respondent's violation of section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)) grave.

Further, the record establishes that the size of Respondent's business is large (RX 55; Tr. 131, 2329). Based on the size of Respondent's business, I do not find that the assessment of a substantial civil penalty would affect Respondent's ability to continue in business.

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

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

The recommendations of administrative officials charged with the responsibility for achieving the congressional purpose of the regulatory statute are highly relevant to any sanction to be imposed and are entitled to great weight in view of the experience gained by administrative officials during their day-to-day supervision of the regulated industry. *In re S.S. Farms Linn County, Inc.*, 50 Agric. Dec. at 497. The administrative officials charged with the responsibility of administering the Packers and Stockyards Act recommend that I assess Respondent an $8,000,000 civil penalty.

However, the recommendation of administrative officials as to the sanction is not controlling, and in appropriate circumstances, the sanction imposed may be considerably less, or different, than that recommended by administrative officials.[19]

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[19] *In re Steven Bourk* (Decision as to Steven Bourk and Carmella Bourk), 61 Agric. Dec. 25, 49 (2002); *In re H.C. MacClaren, Inc.*, 60 Agric. Dec. 733, 762-63 (2001), *appeal docketed*, No. 02-3006 (6th Cir. Jan. 3, 2002); *In re Karl Mitchell*, 60 Agric. Dec. 91, 130 (2001), *aff'd*, 42 Fed. Appx. 991, 2002 WL 1941189 (9th Cir. Aug. 22, 2002); *In re American Raisin Packers, Inc.*, 60 Agric. Dec. 165, 190 n.8 (2001), *aff'd*, No. CIV F 015606 AWI SMS (E.D. Cal. May 18, 2001), *appeal docketed*, No. 02-15602 (9th Cir. Mar. 25, 2002); *In re Fred Hodgins*, 60 Agric. Dec. 73, 88 (2001) (Decision and Order on Remand), *aff'd*, 33 Fed. Appx. 784, 2002 WL 649102 (6th Cir. 2002) (unpublished); *In re Reginald Dwight Parr*, 59 Agric. Dec. 601, 626 (2000), *aff'd per curiam*, 273 F.3d 1095 (5th Cir. 2001) (Table); *In re Greenville Packing Co.*, 59 Agric. Dec. 194, 226-27 (2000), *aff'd in part and transferred in part*, No. 00-CV-1054 (N.D.N.Y. Sept. 4, 2001), (continued...)

The purpose of an administrative sanction is to accomplish the remedial purposes of the Packers and Stockyards Act by deterring future similar violations of the Packers and Stockyards Act.[20] This case involves serious violations of the Packers and Stockyards Act and the Regulations. However, based on the record before me, I agree with the Chief ALJ's determination that a civil penalty is not appropriate in the circumstances of this case. I find Respondent's compliance with section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)) immediately after GIPSA brought the violations to Respondent's attention and Respondent's payment, with interest, to many hog producers that received less for their hogs when Respondent used the Purdue formula than they would have received had Respondent used the Danish formula, indicate that a civil penalty is not necessary to deter Respondent from future violations of a similar nature.

Respondent's Appeal Petition

Respondent raises seven issues in Respondent's Appeal Petition. First, Respondent contends the Chief ALJ erroneously concluded Respondent violated section 202(a) of the Packers and Stockyards Act (7 U.S.C. § 192(a)). Respondent contends its failure to notify hog producers that it changed the formula to estimate lean percent, prior to Respondent's purchase of hogs on a carcass merit basis, is not an "unfair or deceptive practice" as that term is used in section 202(a) of the Packers and Stockyards Act (7 U.S.C. § 192(a)). Respondent states the purpose of the Packers and Stockyards Act is to safeguard farmers and ranchers against receiving less than the true market value of their livestock and there was no evidence that any hog producer received less than true market value for his or her hogs. Respondent further asserts it changed the

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[19](...continued)
appeal withdrawn, No. 01-6214 (2d Cir. Apr. 30, 2002); *In re James E. Stephens*, 58 Agric. Dec. 149, 182 (1999); *In re Western Sierra Packers, Inc.*, 57 Agric. Dec. 1578, 1604 (1998); *In re Colonial Produce Enterprises, Inc.*, 57 Agric. Dec. 1498, 1514 (1998); *In re Judie Hansen*, 57 Agric. Dec. 1072, 1141 (1998), *appeal dismissed*, 221 F.3d 1342 (Table), 2000 WL 1010575 (8th Cir. 2000) (per curiam); *In re Richard Lawson*, 57 Agric. Dec. 980, 1031-32 (1998), *appeal dismissed*, No. 99-1476 (4th Cir. June 18, 1999); *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 574 (1998); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 283 (1998); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1918-19 (1997), *aff'd*, 178 F.3d 743 (5th Cir.), *cert. denied*, 528 U.S. 1021 (1999); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 942, 953 (1997) (Order Denying Pet. for Recons.); *In re William E. Hatcher*, 41 Agric. Dec. 662, 669 (1982); *In re Sol Salins, Inc.*, 37 Agric. Dec. 1699, 1735 (1978); *In re Braxton McLinden Worsley*, 33 Agric. Dec. 1547, 1568 (1974).

[20]*In re Jim Aron*, 58 Agric. Dec. 451, 462 (1999).

formula to estimate lean percent to improve the accuracy of the way Respondent paid hog producers and, once hog producers learned of Respondent's change of the formula, the hog producers did not care that the change had been made or that the change had been made without their knowledge. Respondent contends, "[u]nder these circumstances there is simply no theory or precedent for finding that the equation change amounted to an unfair or deceptive practice." (Respondent's Appeal Pet. at 11-13.)

I disagree with Respondent's contention that the Chief ALJ erroneously concluded Respondent violated section 202(a) of the Packers and Stockyards Act (7 U.S.C. § 192(a)). While one of the purposes of the Packers and Stockyards Act is to safeguard farmers and ranchers against receiving less than true market value for their livestock, as Respondent contends, the purpose of the Packers and Stockyards Act is much broader than Respondent contends.

The sponsors of the bill later enacted as the Packers and Stockyards Act (H.R. 6230) described the bill as one of the most comprehensive regulatory measures ever considered.[21] Similarly, the House Report applicable to the bill describes the bill as giving the Secretary of Agriculture broad authority, as follows:

> A careful study of the bill, will, I am sure, convince one that it, and existing laws, give the Secretary of Agriculture complete inquisitorial, visitorial, supervisory, and regulatory power over the packers, stockyards and all activities connected therewith; that it is a most comprehensive measure and extends farther than any previous law in the regulation of private business, in time of peace, except possibly the interstate commerce act.

H.R. Rep. No. 67-77, at 2 (1921).

The Conference Report applicable to H.R. 6230 states "Congress intends to exercise, in the bill, the fullest control of packers and stockyards which the Constitution permits[.]" H.R. Conf. Rep. No. 67-324, at 3 (1921).

Further, Congress has repeatedly broadened the Secretary of Agriculture's authority under the Packers and Stockyards Act.[22] The primary purpose of the Packers and Stockyards Act was described in a House Report, in connection with a major amendment of the Packers and Stockyards Act enacted in 1958, as

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[21] *See* note 4.

[22] *See* note 5.

follows:

> The Packers and Stockyards Act was enacted by Congress in 1921. The primary purpose of this Act is to assure fair competition and fair trade practices in livestock marketing and in the meatpacking industry. The objective is to safeguard farmers and ranchers against receiving less than the true market value of their livestock and to protect consumers against unfair business practices in the marketing of meats, poultry, etc. Protection is also provided to members of the livestock marketing and meat industries from unfair, deceptive, unjustly discriminatory, and monopolistic practices of competitors, large or small.[23]

H.R. Rep. No. 85-1048, at 1 (1957), *reprinted in* 1958 U.S.C.C.A.N. 5213.

Courts that have examined the Packers and Stockyards Act have uniformly described the Packers and Stockyards Act as constituting a broader grant of authority to regulate than previous legislation.[24] Moreover, the Packers and Stockyards Act is remedial legislation and should be liberally construed to effectuate its purposes.[25] The purposes of the Packers and Stockyards Act are varied. Two of the primary purposes are to prevent economic harm to producers and to maintain open and free competition.[26]

The record establishes that most hog producers who sold hogs to Respondent received less for their hogs when Respondent used the Purdue formula to estimate lean percent than they would have received if Respondent had used the Danish formula (CX 37, CX 38). However, Respondent has the right (unless a contract provides otherwise) to change the formula to estimate lean percent as long as Respondent notifies hog producers of the formula change prior to purchasing hogs on a carcass merit basis from those producers. Since Respondent, or any other packer, has the right, after notice, to alter the price it pays by changing its formula for estimating lean percent, hog producers would not be legally harmed by the change.

Hog producers can compare prices and choose to continue to sell to

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[23] *See* note 6.

[24] *See* note 7.

[25] *See* note 8.

[26] *See* note 9.

Respondent or sell to Respondent's competitors. However, Respondent impeded that choice in this case when it made an unannounced change in the formula. Respondent altered the price it offered hog producers without the hog producers knowing that the price structure had changed. Had hog producers been alerted to the change, they could have shopped their hogs to other packers to determine if they could obtain a better price for their hogs than Respondent's price under its changed formula. As Complainant states, the purpose of section 201.99 of the Regulations (9 C.F.R. § 201.99) "is to provide some basic level of similarity to allow sellers to evaluate different purchase offers" (Complainant's Post-Hearing Brief at 91). The assessment of economic harm to hog producers because of the change would therefore have been whatever higher market price they might have been able to obtain from Respondent's competitors. Complainant, however, offered no evidence on the prices that hog producers could have received from other packers. The true extent of the economic harm to hog producers who sold hogs to Respondent on a carcass merit basis is therefore unknown. However, at the very least, Respondent's failure to notify hog producers of the change in the formula to estimate lean percent impeded competition. Thus, even if I found that Respondent paid hog producers "true market value" for their hogs, as Respondent contends, I would find that Respondent violated the Packers and Stockyards Act.

Moreover, I find Respondent's argument that it changed the formula used to estimate lean percent merely to improve the accuracy of the estimate, irrelevant to the issue of whether Respondent violated the Packers and Stockyards Act. The merit of the Purdue formula is not the issue in this proceeding. The record indicates the Purdue formula more accurately estimates lean percent than the Danish formula and Respondent adopted the Purdue formula for the purpose of improving the accuracy of Respondent's estimate of lean percent. However, it is Respondent's failure to notify hog producers of the change in the formula that violates the Packers and Stockyards Act, not the change itself. I do not find Respondent's purpose for changing the formula to estimate lean percent relevant to issue of whether Respondent violated the Packers and Stockyards Act when Respondent failed to notify hog producers that it was changing the formula to estimate lean percent.

Finally, I find Respondent's argument that, when hog producers learned about the formula change, they did not care that the change had been made or that Respondent failed to inform them about the formula change, irrelevant to the issue of whether Respondent violated the Packers and Stockyards Act. Respondent cites no authority supporting its contention that the feelings of hog producers have a bearing on whether Respondent engaged in an unfair or deceptive practice under section 202(a) of the Packers and Stockyards Act

(7 U.S.C. § 192(a)), and I cannot find authority which supports Respondent's contention. The determination as to whether Respondent violated section 202(a) of the Packers and Stockyards Act (7 U.S.C. § 192(a)) is made by the administrative law judge, the judicial officer, and, ultimately, the courts. The determination is not based on how livestock producers, who the Packers and Stockyards Act is designed to protect, view Respondent's actions. Moreover, the record does not support Respondent's assertion that hog producers did not care about Respondent's change in the formula to estimate lean percent or Respondent's failure to inform them about the formula change (Tr. 1046-47, 1084-85, 1091, 1099-1101, 1158-61, 1203-07, 1365-67).

Second, Respondent contends the Chief ALJ erroneously concluded Respondent violated section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)). Respondent states section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)) does not mention (1) lean percent, (2) equations, or (3) changes made either to lean percent or to equations. Thus, Respondent argues section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)) does not give Respondent fair notice that, prior to purchasing hogs from producers, it is required to give those hog producers notice that it is changing the formula to estimate lean percent. Respondent further contends, as a matter of law, no cease and desist order can be issued where a respondent does not receive fair notice of what it is legally required to do and where the cease and desist order would place that same respondent at a competitive disadvantage. (Respondent's Appeal Pet. at 13-19.)

In order to satisfy constitutional due process requirements, a regulation must be sufficiently specific to give regulated parties notice of what conduct is required or prohibited.[27] I find section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)) gives Respondent fair notice that it is required to make known to hog producers any change in the formula to estimate lean percent prior to Respondent's purchase of hogs on a carcass merit basis from those producers. Section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)) provides that each packer purchasing livestock on a carcass merit basis shall, prior to the purchase, make known to the seller the details of the purchase contract. The regulation explicitly provides that those details include the "grading to be used." Generally, "grade" refers to quality and "grading" is an action or process of

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[27] *Freeman United Coal Mining Co. v. Federal Mine Safety & Health Review Comm'n*, 108 F.3d 358, 362 (D.C. Cir. 1997); *Thomas v. Hinson*, 74 F.3d 888, 889 (8th Cir. 1996); *Georgia Pacific Corp. v. Occupational Safety & Health Review Comm'n*, 25 F.3d 999, 1004-05 (11th Cir. 1994); *Throckmorton v. NTSB*, 963 F.2d 441, 444 (D.C. Cir. 1992); *The Great American Houseboat Co. v. United States*, 780 F.2d 741, 746 (9th Cir. 1986); *United States v. Sun & Sand Imports, Ltd.*, 725 F.2d 184, 187 (2d Cir. 1984).

sorting (hogs) into categories according to quality.[28] Moreover, the record establishes that grading is a system to categorize carcasses and that a formula to estimate lean percent is part of the grading process (Tr. 654-79, 1498).

Respondent also contends section 201.99 of the Regulations (9 C.F.R. § 201.99) is vague and ambiguous (Respondent's Appeal Pet. at 26-31). However, Respondent's failure to notify hog producers of its change in the grading to be used violates express terms of section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)). Even though section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)) does not contain the words "formula" or "equation" or the term "lean percent," the plain language of the regulation requires Respondent to notify hog producers of the "grading to be used" and the record establishes that the formula to estimate lean percent is a component of the grading Respondent used.

Respondent asserts the most telling evidence that section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)) is vague is Complainant's inability to put forth a consistent and coherent interpretation of the regulation. Respondent contends Complainant has variously stated: (1) Respondent has a duty to notify hog producers of an equation change because anything that affects payments to hog producers must be disclosed to the hog producers; (2) Respondent is

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[28]Merriam Webster's Collegiate Dictionary 505 (10th ed. 1997):

> **grade** . . . *n* . . . **1 a** . . . (2) : a position in a scale of ranks or qualities . . . **2 a** : a class of things of the same stage or degree[.]
>
> The Oxford English Dictionary, vol. VI, 725, 727 (2d ed. 1991):
>
> **grade** . . . .
>
> **5. a.** In things: A degree of comparative quality or value. **b.** A class of things, constituted by having the same quality or value.
>
> . . . .
>
> **grading** . . . .
>
> **2.** *spec.* **a.** The action or process of sorting (produce) into grades according to quality.

See also Consolidated Water Power & Paper Co. v. Bowles, 146 F.2d 492, 495 (Emer. Ct. App. 1944) (stating the term "grade" is universally understood as referring to quality); *Taylor v. J.B. Hill Co.*, 189 P.2d 258, 259 (Cal. 1948) (stating "grade" deals with quality; it is a position in a scale of quality).

required to report any major change in program or anything that could affect the amount hog producers are paid; (3) calculation of price is a detail Respondent must make known to hog producers prior to purchase; (4) calculation of price and grading to be used are details Respondent must make known to hog producers prior to purchase; (5) Respondent must provide hog producers with anything that would have an effect on the items listed in section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)); and (6) Respondent must provide hog producers with information to show how the hogs purchased will be dressed and priced. (Respondent's Appeal Pet. at 29-31.)

The record establishes Complainant has continuously and consistently taken the position that Respondent violated section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)) when Respondent failed to notify hog producers that it was changing the formula to estimate lean percent, prior to Respondent's purchase of hogs on a carcass merit basis from those producers. Further, Respondent's list of purportedly inconsistent interpretations of section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)) appears to be nothing more than different ways of describing the requirements imposed on packers in section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)). The descriptions appear to be consistent with each other and the plain language of the regulation. Therefore, I reject Respondent's assertion that Complainant did not put forth a consistent and coherent interpretation of section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)).

Third, Respondent contends the Chief ALJ erroneously found Respondent's research director estimated that there would be a 1 percent difference between what producers received for their hogs when Respondent used the Danish formula and when Respondent used the Purdue formula (Respondent's Appeal Pet. at 19-20).

The Chief ALJ states Respondent's research director testified that Respondent estimated that there would be a 1 percent difference between what producers received for hogs when Respondent used the Danish formula and when Respondent used the Purdue formula, as follows:

> Scott Eilert, Excel's research director, testified that the company estimated that there would be a one percent difference in what producers received between the Danish Formula and the new equation. . . . (Tr. 966.)

Initial Decision and Order at 5-6.

I examined page 966 of the transcript which the Chief ALJ cites as the basis

for his paraphrase of Dr. Eilert's testimony. I find no testimony by Dr. Eilert that Respondent estimated there would be a 1 percent difference between the amount producers received for their hogs when Respondent used the Danish formula and when Respondent used the Purdue formula. Instead, Dr. Eilert answers a hypothetical question regarding a 1 percent change in lean percent posed by Complainant's counsel, as follows:

> [BY MS. HARPS:]
>
> Q. So is it your testimony that a 1 percent change in the lean percent would result in a minimal economic impact on the producer?
>
> [BY DR. EILERT:]
>
> A. If a producer -- if a given producer saw a 1 percent change in his lean point, regardless of the reason, yes, there would be an economic impact. And that 1 percent -- that economic impact would be -- could be an increase or could be a decrease.
>
> Q. That's true. But it would be an economic impact, though?
>
> A. Correct.

Tr. 966.

Moreover, I reviewed all of Dr. Eilert's testimony. I cannot locate any testimony by Dr. Eilert that Respondent estimated there would be a 1 percent difference between the amount producers received for their hogs when Respondent used the Danish formula and when Respondent used the Purdue formula. Therefore, I do not adopt the Chief ALJ's paraphrase of Dr. Eilert's testimony that appears on pages 5 and 6 of the Initial Decision and Order.

Fourth, Respondent contends the Chief ALJ erroneously found Respondent concluded that its agreement with Tyson Foods required Respondent to notify Tyson Foods of the formula change (Respondent's Appeal Pet. at 20).

The Chief ALJ found Respondent "concluded that its agreement with Tyson Foods, which supplied the majority of the hogs for [Respondent's] Marshall, Missouri, slaughtering facility, required that Tyson be notified of the formula change." (Initial Decision and Order at 6-7.) I cannot locate anything in the record supporting the Chief ALJ's finding that Respondent concluded that it was required by contract to notify Tyson Foods of the change in the formula to

estimate lean percent. To the contrary, the record establishes Doug Ott, Respondent's employee responsible for contracts with hog producers, reviewed the contracts Respondent had with Tyson Foods and some of the other hog producers and concluded that Respondent was not required by contract to notify Tyson Foods or any other hog producer of the change in the formula to estimate lean percent (Tr. 1396-98, 1848-50). Therefore, I do not adopt the Chief ALJ's finding that Respondent concluded that its agreement with Tyson Foods required Respondent to notify Tyson Foods of the change in the formula to estimate lean percent.

Fifth, Respondent contends the Chief ALJ erroneously found producer reaction to Respondent's formula change was mixed. Respondent states the evidence demonstrates hog producers did not care that Respondent had changed the formula for estimating lean percent and did not care that Respondent failed to provide hog producers with prior notice of the change in the formula to estimate lean percent. (Respondent's Appeal Pet. at 20-24.)

The Chief ALJ found among hog producers there was a mixed reaction to the formula change. Some hog producers favored the change to a more accurate formula, some hog producers were indifferent to the formula change, and some hog producers were upset with Respondent's failure to notify them of the formula change. (Initial Decision and Order at 10-11.) The Chief ALJ based his finding that hog producers had a mixed reaction to the formula change on testimony by William Alan Houchin, a marketing specialist employed by GIPSA, and Steve E. Ring, the general manager of Hog, Inc. (Tr. 633, 1084, 1091, 1099, 1159).

Mr. Houchin's testimony is based on interviews with six of Respondent's field buyers (Tr. 631). Mr. Houchin testified that one of Respondent's field buyers, Jim Shobe, stated that hog producer response to the change in the formula to estimate lean percent was "indifferent," which means that "some people liked the changes and some didn't." (Tr. 633.) Respondent contends that, later in his testimony, Mr. Houchin acknowledged that Mr. Shobe was referring to hog producer response to Respondent's June 1998 change to its lean value matrix and not to hog producer response to Respondent's use of the Purdue formula beginning in October 1997 (Respondent's Appeal Pet. at 23). While Mr. Houchin's testimony on this subject is not the mirror of clarity, the record supports Respondent's contention that Mr. Shobe characterized hog producer response to Respondent's June 1998 change in the lean value matrix as "indifferent" and that Mr. Shobe was not describing hog producer response to Respondent's change in the formula to estimate lean percent (Tr. 645-49; RX 60 at 2). Therefore, I do not rely on Mr. Houchin's testimony to support the finding that hog producers had a mixed reaction to Respondent's change in the

formula to estimate lean percent.

Respondent also contends Mr. Ring's testimony on the subject of hog producer response to Respondent's change of the formula to estimate lean percent is not credible, and the Chief ALJ erred by giving any weight to Mr. Ring's testimony (Respondent's Appeal Pet. at 23-24).

The Judicial Officer is not bound by an administrative law judge's credibility determinations and may make separate determinations of witnesses' credibility, subject only to court review for substantial evidence. *Mattes v. United States*, 721 F.2d 1125, 1128-29 (7th Cir. 1983).[29] The Administrative

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[29]*See also In re Robert B. McCloy, Jr.*, 61 Agric. Dec. 173, 210 (2002), *appeal docketed*, No. 02-9543 (10th Cir. July 19, 2002); *In re Wallace Brandon* (Decision as to Jerry W. Graves and Kathy Graves), 60 Agric. Dec. 527, 560 (2001), *appeal dismissed sub nom. Graves v. United States Dep't of Agric.*, No. 01-3956 (6th Cir. Nov. 28, 2001); *In re David M. Zimmerman*, 57 Agric. Dec. 1038, 1053-54 (1998); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 90 (1997) (Order Denying Pet. for Recons.); *In re Garelick Farms, Inc.*, 56 Agric. Dec. 37, 78-79 (1997); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 245 (1997), *aff'd*, 172 F.3d 51 (Table), 1999 WL 16562 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206), *printed in* 58 Agric. Dec. 85 (1999); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 860-61 (1996); *In re Jim Singleton*, 55 Agric. Dec. 848, 852 (1996); *In re William Joseph Vergis*, 55 Agric. Dec. 148, 159 (1996); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1271-72 (1995), *aff'd*, 104 F.3d 139 (8th Cir. 1997), *cert. denied sub nom. Heimann v. Department of Agric.*, 522 U.S. 951 (1997); *In re Kim Bennett*, 52 Agric. Dec. 1205, 1206 (1993); *In re Christian King*, 52 Agric. Dec. 1333, 1342 (1993); *In re Tipco, Inc.*, 50 Agric. Dec. 871, 890-93 (1991), *aff'd per curiam*, 953 F.2d 639 (4th Cir.), 1992 WL 14586, *printed in* 51 Agric. Dec. 720 (1992), *cert. denied*, 506 U.S. 826 (1992); *In re Rosia Lee Ennes*, 45 Agric. Dec. 540, 548 (1986); *In re Gerald F. Upton*, 44 Agric. Dec. 1936, 1942 (1985); *In re Dane O. Petty*, 43 Agric. Dec. 1406, 1421 (1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986); *In re Eldon Stamper*, 42 Agric. Dec. 20, 30 (1983), *aff'd*, 722 F.2d 1483 (9th Cir. 1984), *reprinted in* 51 Agric. Dec. 302 (1992); *In re Aldovin Dairy, Inc.*, 42 Agric. Dec. 1791, 1797-98 (1983), *aff'd*, No. 84-0088 (M.D. Pa. Nov. 20, 1984); *In re King Meat Co.*, 40 Agric. Dec. 1468, 1500-01 (1981), *aff'd*, No. CV 81-6485 (C.D. Cal. Oct. 20, 1982), *remanded*, No. CV 81-6485 (C.D. Cal. Mar. 25, 1983) (to consider newly discovered evidence), *order on remand*, 42 Agric. Dec. 726 (1983), *aff'd*, No. CV 81-6485 (C.D. Cal. Aug. 11, 1983) (original order of Oct. 20, 1982, reinstated *nunc pro tunc*), *aff'd*, 742 F.2d 1462 (9th Cir. 1984) (unpublished) (not to be cited as precedent under 9th Circuit Rule 21). *See generally Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951) (stating the substantial evidence standard is not modified in any way when the Board and the hearing examiner disagree); *JCC, Inc. v. Commodity Futures Trading Comm'n*, 63 F.3d 1557, 1566 (11th Cir. 1995) (stating agencies have authority to make independent credibility determinations without the opportunity to view witnesses firsthand and are not bound by an administrative law judge's credibility findings); *Dupuis v. Secretary of Health and Human Services*, 869 F.2d 622, 623 (1st Cir. 1989) (per curiam) (stating while considerable deference is owed to credibility findings by an administrative law judge, the Appeals Council has authority to reject such credibility findings); *Pennzoil v. Federal Energy Regulatory Comm'n*, 789 F.2d 1128, 1135 (5th Cir. 1986) (stating the Commission is not strictly bound by the credibility determinations of an administrative law judge); *Retail, Wholesale & Dep't Store Union v. NLRB*, 466 F.2d 380, 387

(continued...)

Procedure Act provides that, on appeal from an administrative law judge's initial decision, the agency has all the powers it would have in making an initial decision, as follows:

> **§ 557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record**
>
> . . . .
>
> (b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554(d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.

5 U.S.C. § 557(b).

Moreover, the ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT describes the authority of the agency on review of an initial or recommended decision, as follows:

> *Appeals and review*. . . .
>
> In making its decision, whether following an initial or recommended decision, the agency is in no way bound by the decision of its subordinate officer; it retains complete freedom of decision—as though it had heard the evidence itself. This follows from the fact that a recommended decision is advisory in nature. *See National Labor Relations Board v. Elkland Leather Co.*, 114 F.2d 221, 225 (C.C.A. 3,

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[29](...continued)
(D.C. Cir. 1972) (stating the Board has the authority to make credibility determinations in the first instance and may even disagree with a trial examiner's finding on credibility); 3 Kenneth C. Davis, *Administrative Law Treatise* § 17:16 (1980 & Supp. 1989) (stating the agency is entirely free to substitute its judgment for that of the hearing officer on all questions, even including questions that depend upon demeanor of the witnesses).

1940), certiorari denied, 311 U.S. 705.

ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 83 (1947).

However, the consistent practice of the Judicial Officer is to give great weight to the findings by, and particularly the credibility determinations of, administrative law judges, since they have the opportunity to see and hear witnesses testify.[30]

Respondent contends Mr. Ring's testimony is tainted both by a dispute between Respondent and Hog, Inc., over the volume Hog, Inc., is contractually required to provide Respondent and by Mr. Ring's unhappiness that Respondent directly purchased hogs from producers who had earlier sold hogs to Respondent through Hog, Inc. (Respondent's Appeal Pet. at 23-24).

Hog, Inc.'s dispute with Respondent and Mr. Ring's unhappiness with Respondent are not related to Mr. Ring's testimony regarding the reaction of hog producers to Respondent's change of the formula to estimate lean percent. I do not find Hog, Inc.'s dispute with Respondent or Mr. Ring's unhappiness with Respondent about matters which are not related to this proceeding sufficient bases to reverse the Chief ALJ's credibility determination with respect to Mr. Ring. Therefore, I find no basis to reverse the Chief ALJ's finding that hog producers had a mixed reaction to Respondent's change of the formula to estimate lean percent.

Sixth, Respondent contends the Chief ALJ erroneously rejects the

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[30] *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. 173, 212 (2002), *appeal docketed*, No. 02-9543 (10th Cir. July 19, 2002); *In re Wallace Brandon* (Decision as to Jerry W. Graves and Kathy Graves), 60 Agric. Dec. 527, 561-62 (2001), *appeal dismissed sub nom. Graves v. United States Dep't of Agric.*, No. 01-3956 (6th Cir. Nov. 28, 2001); *In re Sunland Packing House Co.*, 58 Agric. Dec. 543, 602 (1999); *In re David M. Zimmerman*, 57 Agric. Dec. 1038, 1055-56 (1998); *In re Jerry Goetz*, 56 Agric. Dec. 1470, 1510 (1997), *aff'd*, 99 F. Supp. 2d 1308 (D. Kan. 1998), *aff'd*, No. 00-3173, 2001 WL 401594 (10th Cir. Apr. 20, 2001) (unpublished); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 89 (1997) (Order Denying Pet. for Recons.); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204, 1229 (1996), *aff'd*, 151 F.3d 735 (7th Cir. 1998); *In re Floyd Stanley White*, 47 Agric. Dec. 229, 279 (1988), *aff'd per curiam*, 865 F.2d 262, 1988 WL 133292 (6th Cir. 1988); *In re King Meat Packing Co.*, 40 Agric. Dec. 552, 553 (1981); *In re Mr. & Mrs. Richard L. Thornton*, 38 Agric. Dec. 1425, 1426 (1979) (Remand Order); *In re Steve Beech*, 37 Agric. Dec. 869, 871-72 (1978); *In re Unionville Sales Co.*, 38 Agric. Dec. 1207, 1208-09 (1979) (Remand Order); *In re National Beef Packing Co.*, 36 Agric. Dec. 1722, 1736 (1977), *aff'd*, 605 F.2d 1167 (10th Cir. 1979); *In re Edward Whaley*, 35 Agric. Dec. 1519, 1521 (1976); *In re Dr. Joe Davis*, 35 Agric. Dec. 538, 539 (1976); *In re American Commodity Brokers, Inc.*, 32 Agric. Dec. 1765, 1772 (1973); *In re Cardwell Dishmon*, 31 Agric. Dec. 1002, 1004 (1972); *In re Sy B. Gaiber & Co.*, 31 Agric. Dec. 474, 497-98 (1972); *In re Louis Romoff*, 31 Agric. Dec. 158, 172 (1972).

importance of Respondent's evidence that Respondent had no contractual obligation to some hog producers to notify these hog producers before Respondent changed the formula to estimate lean percent and Respondent's evidence that some hog producers did not care which formula Respondent used to estimate lean percent. Respondent further states this evidence lends crucial support to its contention that it had no legal duty to inform hog producers before changing the formula to estimate lean percent and the Chief ALJ erroneously describes Respondent's contention as being that hog producers waived their right to notification of the change of the formula to estimate lean percent. (Respondent's Appeal Pet. at 25-26.)

The Chief ALJ describes Respondent's contention as being that some hog producers contractually waived their right to notice of Respondent's change of the formula to estimate lean percent and that some hog producers in effect waived their right to notice of Respondent's change of the formula to estimate lean percent because they did not care whether Respondent changed the formula (Initial Decision and Order at 17-18). Based on my reading of Respondent's filings, I do not find Respondent contends that hog producers waived or in effect waived a right to notice of Respondent's change of the formula to estimate lean percent. Instead, it appears Respondent contends that it had no duty to inform hog producers of the change in the formula and Respondent's contracts with hog producers and hog producer reaction to Respondent's formula change indicate that Respondent had no legal duty to notify hog producers of the change in the formula to estimate lean percent. Therefore, I do not adopt the Chief ALJ's discussion concerning the waiver of a right under the Packers and Stockyards Act and the Regulations.

However, I reject Respondent's contention that its contracts with some hog producers and the reaction of some hog producers to Respondent's change of the formula to estimate lean percent indicate that Respondent had no obligation under the Packers and Stockyards Act and the Regulations to notify hog producers before changing the formula to estimate lean percent. Section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)) requires each packer purchasing livestock on a carcass merit basis, prior to the purchase, to make known to the seller the details of the purchase contract, including the grading to be used. The formula to estimate lean percent is a part of the "grading" within the meaning of section 201.99 of the Regulations (9 C.F.R. § 201.99) as it is an element of Respondent's carcass evaluation process. Respondent legal obligation under section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)) and section 202(a) of the Packers and Stockyards Act (7 U.S.C. § 192(a)) is neither affected by Respondent's contracts with hog producers nor affected by hog producer reaction to Respondent's change of the formula to estimate lean

percent.

Seventh, Respondent contends the Chief ALJ erroneously ordered Respondent to engage in arbitration with producers that Complainant contends were not paid in full for the difference for hogs purchased using the Purdue formula as compared to the Danish formula. Specifically, Respondent contends the Chief ALJ does not have authority to order arbitration and arbitration provides a non-contractual remedy not bargained for by the parties. (Respondent's Appeal Pet. at 31-32.)

I agree with Respondent's contention that the Chief ALJ does not have authority to order Respondent to engage in arbitration with hog producers that Complainant contends were not paid in full for the difference for hogs purchased using the Purdue formula as compared to the Danish formula. My reasons for this conclusion are fully explicated in this Decision and Order, *supra*. Accordingly, I do not adopt the portion of the Chief ALJ's Order that requires Respondent to engage in arbitration with hog producers.

Respondent's Response to Complainant's Appeal

On March 13, 2002, Complainant filed Complainant's Appeal of Procedural Rulings, Complainant's Appeal Petition, and Complainant's Appeal Brief, and Respondent filed Respondent's Appeal Petition. On June 6, 2002, Complainant filed Complainant's Response in which Complainant responds to Respondent's Appeal Petition. On June 6, 2002, Respondent filed Respondent's Response to Complainant's Appeal in which Respondent raises a number of issues that were not raised by Complainant in Complainant's Appeal of Procedural Rulings, Complainant's Appeal Petition, or Complainant's Appeal Brief. Section 1.145(b) of the Rules of Practice provides for a response to an appeal petition, as follows:

> **§ 1.145 Appeal to Judicial Officer.**
>
> . . . .
>
> (b) *Response to appeal petition*. Within 20 days after the service of a copy of an appeal petition and any brief in support thereof, filed by a party to the proceeding, any other party may file with the Hearing Clerk a response in support of or in opposition to the appeal *and in such response any relevant issue, not presented in the appeal petition, may be raised*.

7 C.F.R. § 1.145(b) (emphasis added).

The emphasized language was included in section 1.145(b) of the Rules of Practice (7 C.F.R. § 1.145(b)) so that neither party would have to file a protective notice of appeal (to be dropped if no appeal were filed by the other party), but could, instead, file the equivalent of a cross-appeal in response to the appeal petition filed by the other party.[31] Where a party has previously filed an appeal petition, that party's response to the other party's appeal petition is limited to a response in support of, or in opposition to, the other party's appeal. A party may not, in the guise of a response to another party's appeal petition, file a second appeal petition. Therefore, I do not consider the issues Respondent raises in Respondent's Response to Complainant's Appeal which are not in response to issues raised by Complainant in Complainant's Appeal of Procedural Rulings, Complainant's Appeal Petition, or Complainant's Appeal Brief.

Findings of Fact

1. Respondent, Excel Corporation, is a corporation whose mailing address is P.O. Box 2519, Wichita, Kansas 67201.

2. Respondent is a packer as defined by the Packers and Stockyards Act and engaged in the business of buying livestock, including hogs, in commerce for purposes of slaughter and manufacture into meat products.

3. Respondent buys hogs from producers.

4. After hogs are slaughtered, Respondent uses an instrument called the Fat-O-Meat'er and a formula embedded in the Fat-O-Meat'er to estimate the lean percent in hog carcasses.

5. The estimated lean percent is used to calculate the price Respondent will pay hog producers for their hogs.

6. On or about October 1997, Respondent changed the formula for calculating the lean percent in hogs.

7. The Fat-O-Meat'er and the formula and the change in the formula are all "grading to be used" within the meaning of section 201.99 of the Regulations (9 C.F.R. § 201.99).

8. Beginning on or about October 1997, Respondent did not notify hog producers that it was changing the formula to estimate lean percent prior to purchasing hogs on a carcass merit basis from those producers.

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[31] *In re Floyd Stanley White*, 47 Agric. Dec. 229, 262-63 (1988), *aff'd per curiam*, 865 F.2d 262, 1988 WL 133292 (6th Cir. 1988); *In re Richard L. Thornton*, 41 Agric. Dec. 870, 900 (1982), *aff'd*, 715 F.2d 1508 (11th Cir. 1983), *reprinted in* 51 Agric. Dec. 295 (1992).

Conclusion of Law

Respondent, Excel Corporation, violated section 202(a) of the Packers and Stockyards Act (7 U.S.C. § 192(a)) and section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)) when it failed to make known to hog producers that it was changing the formula to estimate lean percent, prior to purchasing hogs on a carcass merit basis from those producers.

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

ORDER

Respondent, its agents and employees, directly or indirectly through any corporate or other device, in connection with its purchases of livestock on a carcass merit basis, shall cease and desist from:

(a) Failing to make known to sellers, or their duly authorized agents, prior to purchasing livestock, the factors that affect Respondent's estimation of lean percent, including, but not limited to, any change in the formula used to estimate lean percent; and

(b) Failing to make known to sellers, or their duly authorized agents, prior to purchasing livestock, the details of the purchase contract, including, when applicable, the expected date and place of slaughter, carcass price, condemnation terms, description of the carcass trim, grading to be used, accounting, and any special conditions.

This Order shall become effective on the day after service of this Order on Respondent.

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In re: EXCEL CORPORATION.
P. & S. Docket No. 99-0010.
Stay Order.
Filed February 4, 2003.

P&S – Stay order.

Patrice H. Harps and Eric Paul, for Complainant.
John R. Fleder and Brett T. Schwemer, and Jeff P. DeGraffenreid, for Respondent.
Order issued by William G. Jenson, Judicial Officer.

On January 30, 2003, I issued a Decision and Order concluding Excel Corporation [hereinafter Respondent] violated the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §§ 181-229) [hereinafter the Packers and Stockyards Act] and section 201.99(a) of the regulations issued under the Packers and Stockyards Act (9 C.F.R. § 201.99(a)). *In re Excel Corporation*, 62 Agric. Dec. ____ (Jan. 30, 2003). On January 31, 2003, Respondent filed "Excel Corporation's Motion for Stay of the Agency's Decision and Order of January 30, 2003" [hereinafter Motion for Stay]. Respondent states it intends to file a petition for review of *In re Excel Corporation*, 62 Agric. Dec. ____ (Jan. 30, 2003), with the United States Court of Appeal for the Tenth Circuit and requests a stay pending the outcome of proceedings for judicial review.

Mr. Brett T. Schwemer, counsel for Respondent, telephoned me on January 31, 2003, and urged me to expedite a ruling on Respondent's Motion for Stay to forestall Respondent's need to seek a stay in the United States Court of Appeals for the Tenth Circuit. I informed Mr. Schwemer that I would contact Ms. Patrice H. Harps, counsel for Harold W. Davis, Deputy Administrator, Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture [hereinafter Complainant], to determine if Complainant intends to respond to Respondent's Motion for Stay and, if so, to order Complainant to expedite the response to Respondent's Motion for Stay.

Ms. Harps informed me that Complainant intends to file a petition for reconsideration of *In re Excel Corporation*, 62 Agric. Dec. ____ (Jan. 30, 2003). Under the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151), which are applicable to this proceeding, a timely filed petition for reconsideration automatically stays a decision of the Judicial Officer pending

the determination to grant or deny the petition for reconsideration.[1]

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

ORDER

The Order in *In re Excel Corporation*, 62 Agric. Dec. ___ (Jan. 30, 2003), is stayed. This Stay Order is issued *nunc pro tunc* and is effective January 31, 2003. This Stay Order shall remain effective until one of the parties files a timely petition for reconsideration, at which time *In re Excel Corporation*, 62 Agric. Dec. ____ (Jan. 30, 2003), shall be automatically stayed pending the determination to grant or deny the petition for reconsideration. If neither party files a timely petition for reconsideration, this Stay Order shall remain effective until the Judicial Officer lifts the Stay Order or a court of competent jurisdiction vacates the Stay Order.

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[1]*See* 7 C.F.R. § 1.146(b).

PACKERS AND STOCKYARDS ACT

MISCELLANEOUS ORDERS

In re: SUGARCREEK LIVESTOCK AUCTION, INC. AND LEROY H. BAKER, JR.
P&S Docket No. D-02-0001.
Supplemental Order.
Filed January 10, 2003.

Christopher Young-Morales, for Complainant.
Ernest H. Van Hooser, for Respondents.
Order issued by James W. Hunt, Administrative Law Judge.

On December 3, 2002, A Decision was entered in this proceeding, whereby Respondent Sugarcreek Livestock Auction, Inc. and its *alter ego,* Respondent Leroy H. Baker, Jr., were suspended as registrants under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*), hereinafter "the Act" for a period of 14 days and thereafter until they demonstrated that the shortage in the Custodial Account for Shippers' Proceeds had been eliminated. Further, Respondent Sugarcreek Livestock Auction, Inc. and its *alter ego,* Respondent Leroy H. Baker, Jr. were jointly and severally assessed a civil penalty of $3800.00. The suspension began on December 8, 2002, and the civil penalty was to be payed by or before that date.

The civil penalty of $3,800.00 was paid in full before December 8, 2002, and on December 13, 2002, Respondent Sugarcreek Livestock Auction, Inc, and its *alter ego*, Respondent Leroy H. Baker, Jr. demonstrated by Custodial Audit Report Analysis as of December 13, 2002 that the shortage in the Custodial Account for Shippers' Proceeds had been eliminated.

Complainant requested that a Supplemental Order be issued lifting Respondents' suspension as registrants under the Act, effective Monday, December 23, 2002.

The provisions of this order shall become effective on the first day after service of this order on the Respondents Sugarcreek Livestock Auction, Inc., and Leroy H. Baker, Jr.
Copies of this order shall be served upon the parties.

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PACKERS AND STOCKYARDS ACT

DEFAULT DECISIONS

In re: FRED HOLMES, d/b/a HOLMES LIVESTOCK.
P&S Docket No. D-02-0022.
Decision and Order.
Filed May 5, 2003.

P&S – Default – Payment, failure to make prompt – Bankruptcy.

Charles Spicknall, for Complainant.
Robert M. Cook, for Respondent.
Decision and Order issued by James 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 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 alleging that the Respondent has willfully 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 the Respondent, Fred Holmes, doing business as Fred Holmes Livestock, by certified mail. The complaint alleged that, as of January 28, 2002, the Respondent had failed to pay eleven livestock sellers for $505,648.16 in livestock purchases and that payments on those purchases were more than 325 days overdue in violation of the Act. *See* Complaint ¶ II. The complaint also alleged that the Respondent had violated the Act by issuing checks for a majority of these purchases, which checks were returned unpaid by the bank upon which they were drawn because the Respondent did not maintain sufficient funds on deposit and available in the accounts to pay such checks when presented. *See id.*

On October 24, 2002, Respondent filed its "Answer to Complaint Filed by United States Department of Agriculture" generally denying the allegations in the complaint but admitting that Respondent had filed for bankruptcy under Chapter 11, Title 11 of the United States Bankruptcy Code, in the United States District Court, Eastern District of Missouri, Case No. 02-20293. *See* Answer ¶ III. Respondent's answer attached a copy of its filing in the bankruptcy proceeding, including a document entitled "Schedule F – Creditors Holding Unsecured Priority Claims," and deemed all further actions against him stayed pursuant to 11 U.S.C. § 362. *See* Answer at ¶ III and "Exhibit A." Respondent's Schedule F admits that ten of the eleven livestock sellers in the

complaint were unpaid at the time of Respondent's bankruptcy filing, but claims that the debts were contingent, unliquidated and disputed. *See id.* Respondent's answer also alleges that any failure to pay livestock creditors was actually attributable to the misappropriation and misapplication of Respondent's funds by the First National Bank of Missouri. *See* Answer ¶ II.

On April 1, 2003, Complainant filed a "Motion for Decision Without Hearing." Based on careful consideration of the pleadings and the precedent cited by the parties, Complainant's motion is hereby granted and the following decision is issued without further proceeding or hearing pursuant to section 1.139 of the Rules of Practice.

Findings of Fact

1. Fred Holmes, doing business as Holmes Livestock, referred to herein as the "Respondent" is an individual whose business mailing address is P.O. Box 391, Brookfield, Missouri 64658.

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 and a market agency buying livestock on a commission basis; and

b. Registered as an individual with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce and as a market agency to buy livestock on a commission basis.

3. Respondent filed for bankruptcy under Chapter 11, Title 11 of the United States Bankruptcy Code, in the United States District Court, Eastern District of Missouri, Case No. 02-20293. *See* Answer ¶ III.

4. Respondent has admitted in bankruptcy pleadings, of which the Secretary may take official notice, that ten of the eleven sellers alleged to be unpaid in the complaint remained unpaid for more than $500,000 worth of livestock as of the date of Respondent's amended bankruptcy filing on June 5, 2002. Schedule F of the bankruptcy filing contains a table with columns for the name and address of the creditor, along with the amounts of their claims.

5. The amounts alleged unpaid by the Complainant and admitted unpaid by the Respondent are as follows:

SELLER	SCHEDULE F	COMPLAINT
James Brunscher	$305.00	$305.00
David Conrad	$6,224.16	$6,224.16
Farmers Livestock Sales	$63,927.25	$63,927.25[1]
Jim Gerdes	$32,609.40	$32,609.40
George Kimbrough[2]	$746.50	$746.50
Harold Logsdon	$37,411.50	$37,411.50
St. Joseph Stockyards	$124,436.83	$86,671.55[3]
Marvin Springer	$424.25	$424.25
Tecumseh Livestock	$89,107.16	$89,107.16
A&W Cattle/Tim Reese	$186,780.39	$186,780.39
TOTALS:	**$541,972.44**	**$504,207.16**

Conclusions

In his answer to the complaint, Respondent Holmes "deems all further actions against Respondent/Debtor as stayed, pursuant to 11 U.S.C. § 362." (Answer ¶ III.) However, disciplinary proceedings under the Packers and Stockyards Act are exempted from the automatic stay provisions of 362(a) of the Bankruptcy Code pursuant to 11 U.S.C. § 362(b)(4) and the express

[1]The unpaid total for Farmer's Livestock combines the amounts listed in paragraphs II(a) and (b) of the complaint.

[2]George Kimbrough is listed as "GEO KINBROUGH" at page 3 of 7 in Respondent's Schedule F.

[3]The complaint reduces the amount of livestock debt owed by St. Joseph Stockyards alleging that eleven head of cattle valued at $5,687.01 were reclaimed by the seller and that $32,078.27 in sale proceeds were also recovered by the seller. *See* Complaint at ¶ II, n. 1.

exception provided for enforcement proceedings under the Packers and Stockyards Act in 11 U.S.C. § 525(a). *See, e.g., In re: Sechler Foods, Inc*., 59 Agric. Dec. 336, 336 (2000); *In re Jeremy Byrd*, 55 Agric. Dec. 443, 455 (1996); *In re Bluegrass Packing Co.*, 42 Agric. Dec. 1464, 1470 (1983); *In re Pastures, Inc.,* 39 Agric. Dec. 395, 397 (1980). The express language of section 525 was intended to remove any doubt that the Secretary of Agriculture could proceed against registrants under the Packers and Stockyards Act, even where the proceeding involved debts dischargeable in bankruptcy. *See generally, B.G. Sales Co*., 44 Agric. Dec. 2021 (1985) (discussing the legislative history of the express exemption in Section 525). Accordingly, this action is not stayed.

Section 409 of the Packers and Stockyards Act generally requires livestock dealers and market agencies, like the Respondent, to pay for all livestock purchases by the close of the next business day following the sale. *See* 7 U.S.C. § 228b.[4] Here, the Respondent is bankrupt and admits in his bankruptcy pleadings appended to his answer that he has been unable to pay for more than half a million dollars in livestock purchases for a period of time far in excess of anything permitted by the Act.[5] Even under the most liberal interpretation of the prompt payment requirements of the Packers and Stockyards Act, Respondent is in violation of sections 409 and 312(a) of the Act.

Respondent's denials in his answer do not establish the existence of a *bona fide* dispute as to the material facts such that a hearing would be necessary. In particular, Respondent alleges "that any failure to pay was due to the actions by First National Bank of Missouri." *See* Answer at ¶ II(b)). However, even if Respondent's failure to pay for his livestock purchases can be attributed to a misappropriation and misapplication of the Respondent's funds by the First National Bank of Missouri, (*see* Answer ¶ II(c)), it does not excuse the violation under the Packers and Stockyards Act which was designed to protect farmers and ranchers from receiving less than fair market value for their livestock by removing financially unstable and unbonded persons from the chain of distribution. *See*, *e.g., In re Robert F. Johnson,* 47 Agric. Dec. 436, 443 (1988). As the Department's Judicial Officer ("JO") has explained – the damage done

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[4]Section 409 requires payment by the next business day, unless different payment terms are expressly agreed to in writing prior to the sale. *See* 7 U.S.C. § 228b(b). If payment for livestock purchases is mailed, it must be placed in the mail by the next business day. *Id*. at § 228b(a). Respondent does not appear to contend that there were prior written agreements extending the time for payment indefinitely or that payments were lost in the mail.

[5]Official notice is taken of Respondent's bankruptcy schedules appended to his answer. *See In re Peter DeVito Company, Inc., 57 Agric*. Dec. 830, 834, n. 1 (1997).

to livestock producers is the same regardless of the reasons underlying Respondent's payment violations. *See In re Great American Veal*, 48 Agric. Dec. 183, 211 (1989). The 1976 amendments to the Packers and Stockyards Act make any delay in payment to livestock sellers an "unfair practice" and a violation of the Act. *See* 7 U.S.C. § 228b(c)).

Nor does the fact that Respondent checked the "unliquidated," "contingent" and "disputed" boxes for all of the livestock debt listed in his Schedule F filing affect the quality of the bankruptcy admissions for purposes of this proceeding under the Packers and Stockyards Act. *See* Answer at "Exhibit A."[6] The livestock sellers' claims are not "contingent" because the events giving rise to liability occurred prior to the filing of the bankruptcy petition. *See, e.g., Barcal v. Laughlin,* 213 B.R. 1008, 1012 - 1014 (8th Cir. BAP 1997). Similarly, the claims are not "unliquidated" because they are simple contract claims ascertainable by reference to the sales invoice or simple computation. *See id.* Perhaps Respondent could argue that his livestock debts are "disputed" in the bankruptcy proceeding because Respondent's bond, required under the Packers and Stockyards Act, will serve to reduce the admitted amounts. However, under the Packers and Stockyards Act even if Respondent had now fully repaid its livestock-related debts, "it is well-settled that present compliance is irrelevant in determining the sanction for past violations." *See, e.g., In re A.W. Schmidt & Son, Inc.*, 46 Agric. Dec. 586, 593 (1987) (citations omitted)[7]

It is the policy of the Department to impose sanctions for violations of any of the regulatory programs administered by the Department that are serious and repeated in order to serve as an effective deterrent not only to the Respondent, but to other potential violators as well. *See, e.g., In re Larry Wooten*, 58 Agric. Dec. 944, 980 (1999). Here, the Respondent's failure-to-pay violations are serious and repeated. When livestock purchasers, such as the Respondent, do not make prompt payment it forces the sellers to finance the transaction. *See Van Wyk v. Bergland*, 570 F.2d 701, 704 (8th Cir. 1978). Considering Respondent's bankruptcy, there is a very real risk that the sellers may never receive full payment for their livestock. One of the primary purposes of the Packers and Stockyards Act is "to assure fair trade practices . . . in order to

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[6]Checking the "unliquidated," "contingent" and "disputed" boxes on Schedule F of the bankruptcy form forces the livestock creditors to file timely proof of their claims with the bankruptcy court. *See* Bankr. R. 3003(c). The livestock creditors may lose their creditor status if they fail to file proof of their claim by the bar date. *Id*.

[7]In addition to the likely bond payout, the Complainant alleges that at least one livestock seller was able to reclaim some of its livestock, along with some of the proceeds from the sale of other livestock, which will further reduce the debts owed by Respondent.

safeguard farmers and ranchers against receiving less than the fair market value of their livestock." *Bruhn's Freezer Meats v. United States Dep't of Agric*., 438 F.2d 1332, 1337 (8th Cir. 1971). A producer's "livestock may represent his entire year's output. And, if he is not paid, he faces ruin." *In re Great American Veal*, 48 Agric. Dec. 183, 203 (1989) (quoting H. Rep. No. 94-1043, 94th Cong., 2nd Sess., p.5).

The agency's recommendation that the Respondent be ordered to cease and desist from violating the Act and suspended as a registrant under the Act for five years is consistent with the sanctions regularly imposed in other cases involving failure to pay for livestock. *See*, *e.g., In re Hines and Thurn Feedlot, Inc.,* 57 Agric. Dec. 1408, 1429 (1998).[8] Respondent's alleged victimization by the First National Bank of Missouri is not relevant in determining sanctions for Respondent's violation. *See id. at* 1430 (citing *Van Wyk,* 570 F.2d at 704). The sanctions are necessary to deter future violations and to prevent the Respondent from continuing to deal in livestock while he is bankrupt and unable to pay for his purchases. *See In re Larry Wooten*, 58 Agric. Dec. at 977 (the sanction is intended to obtain compliance and deter the Respondent and other registrants from committing unfair and deceptive trade practices similar to those which occurred in this case).

Order

Respondent Fred Holmes, 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 on which the checks are drawn to pay the checks when presented;
2. Failing to pay, when due, the full purchase price of livestock; and
3. Failing to pay the full purchase price of livestock.

The Respondent is hereby suspended as a registrant under the Act for a period of five (5) years. *Provided,* however, that upon application to Packers and Stockyards Programs, a supplemental order may be issued terminating the suspension of the Respondent at any time after one (1) year upon demonstration

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[8] *See also In re S.S. Farms Linn County, Inc.*, 50 Agric. Dec. 476, 497 (1991) ("appropriate weight" is to be given to the sanction recommendations of administrative officials charged with the responsibility for achieving the congressional purpose); *In re Marysville Enterprises, Inc.*, 59 Agric. Dec. 299, 318 (2000) (same). *See also* 7 U.S.C. § 204 (permitting the Secretary to suspend a registrant "for a reasonable specified period").

by the Respondent that he is in full compliance with the Act; and *provided further*, that this order may be modified upon application to Packers and Stockyards Programs to permit the Respondent's salaried employment by another registrant or a packer after the expiration of one (1) year of suspension upon demonstration of circumstances warranting modification of the order, such as a reasonable schedule of restitution.

The provisions of this order shall become effective on the sixth (6th) day after service of this order on the Respondent.

Copies of this decision shall be served upon the parties.

[This Decision and Order became final May 14, 2003.–Editor]

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CONSENT DECISIONS

(Not published herein - Editor)

GRAIN STANDARDS ACT

Buffalo Farm Supply, Inc. G.S.A. Docket No. 03-0001. 5/23/2003.

PACKERS AND STOCKYARDS ACT

Jacob Dressler, III, a/k/a Jake Dressler, III, d/b/a Clover Lane Farm. P&S Docket No. D-03-0003. 4/3/2003.

Kirk Hemmert, d/b/a Wakeeney Livestock Commission Co. P&S Docket No. D-03-0002. 4/8/2003.

Dewey B. Vaughn, d/b/a Vaughn Cattle Service. P&S Docket No. D-03-0006. 4/17/2003.

Michael Claude Edwards. P&S Docket No. D-03-0005. 5/29/2003.

Josephine E. Bonaccurso, Inc., d/b/a Salem Packing Co., and Anthony Bonaccurso. P&S Docket No. D-02-0015. 6/24/2003.

Chris Britten d/b/a Chris Britten Cattle. P&S Docket No. D-03-0010. 6/25/2003.

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AGRICULTURE DECISIONS

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UNITED STATES DEPARTMENT OF AGRICULTURE

AGRICULTURE DECISIONS

AGRICULTURE DECISIONS is an official publication by the Secretary of Agriculture consisting of decisions and orders issued in adjudicatory administrative proceedings conducted for the Department under various statutes and regulations. Selected court decisions concerning the Department's regulatory programs are also included. The Department is required to publish its rules and regulations in the *Federal Register* and, therefore, they are not included in AGRICULTURE DECISIONS.

Beginning in 1989, AGRICULTURE DECISIONS is comprised of three Parts, each of which is published every six months. Part One is organized alphabetically by statute and contains all decisions and orders other than those pertaining to the Packers and Stockyards Act and the Perishable Agricultural Commodities Act, which are contained in Parts Two and Three, respectively.

The published decisions and orders may be cited by giving the volume number, page number and year, e.g., 1 Agric. Dec. 472 (1942). It is unnecessary to cite a decision's docket number, e.g., AWA Docket No. 99-0022, and the use of such references generally indicates that the decision has not been published in AGRICULTURE DECISIONS.

Consent decisions entered subsequent to December 31, 1986, are no longer published. However, a list of consent decisions is included. Consent decisions are on file and may be inspected upon request made to the Hearing Clerk, Office of Administrative Law Judges.

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.

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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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LIST OF DECISIONS REPORTED

PERISHABLE AGRICULTURAL COMMODITIES ACT

COURT DECISION

DEPARTMENTAL DECISIONS

REPARATION DECISIONS

MISCELLANEOUS ORDER

DEFAULT DECISIONS

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PERISHABLE AGRICULTURAL COMMODITIES ACT

COURT DECISION

PMD PRODUCE BROKERAGE CORP. v. USDA.
No. 02-1134.
Decided May 13, 2003.

(Cite as: 2003 WL 21186047 (D.C.Cir.))

PACA – Untimely filing.

Respondent filed his petition for review 2 days later than permitted under the Administrative hearing rules. Respondent's contention of timeliness of filing based upon a nice calculation of presumed mailing date plus an "average" number of days to deliver certified mail is inadequate to show compliance with the rules.

United States Court of Appeals,
District of Columbia Circuit.

Before: HENDERSON, RANDOLPH and GARLAND, Circuit Judges.

JUDGMENT

PER CURIAM.

This cause was considered on the record from the United States Department of Agriculture and on the briefs of counsel. It is

ORDERED that the petition for review be dismissed for lack of jurisdiction. Under the Hobbs Act, an aggrieved party must file a petition for review of a final agency order "within 60 days after its entry." 28 U.S.C. § 2344. Here, the order at issue is date-stamped February 14, 2002. Respondents' Appendix (RA) 1. Although PMD Produce Brokerage Corp. (PMD) did not file its petition for review until sixty-two days later, on April 17, 2002, its petition was timely under the Hobbs Act, it maintains, because the date of "entry" is the date on which the Department of Agriculture (USDA) mailed the order, which it "verily believe[s] was on or about February 22, 2002." Br. for Pet'r at 11.

Even assuming that the date of "entry" is the date on which a final order is mailed, however, PMD has failed to demonstrate the timeliness of its petition. To support its belief that the order at issue was mailed "on or about February 22, 2002," PMD relies solely upon the date on which it received the final

order-February 25, 2002-and the declaration of its counsel that an employee of the United States Postal Service informed him via telephone that "certified mail with return receipt requested takes, on average, from one to three days to deliver from Washington, D.C. to New York City." RA 24. PMD's assertions are plainly insufficient to establish February 22, 2002 as the final order's date of entry, particularly in light of the documentary evidence submitted by the USDA, which uniformly supports the conclusion that the final order was entered and mailed on February 14, 2002. *See* RA 9-22. PMD's petition is therefore dismissed as untimely. *See* 28 U.S.C. § 2344.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* Fed. R.App. P. 41(b); D.C.Cir. Rule 41.

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PERISHABLE AGRICULTURAL COMMODITIES ACT

DEPARTMENTAL DECISIONS

In re: JANET S. ORLOFF, MERNA K. JACOBSON, AND TERRY A. JACOBSON.
PACA-APP Docket No. 01-0002.
Decision and Order as to Merna K. Jacobson.
Filed January 7, 2003.

PACA-APP – Perishable agricultural commodities – Failure to make full payment promptly – Responsibly connected – Active involvement in activities resulting in violations – Personal commission of prohibited activity not required.

The Judicial Officer (JO) affirmed Administrative Law Judge Clifton's decision affirming the Chief of the PACA Branch's determination that Petitioner was *responsibly connected* with Jacobson Produce, Inc. at the time Jacobson Produce, Inc. violated the PACA. The JO found that Petitioner held more than 10% of the stock of Jacobson Produce, Inc. during the period that Jacobson Produce, Inc. violated the PACA. Thus, Petitioner met the first sentence of the definition of the term *responsibly connected* in 7 U.S.C. § 499a(b)(9), and the burden was on Petitioner to demonstrate by a preponderance of the evidence that she was not responsibly connected with Jacobson Produce, Inc. The JO stated that 7 U.S.C. § 499a(b)(9) provides a two-pronged test which Petitioner had to meet to demonstrate that she was not responsibly connected. First, Petitioner had to demonstrate by a preponderance of the evidence that she was not actively involved in the activities resulting in a violation of the PACA. Since the statutory test is in the conjunctive ("and"), Petitioner's failure to meet the first prong of the statutory test resulted in the Petitioner's failure to demonstrate that she was not responsibly connected, without recourse to the second prong. A petitioner who participates in activities resulting in a violation of the PACA is actively involved in those activities, unless the petitioner demonstrates by a preponderance of the evidence that his or her participation was limited to the performance of ministerial functions only. Thus, if a petitioner demonstrates by a preponderance of the evidence that he or she did not exercise judgment, discretion, or control with respect to the activities that resulted in a violation of the PACA, the petitioner would not be found to have been actively involved in the activities that resulted in a violation of the PACA and would meet the first prong of the responsibly connected test. *See In re Michael Norinsberg*, 58 Agric. Dec. 604, 610-11 (1999) (Decision and Order on Remand). Petitioner was the buyer of, or was responsible for buying, produce from produce suppliers which Jacobson Produce, Inc. did not pay in accordance with the PACA. The JO found Petitioner's purchase of, or responsibility for the purchase of, this produce was active involvement in activities that resulted in Jacobson Produce, Inc.'s violations of the PACA. Moreover, the JO found Petitioner did not demonstrate by a preponderance of the evidence that her participation in the purchase of produce was limited to the performance of ministerial functions only. Petitioner, as a buyer for and manager of Jacobson Produce, Inc.'s frozen foods department, decided whether to make produce purchases on behalf of Jacobson Produce, Inc. and chose to do so even though she knew or should have known that Jacobson Produce, Inc. was not paying produce suppliers for perishable agricultural commodities in accordance with the PACA. The JO rejected Petitioner's argument that in order to be actively involved in the activities resulting in a PACA licensee's violation of the PACA, a petitioner must

actually commit the PACA violation stating a petitioner's failure to make full payment promptly is not the only activity that can result in a PACA licensee's failure to make full payment promptly in accordance with the PACA.

Ruben D. Rudolph, Jr., for Respondent.
Paul T. Gentile, for Petitioner.
Initial decision issued by Jill S. Clifton, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

On February 21, 2001, James R. Frazier, Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], issued a determination that Merna K. Jacobson[1] [hereinafter Petitioner] was responsibly connected with Jacobson Produce, Inc. during June 1999 through January 2000, a period during which Jacobson Produce, Inc. violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA].[2] On March 5, 2001, Petitioner filed a Petition for Review pursuant to the PACA 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] seeking reversal of Respondent's determination that she was responsibly connected with Jacobson Produce, Inc. during the period Jacobson Produce, Inc. violated the PACA.

On July 12, 2001, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] conducted a hearing in New York, New York. Paul T. Gentile, Gentile & Dickler, New York, New York, represented Petitioner. Ruben D. Rudolph, Jr., Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented Respondent.

On November 30, 2001, Petitioner filed "Petitioner's Brief and Proposed

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[1]Respondent's February 21, 2001, determination letter (CARX 14) and a number of other exhibits and filings in this proceeding refer to Petitioner as "Myrna K. Jacobson." Petitioner's name is "Merna K. Jacobson" (Amendment of Case Caption, Deadlines for Filing Outstanding Evidence, Request for Settlement Documents, and Briefing Schedule).

[2]During June 1999 through January 2000, Jacobson Produce, Inc. failed to make full payment promptly to 28 sellers of the agreed purchase prices in the total amount of $584,326.83 for 153 lots of perishable agricultural commodities, which Jacobson Produce, Inc. purchased, received, and accepted in interstate and foreign commerce. Jacobson Produce, Inc.'s failures to make full payment promptly constitute willful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). *In re Jacobson Produce, Inc.*, 60 Agric. Dec. 381 (2001) (Consent Decision and Order) (CARX 15).

Finding of Fact." On January 31, 2002, Respondent filed "Respondent's Proposed Findings of Fact, Conclusions of Law, and Order."

On August 13, 2002, the ALJ issued a "Decision" [hereinafter Initial Decision and Order] in which the ALJ affirmed Respondent's determination that Petitioner was responsibly connected with Jacobson Produce, Inc. during June 1999 through January 2000, a period during which Jacobson Produce, Inc. violated the PACA (Initial Decision and Order at 12).

On October 16, 2002, Petitioner appealed to the Judicial Officer. On November 15, 2002, Respondent filed "Respondent's Response to Petitioner's Appeal Petition." On November 18, 2002, the Hearing Clerk transferred the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I agree with many of the ALJ's findings of fact and conclusions of law and the ALJ's affirming Respondent's determination that Petitioner was responsibly connected with Jacobson Produce, Inc. during June 1999 through January 2000, a period during which Jacobson Produce, Inc. violated the PACA. Therefore, pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt with minor modifications the ALJ's Initial Decision and Order as the final Decision and Order. Additional conclusions by the Judicial Officer follow the ALJ's conclusions of law, as restated.

Petitioner introduced no exhibits. Respondent introduced 17 exhibits admitted into evidence at the July 12, 2001, hearing. The 15 Certified Agency Record exhibits introduced by Respondent are designated by "CARX." Two additional exhibits introduced by Respondent are designated by "AX." Transcript references are designated by "Tr."

APPLICABLE STATUTORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

. . . .

§ 499a. Short title and definitions

. . . .

(b) Definitions

For purposes of this chapter:

. . . .

(9) The term "responsibly connected" means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association. A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of this chapter and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.

. . . .

§ 499b. Unfair conduct

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

. . . .

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter.

. . . .

§ 499d. Issuance of license

. . . .

(b) Refusal of license; grounds

The Secretary shall refuse to issue a license to an applicant if he finds that the applicant, or any person responsibly connected with the

applicant, is prohibited from employment with a licensee under section 499h(b) of this title or is a person who, or is or was responsibly connected with a person who–

(A) has had his license revoked under the provisions of section 499h of this title within two years prior to the date of the application or whose license is currently under suspension; [or]

(B) within two years prior to the date of application has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect[.]

. . . .

(c) Issuance of license upon furnishing bond; issuance after three years without bond; effect of termination of bond; increase or decrease in amount; payment of increase

Any applicant ineligible for a license by reason of the provisions of subsection (b) of this section may, upon the expiration of the two-year period applicable to him, be issued a license by the Secretary if such applicant furnishes a surety bond in the form and amount satisfactory to the Secretary as assurance that his business will be conducted in accordance with this chapter and that he will pay all reparation orders which may be issued against him in connection with transactions occurring within four years following the issuance of the license, subject to his right of appeal under section 499g(c) of this title. In the event such applicant does not furnish such a surety bond, the Secretary shall not issue a license to him until three years have elapsed after the date of the applicable order of the Secretary or decision of the court on appeal. If the surety bond so furnished is terminated for any reason without the approval of the Secretary the license shall be automatically canceled as of the date of such termination and no new license shall be issued to such person during the four-year period without a new surety bond covering the remainder of such period. The Secretary, based on changes in the nature and volume of business conducted by a bonded licensee, may require an increase or authorize a reduction in the amount of the bond. A bonded licensee who is notified by the Secretary to provide a bond in an increased amount shall do so within a reasonable time to be specified by the Secretary, and upon failure of the licensee to provide such bond his license shall be automatically suspended until such bond

is provided. The Secretary may not issue a license to an applicant under this subsection if the applicant or any person responsibly connected with the applicant is prohibited from employment with a licensee under section 499h(b) of this title.

§ 499h. Grounds for suspension or revocation of license

. . . .

(b) Unlawful employment of certain persons; restrictions; bond assuring compliance; approval of employment without bond; change in amount of bond; payment of increased amount; penalties

Except with the approval of the Secretary, no licensee shall employ any person, or any person who is or has been responsibly connected with any person–

(1) whose license has been revoked or is currently suspended by order of the Secretary;

(2) who has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect; or

(3) against whom there is an unpaid reparation award issued within two years, subject to his right of appeal under section 499g(c) of this title.

The Secretary may approve such employment at any time following nonpayment of a reparation award, or after one year following the revocation or finding of flagrant or repeated violation of section 499b of this title, if the licensee furnishes and maintains a surety bond in form and amount satisfactory to the Secretary as assurance that such licensee's business will be conducted in accordance with this chapter and that the licensee will pay all reparation awards, subject to its right of appeal under section 499g(c) of this title, which may be issued against it in connection with transactions occurring within four years following the approval. The Secretary may approve employment without a surety bond after the expiration of two years from the effective date of the applicable disciplinary order. The Secretary, based on changes in the

> nature and volume of business conducted by the licensee, may require an increase or authorize a reduction in the amount of the bond. A licensee who is notified by the Secretary to provide a bond in an increased amount shall do so within a reasonable time to be specified by the Secretary, and if the licensee fails to do so the approval of employment shall automatically terminate. The Secretary may, after thirty days[’] notice and an opportunity for a hearing, suspend or revoke the license of any licensee who, after the date given in such notice, continues to employ any person in violation of this section. The Secretary may extend the period of employment sanction as to a responsibly connected person for an additional one-year period upon the determination that the person has been unlawfully employed as provided in this subsection.

7 U.S.C. §§ 499a(b)(9), 499b(4), 499d(b)(A)-(B), (c), 499h(b).

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

Decision Summary

Based on the reasoning in *In re Michael Norinsberg*, 58 Agric. Dec. 604 (1999) (Decision and Order on Remand), I conclude Petitioner was *responsibly connected*, as defined by section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with Jacobson Produce, Inc. during June 1999 through January 2000, when Jacobson Produce, Inc. willfully, repeatedly, and flagrantly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Issue

Did Petitioner prove by a preponderance of the evidence that she was not actively involved in any of the activities that resulted in Jacobson Produce, Inc.’s PACA violations during the period June 1999 through January 2000?

Findings of Fact

1. Before his death, Sidney Jacobson was an equal owner with Aaron (“Eddie”) Gisser of Jacobson Produce, Inc. Each owned 50 percent of Jacobson Produce, Inc. and together they ran the business. (AX 1; Tr. 164.)

2. After Sidney Jacobson died in 1980, the responsibility for running Jacobson Produce, Inc. fell to Aaron Gisser alone. Aaron Gisser assumed the joint roles of chief financial officer and chief executive officer and served as president and secretary, the only two corporate offices, until the business closed in April 2000. (AX 1, AX 2; Tr. 67-68, 123-24.)

3. None of Sidney Jacobson's heirs assumed his management role in the business: not Petitioner, his surviving spouse, nor any of his three children, Kenneth D. Jacobson, Janet S. Orloff, and Terry A. Jacobson (AX 1; Tr. 122-23).

4. Petitioner worked for Jacobson Produce, Inc. from 1971 until the business closed in April 2000 (Tr. 142, 166).

5. After Sidney Jacobson died, Petitioner did not become more of a participant in the decision-making of Jacobson Produce, Inc. and did not change what she did for Jacobson Produce, Inc. which was to manage the frozen foods department. During the period June 1999 through January 2000, Petitioner was a buyer for and managed Jacobson Produce, Inc.'s frozen foods department. (AX 1, CARX 7, CARX 8; Tr. 132, 143, 168.)

6. Petitioner was Aaron Gisser's sister-in-law, which accounts in large part for his testimony that he considered her as "a partner" rather than "his" employee and his feeling that he did not have the authority to fire her if she were not doing a good job (Tr. 132-33).

7. Petitioner never exercised control over Jacobson Produce, Inc. as a whole; her management authority was limited to the frozen foods department (AX 1; Tr. 149).

8. Petitioner was never an officer of Jacobson Produce, Inc. (Tr. 66, 149).

9. Petitioner was never a director of Jacobson Produce, Inc. (Tr. 66, 149).

10. Petitioner did not hire or fire employees for Jacobson Produce, Inc. (Tr. 143).

11. Petitioner had no responsibilities regarding payroll for Jacobson Produce, Inc. (Tr. 125-26, 146).

12. Petitioner was a listed signatory on one Jacobson Produce, Inc. bank account for the purpose of having someone available to sign checks if Aaron Gisser were not available (CARX 7; Tr. 125-26).

13. During June 1999 through January 2000, Petitioner wrote no checks and signed no checks on behalf of Jacobson Produce, Inc. (Tr. 126).

14. During June 1999 through January 2000, Jacobson Produce, Inc. failed to make full payment promptly to 28 sellers of the agreed purchase prices in the total amount of $584,326.83 for 153 lots of perishable agricultural

commodities, which Jacobson Produce, Inc. purchased, received, and accepted in interstate and foreign commerce (CARX 2 at 3-8, CARX 15).

15. Jacobson Produce, Inc. entered into a Consent Decision and Order filed in January 2001 in PACA Docket No. D-00-0023, admitting its failure to make full payment promptly with respect to the transactions described in Finding of Fact 14 (CARX 2 at 3-8, CARX 15).

16. Jacobson Produce, Inc.'s failures to make full payment promptly with respect to the transactions described in Finding of Fact 14 constituted willful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) and resulted in the revocation of Jacobson Produce, Inc.'s PACA license (CARX 2 at 3-8, CARX 15).

17. Approximately 15, 16, or 17 percent of the business of Jacobson Produce, Inc. was frozen foods (Tr. 129).

18. Of the $584,326.83 for perishable agricultural commodities that Jacobson Produce, Inc. failed to pay in violation of the PACA, approximately $127,000 of that was failure to pay for frozen foods purchased, received, and accepted from four produce suppliers: Maine Frozen Foods; Paris Foods Corporation; Endico Potatoes, Inc.; and Reddy Raw, Inc. (CARX 2 at 5-6; Tr. 51-52).

19. Petitioner was the buyer of, or was responsible for buying, in or about June 1999, one lot of frozen mixed vegetables for which Maine Frozen Foods was not promptly paid $12,542.40, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (CARX 2 at 5; Tr. 51-52).

20. Petitioner was the buyer of, or was responsible for buying, in or about September 1999 through November 1999, four lots of frozen mixed vegetables for which Paris Foods Corporation was not promptly paid $36,344.40, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (CARX 2 at 5; Tr. 51-52).

21. Petitioner was the buyer of, or was responsible for buying, in or about October 1999 through November 1999, 16 lots of frozen potatoes for which Endico Potatoes, Inc. was not promptly paid $29,610.43, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (CARX 2 at 5; Tr. 51-52).

22. Petitioner was the buyer of, or was responsible for buying, in or about November 1999 through December 1999, 10 lots of frozen mixed fruits and vegetables for which Reddy Raw, Inc. was not promptly paid $48,907.35, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (CARX 2 at 6; Tr. 51-52).

23. Petitioner made no decisions regarding what payments Jacobson Produce, Inc. would make (Tr. 123-24, 130-31).

24. Petitioner's participation in the payment process for the purchases

she made for Jacobson Produce, Inc. was limited to the performance of ministerial functions only, because, when Jacobson Produce, Inc. received an invoice requesting payment for frozen foods, Petitioner merely verified the correctness of the prices on the invoice and delivered the invoice to the bookkeeper (Tr. 131-32, 144-45).

25. On or before December 29, 1989, Sidney Jacobson's 50 percent ownership of Jacobson Produce, Inc. was divided among his heirs, with each of his heirs receiving 12.63 percent of Jacobson Produce, Inc., except for Petitioner, who received 11.95 percent of Jacobson Produce, Inc. (CARX 1 at 31-32). (The remaining 0.16 percent of Jacobson Produce, Inc. is not relevant to this proceeding.)

26. During the time of Jacobson Produce, Inc.'s PACA violations, June 1999 through January 2000, four people owned more than 10 percent of Jacobson Produce, Inc. Aaron Gisser owned 50 percent of Jacobson Produce, Inc.; Janet S. Orloff owned 12.63 percent of Jacobson Produce, Inc.; Terry A. Jacobson owned 12.63 percent of Jacobson Produce, Inc.; and Petitioner owned 11.95 percent of Jacobson Produce, Inc. (CARX 1 at 13-16.)

27. Initially, Respondent found that each of the four stockholders identified in Finding of Fact 26 was responsibly connected with Jacobson Produce, Inc. during the time of Jacobson Produce, Inc.'s PACA violations (Pet. for Review; Amended Motion to Dismiss as to Janet S. Orloff; Amended Motion to Dismiss as to Terry A. Jacobson; Tr. 9, 78-80, 89-91).

28. Kenneth D. Jacobson had owned 12.63 percent of Jacobson Produce, Inc. until March 16, 1994, when he became a 9.9 percent shareholder (CARX 1 at 29).

29. Janet S. Orloff continued to own 12.63 percent of Jacobson Produce, Inc. until March 23, 2000, when she returned her shares to the corporation (CARX 1 at 4-5, 8).

30. Terry A. Jacobson continued to own 12.63 percent of Jacobson Produce, Inc. until approximately March 23, 2000, when he wrote to the PACA Branch to advise that he had officially surrendered his shares back to the corporation (CARX 1 at 4-5, 10).

31. Petitioner continued to own 11.95 percent of Jacobson Produce, Inc. until March 23, 2000, when she returned her shares to the corporation (CARX 1 at 4-6).

32. Aaron Gisser was responsibly connected with Jacobson Produce, Inc. during the time of Jacobson Produce, Inc.'s PACA violations, June 1999 through January 2000, and he did not deny it (AX 1, AX 2, CARX 1 at 12-13, 15-16, CARX 6).

33. Petitioner, Janet S. Orloff, and Terry A. Jacobson denied being

responsibly connected with Jacobson Produce, Inc. during the time of Jacobson Produce, Inc.'s PACA violations (Pet. for Review).

34. Based on additional information provided regarding Janet S. Orloff and Terry A. Jacobson, Respondent withdrew his determinations that they were each responsibly connected with Jacobson Produce, Inc. (Amended Motion to Dismiss as to Terry A. Jacobson; Amended Motion to Dismiss as to Janet S. Orloff; Order to Dismiss as to Janet S. Orloff; Order to Dismiss as to Terry A. Jacobson).

35. Janet S. Orloff and Terry A. Jacobson were not responsibly connected with Jacobson Produce, Inc. during the time of Jacobson Produce, Inc.'s PACA violations, June 1999 through January 2000.

36. Department managers of Jacobson Produce, Inc. included Petitioner, who handled frozen foods; Larry Gisser, who handled potatoes, onions, cabbage, and turnips; Michael Brewington, who handled "western commodities" and Florida, Mexico, and southern vegetables; Howard Orloff, who handled citrus and deciduous fruits; and Ken Jacobson, who handled the institutional line (CARX 8; Tr. 68-69).

37. Petitioner was sometimes excluded from meetings the managers would have. When asked why she was excluded, she answered that it was perhaps because she was busy, "and they just didn't bother with me. Because, I was a lady, maybe. Who knows?" (Tr. 164.)

38. Petitioner's salary from Jacobson Produce, Inc. was comparable to that of other department managers, and also of the salesmen, Aaron Gisser, the foreman, and with their overtime, most of the drivers and half of the porters (Tr. 139-40, 147).

39. Jacobson Produce, Inc. paid Petitioner no salary for about the last 6 months that Jacobson Produce, Inc. was in business, but Petitioner continued to work (Tr. 166-68).

40. Jacobson Produce, Inc. leased a car that Petitioner, and at times, her co-workers, were permitted to drive. Petitioner personally paid some of the car lease payments in or about late 1999. The car was turned back to the lease company in or about late 1999. (Tr. 148, 165, 168.)

41. Jacobson Produce, Inc. permitted Petitioner the use of one company credit card, a Mobil credit card for gasoline, on an account that was originally opened for the use of her late husband (CARX 12; Tr. 147-48).

42. In or about July or August 1999, Petitioner loaned $100,000 to Jacobson Produce, Inc. to pay its bills. Petitioner was never repaid for this loan. Petitioner also owed Jacobson Produce, Inc. $6,000 in October 1999. (CARX 10; Tr. 46-47, 133-37, 148, 151-54, 165.)

43. Petitioner spoke with some produce suppliers when these suppliers

called requesting payment for produce that was due and owing from Jacobson Produce, Inc. Petitioner directed these unpaid produce suppliers to Aaron Gisser or Jacobson Produce, Inc.'s bookkeeping department. (Tr. 145-46, 148, 162-63.) Petitioner knew Jacobson Produce, Inc. was "a little strapped for cash," but "felt it was just a temporary thing." (Tr. 153.)

44. Petitioner is distinguished from other Jacobson Produce, Inc. produce buyers in that she owned more than 10 percent of Jacobson Produce, Inc. (CARX 1 at 12-13, 15-16.)

Conclusions of Law

1. Petitioner failed to prove by a preponderance of the evidence that she was not actively involved in any of the activities that resulted in Jacobson Produce, Inc.'s willful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) during June 1999 through January 2000.

2. Petitioner was *responsibly connected*, as defined by section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with Jacobson Produce, Inc. during June 1999 through January 2000, when Jacobson Produce, Inc. willfully, repeatedly, and flagrantly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Petitioner raises one issue in her appeal of the ALJ's Initial Decision and Order. Petitioner asserts her involvement with Jacobson Produce, Inc. was not sufficient to result in her being found responsibly connected with Jacobson Produce, Inc. during June 1999 through January 2000, the period during which Jacobson Produce, Inc. willfully, repeatedly, and flagrantly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Appeal Pet. at 1).

Petitioner was a holder of more than 10 per centum of the outstanding stock of Jacobson Produce, Inc. during the period that Jacobson Produce, Inc. willfully, repeatedly, and flagrantly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Thus, Petitioner meets the first sentence of the definition of the term *responsibly connected* in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), and the burden is on Petitioner to demonstrate by a preponderance of the evidence that she was not responsibly connected with Jacobson Produce, Inc.

Section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) provides a two-pronged test which a petitioner must meet in order to demonstrate that he or she was not responsibly connected. First, a petitioner must demonstrate by a preponderance of the evidence that he or she was not actively involved in the

activities resulting in a violation of the PACA. Since the statutory test is in the conjunctive ("and"), a petitioner's failure to meet the first prong of the statutory test results in the petitioner's failure to demonstrate that he or she was not responsibly connected, without recourse to the second prong. If a petitioner satisfies the first prong, then a petitioner for the second prong must demonstrate by a preponderance of the evidence at least one of two alternatives: (1) the petitioner was only nominally a partner, officer, director, or shareholder of a violating PACA licensee or entity subject to a PACA license; or (2) the petitioner was not an owner of a violating PACA licensee or entity subject to a PACA license which was the alter ego of its owners. Petitioner failed to meet the first prong of the statutory test.

The PACA does not define the term *actively involved in the activities resulting in a violation of the PACA*, and there is no legislative history revealing Congressional intent with respect to the meaning of the term. However, the standard for determining whether a person is actively involved in the activities resulting in a violation of the PACA is set forth in *In re Michael Norinsberg*, 58 Agric. Dec. 604 (1999) (Decision and Order on Remand) as follows:

> A petitioner who participates in activities resulting in a violation of the PACA is actively involved in those activities, unless the petitioner demonstrates by a preponderance of the evidence that his or her participation was limited to the performance of ministerial functions only. Thus, if a petitioner demonstrates by a preponderance of the evidence that he or she did not exercise judgment, discretion, or control with respect to the activities that resulted in a violation of the PACA, the petitioner would not be found to have been actively involved in the activities that resulted in a violation of the PACA and would meet the first prong of the responsibly connected test.

58 Agric. Dec. at 610-11.

Petitioner was the manager of and a buyer for Jacobson Produce, Inc.'s frozen foods department. During the period in which Petitioner managed the frozen foods department and bought produce, Jacobson Produce, Inc. failed to pay 28 sellers the agreed purchase prices in the total amount of $584,326.83 for 153 lots of perishable agricultural commodities, which Jacobson Produce, Inc. purchased, received, and accepted in interstate and foreign commerce, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). These failures to pay, in violation of the PACA, included Jacobson Produce, Inc.'s failures to pay for 31 lots of frozen foods purchased, received, and accepted from four produce

suppliers: Maine Frozen Foods; Paris Foods Corporation; Endico Potatoes, Inc.; and Reddy Raw, Inc. (CARX 2 at 5-6; Tr. 51-52). Petitioner was the buyer of, or was responsible for buying, in or about June 1999, one lot of frozen mixed vegetables for which Maine Frozen Foods was not promptly paid $12,542.40, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). Petitioner was the buyer of, or was responsible for buying, in or about September 1999 through November 1999, four lots of frozen mixed vegetables for which Paris Foods Corporation was not promptly paid $36,344.40, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). Petitioner was the buyer of, or was responsible for buying, in or about October 1999 through November 1999, 16 lots of frozen potatoes for which Endico Potatoes, Inc. was not promptly paid $29,610.43, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). Petitioner was the buyer of, or was responsible for buying, in or about November 1999 through December 1999, 10 lots of frozen mixed fruits and vegetables for which Reddy Raw, Inc. was not promptly paid $48,907.35, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). (CARX 2 at 5-6; Tr. 51-52.) Petitioner's purchase of, or responsibility for the purchase of, these 31 lots of frozen foods is active involvement in activities that resulted in Jacobson Produce, Inc.'s failures to pay for perishable agricultural commodities in willful, repeated, and flagrant violation of section 2(4) the PACA (7 U.S.C. § 499b(4)).

Moreover, Petitioner did not demonstrate by a preponderance of the evidence that her participation in the purchase of frozen foods was limited to the performance of ministerial functions only. To the contrary, the record establishes Petitioner was the manager of the frozen foods department and either purchased or was responsible for the purchase of frozen foods during the period that Jacobson Produce, Inc. violated the PACA. Petitioner, as a buyer for and manager of Jacobson Produce, Inc.'s frozen foods department, decided whether to make purchases of frozen foods on behalf of Jacobson Produce, Inc. and chose to do so even though she knew or should have known that Jacobson Produce, Inc. was not paying produce suppliers for perishable agricultural commodities in accordance with the PACA.[3]

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[3]Petitioner asserts she was not aware of Jacobson Produce, Inc.'s PACA violations (Appeal Pet. at 2). I disagree. I find Petitioner knew or should have known Jacobson Produce, Inc. was not paying produce sellers for perishable agricultural commodities based on the loan Petitioner made to Jacobson Produce, Inc. in July or August 1999, in order to pay Jacobson Produce, Inc.'s bills (Tr. 133-37, 148, 151-54, 165) and the telephone calls Petitioner received from produce sellers requesting payment that was due and owing from Jacobson Produce, Inc. for perishable agricultural commodities (Tr. 145-46, 148, 162-63). Moreover, even if I found Petitioner did not know or have

(continued...)

Petitioner asserts frozen foods accounted for less than 18 percent of Jacobson Produce, Inc.'s business; Petitioner was never an officer or director of Jacobson Produce, Inc.; Petitioner had no authority to hire or fire Jacobson Produce, Inc.'s employees; Petitioner had no authority to engage professionals; and Petitioner had no authority to secure insurance on behalf of Jacobson Produce, Inc. (Appeal Pet. at 2).

I agree with Petitioner. However, Petitioner's limited authority within Jacobson Produce, Inc. does not, by itself, demonstrate that she was not actively involved in activities that resulted in Jacobson Produce, Inc.'s violations of the PACA. The issue of limited authority is addressed in *Norinsberg*, as follows:

> I do not agree that an alleged responsibly connected individual's demonstration by a preponderance of the evidence that he or she had very limited corporate authority would, by itself, demonstrate that he or she was not actively involved in activities that resulted in a violation of the PACA. An individual who exercises authority over only one limited area of corporate activities could be responsibly connected due to his or her active involvement in activities resulting in a violation of the PACA.

In re Michael Norinsberg, 58 Agric. Dec. 604, 615 (1999) (Decision and Order on Remand).

Petitioner was the buyer of produce or responsible for buying produce for which Jacobson Produce, Inc. failed to make prompt payment in accordance with the PACA. Therefore, despite the limits on Petitioner's authority within Jacobson Produce, Inc. she was actively involved in an activity resulting in Jacobson Produce, Inc.'s violations of the PACA.

Petitioner asserts she had no authority to pay bills and did not participate in any management decisions (Appeal Pet. at 2).

The record does not support Petitioner's assertion that she had no authority to pay bills. To the contrary, the record establishes that she was a signatory on one Jacobson Produce, Inc. bank account and authorized to sign checks if Aaron Gisser were not available (CARX 7; Tr. 125-26). Moreover, the record does not support Petitioner's assertion that she did not participate in any management

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[3](...continued)
reason to know that Jacobson Produce, Inc. was not paying produce sellers for perishable agricultural commodities in accordance with the PACA, I would still find that she was actively involved in activities resulting in Jacobson Produce, Inc.'s violations of the PACA. *See In re Michael Norinsberg*, 58 Agric. Dec. 604, 617 (1999) (Decision and Order on Remand).

decisions. Instead, while the record establishes that Petitioner did not exercise control over Jacobson Produce, Inc. as a whole, Petitioner was the manager of Jacobson Produce, Inc.'s frozen foods department (AX 1, CARX 7, CARX 8; Tr. 149).

Petitioner asserts "[t]he activity that resulted in violation of the PACA by Jacobson consisted solely in not promptly paying for produce that had been purchased and received. Purchasing produce is not a violation of the PACA, only failing to pay promptly." (Appeal Pet. at 2 (emphasis in original).)

I agree with Petitioner's assertions that Jacobson Produce, Inc.'s purchases of perishable agricultural commodities during June 1999 through January 2000 were not violations of the PACA and that Jacobson Produce, Inc. violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) when it failed to make full payment promptly for perishable agricultural commodities purchased, received, and accepted in interstate and foreign commerce during June 1999 through January 2000. However, I reject what I find to be Petitioner's argument: that in order to be actively involved in the activities resulting in a PACA licensee's violation of the PACA, a petitioner must actually commit the PACA violation.

A petitioner's failure to make full payment promptly is not the only activity that can result in a PACA licensee's failure to make full payment promptly in accordance with the PACA. For example, a petitioner's embezzlement or theft of funds from a PACA licensee is an activity that could leave the PACA licensee unable to make full payment promptly in accordance with the PACA. In such a case, a petitioner's embezzlement or theft of funds from the PACA licensee would constitute active involvement in an activity resulting in the PACA licensee's violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)), but the petitioner would not have actually committed the act of failing to make full payment promptly in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

In *Norinsberg*, I specifically addressed the issue presented in the instant proceeding, a petitioner's purchase of perishable agricultural commodities resulting in a PACA licensee's failure to pay in accordance with the PACA, as follows:

> Thus, if a petitioner buys produce from a seller who is not paid by the partnership, corporation, or association, in accordance with the PACA, the petitioner is actively involved in an activity resulting in a violation of the PACA . . . .

In re Michael Norinsberg, 58 Agric. Dec. 604, 617 (1999) (Decision and Order on Remand).

In the instant proceeding, Petitioner purchased, or was responsible for the purchase of, 31 lots or perishable agricultural commodities from four produce suppliers that Jacobson Produce, Inc. [and] failed to pay in accordance with the PACA. Thus, Petitioner was actively involved in the activities resulting in some of Jacobson Produce, Inc.'s violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Finally, Petitioner contends "[t]he ALJ has misapprehended and misapplied *In re: Michael Norinsberg*, 58 Agric. Dec. 604, 617 (1999). In *Norinsberg* the J.O. decided that the Petitioner was not responsible [sic] connected even though he was an officer and wrote checks and his involvement was greater than the Petitioner herein." (Appeal Pet. at 2 (emphasis in original).)

I disagree with Petitioner's contention that application of the reasoning in *In re Michael Norinsberg*, 58 Agric. Dec. 604 (1999) (Decision and Order on Remand), to the facts in this proceeding would result in a conclusion that Petitioner was not *responsibly connected*, as defined by section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with Jacobson Produce, Inc. during June 1999 through January 2000, when Jacobson Produce, Inc. willfully, repeatedly, and flagrantly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

In *Norinsberg*, Michael Norinsberg, an individual determined by the Chief of the PACA Branch to be responsibly connected with a PACA licensee during a period when the PACA licensee failed to make full payment promptly to produce sellers in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)), signed 14 checks drawn on the violating PACA licensee's checking accounts. These checks were payable to three persons who had not sold produce to the violating PACA licensee. I found that Michael Norinsberg's activities (signing checks) enabled persons who presented the checks for payment to receive payment and resulted in a substantial reduction of the resources available to the violating PACA licensee to pay produce sellers in accordance with the PACA. I concluded that Michael Norinsberg participated in activities that resulted in the PACA licensee's violations of the PACA. However, I did not conclude that Michael Norinsberg was responsibly connected with the violating PACA licensee because he demonstrated by a preponderance of the evidence that his signing checks was a ministerial function only. I described the ministerial nature of his activities, as follows:

> [Michael Norinsberg] demonstrated by a preponderance of the evidence that his signing checks was a ministerial function only. The checks were presented to [Michael Norinsberg] for signature with the checks already made out as to payee and amount. [Michael Norinsberg] signed the checks presented to him when the president of [the violating PACA

> licensee] was not available and at the direction of the president of [the violating PACA licensee]. . . . I find, under these circumstances, that [Michael Norinsberg] did not exercise judgment or discretion with respect to, or control over, the check signing and that [Michael Norinsberg] performed only a ministerial function.

In re Michael Norinsberg, 58 Agric. Dec. 604, 618 (1999) (Decision and Order on Remand).

In the instant proceeding, Petitioner failed to demonstrate by a preponderance of the evidence that her activities (buying frozen foods and managing the frozen foods department) were ministerial acts. Petitioner was the buyer of, or was responsible for buying, 31 lots of frozen foods from four produce suppliers which Jacobson Produce, Inc. failed to pay, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). Petitioner failed to show that she exercised no judgment, discretion, or control with respect to these produce purchases.

ORDER

I affirm Respondent's February 21, 2001, determination that Petitioner was responsibly connected with Jacobson Produce, Inc. during June 1999 through January 2000, a period during which Jacobson Produce, Inc. violated the PACA.

Accordingly, Petitioner is subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)).

This Order shall become effective 60 days after service of this Order on Petitioner.

In re: JANET S. ORLOFF, MERNA K. JACOBSON, AND TERRY A. JACOBSON.
PACA-APP Docket No. 01-0002.
Order Denying Petition for Reconsideration as to Merna K. Jacobson.
Filed April 24, 2003.

PACA-APP – Petition for reconsideration – Perishable agricultural commodities – Failure to make full payment promptly – Responsibly connected – Nominal partner – Nominal manager – Knowledge of violations – Active involvement in activities resulting in violations.

The Judicial Officer (JO) on April 24, 2003, the JO denied Petitioner's petition for reconsideration. The JO held Petitioner's contention that she was only nominally a partner was irrelevant because there was no finding that she was a partner in the violating PACA licensee. Instead, the evidence established that Petitioner was a holder of more than 10 per centum of the outstanding stock of the violating PACA licensee. The JO also held Petitioner's contention that she was only nominally a manager was irrelevant because the second prong of the two-pronged statutory test to show she was not responsibly connected does not require that she show she was only nominally a manager of the violating PACA licensee. The JO rejected Petitioner's contention that the finding that Petitioner knew or should have known that the violating PACA licensee was not paying its bills, was error. The JO also rejected Petitioner's contention that she was not actively involved in the activities resulting in the PACA violations.

Ruben D. Rudolph, Jr., for Respondent.
Paul T. Gentile, for Petitioner.
Initial decision issued by Jill S. Clifton, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

On February 21, 2001, James R. Frazier, Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], issued a determination that Merna K. Jacobson[1] [hereinafter Petitioner] was responsibly connected with Jacobson Produce, Inc., during June 1999 through January 2000, when Jacobson Produce, Inc. violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA].[2] On March 5, 2001, Petitioner filed a Petition for Review pursuant to the PACA 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] seeking reversal of Respondent's determination that she was responsibly connected with Jacobson Produce, Inc. during the period Jacobson Produce, Inc.

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[1]Respondent's February 21, 2001, determination letter (CARX 14) and a number of other exhibits and filings in this proceeding refer to Petitioner as "Myrna K. Jacobson." Petitioner's name is "Merna K. Jacobson" (Amendment of Case Caption, Deadlines for Filing Outstanding Evidence, Request for Settlement Documents, and Briefing Schedule).

[2]During June 1999 through January 2000, Jacobson Produce, Inc. failed to make full payment promptly to 28 sellers of the agreed purchase prices in the total amount of $584,326.83 for 153 lots of perishable agricultural commodities, which Jacobson Produce, Inc. purchased, received, and accepted in interstate and foreign commerce. Jacobson Produce, Inc.'s failures to make full payment promptly constitute willful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). *In re Jacobson Produce, Inc.*, 60 Agric. Dec. 381 (2001) (Consent Decision and Order) (CARX 15).

violated the PACA.

On July 12, 2001, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] conducted a hearing in New York, New York. Paul T. Gentile, Gentile & Dickler, New York, New York, represented Petitioner. Ruben D. Rudolph, Jr., Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented Respondent.

Petitioner and Respondent filed post-hearing briefs. The ALJ then issued a "Decision" [hereinafter Initial Decision and Order] in which the ALJ affirmed Respondent's determination that Petitioner was responsibly connected with Jacobson Produce, Inc. during June 1999 through January 2000, when Jacobson Produce, Inc. violated the PACA (Initial Decision and Order at 12).

On October 16, 2002, Petitioner appealed to the Judicial Officer. On November 15, 2002, Respondent filed a response to Petitioner's appeal petition. On January 7, 2003, I issued a "Decision and Order as to Merna K. Jacobson" in which I adopted the ALJ's Initial Decision and Order with minor modifications. *In re Janet S. Orloff* (Decision as to Merna K. Jacobson), 62 Agric. Dec. ___ (Jan. 7, 2003).

On February 7, 2003, Petitioner filed "Petitioner's Petition for Reconsideration." On April 17, 2003, Respondent filed "Respondent's Response to Petitioner's Petition for Reconsideration." On April 18, 2003, the Hearing Clerk transferred the record to the Judicial Officer for reconsideration of the January 7, 2003, Decision and Order as to Merna K. Jacobson.

APPLICABLE STATUTORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

. . . .

§ 499a. Short title and definitions

. . . .

(b) Definitions

For purposes of this chapter:

. . . .

(9) The term "responsibly connected" means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per

centum of the outstanding stock of a corporation or association. A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of this chapter and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.

. . . .

§ 499b. Unfair conduct

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

. . . .

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter.

. . . .

§ 499d. Issuance of license

. . . .

(b) Refusal of license; grounds

The Secretary shall refuse to issue a license to an applicant if he finds that the applicant, or any person responsibly connected with the applicant, is prohibited from employment with a licensee under section 499h(b) of this title or is a person who, or is or was responsibly connected with a person who–

(A) has had his license revoked under the provisions of section 499h of this title within two years prior to the date of the application or whose license is currently under suspension; [or]

(B) within two years prior to the date of application has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect[.]

. . . .

(c) Issuance of license upon furnishing bond; issuance after three years without bond; effect of termination of bond; increase or decrease in amount; payment of increase

Any applicant ineligible for a license by reason of the provisions of subsection (b) of this section may, upon the expiration of the two-year period applicable to him, be issued a license by the Secretary if such applicant furnishes a surety bond in the form and amount satisfactory to the Secretary as assurance that his business will be conducted in accordance with this chapter and that he will pay all reparation orders which may be issued against him in connection with transactions occurring within four years following the issuance of the license, subject to his right of appeal under section 499g(c) of this title. In the event such applicant does not furnish such a surety bond, the Secretary shall not issue a license to him until three years have elapsed after the date of the applicable order of the Secretary or decision of the court on appeal. If the surety bond so furnished is terminated for any reason without the approval of the Secretary the license shall be automatically canceled as of the date of such termination and no new license shall be issued to such person during the four-year period without a new surety bond covering the remainder of such period. The Secretary, based on changes in the nature and volume of business conducted by a bonded licensee, may require an increase or authorize a reduction in the amount of the bond. A bonded licensee who is notified by the Secretary to provide a bond in an increased amount shall do so within a reasonable time to be specified by the Secretary, and upon failure of the licensee to provide such bond his license shall be automatically suspended until such bond is provided. The Secretary may not issue a license to an applicant under this subsection if the applicant or any person responsibly connected with the applicant is prohibited from employment with a licensee under

section 499h(b) of this title.

§ 499h. Grounds for suspension or revocation of license

. . . .

(b) Unlawful employment of certain persons; restrictions; bond assuring compliance; approval of employment without bond; change in amount of bond; payment of increased amount; penalties

Except with the approval of the Secretary, no licensee shall employ any person, or any person who is or has been responsibly connected with any person–

(1) whose license has been revoked or is currently suspended by order of the Secretary;

(2) who has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect; or

(3) against whom there is an unpaid reparation award issued within two years, subject to his right of appeal under section 499g(c) of this title.

The Secretary may approve such employment at any time following nonpayment of a reparation award, or after one year following the revocation or finding of flagrant or repeated violation of section 499b of this title, if the licensee furnishes and maintains a surety bond in form and amount satisfactory to the Secretary as assurance that such licensee's business will be conducted in accordance with this chapter and that the licensee will pay all reparation awards, subject to its right of appeal under section 499g(c) of this title, which may be issued against it in connection with transactions occurring within four years following the approval. The Secretary may approve employment without a surety bond after the expiration of two years from the effective date of the applicable disciplinary order. The Secretary, based on changes in the nature and volume of business conducted by the licensee, may require an increase or authorize a reduction in the amount of the bond. A licensee who is notified by the Secretary to provide a bond in an

> increased amount shall do so within a reasonable time to be specified by the Secretary, and if the licensee fails to do so the approval of employment shall automatically terminate. The Secretary may, after thirty days[’] notice and an opportunity for a hearing, suspend or revoke the license of any licensee who, after the date given in such notice, continues to employ any person in violation of this section. The Secretary may extend the period of employment sanction as to a responsibly connected person for an additional one-year period upon the determination that the person has been unlawfully employed as provided in this subsection.

7 U.S.C. §§ 499a(b)(9), 499b(4), 499d(b)(A)-(B), (c), 499h(b).

CONCLUSIONS BY THE JUDICIAL OFFICER ON RECONSIDERATION

Petitioner raises three issues in Petitioner’s Petition for Reconsideration. First, Petitioner contends she was a manager and partner of Jacobson Produce, Inc. in name only (Pet. for Recons. at 1-2).

Section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) defines the term *responsibly connected* as affiliated with a commission merchant, dealer, or broker as a partner in a partnership or as an officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association. Petitioner was a holder of more than 10 per centum of the outstanding stock of Jacobson Produce, Inc. during the period when Jacobson Produce, Inc. violated the PACA (CARX 1 at 13-16). Thus, Petitioner meets the first sentence of the definition of the term *responsibly connected* in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), and the burden is on Petitioner to demonstrate by a preponderance of the evidence that she was not responsibly connected with Jacobson Produce, Inc. Section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) provides a two-pronged test which a petitioner must meet in order to demonstrate that he or she was not responsibly connected. If a petitioner satisfies the first prong, then a petitioner for the second prong must demonstrate by a preponderance of the evidence at least one of two alternatives: (1) *the petitioner was only nominally a partner, officer, director, or shareholder of a violating PACA licensee or entity subject to a PACA license*; or (2) the petitioner was not an owner of a violating PACA licensee or entity subject to a PACA license which was the alter ego of its owners.

Petitioner was not a partner in Jacobson Produce, Inc. and Jacobson

Produce, Inc. was not a partnership.[3] Instead, the evidence establishes Jacobson Produce, Inc. was a New York corporation and that, at the time Jacobson Produce, Inc. violated the PACA, Petitioner held 11.95 per centum of the outstanding stock of Jacobson Produce, Inc. (CARX 1 at 13-16, CARX 2 at 4). Thus, for the second prong of the statutory test, Petitioner must show by a preponderance of the evidence that she was only nominally a shareholder of Jacobson Produce, Inc. Since Petitioner was not a partner in Jacobson Produce, Inc., Petitioner's contention that she was only nominally a partner in Jacobson Produce, Inc. is not relevant to this proceeding. Moreover, Petitioner's contention that she was only nominally a manager of Jacobson Produce, Inc. is also irrelevant to this proceeding. Even if Petitioner were to demonstrate that she was only *nominally a manager* of Jacobson Produce, Inc., she would not meet the second prong of the statutory test.

Petitioner points out that other shareholders of Jacobson Produce, Inc. such as Ken Jacobson and Larry Gisser, managed Jacobson Produce, Inc.['s] departments, but Respondent did not determine they were responsibly connected with Jacobson Produce, Inc. Even if I were to find that Respondent erroneously failed to make a determination that other persons affiliated with or connected with Jacobson Produce, Inc. were responsibly connected with Jacobson Produce, Inc. (which I do not so find), that finding would not be relevant to Petitioner's affiliation or connection with Jacobson Produce, Inc. or to the disposition of this proceeding.

Moreover, in order to meet the first sentence of the definition of *responsibly connected*, a shareholder must hold more than 10 per centum of the outstanding stock of the corporation. During the period when Jacobson Produce, Inc. violated the PACA, four people owned more than 10 percent of Jacobson Produce, Inc. Aaron Gisser owned 50 percent of Jacobson Produce, Inc.; Janet S. Orloff owned 12.63 percent of Jacobson Produce, Inc.; Terry A. Jacobson owned 12.63 percent of Jacobson Produce, Inc.; and Petitioner owned 11.95 percent of Jacobson Produce, Inc. (CARX 1 at 13-16.) The record contains no evidence that either Kenneth D. Jacobson or Larry Gisser was a holder of more than 10 per centum of the outstanding stock of Jacobson

[3]Aaron Gisser, the 50 percent owner, chief financial officer, chief executive officer, president, and secretary of Jacobson Produce, Inc. testified that he considered Petitioner a "partner" rather than his "employee" and that he did not have authority to fire Petitioner (Tr. 132-33). However, Petitioner is Aaron Gisser's sister-in-law and Petitioner's relationship by marriage to Aaron Gisser appears to account for Aaron Gisser's testimony characterizing their business relationship a partnership. The record contains no other evidence that Petitioner was a partner or that Jacobson Produce, Inc. was a partnership.

Produce, Inc. during the relevant period. To the contrary, the record establishes that Kenneth D. Jacobson had owned 12.63 percent of Jacobson Produce, Inc. until March 16, 1994, when he became a 9.9 percent shareholder (CARX 1 at 29), and Larry Gisser did not own more than 10 per centum of the outstanding stock of Jacobson Produce, Inc. (CARX 1 at 12, 13, 15).

Second, Petitioner contends my finding that Petitioner knew or should have known that Jacobson Produce, Inc. was not paying its bills, is error (Pet. for Recons. at 2).

I disagree with Petitioner's contention that a finding that Petitioner knew or should have known that Jacobson Produce, Inc. was not paying its bills, was error. The record establishes Petitioner knew or should have known Jacobson Produce, Inc. was not paying its bills. Petitioner received telephone calls from produce sellers requesting payments that were due and owing from Jacobson Produce, Inc. for perishable agricultural commodities (Tr. 145-46, 148, 162-63). Petitioner loaned Jacobson Produce, Inc. $100,000 in July or August 1999, because Jacobson Produce, Inc. was not able to pay its bills (Tr. 133-37, 148, 151-54, 165), and Petitioner testified that she knew Jacobson Produce, Inc. needed the loan because it was unable to pay its bills, as follows:

> [BY MR. RUDOLPH:]
>
> Q. Did he tell you what the money was going to go for?
>
> [BY MS. JACOBSON:]
>
> A. Well, it was obvious, you know, that we needed a little influx of money so that we -- we needed money to operate.
>
> Q. Why was it obvious that you needed some money, your company needed some money?
>
> A. Because, I guess, of the bills that were coming in.
>
> Q. You knew that the bills weren't being paid?
>
> A. Well, I heard them -- I heard the bookkeeper make excuses, you know, whatever, and so in that way I knew that they were really late.
>
> Q. What did you think about the bookkeeper making excuses, the bills not coming up?

> A. I didn't make any judgments. I just felt that my -- we were a little strapped for cash, which happens, you know, at different times a year. You have more money at certain times and less money at other times. I felt it was just a temporary thing.

Tr. 153.

Petitioner also contends she had no authority to pay Jacobson Produce, Inc.'s debts (Pet. for Recons. at 2). The record does not support Petitioner's contention that she had no authority to pay bills. To the contrary, the record establishes Petitioner was a signatory on one Jacobson Produce, Inc. bank account and authorized to sign checks if Aaron Gisser was not available (CARX 7; Tr. 125-26).

Third, Petitioner contends she was not actively involved in Jacobson Produce, Inc.'s violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) provides a two-pronged test which a petitioner must meet in order to demonstrate that he or she was not responsibly connected. First, a petitioner must demonstrate by a preponderance of the evidence that he or she was not actively involved in the activities resulting in a violation of the PACA.

The PACA does not define the term *actively involved in the activities resulting in a violation of the PACA*, and there is no legislative history revealing Congressional intent with respect to the meaning of the term. However, the standard for determining whether a person is actively involved in the activities resulting in a violation of the PACA is set forth in *In re Michael Norinsberg*, 58 Agric. Dec. 604 (1999) (Decision and Order on Remand), as follows:

> A petitioner who participates in activities resulting in a violation of the PACA is actively involved in those activities, unless the petitioner demonstrates by a preponderance of the evidence that his or her participation was limited to the performance of ministerial functions only. Thus, if a petitioner demonstrates by a preponderance of the evidence that he or she did not exercise judgment, discretion, or control with respect to the activities that resulted in a violation of the PACA, the petitioner would not be found to have been actively involved in the activities that resulted in a violation of the PACA and would meet the first prong of the responsibly connected test.

58 Agric. Dec. at 610-11.

Petitioner was the manager of, and a buyer for, Jacobson Produce, Inc.'s frozen foods department. During the period in which Petitioner managed the frozen foods department and bought produce, Jacobson Produce, Inc. failed to pay 28 sellers the agreed purchase prices in the total amount of $584,326.83 for 153 lots of perishable agricultural commodities, which Jacobson Produce, Inc. purchased, received, and accepted in interstate and foreign commerce, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). These failures to pay, in violation of the PACA, included Jacobson Produce, Inc.'s failures to pay for 31 lots of frozen foods purchased, received, and accepted from four produce suppliers: Maine Frozen Foods; Paris Foods Corporation; Endico Potatoes, Inc.; and Reddy Raw, Inc. (CARX 2 at 5-6; Tr. 51-52). Petitioner was the buyer of, or was responsible for buying, in or about June 1999, one lot of frozen mixed vegetables for which Maine Frozen Foods was not promptly paid $12,542.40, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). Petitioner was the buyer of, or was responsible for buying, in or about September 1999 through November 1999, four lots of frozen mixed vegetables for which Paris Foods Corporation was not promptly paid $36,344.40, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). Petitioner was the buyer of, or was responsible for buying, in or about October 1999 through November 1999, 16 lots of frozen potatoes for which Endico Potatoes, Inc. was not promptly paid $29,610.43, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). Petitioner was the buyer of, or was responsible for buying, in or about November 1999 through December 1999, 10 lots of frozen mixed fruits and vegetables for which Reddy Raw, Inc. was not promptly paid $48,907.35, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). (CARX 2 at 5-6; Tr. 51-52.) Petitioner's purchase of, or responsibility for the purchase of, these 31 lots of frozen foods is active involvement in activities that resulted in Jacobson Produce, Inc.'s failures to pay for perishable agricultural commodities in willful, repeated, and flagrant violation of section 2(4) the PACA (7 U.S.C. § 499b(4)).

Moreover, Petitioner did not demonstrate by a preponderance of the evidence that her participation in the purchase of frozen foods was limited to the performance of ministerial functions only. To the contrary, the record establishes Petitioner was the manager of the frozen foods department and either purchased or was responsible for the purchase of frozen foods during the period when Jacobson Produce, Inc. violated the PACA. Petitioner, as a buyer for and manager of Jacobson Produce, Inc.'s frozen foods department, decided whether to make purchases of frozen foods on behalf of Jacobson Produce, Inc. and chose to do so even though she knew or should have known that Jacobson Produce, Inc. was not paying produce suppliers for perishable agricultural

commodities in accordance with the PACA.

For the foregoing reasons and the reasons set forth in *In re Janet S. Orloff* (Decision as to Merna K. Jacobson), 62 Agric. Dec. ___ (Jan. 7, 2003), Petitioner's Petition for Reconsideration 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.[4] Petitioner's Petition for Reconsideration was timely filed and automatically stayed the January 7, 2003, Decision and Order as to Merna K. Jacobson. Therefore, since Petitioner's Petition for Reconsideration is denied, I hereby lift the automatic stay, and the Order in *In re Janet S. Orloff* (Decision as to Merna K. Jacobson), 62 Agric. Dec. ___ (Jan. 7, 2003), is reinstated; except that the effective date of the Order is the date indicated in the Order in this Order Denying Petition for Reconsideration as to Merna K. Jacobson.

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

ORDER

I affirm Respondent's February 21, 2001, determination that Petitioner was responsibly connected with Jacobson Produce, Inc. during June 1999 through January 2000, a period during which Jacobson Produce, Inc. violated the PACA.

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[4]*In re PMD Produce Brokerage Corp.*, 61 Agric. Dec. 389, 404 (2002) (Order Denying Pet. for Recons. and Pet. for New Hearing on Remand); *In re Mangos Plus, Inc.*, 59 Agric. Dec. 883, 890 (2000) (Order Denying Pet. for Recons.); *In re Kirby Produce Co.*, 58 Agric. Dec. 1032, 1040 (1999) (Order Denying Pet. for Recons.); *In re Michael Norinsberg*, 58 Agric. Dec. 619, 625 (1999) (Order Denying Pet. for Recons. on Remand); *In re Produce Distributors, Inc.*, 58 Agric. Dec. 535, 540-41 (1999) (Order Denying Pet. for Recons. as to Irene T. Russo, d/b/a Jay Brokers); *In re JSG Trading Corp.*, 57 Agric. Dec. 710, 729 (1998) (Order Denying Pet. for Recons. as to JSG Trading Corp.); *In re Allred's Produce*, 57 Agric. Dec. 799, 801-02 (1998) (Order Denying Pet. for Recons.); *In re Michael Norinsberg*, 57 Agric. Dec. 791, 797 (1998) (Order Denying Pet. for Recons.); *In re Tolar Farms*, 57 Agric. Dec. 775, 789 (1998) (Order Denying Pet. for Recons.); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 942, 957 (1997) (Order Denying Pet. for Recons.); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 898, 901 (1997) (Order Denying Pet. for Recons.); *In re Havana Potatoes of New York Corp.*, 56 Agric. Dec. 1017, 1028 (1997) (Order Denying Pet. for Recons.); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1234 (1996) (Order Denying Pet. for Recons.).

Accordingly, Petitioner is subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)).

This Order shall become effective 60 days after service of this Order on Petitioner.

_____

In re: NICK PENACHIO CO., INC.
PACA Docket No. D-01-0022.
Decision and Order by Reason of Failure to Appear.
Filed November 22, 2002.

Christopher P. Young-Morales, for Complainant.
Respondent, Pro se.
Decision and Order by Dorothea A. Baker, Administrative Law Judge.

PACA – Default, failure to appear at hearing – Payment, failure to make, prompt – Fraud – Bid rigging.

Preliminary Statement

This is an administrative proceeding. It was initiated by a Notice to Show Cause and Complaint filed July 26, 2001, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, pursuant to the provisions of the Perishable Agricultural Commodities Act, 1930 as amended (7 U.S.C. §§ 499a *et seq.)*, hereinafter sometimes referred to as the PACA, and the regulations issued pursuant thereto as well as the Rules of Practice Governing Former Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130 *et seq.*).

The Complaint constituted a disciplinary proceeding against Respondent Nick Penachio Co., Inc. alleging that it had committed willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). There is also a Notice to Show Cause why Respondent Nick Penachio Co., Inc. should not be denied a license pursuant to section 4(d) of the PACA (7 U.S.C. § 499d(d)).

Among the allegations of the Complaint, are that, during the period October, 2000 through June, 2001, Respondent violated section 2(4) of the PACA by failing to make full payment promptly to 32 sellers of the agreed purchase prices or balances thereof, in the total amount of $268,915.00, for 162 lots of perishable agricultural commodities which were purchased, received, and accepted in interstate and foreign commerce.

It is further alleged that on May 7, 2001, Respondent filed a Voluntary Petition pursuant to Chapter 11 of the Bankruptcy Code (11 U.S.C. §§ 1100 *et seq*.) in the United States Bankruptcy Court for the Southern District of New York, being designated Case No. 01-12668-CB.

Additionally, it is alleged that on February 20, 2001, Respondent and its president Nicholas A. Penachio waived indictment pursuant to Rule 7(b) of the Federal Rules of Criminal Procedure and pled guilty to an eight count Superseding Information which charged them with participating in schemes to rig bids of frozen food, produce, dairy, and other products supplied to the New York City Board of Education, the Department of Citywide Administrative Services, the Nassau County Department of General Services, and the Newark Public Schools. These charges included, among other things, conspiring to defraud through a kickback and fraud scheme using the United States Mail, conspiring to defraud the I.R.S. by filing false and fraudulent federal tax returns, and obstruction of justice by causing the destruction of incriminating documents that had been subpoenaed by the Grand Jury.

Respondent had a license pursuant to the provisions of the PACA [Number 741326] from March, 1974 until March 4, 2001 when it was terminated because Respondent failed to pay the required annual renewal fee.

An Answer to said Complaint was filed by Respondent on August 8, 2001.

The case was set for hearing to commence on March 6, 2002, in New York City. On February 20, 2002 the Judge was notified for the first time that a Petition for Review had been filed by Tony Penachio with respect to a determination dated January 4, 2002 by the PACA Branch Chief that Tony Penachio is responsibly connected with Nick Penachio Co., Inc. (the Respondent). As a result of a conference call it was agreed that there would be a consolidation of the cases and a postponement of the scheduled oral hearing date of March 6 and 7, 2002. Subsequently, the parties agreed that the oral hearing would take place on June 19, 2002. The case was subsequently rescheduled for hearing for June 20, 2002, in New York City.

On February 4, 2002, Tony Penachio filed a Petition for Review in regards to a letter of determination dated January 4, 2002 by the PACA Branch Chief that he was responsibly connected with Nick Penachio Co., Inc. during the period October, 2000 through June, 2001 during which period there was a failure to pay 32 vendors $268,915.00 for perishable agricultural commodities.

The Petition for Review was consolidated with the present proceeding and an oral hearing on both cases was scheduled for June 20-21, 2002. Under date of June 12, 2002, Tony Penachio withdrew his Petition for Review and consented to the determination of the PACA Branch Chief. The Government accepted said withdrawal and the Judge granted the withdrawal and removed

"Tony Penachio, Petitioner" from the caption of the proceeding. On October 15, 2002, a letter was filed by Tony Penachio which stated, in part:

> I have received your letter to William A. Hrabsky, Esq. of October 1, 2002 today. Please be advised that Mr. Hrabsky, who had been representing me in the matter of PACA Docket No. APP-02-0003, passed away in late July, 2002 and therefore Mr. Hrabsky has not filed a brief on my behalf in this matter.
>
> I will now be representing myself, pro se, in the remainder of this action.
>
> In lieu of my requesting to file a brief on my behalf I am respectfully requesting the mercy of the court in the decision of my appeal in this matter; please be so kind as to advise the Administrative Law Judge accordingly.

The matter of Tony Penachio, PACA Docket No. APP-02-0003, was concluded with his withdrawal of his Petition for Review.

A hearing in this matter was held on June 20, 2002, in New York City, New York before Administrative Law Judge Dorothea A. Baker. Complainant was represented by Christopher Young-Morales, Esquire, Office of the General Counsel, Department of Agriculture. Respondent and its counsel failed to appear at the scheduled hearing on June 20, 2002. In all matters prior to the date of the hearing, Respondent was represented by Harry D. Jones, Esquire, of Gersten, Savage & Kaplowitz, New York, New York. The hearing was conducted in Respondent's absence pursuant to § 1.141(e)(1) of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary (7 C.F.R. §§ 1.130 through 1.151; hereinafter the "Rules of Practice"). The Complainant presented its evidence in the absence of Respondent. The parties were given until November 6, 2002, within which to file simultaneous briefs. The Complainant did so; the Respondent did not.

Pertinent Statutory Provisions

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

> It shall be unlawful in or in connection with any transaction in interstate or foreign commerce--
> . . . .
> (4) For any commission merchant, dealer, or broker to make, for a

fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under Section 5(c). However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this Act.

§ 499h. Grounds for suspension or revocation of license

(a) Authority of Secretary

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

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

The Secretary may withhold the issuance of a license to an applicant, for a period not to exceed thirty days pending an investigation, for the purpose of determining (a) whether the applicant is unfit to engage in the business of a commission merchant, dealer, or broker because the applicant, or in case the applicant is a partnership, any general partner, or in case the applicant is a corporation, any officer or holder of more than 10 per centum of the stock, prior to the date of the filing of the application engaged in any practice of the character prohibited by this Act or was convicted of a felony in any State or Federal Court, or (b)

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

7 C.F.R. 1.141(e)(1) of the Rules of Practice provides in part:

> A [R]espondent who, after being duly notified, fails to appear at the hearing without good cause, shall be deemed to have waived the right to an oral hearing in the proceeding and to have admitted any facts which may be presented at the hearing. Such failure by the [R]espondent shall also constitute an admission of all the material allegations of fact contained in the complaint.

Pursuant to 7 C.F.R. § 1.141(e)(1), Respondent's failure to appear at the hearing constitutes an admission of all the material allegations of fact in the Complaint. In addition, the Respondent did not file any brief in this matter. A careful consideration of the evidence adduced by the Government indicates that the Complainant has borne its burden of proof by more than a preponderance of the evidence and that the following findings of fact are justified thereby.

Findings of Fact

1. Nick Penachio Co., Inc. is a corporation organized and existing under the laws of the State of New York. Its business and mailing address is 240 Food

Center Drive, Bronx, New York.

2. Pursuant to the licensing provisions of the PACA, license number 741326 was issued to Respondent on March 4, 1974. Respondent's license was renewed annually until March 4, 2001, when it was terminated pursuant to section 4(a) of the PACA (7 U.S.C. § 499d(a)) because Respondent failed to pay the required annual renewal fee.

3. Nicholas A. Penachio is the president and thirty-five percent stockholder of Respondent. (CX 1; Tr. 60).

4. During the period of October, 2000 through June, 2001, Respondent Nick Penachio Co., Inc. violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) when it failed to make full payment promptly to 32 sellers of the agreed purchase prices in the total amount of $268,915.00 for 162 lots of perishable agricultural commodities that Respondent purchased, received, and accepted in interstate commerce. (CX 11-44; Tr. 6, 32.)

5. Follow-up investigation revealed that as of June 7, 2002, more than 120 days after the Complaint was served, Respondent still owed over $62,000.00 to at least 6 sellers listed in the Complaint. (Tr. 37-38, 44, 57.)

6. On February 20, 2001, Respondent and its president, Nicholas A Penachio, waived indictment pursuant to Rule 7(b) of the Federal Rules of Criminal Procedure and pled guilty to an eight count Superseding Information which charged them with participating in schemes to rig bids of frozen food, produce, dairy and other products supplied to the New York City Board of Education, the Department of Citywide Administrative Services, the Nassau County Department of General Services, and the Newark Public Schools. These charges included, *inter alia,* conspiring to defraud through a kickback and fraud scheme using the U.S. Mail; conspiring to defraud the I.R.S. by filing false and fraudulent tax returns; and obstruction of justice by causing the destruction of incriminating documents that had been subpoenaed by the Grand Jury. (CX 6-7; Tr. 61-74.)

7. 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 pursuant to section 4(d) of the PACA (7 U.S.C. § 499d(d)). (CX 5-7; Tr. 61-74.)

Conclusions

The PACA requires full payment promptly, and persons subject to the provisions of the PACA as commission merchants, dealers, and brokers are required to be in compliance with the payment provisions of the PACA at all times. *Scamcorp, Inc., d/b/a Goodness Greeness*, 57 Agric. Dec. 527, 547. As the Judicial Officer held in *Scamcorp*: "In any PACA disciplinary proceeding

in which it is shown that a respondent has failed to pay in accordance with the PACA and is not in full compliance with the PACA within 120 days after the complaint is served on that respondent, or the date of the hearing, whichever occurs first, the PACA case will be treated as a 'no-pay' case." *Scamcorp* at 548-549. In the case at hand, Respondent failed to pay in accordance with the PACA, and was not in full compliance as of the date of the hearing on June 20, 2002, well over 120 days after the Complaint was served on Respondent. Evidence presented at hearing established that Respondent had not made full payment over 330 days after the Complaint was served.

Marketing Specialist Josephine Jenkins testified at the hearing that between June 5 and June 7, 2002, she conducted a follow-up investigation to ascertain whether or not the unpaid creditors listed in the Complaint had been paid any monies since the initial investigation had been conducted. At the hearing, Ms. Jenkins testified that after detailed investigation conducted in June of 2001, she was able to document from Nick Penachio Co., Inc.'s own records that between October, 2000 and June, 2001, Respondent failed to pay 32 sellers $268,915.00 for produce sold in interstate and foreign commerce. That follow-up investigation revealed that as of June 7, 2002, Respondent still owed over $62,000.00 to at least 6 sellers listed in the Complaint. (Tr. 37-38.) Further, two industry witnesses, creditor produce suppliers listed in the Complaint, corroborated Ms. Jenkins' findings. Juana Landestoy, credit manager for Doral Finest, stated that as of the date of the hearing, 30 percent of the debt listed in the Complaint as owed by Respondent to Doral Finest was still owed; Joel Fierman, owner of Fierman Produce Exchange, stated that as of the date of the hearing, Respondent still owed Fierman Produce Exchange over $9,000.00. Accordingly, this case should be treated as a "no-pay" case, pursuant to the policy set forth in *Scamcorp*.

"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." In the case at hand, as Respondent's PACA license has terminated, publication of the facts and circumstances surrounding Respondent's PACA violation would be the appropriate sanction. *Scamcorp* at 549. Here, Respondent's violations of section 2(4) of the PACA are willful, flagrant and repeated, as a matter of law. Willfulness is reflected by a Respondent's violations of express requirements of the PACA, the length of time during which the violations occurred, and the number and dollar amount of violative transactions involved. *Scamcorp* at 553; *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 895 (1997); *See, Finer Foods Sales Co., Inc. v. Block*, 708 F.2d 774,781-82 (D.C. Cir. 1983). Respondent's violations are "repeated" because repeated means more than one, and Respondent's

violations are flagrant because of the number of violations, the amount of money involved, and the time period during which the violations occurred." *Scamcorp* at 551; *See*, *Farley & Calfee v. U. S. Department of Agriculture*, 941 F.2d 964, 968 (9th Cir. 1991) (holding that 51 violations of the payment provisions of the PACA falls plainly within the permissible definition of repeated); *Wayne Cusimano, Inc. v. Block*, 692 F.2d 1025,1029 (5th Cir. 1982) (holding 150 transactions occurring over a 15-month period involving over $135,000.00 to be frequent and flagrant violations of the payment provisions of the PACA).

Further, in the case at hand, Senior Marketing Specialist Basil Coale testified that the violations committed by Nick Penachio Co., Inc. were willful, flagrant, and repeated, as Respondent "actively went out and incurred this debt over this time period, that they had failed to pay . . . and there was more than one violation . . . over this time period . . . [s]pecifically . . . between October, 2000 and June of 2001". (Tr. 71.) Mr. Coale testified that Respondent's failure to pay 32 suppliers over $268,000.00 over this time period adversely affected both the individual suppliers listed in the Complaint as well as on the industry as a whole." (Tr. 71.) Both industry witnesses called at the hearing corroborated Mr. Coale's testimony. Juana Landestoy, credit manager of Doral Finest, testified that: "we were very affected because those particular invoices were very high." (TR 57.) Joel Fierman, owner of Fierman Produce Exchange, testified that Respondent's failure to pay: "obviously is a financial burden on our business that can hinder us in our payment of our own shippers in a prompt fashion." (Tr. 43.) Here, as when such factors are present, the only appropriate sanction is revocation, or publication in the case at hand, where Respondent's license terminated on March 4, 2001 for failure to pay the required annual renewal fee.

Respondent has been shown to have committed willful, flagrant, and repeated violations of section 2(4) of the PACA, and is deemed to have admitted those violations by failing to appear at hearing. Further, Respondent has been shown to be unfit to be licensed under the PACA. Section 4(d) of the PACA (7 U.S.C. § 499d(d)) provides that a PACA license can be refused an applicant if it is shown that: the applicant is unfit to engage in the business of a commission merchant, dealer, or broker because the applicant, or in the case the applicant is a partnership, any general partner, or in case the applicant is a corporation, any officer or holder of more than ten per centum of the stock, prior to the date of the filing of the application engaged in any practices of the character prohibited by this Act or was convicted of a felony in any State or Federal Court.

On February 20, 2001, Respondent and its president, Nicholas A Penachio,

waived indictment pursuant to Rule 7(b) of the Federal Rules of Criminal Procedure and pled guilty to an eight count Superseding Information which charged them with participating in schemes to rig bids of frozen food, produce, dairy, and other products supplied to the New York City Board of Education, the Department of Citywide Administrative Services, the Nassu County Department of General Services, and the Newark Public Schools. These charges included, *inter alia,* conspiring to defraud through a kickback and fraud scheme using the U.S. Mail; conspiring to defraud the I.R.S. by filing false and fraudulent tax returns; and obstruction of justice for causing the destruction of incriminating documents that had been subpoenaed by the Grand Jury. (CX 6-7; Tr. 61-74.) Such fraudulent activity constitutes acts of a character prohibited by the Act. Further, conspiracy to defraud and obstruction of justice, to which Respondent and its president pled guilty, are felonies under the United States Code.

For the foregoing reasons, this case warrants: (1) a finding that Respondent engaged in willful, flagrant and repeated violations of section 2(4) of the PACA and publication of the facts and circumstances surrounding that violation and (2) a finding that Respondent is unfit to be licensed under the PACA pursuant to section 4(d) of the PACA.

Order

1. Respondent Nicholas Penachio Co., Inc. committed willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) during the period of October, 2000 through June, 2001, by failing to make full payment promptly to 32 sellers of the agreed purchase prices in the total amount of $268,915.00 for 162 lots of perishable agricultural commodities that Respondent purchased, received and accepted in interstate commerce; and
2. The facts and circumstances surrounding this violation shall be published; and
3. Respondent Nicholas Penachio Co., Inc. is unfit to be licensed under the PACA pursuant to section 4(d) of the PACA because Respondent engaged in practices of a character prohibited under section 4(d) of the PACA (7 U.S.C. § 499(d)), and because Respondent was convicted of a felony in Federal Court on February 20, 2001. (CX 6-7; Tr. 61-74.) Respondent's application for a PACA license is denied.

This Decision and Order will become final and effective thirty-five (35) days after service upon the Respondent unless appealed within thirty (30) days

as provided by the Rules of Practice and Procedure, 7 C.F.R. § 1.145.

Copies hereof shall be served upon the parties.

[Note: This Decision and Order became effective on January 13, 2003.]

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In re: ROBERT A. ROBERTI, JR., d/b/a PHOENIX FRUIT CO.
PACA Docket No. D-03-0006.
Ruling on Certified Question.
Filed February 14, 2003.

Ruben D. Rudolph, Jr., for Complainant.
Charles Hultstrand, for Respondent.
Ruling issued by William G. Jenson, Judicial Officer.

PACA – License application, USDA may withhold, if incomplete – Certified question, ruling.

The Judicial Officer (JO) ruled in response to a question certified by Chief Judge James W. Hunt: Is Respondent entitled to a PACA license, pursuant to 7 U.S.C. § 499d(d), because the Secretary of Agriculture did not conclude her investigation of Respondent's fitness for a PACA license within 30 days of the date Respondent filed his PACA license application? The JO concluded the Secretary of Agriculture completed the investigation of Respondent's fitness for a PACA license no later than December 4, 2002, 29 days after Respondent filed a valid PACA license application, as required by 7 C.F.R. § 46.4. The JO concluded the term "full or complete answers to all the questions," as used in 7 C.F.R. § 46.4(d), indicates that Respondent's answers to questions must not be lacking in any essential and must have all the necessary parts, elements, or steps. The JO found Respondent's October 10, 2002, and October 29, 2002, PACA license applications were not complete. Further, the JO concluded the Respondent's October 10, 2002, and October 29, 2002, PACA license applications were not inaccurate, but rather were incomplete; therefore, 7 C.F.R. § 46.4(f) was not applicable to the proceeding.

On January 14, 2003, Chief Administrative Law Judge James W. Hunt [hereinafter the Chief ALJ] certified a question to the Judicial Officer pursuant to section 1.143(e) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.143(e)). On January 31, 2003, Eric M. Forman, Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], filed a "Brief Regarding Question Certified to the Judicial Officer" [hereinafter Complainant's Brief] addressing the issue raised in the Chief ALJ's January 14, 2003, certified question. On February 6, 2003, Robert A. Roberti, Jr., d/b/a Phoenix Fruit Co. [hereinafter Respondent], filed "Responding Brief Regarding Question Certified to the Judicial Officer" [hereinafter Respondent's Brief]. On

February 7, 2003, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on the Chief ALJ's January 14, 2003, certified question.

The Chief ALJ poses the following certified question:

> **Query:** Is Respondent entitled to a license because Complainant did not conclude its investigation within thirty days of the application?

Certification of Question to the Judicial Officer at 3.

The Perishable Agricultural Commodities Act, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA], provides the Secretary of Agriculture may withhold the issuance of a PACA license to an applicant, pending an investigation of the applicant's fitness for a PACA license or the accuracy and completeness of the PACA license application, for a period not exceeding 30 days, as follows:

> **§ 499d. Issuance of license**
> . . . .
> **(d) Withholding license pending investigation**
>
> The Secretary may withhold the issuance of a license to an applicant, for a period not to exceed thirty days pending an investigation, for the purpose of determining (a) whether the applicant is unfit to engage in the business of a commission merchant, dealer, or broker because the applicant . . ., prior to the date of the filing of the application engaged in any practice of the character prohibited by this chapter or was convicted of a felony in any State or Federal court, or (b) whether the application contains any materially false or misleading statement or involves any misrepresentation, concealment, or withholding of facts respecting any violation of the chapter by any officer, agent, or employee of the applicant. If after investigation the Secretary believes that the applicant should be refused a license, the applicant shall be given an opportunity for hearing within sixty days from the date of the application to show cause why the license should not be refused. If after the hearing the Secretary finds that the applicant is unfit to engage in the business of a commission merchant, dealer, or broker because the applicant . . ., prior to the date of the filing of the application engaged in any practice of the character prohibited by this chapter or was convicted of a felony in any State or Federal court, or because the application contains any materially false or misleading statement made by the applicant or by its

> representative on its behalf, or involves any misrepresentation, concealment, or withholding of facts respecting any violation of the chapter by any officer, agent, or employee, the Secretary may refuse to issue a license to the applicant.

7 U.S.C. § 499d(d).

Based on the limited record before me, I find Respondent did not file a complete PACA license application until November 5, 2002.[1] I also find Complainant completed the investigation of Respondent's fitness for a PACA license no later than December 4, 2002, 29 days after Respondent filed a complete PACA license application.[2] I, therefore, conclude the Secretary of Agriculture is not required to issue Respondent a PACA license based on the time limitation for withholding the issuance of a PACA license in section 4(d) of the PACA (7 U.S.C. § 499d(d)).

Respondent asserts he filed a complete PACA license application on October 10, 2002.[3] I disagree with Respondent's assertion.

Section 46.4(b)(1)-(7) of the regulations issued under the PACA (7 C.F.R. § 46.4(b)(1)-(7)) specifies the information an applicant for a PACA license must furnish to obtain a PACA license. Section 46.4(b)(8) of the regulations issued under the PACA (7 C.F.R. § 46.4(b)(8)) provides, in addition to the information specified in 7 C.F.R. § 46.4(b)(1)-(7), the applicant must furnish "[a]ny other information the Director[4] deems necessary to establish the identity and eligibility of the applicant to obtain a license."

The record establishes that Respondent's October 10, 2002, PACA license application was not complete. Specifically, Respondent failed to submit a copy of the bankruptcy petition, schedules, disclosure statements, and other documents relevant to Respondent's bankruptcy petition, as required by

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[1] *See* letter dated November 4, 2002, from Charles Hultstrand to John A. Koller and Affidavit of Jane E. Servais ¶ 6 (Reply to Matter Concerning Date of Respondent's Application for PACA License (Attach. 1 and Attach. 6)).

[2] *See* Notice to Show Cause filed December 4, 2002.

[3] See Response to Notice to Show Cause ¶¶ I, II(b), V, VIIIa; Response to Motion for Expedited Hearing; Reply Re: Date of Application for PACA License; Respondent's Brief.

[4] "Director" means the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. 7 C.F.R. § 46.2(d), (f)-(g).

Respondent's affirmative response to question 9 on the PACA license application form.[5] Moreover, on September 26, 2002, David N. Studer, an employee of the PACA Branch, Agricultural Marketing Service, United States Department of Agriculture, informed Respondent's counsel that, due to Respondent's involvement in bankruptcy proceedings within the last 3 years, Respondent would be required to submit additional information when applying for a PACA license.[6] Respondent's October 10, 2002, PACA license application did not include the information which David N. Studer stated would be required to be submitted as part of Respondent's PACA license application.

Section 46.4(d) of the regulations issued under the PACA (7 C.F.R. § 46.4(d)) provides that an incomplete PACA license application is not a valid license application and the 30-day period in section 4(d) of the PACA (7 U.S.C. § 499d(d)) for the Secretary of Agriculture's completion of an investigation does not commence until a valid PACA license application is received, as follows:

> **§ 46.4 Application for license.**
>
> . . . .
>
> (d) The application and fees shall be forwarded to the Director, Fruit and Vegetable Division, Agricultural Marketing Service, U.S. Department of Agriculture, Washington, D.C. 20250, or to his representative. *An application which does not contain full or complete answers to all the questions . . . shall not be considered a valid application for license. The "period not to exceed 30 days" as prescribed in section 4(d) of the Act shall commence on the day a valid application for license is received by the Director or his representative.*

7 C.F.R. § 46.4(d) (emphasis added).

Respondent asserts his October 10, 2002, PACA license application contains full and complete answers to all of the questions on the PACA license

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[5]*See* Reply to Matter Concerning Date of Respondent's Application for PACA License (Attach. 2 at 2).

[6]*See* Reply to Matter Concerning Date of Respondent's Application for PACA License (Attach. 3).

application form.[7] The term *full or complete answers to all the questions*, as used in section 46.4(d) of the regulations issued under the PACA (7 C.F.R. § 46.4(d)), indicates that answers to questions must not be "lacking in any essential" and must have "all necessary parts, elements, or steps."[8] I find Respondent's failure to provide the documents required by Respondent's affirmative response to question 9 on the PACA license application form is a failure to provide a "full or complete" answer to question 9 on the PACA license application form. Moreover, Respondent's failure to provide the information which David N. Studer informed Respondent's counsel would be required to be submitted with Respondent's PACA license application is a failure to provide "full or complete answers to all the questions." As Respondent's PACA license application was not complete on October 10, 2002, I conclude Respondent did not file a valid PACA license application on October 10, 2002, as Respondent asserts.

The Chief ALJ tentatively decided Respondent submitted a complete PACA license application on October 29, 2002; Complainant did not show he concluded his investigation within 30 days of October 29, 2002; and the Secretary of Agriculture must issue Respondent a PACA license pursuant to section 4(d) of the PACA (7 U.S.C. § 499d(d)).[9] I disagree with the Chief ALJ's tentative decision.

The Chief ALJ bases his tentative determination that Respondent's application was complete on October 29, 2002, on section 46.4(f) of the regulations issued under the PACA, which provides, as follows:

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[7]*See* Reply Re: Date of Application for PACA License at 2; Respondent's Brief at 2.

[8]*See* definitions of *complete* and *full* in Merriam-Webster's Collegiate Dictionary 235, 471(10th ed. 1997). *See* also *Hoyt v. Daily Mirror, Inc.*, 31 F. Supp. 89, 90 (S.D.N.Y. 1939) (stating the adjective *complete* is defined in Funk & Wagnalls Standard Dictionary as "having all needed or normal parts, elements, or details; lacking nothing; entire, perfect; full"); *Town of Checotah v. Town of Eufaula*, 119 P. 1014, 1017 (Okla. 1911) (citing with approval the definition of *complete* in Webster's New International Dictionary: filled up, with no part, item, or element lacking; free from deficiency; entire; perfect; consummate); *Quinn v. Donovan*, 85 Ill. 194, 195 (Ill. Jan. Term 1877) (stating one of Webster's definitions of the word *full* is "complete, entire, without abatement, -- mature, perfect"); *Wood v. Los Angeles City School Dist.*, 44 P.2d 644, 646 (Cal. Dist. Ct. App. 1935) (citing with approval the definition of *complete* in Webster's New International Dictionary: filled up, with no part, item, or element lacking; free from deficiency; entire; perfect; consummate; and citing with approval the definition of *complete* in Webster's Dictionary: free from deficiency, entire, absolutely finished).

[9]*See* Certification of Question to the Judicial Officer at 2-3.

§ 46.4 Application for license.

. . . .

(f) If the Director has reason to believe that the application contains inaccurate information, he may afford the applicant an opportunity to submit a corrected application or verify or explain information contained in the application. If the applicant submits a corrected application, the original application shall be considered withdrawn. If the applicant, in response to the Director's request, submits additional or corrected information for consideration in connection with his original application, the original application plus such information shall be considered as constituting a new application.

7 C.F.R. § 46.4(f).

Specifically, the Chief ALJ tentatively found Respondent's October 29, 2002, submission, together with Respondent's original PACA license application of October 10, 2002, constitutes a new and complete application, as provided in section 46.4(f) of the regulations issued under the PACA (7 C.F.R. § 46.4(f)).[10]

Section 46.4(f) of the regulations issued under the PACA (7 C.F.R. § 46.4(f)) applies to circumstances in which the Director has reason to believe a PACA license application contains inaccurate information. Based on the limited record before me, I do not find that the Director had reason to believe Respondent's October 10, 2002, PACA license application contained inaccurate information. Therefore, section 46.4(f) of the regulations issued under the PACA (7 C.F.R. § 46.4(f)) is not applicable to this proceeding, and Respondent's October 10, 2002, PACA license application plus the information Respondent provided on October 29, 2002, cannot "be considered as constituting a new application" filed on October 29, 2002, in accordance with section 46.4(f) of the regulations issued under the PACA (7 C.F.R. § 46.4(f)).[11]

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[10]*See* Certification of Question to the Judicial Officer at 2.

[11]Complainant contends Respondent's PACA license "application was incomplete and inaccurate in that it did not contain the required information relative to previous bankruptcy filings by one of the principals" and section 46.4(f) of the regulations issued under the PACA (7 C.F.R. § 46.4(f)) is applicable to this proceeding (Complainant's Brief at 3). I reject Complainant's contention that Respondent's PACA license application was "inaccurate" because the PACA license application "did not contain the required information relative to previous bankruptcy filings by one of the principals" and that section 46.4(f) of the regulations issued under the PACA (7 C.F.R. § (continued...)

Instead, the record indicates John A. Koller, an employee of the PACA Branch, Agricultural Marketing Service, United States Department of Agriculture, returned Respondent's October 10, 2002, PACA license application to Respondent because it was incomplete.[12] On October 18, 2002, John A. Koller returned Respondent's incomplete application to Respondent's counsel requesting that Respondent provide the bankruptcy petition, schedules, disclosure statements, and other documents relevant to Respondent's bankruptcy petition, as required by Respondent's affirmative response to question 9 on the PACA license application, and the information identified in David N. Studer's September 26, 2002, letter.[13] I conclude Mr. Koller returned Respondent's PACA license application pursuant to section 46.4(e) of the Regulations (7 C.F.R. § 46.4(e)), which provides, if a PACA license application is incomplete, it may be returned to the applicant with a request that the applicant complete the application.

On October 29, 2002, Respondent submitted the additional information requested in John A. Koller's October 18, 2002, letter.[14] However, Respondent failed to resubmit the PACA license application form with his October 29, 2002, submission. Instead, the United States Department of Agriculture did not receive Respondent's resubmitted PACA license application form until

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[11](...continued)
46.4(f)) is applicable to this proceeding. An inaccurate application is an application that contains erroneous information. *See Huntington Securities Corp. v. Busey*, 112 F.2d 368, 370 (6th Cir. 1940) (stating in its ordinary use *accurately* means precisely, exactly, correctly, without error or defect); *Globe Indemnity Co. v. Cohen*, 106 F.2d 687, 690 (3d Cir. 1939) (stating the word *accuracy* signifies merely the state or quality of being accurate, freedom from mistake or error), *cert. denied*, 309 U.S. 660 (1940); *Cedar Rapids Engineering Co. v. United States*, 86 F. Supp. 577, 582 (N.D. Iowa 1949) (stating in its ordinary use *accurately* means precisely, exactly, correctly, without error or defect); *Marshall v. City of Cambridge*, 38 N.E.2d 59 (Mass. 1941) (distinguishing between an omission and an inaccuracy). Based on the limited record before me, I find Respondent's October 10, 2002, and October 29, 2002, PACA license applications were incomplete, not inaccurate.

[12]*See* Reply to Matter Concerning Date of Respondent's Application for PACA License (Attach. 4 and Attach. 6 ¶ 3).

[13]*See* Reply to Matter Concerning Date of Respondent's Application for PACA License (Attach. 4).

[14]*See* Reply to Matter Concerning Date of Respondent's Application for PACA License (Attach. 5).

November 5, 2002.[15] I conclude Respondent did not file a complete PACA license application until November 5, 2002, when the United States Department of Agriculture had in its possession: (1) Respondent's completed PACA license application form; (2) the bankruptcy petition, schedules, disclosure statements, and other documents relevant to Respondent's bankruptcy petition, as required by Respondent's affirmative response to question 9 on the PACA license application; and (3) the information identified in David N. Studer's September 26, 2002, letter.

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In re: FRESH VALLEY PRODUCE, INC.
PACA-APP Docket No. 01-0001.
Decision and Order.
Filed March 20, 2003.

PACA-APP – Actively involved – Failure to pay reparation award – Responsibly connected – Agency, scope of authority – Evidence, determination by AMS, admissible.

The Judicial Officer (JO) affirmed Judge Baker's (ALJ) decision that Fresh Valley Produce, Inc. (Petitioner) was responsibly connected with Fresh Valley Food Service, LLC when Fresh Valley Food Service, LLC failed to pay a reparation award in violation of the PACA. The JO found Petitioner was the holder of 40 percent of the outstanding stock of Fresh Valley Food Service, LLC. The JO rejected the Petitioner's contention that Petitioner's president did not have authority to establish Fresh Valley Food Service, LLC and to make the Petitioner a member of Fresh Valley Food Service, LLC. The JO also rejected the Petitioner's argument that it was not actively involved in the activities that resulted in the violation of the PACA. The JO held that the violation of the PACA occurred when Fresh Valley Food Service, LLC failed to pay the reparation award by June 16, 2000, and not when Fresh Valley Food Service, LLC initially failed to make prompt payment for produce. Finally, the JO rejected the Petitioner's contention that the ALJ erred when she considered testimony that was not part of the record when the Chief of the PACA Branch made his determination that the Petitioner was responsibly connected with Fresh Valley Food Service, LLC. The JO stated, under 7 C.F.R. § 1.136(a), the record upon which the Chief of the PACA Branch bases his responsibly connected determination is only part of the record in the proceeding to review that determination.

George O. Krauja, for Petitioner.
Ruben D. Rudolph, Jr., for Respondent.
Initial decision issued by Dorothea A. Baker, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

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[15]*See* Reply to Matter Concerning Date of Respondent's Application for PACA License (Attach. 6 ¶ 6).

PROCEDURAL HISTORY

On January 31, 2001, James R. Frazier, Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], issued a determination that Fresh Valley Produce, Inc. [hereinafter Petitioner], was responsibly connected with Fresh Valley Food Service, LLC on June 16, 2000, when Fresh Valley Food Service, LLC violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA].[1] On March 1, 2001, Petitioner filed a "Petition for Review of Determination That Fresh Valley Produce, Inc. Was Responsibly Connected" [hereinafter Petition for Review] pursuant to the PACA 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] seeking reversal of Respondent's determination that Petitioner was responsibly connected with Fresh Valley Food Service, LLC, when Fresh Valley Food Service, LLC violated the PACA.

On April 24, 2002, Administrative Law Judge Dorothea A. Baker [hereinafter the ALJ] conducted a hearing in Tucson, Arizona. George O. Krauja, Law Offices of Fennemore Craig, Tucson, Arizona, represented Petitioner. Ruben D. Rudolph, Jr., Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented Respondent.

On May 31, 2002, Petitioner filed a "Post-Hearing Brief," "Proposed Findings of Fact and Conclusions of Law," an "Order," and a "Notice of Lodging Transcript." On June 28, 2002, Respondent filed "Proposed Finding of Fact, Conclusions of Law, and Order." On July 26, 2002, Petitioner filed "Petitioner's Reply in Support of Proposed Findings of Fact and Conclusions of Law" and "Objection to Respondent's Proposed Findings of Fact and Conclusions of Law." On August 14, 2002, Respondent filed "Response to Petitioner's Reply." On September 5, 2002, Petitioner filed "Petitioner's Reply to Response Brief."

On October 18, 2002, the ALJ issued a "Decision and Order" [hereinafter Initial Decision and Order] in which the ALJ affirmed Respondent's January 31, 2001, determination that Petitioner was responsibly connected with Fresh

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[1]On May 17, 2000, I issued a "Default Order" ordering Fresh Valley Food Service, LLC, to pay Denice & Filice Packing Company a reparation award no later than June 16, 2000. *Denice & Filice Packing Co. v. Fresh Valley Food Service LLC*, PACA Docket No. RD-00-204 (May 17, 2000) (Default Order) (RX 4). Fresh Valley Food Service, LLC, failed to pay the reparation award by June 16, 2000, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Valley Food Service, LLC on June 16, 2000, during the period of time Fresh Valley Food Service, LLC violated the PACA (Initial Decision and Order at 11).

On November 25, 2002, Petitioner appealed to, and requested oral argument before, the Judicial Officer. On December 16, 2002, Respondent filed "Respondent's Response to Petitioner's Appeal Petition." On December 20, 2002, Respondent filed "Respondent's Response to Request for Oral Hearing." On December 23, 2002, the Hearing Clerk transferred the record to the Judicial Officer for consideration and decision.

Petitioner's request for oral argument before the Judicial Officer, which the Judicial Officer may grant, refuse, or limit (7 C.F.R. § 1.145(d)), is refused because Petitioner and Respondent have thoroughly addressed the issues and the issues are not complex. Thus, oral argument would appear to serve no useful purpose.

Based upon a careful consideration of the record, I agree with most of the ALJ's discussion, most of the ALJ's findings of fact, and the ALJ's order affirming Respondent's January 31, 2001, determination that Petitioner was responsibly connected with Fresh Valley Food Service, LLC, on June 16, 2000, during the period of time Fresh Valley Food Service, LLC violated the PACA. Therefore, pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt with minor modifications the ALJ's Initial Decision and Order as the final Decision and Order. Additional conclusions by the Judicial Officer follow the ALJ's findings of fact and conclusions of law, as restated.

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

APPLICABLE STATUTORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

. . . .

§ 499a. Short title and definitions

. . . .

(b) Definitions

For purposes of this chapter:

. . . .

(9) The term "responsibly connected" means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association. A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of this chapter and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.

. . . .

§ 499b. Unfair conduct

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

. . . .

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter.

. . . .

§ 499d. Issuance of license

. . . .

(b) Refusal of license; grounds

The Secretary shall refuse to issue a license to an applicant if he finds that the applicant, or any person responsibly connected with the

applicant, is prohibited from employment with a licensee under section 499h(b) of this title or is a person who, or is or was responsibly connected with a person who–

(A) has had his license revoked under the provisions of section 499h of this title within two years prior to the date of the application or whose license is currently under suspension; [or]

(B) within two years prior to the date of application has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect[.]

. . . .

(c) Issuance of license upon furnishing bond; issuance after three years without bond; effect of termination of bond; increase or decrease in amount; payment of increase

Any applicant ineligible for a license by reason of the provisions of subsection (b) of this section may, upon the expiration of the two-year period applicable to him, be issued a license by the Secretary if such applicant furnishes a surety bond in the form and amount satisfactory to the Secretary as assurance that his business will be conducted in accordance with this chapter and that he will pay all reparation orders which may be issued against him in connection with transactions occurring within four years following the issuance of the license, subject to his right of appeal under section 499g(c) of this title. In the event such applicant does not furnish such a surety bond, the Secretary shall not issue a license to him until three years have elapsed after the date of the applicable order of the Secretary or decision of the court on appeal. If the surety bond so furnished is terminated for any reason without the approval of the Secretary the license shall be automatically canceled as of the date of such termination and no new license shall be issued to such person during the four-year period without a new surety bond covering the remainder of such period. The Secretary, based on changes in the nature and volume of business conducted by a bonded licensee, may require an increase or authorize a reduction in the amount of the bond. A bonded licensee who is notified by the Secretary to provide a bond in an increased amount shall do so within a reasonable time to be specified by the Secretary, and upon failure of the licensee to provide such bond his license shall be automatically suspended until such bond

is provided. The Secretary may not issue a license to an applicant under this subsection if the applicant or any person responsibly connected with the applicant is prohibited from employment with a licensee under section 499h(b) of this title.

. . . .

§ 499g. Reparation order

. . . .

(d) Suspension of license for failure to obey reparation order or appeal

Unless the licensee against whom a reparation order has been issued shows to the satisfaction of the Secretary within five days from the expiration of the period allowed for compliance with such order that he has either taken an appeal as herein authorized or has made payment in full as required by such order his license shall be suspended automatically at the expiration of such five-day period until he shows to the satisfaction of the Secretary that he has paid the amount therein specified with interest thereon to the date of payment: *Provided*, That if on appeal the appellee prevails or if the appeal is dismissed the automatic suspension of license shall become effective at the expiration of thirty days from the date of judgment on the appeal, but if the judgment is stayed by a court of competent jurisdiction the suspension shall become effective ten days after the expiration of such stay, unless prior thereto the judgment of the court has been satisfied.

§ 499h. Grounds for suspension or revocation of license

. . . .

(b) Unlawful employment of certain persons; restrictions; bond assuring compliance; approval of employment without bond; change in amount of bond; payment of increased amount; penalties

Except with the approval of the Secretary, no licensee shall employ any person, or any person who is or has been responsibly connected with any person–

(1) whose license has been revoked or is currently suspended by order of the Secretary;

(2) who has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision shall not apply to any case in which

the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect; or

(3) against whom there is an unpaid reparation award issued within two years, subject to his right of appeal under section 499g(c) of this title.

The Secretary may approve such employment at any time following nonpayment of a reparation award, or after one year following the revocation or finding of flagrant or repeated violation of section 499b of this title, if the licensee furnishes and maintains a surety bond in form and amount satisfactory to the Secretary as assurance that such licensee's business will be conducted in accordance with this chapter and that the licensee will pay all reparation awards, subject to its right of appeal under section 499g(c) of this title, which may be issued against it in connection with transactions occurring within four years following the approval. The Secretary may approve employment without a surety bond after the expiration of two years from the effective date of the applicable disciplinary order. The Secretary, based on changes in the nature and volume of business conducted by the licensee, may require an increase or authorize a reduction in the amount of the bond. A licensee who is notified by the Secretary to provide a bond in an increased amount shall do so within a reasonable time to be specified by the Secretary, and if the licensee fails to do so the approval of employment shall automatically terminate. The Secretary may, after thirty days['] notice and an opportunity for a hearing, suspend or revoke the license of any licensee who, after the date given in such notice, continues to employ any person in violation of this section. The Secretary may extend the period of employment sanction as to a responsibly connected person for an additional one-year period upon the determination that the person has been unlawfully employed as provided in this subsection.

§ 499p. Liability of licensees for acts and omissions of agents

In construing and enforcing the provisions of this chapter, the act, omission, or failure of any agent, officer, or other person acting for or employed by any commission merchant, dealer, or broker, within the scope of his employment or office, shall in every case be deemed the act, omission, or failure of such commission merchant, dealer, or broker as

that of such agent, officer, or other person.

7 U.S.C. §§ 499a(b)(9), 499b(4), 499d(b)(A)-(B), (c), 499g(d), 499h(b), 499p.

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

Discussion

Responsibly connected means affiliated or connected with a commission merchant, dealer, or broker as a partner in a partnership or as an officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association.[2] Respondent determined that Petitioner was responsibly connected with Fresh Valley Food Service, LLC when Fresh Valley Food Service, LLC violated the PACA. Petitioner bears the burden of proving by a preponderance of the evidence that: (1) it was not actively involved in the activities resulting in a violation of the PACA; and (2) either it was only nominally a partner, officer, director, or shareholder of Fresh Valley Food Service, LLC, or it was not an owner of Fresh Valley Food Service, LLC which was the *alter ego* of the owners of Fresh Valley Food Service, LLC.[3]

Petitioner is an Arizona corporation formed on March 18, 1998 (RX 11 at 1; Tr. 17). Petitioner's Articles of Incorporation provides that Petitioner's place of business is 772 W. Frontage Road, Suite 2, Nogales, Arizona; Petitioner's statutory agent is James A. Soto, 441 N. Grand Avenue, Suite 13, Nogales, Arizona; Ruben Castillo and Arminda Cano serve on Petitioner's two-person board of directors; and Ruben Castillo and Arminda Cano are Petitioner's incorporators (RX 20). Petitioner is in the business of importing into the United States, as principal or agent, fruits and vegetables, and then selling, marketing, distributing, and brokering those fruits and vegetables (RX 20; Tr. 39-40).

Fresh Valley Food Service, LLC is an Arizona limited liability company formed on April 22, 1999 (PX 1; RX 7, RX 8, RX 11 at 1). Fresh Valley Food Service, LLC's Articles of Incorporation provides that Fresh Valley Food Service, LLC's registered office is 772 W. Frontage Road, Suite 2, Nogales, Arizona; Fresh Valley Food Service, LLC's statutory agent is James A. Soto,

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[2] 7 U.S.C. § 499a(b)(9).

[3] *Norinsberg v. United States Dep't of Agric.*, 162 F.3d 1194, 1197 (D.C. Cir. 1998).

441 N. Grand Avenue, Suite 13, Nogales, Arizona; and Fresh Valley Food Service, LLC's members are Ruben Castillo, Paul Gober, and Kevin Vasquez (RX 7). On November 12, 1999, Fresh Valley Food Service, LLC filed First Amended and Restated Articles of Organization of Fresh Valley Food Service, LLC with the Arizona Corporation Commission in which Fresh Valley Food Service, LLC replaced the statutory agent and removed Paul Gober as a member and replaced him with Petitioner (RX 8).

Denice & Filice Packing Co., located in Hollister, California, sold perishable agricultural commodities to Fresh Valley Food Service, LLC and invoiced Petitioner approximately $299,000 for the produce sold to Fresh Valley Food Service, LLC. Petitioner paid approximately $217,000 of the $299,000 owed to Denice & Filice Packing Co. During the period August 28, 1999, through October 13, 1999, Denice & Filice Packing Co. sold 26 truckloads of peppers to Fresh Valley Food Service, LLC (PX 6; RX 11). Denice & Filice Packing Co. invoiced Petitioner $85,042 for the peppers sold to Fresh Valley Food Service, LLC. Neither Petitioner nor Fresh Valley Food Service, LLC paid Denice & Filice Packing Co. for these peppers, and Denice & Filice Packing Co. instituted a reparation proceeding against Fresh Valley Food Service, LLC seeking payment for these peppers. (RX 11, RX 12, RX 19; Tr. 138-41.)

Fresh Valley Food Service, LLC never responded to the reparation complaint filed by Denice & Filice Packing Co., and the Judicial Officer issued a Default Order against Fresh Valley Food Service, LLC on May 17, 2000, based on Fresh Valley Food Service, LLC's failure to pay for produce Denice & Filice Packing Co. sold to Fresh Valley Food Service, LLC during the period August 28, 1999, through October 13, 1999. The Default Order orders Fresh Valley Food Service, LLC to pay Denice & Filice Packing Co. a reparation award of $85,042 with interest and a $300 filing fee. (RX 4.) Fresh Valley Food Service, LLC failed to pay the reparation award by June 16, 2000, in violation of the PACA.

Petitioner maintains it was not actively involved in the activities resulting in the violation of the PACA by Fresh Valley Food Service, LLC or other persons (Petitioner's Post-Hearing Brief at 3). Based upon a careful consideration of the record, I find Petitioner has failed to prove by a preponderance of the evidence that it was not actively involved in the activities resulting in Fresh Valley Food Service, LLC's violation of the PACA.

Petitioner maintains it does not meet the definition of the term *responsibly connected* in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) because it is not and never has been an owner of more than 10 percent of Fresh Valley Food Service, LLC (Petitioner's Post-Hearing Brief at 3). The record establishes that Petitioner owned 40 per centum of Fresh Valley Food Service, LLC (RX 1,

RX 2). Fresh Valley Food Service, LLC's PACA license application signed by Petitioner's president, Ruben Castillo, on May 20, 1999, and received by the United States Department of Agriculture on May 27, 1999, states Petitioner owns 40 percent of Fresh Valley Food Service, LLC (RX 1 at 3-8). Petitioner's owner, Arminda Cano, was informed of Petitioner's ownership interest in Fresh Valley Food Service, LLC in writing, when Petitioner's president, Ruben Castillo, resigned from Petitioner on December 12, 1999 (RX 9). Petitioner knew of its ownership interest in Fresh Valley Food Service, LLC through Petitioner's president, regardless of when Petitioner's owner was informed of the ownership interest. In addition, the First Amended and Restated Articles of Organization of Fresh Valley Food Service, LLC signed by Ruben Castillo on October 11, 1999, and filed with the Arizona Corporation Commission on November 12, 1999, recite Petitioner's ownership interest, as first stated by Petitioner's president in the May 1999 Fresh Valley Food Service, LLC application for a PACA license (RX 8).

Petitioner's arguments and contentions that Petitioner was not actively involved with Fresh Valley Food Service, LLC; that Petitioner was not a member of Fresh Valley Food Service, LLC; and that there is no nexus between Petitioner's activities and the activities of Fresh Valley Food Service, LLC are not sustained by the evidence.

The evidence is sufficiently persuasive that Petitioner is precluded from denying that it owned 40 percent of Fresh Valley Food Service, LLC when Fresh Valley Food Service, LLC violated the PACA and from denying that Petitioner was not otherwise responsibly connected with Fresh Valley Food Service, LLC. Petitioner is a company of four employees, two of whom knew of Petitioner's ownership interest in Fresh Valley Food Service, LLC through December 1999 (Tr. 49, 52-56).

The details of the involvement of Petitioner and Fresh Valley Food Service, LLC show that the two companies were inextricably intertwined. Petitioner and Fresh Valley Food Service, LLC had the same telephone and fax numbers and the same physical address (RX 1 at 2-4, RX 3 at 4-5, 8-9, 11, 13, 17, RX 7, RX 8 at 2, RX 16, RX 17, RX 18). Ruben Castillo was a founding member of both Petitioner and Fresh Valley Food Service, LLC (PX 1; RX 7, RX 20). Petitioner's attorney, James A. Soto, prepared the documents to establish both Petitioner and Fresh Valley Food Service, LLC and to obtain PACA licenses for both Petitioner and Fresh Valley Food Service, LLC. Petitioner's office manager, Sylvia Montanez, signed checks on behalf of Fresh Valley Food Service, LLC while working at Petitioner. (PX 1; RX 1 at 8, RX 3 at 17-20, RX 7, RX 16, RX 20; Tr. 49, 52-56.) Under the authority of Petitioner's president, Ruben Castillo, Petitioner became a 40 percent owner of Fresh Valley

Food Service, LLC.

Petitioner argues Arminda Cano, Petitioner's 100 percent owner, never authorized the creation of another company (Petitioner's Post-Hearing Brief at 3). Petitioner's Articles of Incorporation, and Arminda Cano herself, gave Ruben Castillo the broadest possible authority in running Petitioner (RX 20; Tr. 31-32). While Arminda Cano may not have expressly authorized the specific actions of Ruben Castillo, Arminda Cano knew of "problems" at Petitioner and participated in the firing of personnel even if Arminda Cano never visited Petitioner's place of business and at hearing allegedly did not know the last name of Petitioner's current president or his salary. According to Arminda Cano, she met Ruben Castillo only on two occasions; once when Ruben Castillo traveled to Los Angeles, California, to have her sign corporate documents. She further states, except for two meetings with Ruben Castillo in 1998, she never was in contact with him in any way. Allegedly, Arminda Cano is only informed of her business through her husband, Pedro Chavez, who lives in Mexico and visits the business infrequently. Arminda Cano made efforts to establish in her testimony that she only knows what her husband tells her of the business and that she is mainly concerned with raising her children. Her testimony and general demeanor leave some doubt as to the credibility of her testimony; however, the record does establish that she was not involved with the day-to-day management of Petitioner and that Ruben Castillo had broad authority to manage Petitioner. (Tr. 17-35, 41-42, 149.)

Ruben Castillo's actions in establishing Fresh Valley Food Service, LLC to conduct business in conjunction with Petitioner were contemplated expressly in Petitioner's Articles of Incorporation that Arminda Cano signed (RX 3 at 18-20). The indemnification clause of the Articles of Incorporation contemplates the formation of joint ventures, partnerships, or "other enterprises," as follows:

> ***ARTICLE 9.*** The Corporation shall indemnify any person who incurs expenses or liabilities by reason of the fact he or she is or was an officer, director, employee or agent of the Corporation or is or was serving at the request of the Corporation as a director, officer, employee or agent of another Corporation, partnership, joint venture, trust or other enterprises. This indemnification shall be mandatory in all circumstances in which indemnification is permitted by law.

RX 3 at 19.

Both Ruben Castillo and Arminda Cano signed the Articles of Incorporation.

Because "partnership" and "other enterprises" were contemplated in Petitioner's Articles of Incorporation, Ruben Castillo was not acting outside his authority in establishing a joint venture, partnership, or other enterprise in conjunction with his duties as president of Petitioner.

The evidence suggests that Arminda Cano was not as unaware of the business activities of Petitioner as she would have one believe. However, even if the 100 percent shareholder was initially unaware of the existence of Fresh Valley Food Service, LLC, Ruben Castillo informed Arminda Cano that Petitioner owned Fresh Valley Food Service, LLC as early as 6 months prior to the June 16, 2000, PACA violation. In his December 12, 1999, resignation letter to Arminda Cano, Ruben Castillo informed her Petitioner "owned" Fresh Valley Food Service, LLC (RX 9 at 2). The evidence at the hearing also showed that Petitioner was informed of the actions of Fresh Valley Food Service, LLC as early as August 1999. In a letter dated February 24, 2000, to Denice & Filice Packing Co., Petitioner's attorney states Petitioner has not been provided information from Fresh Valley Food Service, LLC for 6 months (PX 7 at 2; RX 13 at 2). This letter implies Petitioner had been informed of the activities of Fresh Valley Food Service, LLC in August 1999.

Petitioner's claim that it had no knowledge of Fresh Valley Food Service, LLC prior to the time it was contacted by Denice & Filice Packing Co. for collection, is completely untenable and not supported by the evidence. Denice & Filice Packing Co. routinely billed Petitioner, not Fresh Valley Food Service, LLC for produce Fresh Valley Food Service, LLC ordered, and Petitioner paid these bills. Denice & Filice Packing Co. transacted approximately $299,000 of business by billing Petitioner for produce purchased by Fresh Valley Food Service, LLC and Petitioner paid these bills from its corporate account (Tr. 138-40). Petitioner's claim of ignorance of the existence of Fresh Valley Food Service, LLC is unsupportable. Fresh Valley Food Service, LLC was run out of Petitioner's own office. Petitioner conducted business with Denice & Filice Packing Co. and paid for the produce Fresh Valley Food Service, LLC purchased until August 1999.

I have considered Petitioner's many arguments and contentions but do not find them convincing or sustainable in law and fact.

Denice & Filice Packing Co. was being paid by the Petitioner, not by Fresh Valley Food Service, LLC and the reparation complaint and subsequent reparation order, which was not paid in violation of the PACA, stemmed from Petitioner's failure to continue to pay for produce ordered by Fresh Valley Food Service, LLC. The evidence and record establish Petitioner was actively involved in activities resulting in the PACA violation committed by Fresh Valley Food Service, LLC.

In this proceeding, Petitioner failed to prove it did not exercise judgment, discretion, or control over the actions that resulted in the non-payment of the reparation award.

Petitioner's argument that ignorance of the underlying transactions as they occurred equates to no active involvement, mischaracterizes the violation of the PACA which was the basis of Respondent's determination, and thwarts the main goal of the responsible connection doctrine. Following the concepts set forth in *In re Michael Norinsberg*, 58 Agric. Dec. 604 (1999) (Decision and Order on Remand), and *Bell v. Dep't of Agric.*, 39 F.3d 1199 (D.C. Cir. 1994), the Judicial Officer in *In re Anthony L. Thomas*, 59 Agric. Dec. 367, 386 (2000), enunciated one of the main goals of finding a party responsibly connected to a PACA violator:

> Responsibility is placed upon corporate officers, directors, and holders of more than 10 per centum of the outstanding stock because their status with the company requires that they know, or should know, about violations being committed and that they be held responsible for their failure to "counteract or obviate the fault of others." [Quoting *Bell* at 1201].

In the instant proceeding, as a 40 percent owner of the violating PACA licensee, Petitioner was in a position to know of the transactions. Petitioner knew that Fresh Valley Food Service, LLC was purchasing produce from Denice & Filice Packing Co. and knew that Fresh Valley Food Service, LLC in which it held 40 percent ownership was not paying for produce. Petitioner could have obviated the fault of the company it owned but did not. Petitioner had paid for produce ordered by Fresh Valley Food Service, LLC but chose not to continue paying. Petitioner must be found responsibly connected to Fresh Valley Food Service, LLC in which it had an ownership interest, and which ran its business operations out of Petitioner's office.

Findings of Fact and Conclusions of Law

1. Petitioner is an Arizona corporation whose principal address is 1555 Calle Plata, Suite 203, Nogales, Arizona 85621-4569. Petitioner has been at the 1555 Calle Plata, Suite 203, Nogales, Arizona, location since September 2000.

2. Petitioner's principal place of business was 772 Frontage Road, Suite 2, Nogales, Arizona 85628-2570, from the time the company was established on March 18, 1998, until September 2000.

3. The principle place of business of Fresh Valley Food Service, LLC

was 772 Frontage Road, Suite 2, Nogales, Arizona 85628-2570, from the time Fresh Valley Food Service, LLC was formed on April 22, 1999, and this address is the last known address for Fresh Valley Food Service, LLC. Until September 2000, Fresh Valley Food Service, LLC and Petitioner shared the same telephone and fax numbers.

4. Petitioner currently employs four people, including its president, Victor Hernandez. Victor Hernandez has worked for Petitioner since the inception of the company in 1998.

5. Sylvia Montanez was Petitioner's office manager until December 1999. Ruben Castillo was Petitioner's president until December 1999.

6. Petitioner owned 40 percent of Fresh Valley Food Service, LLC on June 16, 2000, when Fresh Valley Food Service, LLC violated the PACA by failing to pay a reparation award. Petitioner's former president, Ruben Castillo, owned 25 percent of Fresh Valley Food Service, LLC during the period of May 27, 1999, through May 27, 2000.

7. Arminda Cano owns 100 percent of Petitioner. Arminda Cano is 32 years old, with a high school education. Arminda Cano maintained she has never been involved with the day-to-day management of Petitioner although she has signed papers, participated in firing one of Petitioner's employees, and was aware of problems. Arminda Cano lives in California and has never visited Petitioner's place of business in Arizona.

8. Arminda Cano is married to Pedro Chavez who lives in Mexico, but visits Arizona on occasion. Pedro Chavez created Petitioner and placed the company's ownership in his wife's name. Pedro Chavez makes management decisions at Arminda Cano's company, and Petitioner's current president, Victor Hernandez, informs Pedro Chavez of the business activities of Petitioner.

9. Arminda Cano was aware of Petitioner's ownership interest in Fresh Valley Food Service, LLC since at least December 1999, when, at the time of his resignation as president, Ruben Castillo informed Arminda Cano that Petitioner had an ownership interest in Fresh Valley Food Service, LLC.

10. Denice & Filice Packing Co., located in Hollister, California, sold perishable agricultural commodities to Fresh Valley Food Service, LLC and invoiced Petitioner approximately $299,000 for the produce sold to Fresh Valley Food Service, LLC. Petitioner paid approximately $217,000 of the $299,000 owed to Denice & Filice Packing Co. During the period August 28, 1999, through October 13, 1999, Denice & Filice Packing Co. sold 26 truckloads of peppers to Fresh Valley Food Service, LLC. Denice & Filice Packing Co. invoiced Petitioner $85,042 for the peppers sold to Fresh Valley Food Service, LLC. Neither Petitioner nor Fresh Valley Food Service, LLC paid Denice & Filice Packing Co. for these peppers, and Denice & Filice

Packing Co. instituted a reparation proceeding against Fresh Valley Food Service, LLC seeking payment for these peppers. Fresh Valley Food Service, LLC never responded to the reparation complaint filed by Denice & Filice Packing Co.

11. On May 17, 2000, the Judicial Officer issued a Default Order against Fresh Valley Food Service, LLC based on Fresh Valley Food Service, LLC's failure to pay for produce Denice & Filice Packing Co. sold to Fresh Valley Food Service, LLC during the period August 28, 1999, through October 13, 1999. Fresh Valley Food Service, LLC failed to pay the May 17, 2000, reparation award by June 16, 2000, in violation of the PACA.

12. Fresh Valley Food Service, LLC had its PACA license suspended for failure to pay the May 17, 2000, reparation award by June 16, 2000. Fresh Valley Food Service, LLC's PACA license terminated on July 12, 2000, when it failed to pay its annual fees.

13. On January 31, 2001, Respondent issued a determination that Petitioner was responsibly connected with Fresh Valley Food Service, LLC on June 16, 2000, when Fresh Valley Food Service, LLC violated the PACA.

14. Petitioner has failed to demonstrate by a preponderance of the evidence that it was not actively involved in the activities resulting in Fresh Valley Food Service, LLC's June 16, 2000, violation of the PACA.

15. Petitioner has failed to demonstrate by a preponderance of the evidence that it was only nominally a shareholder of Fresh Valley Food Service, LLC.

16. Petitioner was *responsibly connected*, as that term is defined in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with Fresh Valley Food Service, LLC on June 16, 2000, when Fresh Valley Food Service, LLC violated the PACA.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Petitioner raises two issues in its "Petition for Appeal to Judicial Officer" [hereinafter Appeal Petition]. First, Petitioner contends it is not and never has been a holder of more than 10 per centum of the stock of Fresh Valley Food Service, LLC; therefore, Petitioner does not meet the definition of term *responsibly connected* in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) (Appeal Pet. at 1-10).

Responsibly connected means affiliated or connected with a commission merchant, dealer, or broker as a partner in a partnership or as an officer, director, or holder of more than 10 per centum of the outstanding stock of a

corporation or association.[4] Petitioner contends Respondent failed to prove by a preponderance of the evidence that Petitioner was a holder of more than 10 per centum of the outstanding stock of Fresh Valley Food Service, LLC[5] (Appeal Pet. at 4).

Petitioner states Fresh Valley Food Service, LLC's Articles of Organization, filed with the Arizona Corporation Commission on April 22, 1999, lists only Paul Gober, Ruben C. Castillo, and Kevin Vasquez as members of Fresh Valley Food Service, LLC (PX 1). Petitioner argues it was not even nominally a member of Fresh Valley Food Service, LLC until November 12, 1999, when Fresh Valley Food Service, LLC filed the First Amended and Restated Articles of Organization with the Arizona Corporation Commission listing Ruben C. Castillo, Kevin Vasquez, and Petitioner as members (PX 3). Petitioner correctly points out that the First Amended and Restated Articles of Organization, in which Petitioner is first listed as a member of Fresh Valley Food Service, LLC were not filed with the Arizona Corporation Commission until approximately 1 month after the last produce transaction that was the subject of *Denice & Filice Packing Co. v. Fresh Valley Food Service LLC*, PACA Docket No. RD-00-204. (Appeal Pet. at 5.) However, the issue in this proceeding is whether Petitioner was responsibly connected with Fresh Valley Food Service, LLC on June 16, 2000, when Fresh Valley Food Service, LLC violated the PACA by failing to pay the reparation award which the Judicial Officer ordered it to pay in *Denice & Filice Packing Co. v. Fresh Valley Food Service LLC*, PACA Docket No. RD-00-204 (May 17, 2000) (Default Order) (RX 4).

Petitioner further argues that none of the corporate documents issued by Petitioner or Fresh Valley Food Service, LLC show Petitioner was a holder of more than 10 per centum of the outstanding stock of Fresh Valley Food Service, LLC because, while these documents may identify Petitioner as a member of Fresh Valley Food Service, LLC they do not reveal the per centum of stock in Fresh Valley Food Service, LLC held by Petitioner (Appeal Pet. at 5-6).

The record contains two documents issued by Fresh Valley Food Service, LLC that establish that Petitioner was a holder of more than 10 per centum of the outstanding stock of Fresh Valley Food Service, LLC. In Fresh Valley Food Service, LLC's application for a PACA license, signed by Ruben Castillo on May 20, 1999, and filed on May 27, 1999, Fresh Valley Food Service, LLC reported to the United States Department of Agriculture that Petitioner held

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[4] *See* note 2.

[5] Respondent does not allege Petitioner was a partner of Fresh Valley Food Service, LLC or an officer or director of Fresh Valley Food Service, LLC.

40 per centum of the outstanding stock, Ruben Castillo held 25 per centum of the outstanding stock, Paul Gober held 25 per centum of the outstanding stock, and Kevin Vasquez held 10 per centum of the outstanding stock (RX 1; Tr. 91-93). Again in Fresh Valley Food Service, LLC's unsigned operating agreement submitted by Kevin Vasquez to the United States Department of Agriculture in June 2000, Petitioner is identified as owning a 40 percent interest, Ruben Castillo is identified as owning a 25 percent interest, Paul Gober is identified as owning a 25 percent interest, and Kevin Vasquez is identified as owning a 10 percent interest (RX 2 at 2; Tr. 102-04).

Finally, Petitioner states the only documents purporting to make Petitioner a member of Fresh Valley Food Service, LLC are signed by Petitioner's former president, Ruben Castillo. Petitioner contends Ruben Castillo had no authority to establish Fresh Valley Food Service, LLC and to make Petitioner a member of Fresh Valley Food Service, LLC. (Appeal Pet. at 6-10.)

Ruben Castillo had broad authority to run Petitioner. While Arminda Cano, Petitioner's sole stockholder testified she never authorized Ruben Castillo to make Petitioner a member of Fresh Valley Food Service, LLC (Tr. 20), her testimony indicates she provided almost no oversight over the actions of Petitioner or Ruben Castillo and Ruben Castillo "was in charge of everything" (Tr. 32).

Further, Petitioner's Articles of Incorporation contemplate the formation of corporations, partnerships, joint ventures, trusts, or other enterprises and expressly provides for the indemnification of Petitioner's officers, directors, employees, or agents serving at Petitioner's request as directors, officers, employees, or agents of another corporation, partnership, joint venture, trust, or enterprise (RX 3 at 19). Both Ruben Castillo and Arminda Cano signed these Articles of Incorporation (RX 3 at 20). I agree with the ALJ's conclusion that "[b]ecause 'partnership' and 'other enterprises' were contemplated in Petitioner's Articles of Incorporation, Mr. Castillo was not acting outside his authority in establishing a joint venture, partnership, or other enterprise in conjunction with his duties as President of Petitioner." (Initial Decision and Order at 7.)

Petitioner argues that the indemnification clause in article 9 of the Articles of Incorporation does not mean that Petitioner's president was vested with authority to unilaterally form another entity and to make Petitioner a member of that entity (Appeal Pet. at 8). I reject Petitioner's argument. The record reveals that Ruben Castillo was vested with authority to perform every corporate function (Tr. 32). Petitioner ratified Ruben Castillo's action by paying for produce purchased by Fresh Valley Food Service, LLC. Finally, pursuant to section 16 of the PACA (7 U.S.C. § 499p) the act of Petitioner's

officer, Ruben Castillo, is deemed the act of Petitioner.

Second, Petitioner contends the ALJ based her conclusion that Petitioner was actively involved in activities resulting in Fresh Valley Food Service, LLC's violation of the PACA on Petitioner's payment of $217,000 of the $299,000 owed to Denice & Filice Packing Co. for produce ordered by Fresh Valley Food Service, LLC. Petitioner contends the ALJ's finding that Petitioner paid Denice & Filice Packing Co. for produce ordered by Fresh Valley Food Service, LLC is not supported by the record. (Appeal Pet. at 2.)

I disagree with Petitioner's contention that the ALJ's finding that Petitioner paid Denice & Filice Packing Co. $217,000 for produce ordered by Fresh Valley Food Service, LLC is error. I find the record contains substantial evidence that Petitioner paid Denice & Filice Packing Co. for produce ordered by Fresh Valley Food Service, LLC.

Petitioner states the Denice & Filice Packing Co. representative who testified did not specify who paid Denice & Filice Packing Co. $217,000 of the $299,000 owed for produce. I disagree with Petitioner. Mark Bauman, chief financial officer for Denice & Filice Packing Co. testified that Denice & Filice Packing Co. invoiced Petitioner for produce sold to Fresh Valley Food Service, LLC and Petitioner paid the $217,000 at issue, as follows:

> [BY MR. RUDOLPH:]
>
> Q. All right. And are you familiar with the Petitioner?
>
> [BY MR. BAUMAN:]
>
> A. Yes.
>
> Q. How are you familiar with the Petitioner?
>
> A. The L.L.C. would order products through our company. We would pack it for them and then ship it to their customers.
>
> . . . .
>
> Q. How are you familiar with the Petitioner, the corporation Fresh Valley Produce, Inc.?
>
> A. When Kevin Vasquez first came to us he represented that he worked for the corporation.
>
> Q. Okay.

A. And then subsequently when we started doing business with them they brought business cards saying that they were an L.L.C. And our sales manager did not want to extend credit to the L.L.C. so he told Kevin we were going to invoice the corporation.

And he told me he called Ruben Castillo and informed him that if he wanted to do business with us we would be billing the corporation for any product they bought from us.

. . . .

Q. . . . .

Do you recall what period of, what time period that Kevin Vasquez first approached you?

A. It would have been early in `99, probably February or March of `99.

Q. Okay. And then later on you said you were supposed, you were going to do business or it was proposed to do business with the L.L.C., Kevin Vasquez has proposed to do business with the L.L.C.?

A. Yes. Yeah, they came to us and said that they have now formed an L.L.C. And that's when we told them we didn't want to do business with an L.L.C. that had no track record.

Q. And why did, how long after you set up this account did Kevin Vasquez bring up the L.L.C.?

A. Would have been about May or June.

Q. Okay. So a couple months after the account had been set up. All right.

I'm handing you what's been marked as Respondent's Exhibit Number 19.

. . . .

Q. Do you know what this document is?

A. This is an invoice that was faxed over to us from Fresh Valley Food Service, L.L.C. for us to pack 84 boxes of 25 pound large peppers and ship them to Boys Market in Delray Beach, Florida. And we filled that order on the 24th and it's initialed by the sales manager. And that number 76287 is the invoice number where we would have invoiced the corporation.

Q. So in this transaction you packed, your company packed the peppers and sent them to the ship to address of Boys Farmers?

A. That's correct.

Q. And how were you going to get paid for these peppers that you packed?

A. We invoiced the corporation for the peppers.

Q. Okay.

A. And have been paid for them.

Q. So you sent your invoice?

A. 76287.

Q. To Fresh Valley Produce?

A. Yes.

Q. The corporation?

A. Yes.

Q. And there was no dispute over this invoice was there?

A. Not at all.

Q. You were paid?

A. We were paid.

. . . .

Q. Okay. Of course your company didn't get paid for some invoices; is that correct?

A. That's correct. We invoiced them for about $299,000 worth of product. They paid for about 217. And there's 82,000 left to pay, approximately.

Tr. 135-40.

Petitioner correctly states Mark Bauman does not specify who "they" is in his last response in the above-quoted testimony (Appeal Pet. at 10-11). However, the record clearly establishes Mark Bauman was referring to Petitioner when he used the words "them" and "they" in his last response in the above-quoted testimony.[6]

Further, Petitioner notes Mark Bauman's testimony was not part of the record when Respondent made his January 31, 2001, determination that Petitioner was responsibly connected with Fresh Valley Food Service, LLC (Appeal Pet. at 11). I agree with Petitioner. However, I do not conclude the ALJ erred by relying on Mark Bauman's testimony because it was not part of the record when Respondent made his January 31, 2001, determination.

Under the Rules of Practice, the record upon which the Chief of the PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture, bases a responsibly connected determination is only part of the record in a proceeding to review that determination.[7] Petitioner filed Petition for Review of Respondent's January 31, 2001, determination on March 1, 2001. A petition for review is deemed a request for hearing.[8] Moreover, Petitioner specifically requested a hearing in the Petition for Review (Pet. for Review at 1). The Rules of Practice provides for the receipt of witness testimony at hearings.[9] The administrative law judge's decision must be made in accordance with 5 U.S.C. § 556[10] which requires that the decision be based on consideration of the whole record or those parts of the record cited by a party.[11] Therefore, I find the ALJ did not err when she considered the testimony given by Mark Bauman at the April 24, 2002, hearing.

Finally, Petitioner contends Denice & Filice Packing Co.'s institution of a

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[6]*See Wiley v. Borough of Towanda*, 26 F. 594, 595 (C.C.W.D. Pa. 1886) (finding, even though the word "they" was sometimes employed in an agreement, the parties were referring to a corporation).

[7]*See* 7 C.F.R. § 1.136(a).

[8]*See* 7 C.F.R. § 1.141(a).

[9]*See* 7 C.F.R. § 1.141(h)(1).

[10]*See* the definition of the word *decision* in 7 C.F.R. § 1.132.

[11]*See* 5 U.S.C. § 556(d).

reparation proceeding only against Fresh Valley Food Service, LLC makes clear that Denice & Filice Packing Co. knew it contracted only with Fresh Valley Food Service, LLC and knew only Fresh Valley Food Service, LLC was liable to Denice & Filice Packing Co. for produce Denice & Filice Packing Co. sold to Fresh Valley Food Service, LLC. Petitioner contends, if Denice & Filice Packing Co. thought Petitioner was involved with or responsible for Fresh Valley Food Service, LLC, Denice & Filice Packing Co. would have instituted the reparation action against Petitioner. (Appeal Pet. at 11.)

The record establishes Denice & Filice Packing Co. viewed Petitioner as related to Fresh Valley Food Service, LLC and responsible for payment for produce Denice & Filice Packing Co. sold to Fresh Valley Food Service, LLC. Mark Bauman testified that Denice & Filice Packing Co. viewed Petitioner responsible for paying for produce that Denice & Filice Packing Co. sold to Fresh Valley Food Service, LLC and that in hindsight, Denice & Filice Packing Co. probably should have instituted the reparation action against both Petitioner and Fresh Valley Food Service, LLC (Tr. 135-41). Denice & Felice Packing Co. sent Petitioner a written demand for payment for produce sold to Fresh Valley Food Service, LLC sometime prior to February 3, 2000 (RX 10). When Petitioner refused to pay, Denice & Filice Packing Co. responded with a letter dated February 8, 2000, from its attorney again demanding payment from Petitioner (RX 11). Finally, in a letter dated February 9, 2000, Denice & Filice Packing Co. requested that the PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture, request Petitioner "and/or" Fresh Valley Food Service, LLC make full payment to Denice & Filice Packing Co. (RX 12).

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

ORDER

I affirm Respondent's January 31, 2001, determination that Petitioner was responsibly connected with Fresh Valley Food Service, LLC during the period of time that Fresh Valley Food Service, LLC violated the PACA.

Accordingly, Petitioner is subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)).

This Order shall become effective 60 days after service of this Order on Petitioner.

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PERISHABLE AGRICULTURAL COMMODITIES ACT

REPARATION DECISIONS

THOMAS PRODUCE COMPANY v. LANGE TRADING COMPANY, INC.
PACA Docket No. R-02-120.
Decision and Order.
Filed January 30, 2003.

PACA – Contracts – Novation.

Where Respondent buyer was concluded to have accepted a load of tomatoes because it failed to prove that it gave notice of rejection within the time required in the Regulations, but did convey its complaint about the load to Complainant's seller, and its opinion that the load could bring more money if sold elsewhere, Complainant's repossession of the load with Respondent's permission did not constitute a novation of, or recision of, the contract, and Complainant was deemed to have acted as Respondent's agent in reselling the tomatoes. Inspection of the tomatoes at Complainant's request after the repossession shoed that the tomatoes made good delivery, and Respondent was liable for the contract price, less the amount realized on resale.

Mike D. Bess, for Complainant.
Respondent is Pro Se.
Patricia Harps, Presiding Officer.
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.*), hereinafter referred to as the Act. A timely complaint was filed with the Department within nine months of the accrual of the cause of action, in which Complainant seeks a reparation award against Respondent in the amount of $10,039.50 in connection with one trucklot of tomatoes shipped in the course of interstate commerce.

Copies of the Report of Investigation prepared by the Department were served upon the parties. A copy of the formal complaint was served upon the Respondent, which filed an answer thereto, denying liability to Complainant.

The amount claimed in the formal complaint does not exceed $30,000.00. Therefore, the documentary procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered part of the evidence of the case, as is the Department's Report of Investigation. In addition, the parties were

given the opportunity to file evidence in the form of verified statements and to file briefs. Complainant filed an opening statement and a statement in reply. Respondent filed an answering statement. Both parties also filed a brief.

Findings of Fact

1. Complainant, Thomas Produce Company, Inc., is a corporation whose post office address is 9905 Clint Moore Road, Boca Raton, Florida, 33496.

2. Respondent, Lange Trading Company, Inc., is a corporation whose post office address is 5231 S. 6th Street, Springfield, Illinois, 62703. At the time of the transaction involved herein, Respondent was licensed under the Act.

3. On or about November 22, 1999, Complainant sold to Respondent, and shipped from loading point in Boca Raton, Florida, to Respondent's customer, Veg Fresh, in Los Angeles, California, 1,600 cartons of medium tomatoes at $7.00 per carton, or $11,200.00, plus $0.85 per carton for palletizing, or $1,360.00, and $23.50 for a temperature recorder, for a total f.o.b. contract price of $12,583.50.

4. The tomatoes mentioned above arrived at the place of business of Veg-Fresh Farms LLC ("Veg-Fresh"), in Los Angeles, California, on Friday, November 26, 1999, at which time Veg-Fresh complained that the tomatoes did not meet good delivery guidelines, and advised that, due to the holiday weekend, an inspection could not be performed until the following Monday. Veg-Fresh also advised that the load would probably return more money if it was moved to a wholesale street market where it could be more readily sold. Complainant subsequently agreed to move the load to a receiver of its own choosing, Continental Tomato Packers in Sacramento, California.

5. On Tuesday, November 30, 1999, the tomatoes were federally inspected at the place of business of Continental Tomato Packers in Sacramento, California, the report of which disclosed, in relevant part, as follows:

TEMPERATURES: 49 to 52°
PRODUCT: Tomatoes
BRAND/MARKINGS: "7-T's"
ORIGIN: FL
LOT ID: 914611 = USDA
NUMBER OF CONTAINERS: 1600 Cartons
INSP. COUNT: N

AVERAGE DEFECTS	including SER. DAM.	including V.S. DAM.	OFFSIZE/DEFECTS
01 %	00 %	00 %	Quality (Scars, [illeg.], Miss.)
01 %	00 %	00 %	Bruising, scattered throughout the pack
08 %	03 %	00 %	Sunken discolored areas (4 to 14%)
04 %	04 %	04 %	Soft (2 to 9%)
04 %	04 %	04 %	Decay (4 to 7%)
18 %	11 %	08 %	Checksum

GRADE: Fails to grade U.S. No. 1 account of condition.

6. On December 4, 1999, Mr. John M. Moore, the salesman who negotiated the transaction on behalf of Complainant, sent a letter to Mr. Thomas Banks, the salesman who negotiated the transaction on behalf of Respondent. The letter reads as follows:

> Your customer in California rejected this load of tomatoes on November 26, 1999. Due to the information that you supplied to me about the quality of the load, I found a Customer of mine to take this load from you. My customer, Continental Tomato Packers, received the load of tomatoes on November 30, 1999. I instructed Continental to have the load inspected ASAP. This load was sold based off of a U.S. Combination Grade. CTP had the load inspected as US # 1. Enclosed is a copy of the Inspection. The inspection was taken on November 30, 1999, four days after your customer had received the load. The inspection shows that the grade on these tomatoes was 82% and was slightly out of grade on serious damage. I believe that if the inspection had been taken in a timely fashion that there would have been no reason for this load to be rejected. This load was sold for $7.85 per case F.O.B. Boca Raton, Florida. As a result, Thomas Produce will seek any shortfall of moneys received by Continental from the Lange Trading Company, Inc.

7. On December 7, 1999, Respondent's Thomas Banks responded to the letter set forth above with a letter addressed to Complainant's John M. Moore, which reads as follows:

> In response to your letter dated December 4, 1999, our customer in California did not reject this load.
>
> As per our phone conversation on Saturday, November 27, 1999, we informed you that the tomatoes were not up to our customer's standards because of very high color, some soft, decay and rain check. Due to the holiday, our customer would not be able to get an inspection until

Monday 29, 1999 as indicated to you.

You made the decision that you would be better off sending the load to a market with some street trade as our customer's only outlet for a load with these problems would be to sell them for salsa at around two to two and ½ dollars at the time.

In our conversation you agreed to take the load back and place it with your customer, Continental Tomato Packers. As such, Lange Trading was relieved of any and all liability for payment of this load of tomatoes.

Therefore, your letter dated December 4, 1999 is contradictory to our understanding of the new agreement entered into with you on Saturday, November 27, 1999 and has no relevance or merit.

8. Continental Tomato Packers paid Complainant $2,544.00 for the tomatoes with check number 014653, dated December 30, 1999.

9. The informal complaint was filed on May 15, 2000, which is within nine months from the accrual of the cause of action.

Conclusions

Complainant brings this action to recover the unpaid balance of the contract price for one trucklot of tomatoes that it states was wrongfully rejected by Respondent's customer, Veg-Fresh Farms, LLC, in Los Angeles, California. Complainant maintains that after the tomatoes arrived at Veg-Fresh, Respondent reported that the tomatoes were unacceptable and that Veg-Fresh was rejecting them, so Complainant moved the tomatoes to another receiver, Continental Tomato Packers, in Sacramento, California, and had them federally inspected. The inspection, Complainant states, revealed that the tomatoes were in suitable shipping condition. Accordingly, Complainant maintains that the rejection of the tomatoes was not justified, and claims that it incurred damages as a result of the rejection totaling $10,039.50, which amount represents the difference between the resale proceeds of $2,544.00 received from Continental Tomato Packers, and the $12,583.50 contract price with Respondent.

In response to Complainant's allegations, Respondent attached to its sworn answer the affidavit of its salesman, Mr. Thomas Banks. In the affidavit, Mr. Banks states that he received notice that there was a problem with the tomatoes early in the morning on Saturday, November 27, 1999. At that time, Mr. Banks

states he was advised that an inspection had been called for upon arrival of the load on Friday, but that the inspector never showed up, so the load could not be inspected until the following Monday morning. Mr. Banks states that his customer, Veg-Fresh, wanted him to call the shipper and tell him that the load showed very high color, some soft, some decay and some rain check. According to Mr. Banks, Veg-Fresh also advised that the shipper would be better off placing the load in a market with some street trade, as all Veg-Fresh would be able to do was sell it for salsa. Mr. Banks states that he called Complainant's John Moore and relayed his customer's opinion of the product, and that to his surprise, Mr. Moore did not insist upon an inspection and agreed to take the load back. After Complainant moved the load to Continental Tomato Packers, Mr. Banks states he did not hear anything further until December 6, 1999, when he received a letter via facsimile from Mr. Moore stating that Respondent's customer rejected the tomatoes, and seeking monies to cover any shortfall in the payment received from Continental Tomato Packers (see Finding of Fact 6). Mr. Banks adds that he took prompt exception to this letter with his letter of December 7, 1999, which Mr. Moore did not refute (see Finding of Fact 7).

In response to Mr. Banks' allegations, Complainant submitted a sworn statement signed by its salesman, Mr. John Moore, as its opening statement. In the statement, Mr. Moore contends that when the tomatoes arrived at the place of business of Respondent's customer, Mr. Banks advised that his customer couldn't use the load and that the tomatoes were still on the truck. According to Mr. Moore, Mr. Banks stated that the reason his customer didn't want the tomatoes was because they had high color, decay, and softness. Mr. Moore states that Mr. Banks also advised that perhaps the tomatoes could be sold for $2.00 per carton by taking them to a processor where they could be used to make salsa, or they could be taken to another local wholesaler and sold on the street. Mr. Moore explains that he sold the tomatoes for $7.85 per carton, so he obviously didn't want the tomatoes to be sold for $2.00 per carton, but he also did not know any local wholesalers. Mr. Moore states that he only agreed to move the tomatoes because Respondent didn't want them, so he found a receiver in Sacramento who agreed to take the load, and he had the tomatoes inspected there. Mr. Moore states that he got the inspection because he wanted to see what type of problems the tomatoes had. Mr. Moore states further that the inspection showed that the product didn't have high color and decay as Respondent's customer had reported, and that in fact, eight days after shipment, the tomatoes still made good delivery. Mr. Moore states that immediately after the inspection, he called Mr. Banks and told him that the tomatoes didn't have the quality problems that he said they did. Mr. Moore states he also told Mr. Banks that the rejection was unjustified and that he would be holding him liable

for any damages.

The primary issue to be decided here is whether Respondent was relieved of liability for the tomatoes when Complainant agreed to move the load to Continental Tomato Packers. There is no dispute that after Respondent's customer complained about the condition of the tomatoes, Complainant found its own receiver, Continental Tomato Packers, to receive and resell the load. The legal significance which should be attached to Complainant's voluntary repossession of the tomatoes, consented to by Respondent, will be determined by the context within which the repossession took place. The parties did not, at the time, verbally agree to any particular legal significance to the repossession. Complainant's salesman, John Moore, claims that he repossessed the load because he thought Respondent had rejected. However, Mr. Moore admits that Respondent's Thomas Banks did not say he was rejecting.[1] Mr. Moore's description of what he was told by Thomas Banks, given in Complainant's Opening Statement, is as follows:

> . . . Mr. Banks told me that his customer couldn't use the load and that they were still on the truck. Mr. Banks stated the reason his customer didn't want the tomatoes was because they had high color, decay, and softness. He told me that perhaps the tomatoes could be sold for $2 per carton, by taking them to a processor, where they could be used to make salsa. Or they could be taken to another local wholesaler and sold on the street.

Thomas Banks' version of the conversation, contained in an affidavit attached to the Answer, is as follows:

> . . . Early Saturday morning on November 27, 1999, I received a message that there was a problem with the Thomas Produce load. The buyer had called for an inspection on Friday when the load had arrived but the inspector did not show up. Due to the Thanksgiving holiday weekend, the load, which, was still on the truck could not be inspected until Monday morning.
>
> Veg Fresh wanted me to call the shipper and tell him the load showed very high color, some soft, some decay and some rain check. He said the shipper would be better off placing the load in a market with some street

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[1]An attempt to thrust possession back upon the seller is the very essence of a rejection. "Somewhat simplified, rejection is a combination of the buyer's refusal to keep delivered goods and his notification to the seller that he will not keep them." B J. White & R. Summers, Handbook of the Law Under the Uniform Commercial Code, § 8B1, p. 247 (1972).

> trade as all Veg Fresh would be able to do with it was to sell it for salsa. I called John Moore with Thomas Produce and relayed my customer's opinion of the product. To my surprise, he did not insist on an inspection, he agreed to take the load back.

Neither of these descriptions of what occurred necessarily entails a rejection of the tomatoes by Respondent.[2]

If Respondent did not reject, it is still pertinent to inquire whether Respondent had accepted the load before it was repossessed by Complainant. This will require a discussion of the reasonable time provision of the Regulations (see 7 C.F.R. 46.2(cc)), and an inquiry as to whether, and when an inspection was requested. Mr. Moore, in Complainant's Statement in Reply, related a conversation he had with an official in the Inspection Service in an effort to show that no inspection was requested. However, the statements attributed to the official in the Inspection Service are hearsay, and, furthermore, it is improper to submit new evidence in a Statement in Reply because there is no opportunity for the other party to rebut the evidence. Respondent's Michael Smith did, however, attempt to rebut the evidence by relating his own conversation with the same official in the Inspection Service in Respondent's brief. Evidence, however, cannot be received in connection with a brief. Accordingly, both the Statement in Reply and Brief, insofar as they relate to the issue of whether an inspection was called for, will be ignored. Without considering these submissions, a preponderance of the evidence of record supports Respondent's contention that an inspection was called for on November 26th.

The relevant "reasonable time" within which rejection or acceptance must take place is defined by the Regulations in section 46.2 (cc)(2) as follows:

> For fresh fruits and vegetables . . . with respect to truck shipments, not to exceed 8 hours after the receiver or a responsible representative is given notice of arrival and the produce is made accessible for inspection; . . .

Paragraphs (3) and (4) of the same section provide that:

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[2]A rejection by Respondent's customer to Respondent does not have the effect of causing a rejection by Respondent to Complainant. A. . . rejections must be made by each buyer to [its] own seller, and must be clearly communicated as such. [*See*] Phoenix Vegetable Distributors v. Randy Wilson, Co., 55 Agric. Dec. 1345 (1996).

> (3) If, within the applicable period, the receiver cannot make a thorough inspection due to adverse weather conditions or applies for but cannot obtain Federal inspection before the end of this period, and so notifies the consignor within the applicable period, the period shall be extended until weather conditions permit inspection or until Federal inspection is made, as the case may be, plus two hours after either an oral or written report of the results of such inspection is made available to the receiver; and
> (4) In computing the time periods specified above, (i) for shipments arriving on non-work days or after the close of regular business hours on work days when a representative of the receiver having authority to reject shipments is not present, non-working hours preceding the start of regular business hours on the next working day shall not be included; and (ii) for shipments arriving during regular business hours when a representative of the receiver having authority to reject shipments customarily is present, the period shall run without interruption except that, for shipments arriving less than two hours before the close of regular business hours, the unexpired balance of the time period shall be extended and run from the start of regular business hours on the next working day.

The subject load arrived on November 26th, a Friday. Respondent has not submitted any evidence as to the time of arrival on the 26th. Respondent states that notice to Complainant was not given until early on the 27th. Respondent does not state what is meant by "early," but in view of our lack of knowledge of the arrival time on the 26th this is hardly consequential. Respondent had the burden of proof as to notice, and has failed to prove that the federal inspection was requested within the requisite 8 hours following arrival, or, even if it was so requested, that notice was given to Complainant, within the applicable 8 hour period, that the inspection would be delayed.[3] In fact, given the fact that Respondent's first notice to Complainant was the day following arrival, it seems unlikely that this latter notice would have been within the requisite 8 hours. Accordingly, we must conclude that Respondent accepted the load.[4]

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[3]*See Robert Ruiz Inc. v. Hale Brothers, Inc. and/or Hubert H. Nall Co., Inc.*, 43 Agric. Dec. 572 (1984).

[4]The Uniform Commercial Code, section 2B606, states, in part, that "[a]cceptance occurs when the buyer . . . fails to make an effective rejection . . . ." The Regulations (7 C.F.R. '46.2(dd)) state,

(continued...)

Respondent makes much of the fact that Complainant's repossession of the load was voluntary. This does indeed show that Respondent did not reject. However, when we question the significance of the repossession as an indication that the contract was voided, we fail to see that a voluntary repossession by Complainant is any more relevant than the fact that Respondent voluntarily relinquished possession.[5] Neither of these voluntary actions tells us that either party intended thereby to void the contract. If Complainant had taken back a load that Respondent had yet to accept there would be considerable legal significance.[6] However, as we have already determined that the load had been accepted by Respondent, we think that, in view of the total lack of evidence as to any expressed agreement between the parties attendant upon the repossession of the load, it is best to attribute the minimum significance possible to the repossession of the load. That significance is merely that Complainant acted as Respondent's agent in the disposition of the load in an effort to minimize damages. At the point at which Complainant repossessed the load neither party knew for certain whether the load had made good delivery. What they did know was that Respondent's customer had stated that it was in no position to get a good price for the tomatoes. Therefore, Complainant's voluntary repossession of the load at that point, with Respondent's voluntary permission, was a prudent action to minimize damages.[7]

As we have determined that Respondent accepted the tomatoes, Respondent is liable to Complainant for the full contract price of the tomatoes, less any

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[4](...continued)
in part, that "'[a]cceptance' means: . . . [f]ailure of the consignee to give notice of rejection to the consignor within a reasonable time as defined in paragraph (cc) of this section . . . ."

[5]There can be no doubt but what Respondent's relinquishment of the load was voluntary. If Respondent had already accepted the load at the time Complainant sought to repossess it then Complainant could not have repossessed it without Respondent's permission, for it was, by virtue of Respondent's acceptance, Respondent's property. If Respondent had not accepted the load at the time Complainant sought to repossess it, all Respondent had to do to prevent Complainant from gaining possession was to accept it.

[6]Complainant would be repossessing its own goods. This would not necessarily mean that there was a novation of the contract, but, if the repossession did not accomplish a novation Complainant could nevertheless not recover the contract price, but would be relegated to damages for non-acceptance under UCC section 2B708.

[7]*See Robert A. Shipley, d/b/a Shipley Sales Service v. Peacock Sales Co., Inc.*, 46 Agric. Dec. 702 (1987).

damages resulting from any breach of warranty by Complainant.[8] The tomatoes were sold under f.o.b. terms. The Regulations[9], in relevant part, define f.o.b. as meaning:

> . . . that the produce quoted or sold is to be placed free on board the boat, car, or other agency of the through land transportation at shipping point, in suitable shipping condition . . . , and that the buyer assumes all risk of damage and delay in transit not caused by the seller irrespective of how the shipment is billed.
> Suitable shipping condition is defined,[10] in relevant part, as meaning:
> . . . that the commodity, at time of billing, is in a condition which, if the shipment is handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the contract destination agreed upon between the parties.[11]

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[8]*Norden Fruit Co., Inc. v. E D P Inc.*, 50 Agric. Dec. 1865 (1991); *Granada Marketing, Inc. v. Jos. Notarianni & Company, Inc.*, 47 Agric. Dec. 329 (1988); *Jerome M. Matthews v. Quong Yuen Shing & Co.*, 46 Agric. Dec. 1681 (1987).

[9]7 C.F.R. § 46.43(i).

[10]7 C.F.R. § 46.43(j).

[11]The suitable shipping condition provisions of the Regulations (7 C.F.R. § 46.43(j)) which require delivery to contract destination "without abnormal deterioration", or what is elsewhere called "good delivery" (7 C.F.R. § 46.44), are based upon case law predating the adoption of the Regulations. *See* Williston, Sales § 245 (rev. ed. 1948). Under the rule it is not enough that a commodity sold f.o.b., U. S. No. 1, actually be U. S. No. 1 at time of shipment. It must also be in such a condition at the time of shipment that it will make good delivery at contract destination. It is, of course, possible for a commodity that grades U. S. No. 1 at the time of shipment, and is shipped under normal transportation service and conditions, to fail to make good delivery at destination due to age or other inherent defects which were not present, or were not present in sufficient degree to be cognizable by the federal inspector, at shipping point. Conversely, since the inherently perishable nature of commodities subject to the Act dictates that a commodity cannot remain forever in the same condition, the application of the good delivery concept requires that we allow for a "normal" amount of deterioration. This means that it is entirely possible for a commodity sold f.o.b. under a U. S. grade description to fail, at destination, to meet the published tolerances of that grade, and thus fail to grade at destination, and nevertheless make good delivery. This is true because under the f.o.b. terms the grade description applies only at shipping point, and the applicable warranty is only that the commodity thus sold will reach contract destination without abnormal deterioration, not that it will meet the grade description at destination. If the latter result is desired then the parties should effect a delivered sale rather than an f.o.b. sale. For all commodities other than lettuce (for which specific good delivery standards have been promulgated)

(continued...)

A federal inspection performed on the tomatoes on November 30, 1999, eight days following shipment, disclosed 18% average defects, including 8% soft and decay. The United States Standards for Grades of Fresh Tomatoes[12] provide a destination tolerance for U.S. No. 1 tomatoes of 15% for tomatoes that fail to meet the requirements of the grade, including therein not more than 5% for tomatoes which are soft and/or affected by decay. To allow for some normal deterioration in transit for tomatoes sold f.o.b., we typically expand these tolerances under the suitable shipping condition rule to as much as 20% average defects, including 8% soft and/or decay, for a coast to coast shipment having a duration of approximately five days. The tomatoes in question fell within these tolerances eight days following shipment. On this basis, we find that the evidence clearly fails to support Respondent's contention that the tomatoes were not in suitable shipping condition. Lacking proof of a breach of warranty by Complainant, Respondent is liable to Complainant for the contract price of the tomatoes, $12,583.50, less the proceeds collected by Complainant from their resale, $2,544.00, or a balance of $10,039.50.

Respondent's failure to pay Complainant $10,039.50 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.[13] Since the Secretary is charged with the duty of awarding damages, he/she also has the duty, where appropriate, to award interest at a reasonable rate as a part of each reparation award.[14] We have determined that a reasonable

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[11](...continued)
what is "normal" or abnormal deterioration is judicially determined. *See Pinnacle Produce, Ltd. v. Produce Products, Inc.*, 46 Agric. Dec. 1155 (1987); *G & S Produce v. Morris Produce*, 31 Agric. Dec. 1167 (1972); *Lake Fruit Co. v. Jackson*, 18 Agric. Dec. 140 (1959); and *Haines Assn. v. Robinson & Gentile*, 10 Agric. Dec. 968 (1951).

[12]7 C.F.R. §§ 51.1855 through 51.1877. Grade standards may also be accessed via the Internet at www.ams.usda.gov/standards/stanfrfv.htm.

[13]*Louisville & Nashville Railroad Co. v. Sloss Sheffield Co.*, 269 U.S. 217 (1925); *Louisville & Nashville Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916).

[14]*See Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Co., Inc.*, 29 Agric. Dec. 978 (1970); *John W. Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335 (1970); and *W.D. Crockett* (continued...)

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. § 499e(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 Complainant as reparation $10,039.50, with interest thereon at the rate of 10% per annum from January 1, 2000, until paid, plus the amount of $300.00.
Copies of this Order shall be served upon the parties.
Done at Washington, DC.

ANTHONY VINEYARDS, INC. v. SUN WORLD INTERNATIONAL, INC.
PACA Docket No. R-98-143.
Ruling on Respondent's Petition for Reconsideration.
Filed January 8, 2003.

PACA-R – Equitable estoppel defense – Complaint, amendment of, when new counsel – Attorney fees, prevailing party awarded – American rule, attorney fees – English rule, attorney fees – PACA, attorney fee awards to prevailing merchant, dealer or broker only in an oral hearing.

The prevailing party in a PACA reparation action may be awarded attorney's fees upon a properly filed request after hearing (7 CFR § 47.19(d)). The question of which party is the prevailing party is one that depends upon the facts of the case. Where Respondent prevailed on two of the three issues presented at the hearing and limited Complainant's recovery to 32% of the amount actually litigated at the hearing, Respondent is determined to be the prevailing party, and is awarded attorney's fees and expenses, reduced by 32%..

Patricia J. Ryan, for Complainant.
Stephen P. McCarron, for Respondent.
Andrew Y. Stanton , Presiding Officer.
Decision and Order filed by William G. Jenson, Judicial Officer.

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), a Decision and Order

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[14](...continued)
v. Producers Marketing Association, Inc., 22 Agric. Dec. 66 (1963).

(hereinafter, "Decision") was issued on February 7, 2001, awarding reparation to Complainant in the amount of $132,026.19 plus interest, and $300.00 as reimbursement for Complainant's handling fee. The Decision also awarded fees and expenses to Respondent in the amount of $53,782.55 plus interest. Complainant filed a Petition for Reconsideration and, on November 28, 2001, a Ruling on Petition for Reconsideration (hereinafter, "Ruling") was issued, awarding Complainant $186,971.40 plus interest, and $300.00 as reimbursement for Complainant's handling fee. The Ruling also awarded fees and expenses to Complainant in the amount of $93,485.70 plus interest.

Respondent filed a Petition for Reconsideration of the November 28, 2001, Ruling in which it makes several assertions of error. Complainant filed an Opposition to Petition for Reconsideration.

Respondent contends that the Ruling erroneously awarded Complainant $27,516.65 as damages for Respondent's overcharges for supplies and services, reversing the denial of such claim in the Decision. Respondent argues that Complainant's claim should be dismissed on the grounds of equitable estoppel. Respondent states that when the claim for overcharges was made in the formal complaint, Complainant did not allege a specific amount, but asserted that Complainant would "amend the Complaint to allege the precise amount of the overcharges once it receives a breakdown of such overcharges from the PACA auditors." Respondent states that Complainant never did amend the complaint to include the specific amount of alleged overcharges prior to the hearing or at the hearing and did not mention the issue in its brief. Respondent claims that circumstances warranting equitable estoppel are present, citing *In re: S.E.L. International Corporation*, 51 Agric. Dec. 1407 (1992), asserting that Complainant, by its words, acts, conduct or acquiescence, caused Respondent to believe that Complainant had abandoned the claim for overcharges, that Complainant's words and conduct, indicating that it had abandoned the claim, were done willfully or negligently, and that Respondent relied on Complainant's representations that the claim was abandoned by not presenting any evidence with respect to this issue.

The $27,516.65 claimed by Complainant for overcharges comes from the finding of the Department's auditors, which was made after the filing of the formal complaint and was included in the Report of Investigation served upon both parties. The finding was referred to in the Ruling (at page 3) as follows:

> The audit further showed Sun World received discounts totaling $10,991.41 for its early payment of grape supply invoices. These discounts were not passed on to Anthony Vineyards. Sun World charged complainant $4,459.30 more than its actual cost for the supplies

> it invoiced complainant. Sun World overcharged complainant $12,065.94 for hauling the grapes from the field to its central facility. This was due to Sun World charging Anthony Vineyards for hauling a full truck when there was other grower's product on the truck. The USDA accounting allowed actual cost for the supply and hauling charges.

Respondent relies upon *S.E.L.* for the elements of equitable estoppel, but the decision in that case specifically makes reference to the fact that it is applying the law of the 11th Circuit (51 Agric. Dec. at 1419). In the case at hand, we must apply the standard for equitable estoppel utilized in the Circuit where Respondent is engaged in business, the 9th Circuit. That standard is set forth in *United States v. Hemmen*, 51 F.3d 883, 892 (9th Cir. 1995), as follows:

> The traditional elements of equitable estoppel are that: (1) the party to be estopped knows the facts, (2) he or she intends that his or her conduct will be acted on or must so act that the party invoking estoppel has a right to believe it is so intended, (3) the party invoking estoppel must be ignorant of the true facts, and (4) he or she must detrimentally rely on the former's conduct. *Watkins v. United States Army,* 875 F.2d 699, 709 (9th Cir.1989) (en banc), *cert. denied,* 498 U.S. 957, 111 S.Ct. 384, 112 L.Ed.2d 395 (1990).

With respect to the first and third elements, there is no doubt that both parties knew or should have known the facts - that the Department's audit contained a finding that $27,516.65 was overcharged by Respondent - as that finding was part of the Report of Investigation. We do not conclude that the second element was present; that Complainant intended that its conduct, the failure to formally amend the complaint to note the amount of damages for overcharges found by the audit, would give Respondent the right to believe that Complainant was abandoning its claim. We believe Complainant assumed, with good reason, that Respondent was aware that the amount of the alleged overcharges was $27,516.65, so there was no reason for Complainant to formally amend its complaint. Further, we do not believe that Respondent detrimentally relied on Complainant's failure to amend the complaint, in view of the fact that the findings of the audit, showing the amount of the alleged damages as $27,516.65, were made known to Respondent. Respondent had the opportunity at the hearing to present evidence to attempt to rebut Complainant's claim for overcharges, but elected not to do so. Under these circumstances, equitable estoppel is not warranted.

Respondent claims that the Decision erred in determining that Complainant's June 9, 1997, letter, filed on June 11, 1997, was an informal complaint that preserved jurisdiction over transactions that accrued within nine months prior to the date of filing. Respondent asserts that of the six allegations of wrongful conduct alleged in the letter, only the first was made with specificity. With respect to the remaining five allegations, Respondent contends Complainant did not provide any details but merely requested that the Department conduct an audit. Respondent argues that Complainant's letter did not comply with section 47.3(a)(2) of the Rules of Practice (7 C.F.R. § 47.3(a)(2)), as it did not contain "the essential details of the transaction complained of."

Complainant asserts that Respondent should not be permitted to raise the issue of whether Complainant's letter qualifies as an informal complaint, as it was not one of the findings made in the Ruling. However, the Ruling did discuss whether various transactions were within the Department's jurisdiction, and concluded that certain transactions did so qualify because they were referred to, in general terms, in Complainant's letter and accrued within nine months prior to June 11, 1997 (Ruling, at pages 1-3, 9). As the issue of the jurisdictional effect of Complainant's letter was addressed in the Ruling, Respondent is not precluded from raising the issue of whether the letter is a valid informal complaint for jurisdictional purposes.

However, we do not agree with Respondent's contention that Complainant's letter was not a valid informal complaint. While Respondent is correct that section 47.3(a)(2) of the Rules of Practice states that the informal complaint shall set forth the "essential details" of the transactions, that section also states that these details shall be set out "so far as practicable." *Six L's Packing Company, Inc. v. Preciosa Packing House, Inc.*, 41 Agric. Dec. 1233 (1992). Complainant's June 9, 1997, letter is a five page document containing a wealth of detail about the alleged violations committed by Respondent. While the letter requests the Department to conduct an audit to obtain additional information, which eventually took place, the letter includes as much detail about Respondent's alleged violations as was possible at the time it was written. We conclude that Complainant's June 9, 1997, letter meets the criteria for a valid informal complaint as set forth in the Rules of Practice.

Respondent disputes the conclusion of the Decision that Complainant did not waive the contractual requirement that Respondent consult with Complainant prior to granting price adjustments in excess of 30%. Complainant argues, as it did with respect to the jurisdictional effect of its June 9, 1997, letter, that Respondent should not be permitted to raise this issue, as it was addressed in the Decision but not the Ruling, and Respondent should be limited

to only those issues discussed in the Ruling. Although we found that the Ruling discussed the jurisdictional effect of Complainant's letter, and that such issue may thus be addressed here, the Ruling never mentioned the waiver issue. If Respondent desired to contest the finding in the Decision that Complainant did not waive its contractual right to be consulted, Respondent could have filed a petition for reconsideration of the Decision, but elected not to do so. Respondent is precluded from raising the waiver issue at this time.

Even if the waiver issue were given consideration, Respondent has merely repeated the argument raised in its brief that Complainant failed to complain about not being consulted on many transactions where Respondent granted adjustments exceeding 30%. The Decision found that Complainant did complain about the failure to consult through communications by Complainant's then controller, Carla Dodd, with Respondent, and by the fact that, in May 1996, Complainant filed suit in state court regarding the 1995 growing season, alleging, among other things, Respondent's failure to comply with the consultation provisions of the contract, which were essentially the same provisions present for the 1996 growing season at issue here (Decision, at page 24). Respondent has not provided any basis for changing the finding in the Decision that Complainant did not waive the consultation requirement.

Respondent's final assertion of error is that, by concluding that Complainant was the prevailing party, and thus entitled to attorneys fees, the Ruling did not follow the precedent set in *Newbern Groves, Inc. v. C. H. Robinson Company*, 53 Agric. Dec. 1766, 1855 (1994), *petition for reconsideration denied*, 54 Agric. Dec.1444 (1995). Respondent notes that the conclusion in the Ruling was based solely on the fact that Complainant was awarded 34% (actually 36%)[1] of the amount it originally claimed, compared to 25% awarded the complainant in *Newbern Groves*, which found that the respondent had prevailed. Respondent contends that additional factors should have been considered in determining the identity of the prevailing party. In response, Complainant argues that the principle enunciated in *Newbern Groves*, that under certain circumstances, the party that is awarded damages may not be the prevailing party, conflicts with a recent Supreme Court case, *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dep't. of Health and Human Resources*, 532 U.S. 598, 121 S. Ct. 1835 (2001), which held that a prevailing party is the party in whose favor judgment is rendered, regardless of the amount of damages

[1]Respondent's assertion that Complainant was awarded 34% of its total claim of damages is based on a figure contained in the November 28, 2001, Ruling. However, the Ruling was in error, as the amount of reparation awarded therein, $186,971.40, constitutes about 36% of Complainant's claimed damages of $524,814.72.

awarded.

Complainant's contention that *Newbern Groves* conflicts with *Buckhannon* requires a consideration of the underlying purpose of fee-shifting under section 7(a) of the Act. There are three approaches to dealing with attorney fees in litigation in the United States. The most basic is the American rule in which there is no fee-shifting, and both parties are responsible for their own attorney fees. This is the primary rule at the federal level, and in all states except one. Exceptions to the American rule are always statutory. The second approach to fee-shifting is the English rule in which the loser, whether plaintiff or defendant, pays the winner's attorney fees. The English rule has existed as a statutory exception to the American rule in Alaska since it was established as a territory[2]. The English rule also has existed in Arizona since 1976 as to commercial cases only,[3] and in Florida, for a five year period, as to medical malpractice cases only[4]. The third approach is private attorney general type fee-shifting with the aim of promoting a degree of private enforcement of legislatively mandated policy. This type fee-shifting is applicable by statute at the federal and state levels in multiple selective areas, and favors the award of attorney fees to successful plaintiffs, but is restrictive in the award of attorney fees to successful defendants.

In *Buckhannon* the Court had under consideration private attorney general type fee-shifting statutes. The question under consideration was whether, under the applicable civil rights statutes, attorney fees should be awarded to a claimant whose lawsuit provoked the defendant to change its illegal policy without a judgment on the merits, or a consent decree, being entered. The holding in

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[2]Alaska Stat. § 09.60.010 (1962, amend. 1986). Since 1993 the English rule has existed in that State in a modified form that gives fees to a prevailing party according to a fixed schedule with a discretionary override provision. *See* Alaska Rules of Civil Procedure, Rule 82.

[3]Ariz.Rev.Stat.Ann. § 12-341.01 (1982), which allows a "successful party" to recover attorney fees in breach of contract actions.

[4]Fla. Stat. Ann. § 768.56 (1984) provided, in pertinent part, as follows:

> . . . the court shall award a reasonable attorney's fee to the prevailing party in any civil action which involves a claim for damages by reason of injury, death, or monetary loss on account of alleged malpractice by any medical or osteopathic physician, podiatrist, hospital, or health maintenance organization. . . . When there is more than one party on one or both sides of an action, the court shall allocate its award of attorney's fees among prevailing parties and tax such fees against unprevailing parties in accordance with the principles of equity.

Buckhannon is spelled out at the beginning of the opinion:

> The question presented here is whether this term [prevailing party] includes a party that has failed to secure a judgment on the merits or a court-ordered consent decree, but has nonetheless achieved the desired result because the lawsuit brought about a voluntary change in the defendant's conduct. We hold that it does not.

Thus, the fundamental distinction in *Buckhannon* was between litigation ending in a judgment, and litigation not ending in a judgment. We will have more to say about this later. A subsidiary factor distinguishing *Buckhannon* from *Newbern Groves* is the fact that *Buckhannon* dealt with private attorney general type fee-shifting while *Newbern Groves* was a commercial case decided under a statute with a very different Congressional purpose.

The purpose of private attorney general type fee-shifting statutes is to enhance private enforcement efforts[5]. As Justice Ginsburg said in the dissent to Buckhannon:

> The Civil Rights Act of 1964 included provisions for fee awards to "prevailing parties" in Title II (public accommodations), 42 U.S.C. § 2000a-3(b), and Title VII (employment), 42 U.S.C. § 2000e-5(k), but not in Title VI (federal programs). The provisions' central purpose was "to promote vigorous enforcement" of the laws by private plaintiffs; although using the two-way term "prevailing party," Congress did not make fees available to plaintiffs and defendants on equal terms. *Christiansburg Garment Co. v. EEOC,* 434 U.S. 412, 417, 421, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978) (under Title VII, prevailing plaintiff qualifies for fee award absent "special circumstances," but prevailing defendant may obtain fee award only if plaintiff's suit is "frivolous, unreasonable, or without foundation."[6]

In the case of reparation litigation, such as is allowed under the Perishable Agricultural Commodities Act, no such enforcement motive is present. Indeed, the legislative history shows that in regard to the fee-shifting statute under which we operate an entirely different motive was at work. Report No. 92-751 of the Committee on Agriculture (December 14, 1971) included a statement by Mr. Arthur E. Brown, Deputy Director, Fruit and Vegetable Division, which closely tracked the Department's Executive Communication on the fees and

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[5] *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dep't of Health and Human Resources*, 532 U.S. 598, at 620 (1999) (Scalia, J., concurring) "[In regard to] the fee-shifting statutes at issue here. . . Congress desired an *appropriate* level of enforcement . . . ."

[6] *Id*. at 635 (Ginsburg, J., dissenting).

expenses legislation. That statement was, in relevant part, as follows:

> Section 2 of the proposed amendment would add a new feature to the Act since there is now no provision for the payment to the prevailing party of fees and expenses, in addition to the damages awarded, in reparation disputes formally adjudicated by the Department. The objective here is also to speed up the handling of reparation complaints through providing a degree of protection to aggrieved parties **by discouraging requests for oral hearings**[7] based on inadequately founded defense allegations or counterclaims filed solely because of their nuisance value or to enhance one's bargaining position in the dispute. This section of the bill would provide for issuance of an order against the losing party to cover the prevailing party's reasonable fees and expenses in those reparation cases in which a hearing is requested and held. **An award of fees and expenses could be against any losing party, whether complainant or respondent**, provided such losing party is a commission merchant, dealer or broker within the meaning of the Act. The regulatory provisions of the Act apply only to such persons, and a reparation order may not issue against a person who is not a commission merchant, dealer or broker. **It is the intent of this section of the bill that the prevailing party may be awarded fees and expenses only, or he may be awarded fees and expenses in addition to an award of damages for violation of Section 2 of the Act.**
>
> **Industry representatives have pointed out that the disputants in such cases would exercise a greater degree of responsibility in requesting an oral hearing if the party losing the case were required to pay reasonable fees and expenses incurred by the prevailing party**. The proposed amendment would provide a strong incentive to negotiate in good faith and reach an amicable settlement if at all possible. Even in the event of formal adjudication, there would be an incentive to use the less time-consuming shortened procedure instead of an oral hearing. (Emphasis supplied.)

In addition, the wording of the statute itself clearly shows an intent that attorney fees may be awarded to either party in a balanced fashion:

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[7]The fee-shifting provisions of section 7(a) apply only to oral hearing cases. In reparation cases either party may, by right, request an oral hearing where the amount in controversy exceeds $30,000. Otherwise the case is heard under the documentary procedure by affidavit or deposition evidence.

> If . . . the Secretary determines that the commission merchant, dealer, or broker has violated any provision of section 499b of this title, he shall, unless the offender has already made reparation to the person complaining, determine the amount of damage, if any, to which such person is entitled as a result of such violation and shall make an order directing the offender to pay to such person complaining such amount on or before the date fixed in the order. The Secretary shall order any commission merchant, dealer, or broker who is the losing party to pay the prevailing party, as **reparation or additional reparation**, reasonable fees and expenses incurred in connection with any such hearing. (7 U.S.C. 499g(a). (emphasis supplied).

"*Additional* reparation" for fees and expenses would be awarded to a party only if there had been success, and a monetary award, on the party's claim. However, "reparation" for fees and expenses, as an either/or proposition, could only be awarded where there was success, but no basic monetary award in the party's favor. There is no reason to suppose that there is any intent that such an award of reparation for fees and expenses to a party who received no basic monetary award was to be in any way restricted to instances where the opposing party's claim was "frivolous, unreasonable, or without foundation."

In addition to the legislative history, and the express wording of section 7(a) of the Act, the nature of two other fee-shifting provisions in the Act lends credence to the proposition that the intent of Congress in passing the fee-shifting provision of section 7(a) was to establish the balanced two way fee-shifting of the English rule in place of the American rule as to fee-shifting, and not to establish a private attorney general type of fee-shifting. In the crafting of section 7(c) of the Act[8] Congress eschewed balance in favor of the effectuation of a definite policy:

> . . . Such appeal shall not be effective unless within thirty days from and after the date of the reparation order the appellant also files with the clerk a bond in double the amount of the reparation awarded against the appellant conditioned upon the payment of the judgment entered by the court, plus interest and costs, including a reasonable attorney's fee for the appellee, if the appellee shall prevail. . . . Appellee shall not be liable for costs in said court and if appellee prevails he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of his

[8] 7 U.S.C. 499g(c).

costs. . . .

Congress here singled out the prevailing appellee alone to be the recipient of attorney fees in order to discourage appeals. The lack of balance is overt, and serves a rational purpose. Congress was clearly not reluctant to expressly favor one party over another when there was reason to do so.

Again, in the bonding provision of section 6(e)[9] Congress favors one party over the other:

> In case a complaint is made by a nonresident of the United States, or by a resident of the United States to whom the claim of a nonresident of the United States has been assigned, the complainant shall be required, before any formal action is taken on his complaint, to furnish a bond in double the amount of the claim conditioned upon the payment of costs, including a reasonable attorney's fee for the respondent if the respondent shall prevail, and any reparation award that may be issued by the Secretary of Agriculture against the complainant on any counter claim by respondent . . . .

The attorney's fees payable under this section are payable only to a prevailing respondent. Unlike the provision of section 7(a), such fees will be payable even in non-oral hearing cases, and in such cases there is no provision in the Act that would allow the payment of such fees to a prevailing foreign Complainant. Again, a definite policy is discernible as the rationale for the overt and clearly expressed lack of balance.

An underlying rationale is also discernable behind the balanced provisions of section 7(a). We have stated that "the basic substrata of law governing perishable transactions is the law of sales as established by statute, and under the common law, in applicable State jurisdictions."[10] Clearly, reparation cases constitute commercial litigation in which the interests of the parties are balanced. There is, therefore, no public policy reason to favor one domestic litigant over another in the award of attorney fees in administrative level reparation litigation. In those rare instances where the states have passed fee-shifting statutes that apply to commercial litigation they have recognized the need for balance by opting for the English type fee-shifting approach.

Not only is there no public policy reason to encourage the bringing of

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[9] 7 U.S.C. 499f(e).

[10] *Salinas Lettuce Farmers Cooperative v. Ag-West Growers, Inc.*, 50 Agric. Dec. 984 (1991)

commercial complaints, but there is equally no reason to discourage commercial defendants. A commercial defendant can defend successfully against large claims, and still end up owing a relatively small amount due to the difficulties of accurately calculating beforehand the exact amount that should be due. In such cases the defendant will have effectively prevailed in the litigation, but will end up with a small award against it.

For example, in reparation cases a claimant will frequently bring suit on the theory that the defendant accepted purchased goods, and is therefore liable for the purchase price. However, the defendant will often admit acceptance, and consequent liability for the purchase price, but will defend on the basis of the allegation that the claimant breached the contract of sale by supplying inferior goods. The issue of whether accepted goods were indeed inferior is more frequently a hotly contested issue in the sale of perishables because perishables will often appear good at time of shipment, but will have deteriorated by the time of arrival. In f.o.b. sales the shipper of perishable goods warrants that the goods will arrive in sound condition if transportation services and conditions are normal. But, since perishable goods will always deteriorate over time, the judgment must be made as to whether the deterioration noted on arrival is a normal amount, or an abnormal amount in breach of contract. This issue is often paralleled by the issue of whether transit conditions were normal. Both parties may litigate in good faith over these issues, and it will frequently happen that a claimant will be found to have breached the contract of sale by shipping goods that did not possess sufficient carrying quality to arrive in sound condition. Such a claimant will therefore be liable for damages for its breach of contract. The determination of the amount of damages is itself often a difficult problem, and the purchase price owing by the defendant as result of acceptance of the goods (an issue not actually litigated) will often exceed the amount of damages owing by the claimant for its breach of contract (the only issue actually litigated). Thus as to the litigated issue the defendant will win, but because of the un-litigated and uncontested fact of the defendant's acceptance, and the consequent liability for the purchase price less damages, the claimant will be awarded a small balance of purchase price over damages. Of course, the Department's award in the claimant's favor will state that the defendant violated section 2 of the Act by failing to pay the amount awarded. But the failure to pay is recognized as a good faith failure to pay, and this is evident from the fact that such failure is never made the subject of a disciplinary complaint for "slow pay" against the defendant by the Department.

The Supreme Court of Alaska dealt with a similar case under its English type fee-shifting statute. In *Owen Jones & Sons, Inc. v. C. R. Lewis Company, Inc*., 497 P.2d 312 (Alaska 1972), Jones, a contractor, entered into

a contract with Lewis, a subcontractor, under which Lewis was to furnish the labor and materials necessary to complete the plumbing and other systems for an apartment building to be built in Anchorage. The total agreed price was $178,449.19. The contract also provided for progress payments, not to exceed 90% of the contract price. When the building was partially completed it was destroyed in an earthquake. The contract contained a clause that called for indemnification of the contractor by the subcontractor for all damages caused "by reason of the elements . . . ." Under this clause Jones brought an action against Lewis to recover $119,663.12 that Jones had disbursed to Lewis as progress payments, and Lewis counter-claimed for $46,620.92 for services rendered and materials furnished before the collapse.

The trial court held that there could be no indemnification under the contract to supply plumbing because the building, the subject matter of the contract, had been destroyed, thus discharging any obligation on the subcontractor's part to furnish further performance. The trial court also found that Lewis was entitled to recover the cost of its performance from Jones on a *quantum meruit* basis.

The trial court then decided that the subcontractor's services and materials supplied should be reasonably valued at approximately $142,300. From this figure a computation was made which took into account the amount of progress payments ($119,663.12) and the value of materials belonging to Jones which were salvaged by Lewis ($30,000), representing a total value received by Lewis of $149,663.12. From this total was subtracted the amount due to Jones under the *quantum meruit* theory employed by the court, which left an excess of $7,363.12, the amount of judgment for Jones. The trial court then found that Lewis was the prevailing party, and awarded Lewis $10,000 in attorney fees.

The Alaska Supreme Court stated that "under AS 09.60.010[11] and Rule 54(d)[12], Rules of Civil Procedure, it is clear that the prevailing party is entitled to costs." After saying that: "[i]t is the contention of the appellants that only they could be considered the prevailing parties in light of their affirmative recovery of $7,363.12 at the conclusion of the trial," the Court said:

> With this contention we cannot agree; it is not an immutable rule that the party who obtains an affirmative recovery must be considered the

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[11]AS 09.60.010 provides: "Costs allowed prevailing party. Except as otherwise provided by statute, the supreme court shall determine by rule or order what costs, if any, including attorney fees, shall be allowed the prevailing party in any case."

[12]Rule 54(d) provides: "Costs. Except when express provision therefor is made either in a statute of the state or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs. The procedure for the taxing of costs by the clerk and review of his action by the court shall be governed by Rule 79."

> prevailing party. The decision of the trial court that appellee was the prevailing party did not involve an erroneous construction of either AS 09.60.010 or Rule 54(d). (footnote omitted.)
>
> . . .
>
> It was clear that the main issue had been resolved against appellants when the court found that appellee had no obligation to refund its progress payments under the contract, the obligation having been discharged by destruction of the subject matter.

The court characterized the recovery of the $7,363.12 by the losing party as an incidental recovery[13]. The Court then went on to decide that the amount of the fee award was proper:

> It is clear from the record in this case that the court considered the efforts of appellee's counsel in defeating the appellants' claim for $119,663.12 and the value of that effort in determining the amount of the attorney's fee awarded. The trial judge also considered the potential liability that threatened appellee. Finally, it is clear that the amount of attorney's fee was within the sound discretion of the trial court and such an award will not be disturbed unless the court has exceeded that discretion. We find no reason to disturb the award in this case. (footnotes omitted.)

An adjudication (when final) that a commercial complainant has breached the contract of sale upon which it sued, or sought reparation, has a claim preclusive effect. So does the determination of the amount of damages resulting from that breach. In other words, these rulings are *res judicata* of the issues, and binding on all other forums. This effect is present even though the defendant receives no net monetary award. We stated earlier that the fundamental distinction in *Buckhannon* was between litigation ending in a judgment, and litigation not ending in a judgment. *Buckhannon*, as well as other fee-shifting cases under the various civil rights statutes, recognize the potential that in certain cases attorney fees may be awarded to a defendant where the complaint is dismissed. In those cases there is an adjudication – a judgment – in the defendant's favor. The lack of such a judgment in the complainant's favor, or at least a judicial consent decree, was the determinative

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[13] *Owen Jones & Sons, Inc. v. C. R. Lewis Company, Inc*., 497 P.2d 312, at 314 n.5 (Alaska 1972) "This recovery based on the accounting can be classified as an incidental recovery which will not be a sufficient recovery to bar a party who has defended a large claim from being considered a prevailing party."

factor in the majority's ruling in *Buckhannon*. In *Buckhannon*, Justice Rehnquist quoted the 1999 7th edition of Black's Law Dictionary which defines prevailing party as: "[a] party in whose favor a judgment is rendered, regardless of the amount of damages awarded <in certain cases, the court will award attorney's fees to the prevailing party>.--Also termed *successful party*." This 7th edition definition is relegated to a small segment of the Dictionary's treatment of the subject "party," and constitutes the only thing said concerning "prevailing party." The 1990 6th edition of Black's Law Dictionary gives a much more lengthy treatment of "prevailing party" under a separate heading rather than under the heading "party." The first definition given is as follows: "The party to a suit who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not necessarily to the extent of his original contention." This does not conflict with the definition cited in Buckhannon, but it does give some additional insight into the meaning of the phrase. We believe that when the Alaska Supreme Court in *Owen Jones & Sons, Inc.* adjudicated that the defendant was entitled to the sum of $142,300, that defendant became "[a] party in whose favor a judgment [was] rendered . . . ." The less abbreviated definition of prevailing party in the 1990 edition of Black's Law Dictionary also is inclusive of this type adjudication when it, perhaps less ambiguously, speaks of one who ". . . successfully defends against [an action], prevailing on the main issue, even though not necessarily to the extent of his original contention."

In his concurring opinion in *Buckhannon* Justice Scalia refers to the Court's "ill-considered dicta" as misleading the Circuits to follow the catalyst theory. While the Court's reasoning in *Buckhannon* may be impeccable in regard to the question of whether a change of position by a litigant in a suit in which there is no adjudication can cause the opposing claimant to be considered a prevailing party under a private attorney general fee-shifting statute, we would also be misled by dicta if we applied the Court's language in *Buckhannon* to a reparation case where no catalyst theory is remotely in view, where there were final adjudications of multiple litigated issues, and where the fee-shifting statute under consideration clearly aims at balance between commercial litigants. We cannot believe that the majority in *Buckhannon* intended any such application of their words. We conclude that it was not the intent of the *Buckhannon* Court to disturb the English type fee-shifting required by Congress under the Act as evinced in *Newbern Groves* and the cases which have followed it.

As we have concluded that *Buckhannon* has not overruled *Newbern* Groves, we must now decide whether the November 28, 2001, Ruling correctly awarded fees and expenses to Complainant in the amount of $93,485.70 based solely on

the fact that Complainant was determined to have prevailed on 36%[14] of the amount of its original claim ($186,971.40 of the total damages claimed of $524,814.72), which exceeds the 25% figure in *Newbern Groves*. Respondent argues that other factors should be considered. In support of this argument, Respondent asserts that the complaint consisted of four claims: (1) failure to remit cooling revenues (on the Sugraone grapes); (2) overcharges for services and supplies; (3) failure to notify of significant price adjustments; and (4) negligent handling of grapes. Respondent contends that the majority of testimony and evidence submitted at the hearing concerned the two of Complainant's claims, 1 and 4, in which Respondent prevailed, that Complainant submitted no evidence supporting claim 2, relying solely on work done by the Department, and prevailed on only 40% of its claim regarding claim 3. Complainant rejects Respondent's effort to "compartmentalize" its conduct towards Complainant, arguing that Respondent's breach of its fiduciary duty as a grower's agent was part of an overall business relationship involving related events.

Respondent is correct that, in determining the identity of the prevailing party, other factors should be considered in addition to the percentage of the original claim which is awarded as damages, and that the amount of effort put forth at the hearing in support of certain allegations is a significant factor.[15] We do not agree with Respondent's contention that the majority of testimony at the hearing concerned Complainant's claims for Respondent's alleged failure to remit cooling revenues on the Sugraone grapes and for Respondent's alleged negligent handling of grapes, as the record indicates that both parties' witnesses spent most of their time addressing the issue of notice of price adjustments, on which we awarded Complainant a total of $159,454.75, or 42% of the $377,645.87 claimed. However, Respondent is correct that, on the issues of Respondent's alleged failure to remit cooling revenues on the Sugraone grapes, for which Complainant claimed $78,921.04, and the alleged negligent handling of grapes, for which Complainant claimed $108,703.01[16], Respondent

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[14]*See* footnote 1.

[15]We reject Respondent's suggestion that the amount of documentary evidence submitted is, in an of itself, an important factor to consider in the determination of who is the prevailing party and entitled to an award of fees and expenses.

[16]Complainant states in its brief (Complainant's brief, at 65) that $40,055.20 of the amount claimed for negligent handling is also part of Complainant's claim of $50,091.70 for alleged improper adjustments which Complainant contends should have be allowed by the Department's

(continued...)

completely prevailed. A substantial time was spent on these issues at the hearing. With respect to Complainant's claim of Respondent's alleged overcharges for supplies and services, Complainant was awarded its entire claim of $27,516.65, but no time was devoted to this issue at the hearing. Therefore, the total awarded Complainant as a result of evidence presented at the hearing was $159,454.75 out of the $497,298.07 remaining at issue after deducting Complainant's claim for alleged overcharges ($524,814.72 less $27,516.65), or 32%.

As Respondent prevailed on two of the three issues presented at the hearing, and limited Complainant's recovery to 32% of the amount actually litigated at the hearing, we conclude, as we did in the February 7, 2001, Decision and Order, that Respondent is the prevailing party. Therefore, we will restate our conclusions made in the Decision and Order with respect to Respondent's recovery of fees and expenses, with certain changes.

Respondent filed a claim for fees and expenses in the amount of $73,463.63. Complainant objected to the amount paid by Respondent's attorney for round-trip airfare between Washington, D.C. to Bakersfield, California, for depositions on September 29, 1998, and October 26, 1998, in the amounts of $1,775.87 and $1,876.00, respectively, and for the hearing on September 16, 1999, in the amount of $1,972.00. Complainant claimed Respondent's attorney could have obtained less expensive flights if he had left from Baltimore rather than Washington, D.C. or purchased tickets earlier. Respondent replied that purchasing tickets earlier would not have saved any money, as Respondent's attorney was not staying over a Saturday night. Complainant's objections are not well taken. Respondent's attorney, whose office is located in Washington, D.C., was entitled to use an airport in the Washington, D.C. area. Complainant offered no evidence that Respondent's attorney could have obtained a less expensive flight if he had purchased tickets earlier.

Complainant also objected to charges for charter flights from Coachella, California, to Bakersfield, California, taken by Respondent's officers Michael Aiton and David Marguleas. The flights were on October 29, 1998, to take depositions, in the amount of $1,637.72, and on September 24, 1999, to testify at the hearing, in the amount of $1,463.84. A search on the American Airlines website made at approximately the time the Decision and Order was issued, revealed that a round-trip unrestricted fare to Bakersfield from Palm Springs, California, which is the closest large airport to Coachella, was $337.00. Respondent never provided any justification for the use of charter flights rather

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[16](...continued)
auditors.

than the readily available commercial flights. Therefore, we allow $337.00 for each person for each trip, resulting in a total of $1,348.00 for both persons on both trips. This reduces Respondent's eligible fees and expenses by $1,753.56, from $73,463.63 to $71,710.07.

As stated, Complainant's efforts at the hearing resulted in a recovery of about 32% of the amount claimed as damages and litigated at the hearing. All of the issues litigated at the hearing were hotly contested. As a result of Complainant's partial recovery, we will reduce Respondent's $71,710.07 claim by 32%, or $22,947.22, which leaves $48,762.85 to be awarded Respondent as fees and expenses.

Order

The reparation awarded in the November 28, 2001, Ruling on Reconsideration, $186,971.40, with interest thereon at the rate of 10% per annum from September 1, 1996, until paid, plus the amount of $300.00, shall be paid by Respondent to Complainant within 30 days from the date of this Order.

Within 30 days from the date of this Order, Complainant shall pay to Respondent, as reparation for fees and expenses, $48,762.85, with interest thereon at the rate of 10% per annum from the date of this Order, until paid.

Copies of this Order shall be served upon the parties.

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C. H. ROBINSON COMPANY v. BUDDY'S PRODUCE, INC.
PACA Docket No. R-02-021.
Order of Dismissal.
Filed August 21, 2003.

, for Complainant.
, for Respondent.
Patricia Harps, Presiding Officer.
Decision and Order filed by William G. Jenson, Judicial Officer.

PACA-R – 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 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.

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 28, 2002, the court entered the following order:

ORDER

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[1]A timely informal complaint covering the same transactions was filed on October 26, 2000.

[2]7 U.S.C. 499(e)(c).

> 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 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

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[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).

[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).

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]

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.

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[5] *United States v. ITT Continental Baking Co.*, 420 U.S. 223 at 238 (1975).

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 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

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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).

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 . . . is sufficient by itself to invoke the preclusive effect of res

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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).

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.

Copies of this order shall be served upon the parties.

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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: ZEMA FOODS, L.L.C.
PACA Docket No. D-01-0027.
Order Dismissing the Complaint.
Filed February 7, 2003.

Charles E. Spicknall, for Complainant.
Respondent, Pro se.
Order issued by James W. Hunt, Chief Administrative Law Judge.

Complainant's motion to dismiss the disciplinary complaint filed on August 21, 2001 against Zema Foods, L.L.C., 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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PERISHABLE AGRICULTURAL COMMODITIES ACT

DEFAULT DECISIONS

In re: C.T. PRODUCE, INC.
PACA Docket No. D-02-0011.
Decision Without Hearing by Reason of Default.
Filed November 5, 2002.

PACA – Default – Payment, failure to make prompt.

David A. Richman, 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 March 14, 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 May 2000 through July 2000, Respondent C.T. Produce, Inc. (hereinafter "Respondent") failed to make full payment promptly to 2 sellers of the agreed purchase prices in the total amount of $523,917.39 for 186 lots of perishable agricultural commodities which it purchased, received and accepted in foreign commerce.

As described in Complainant's Motion for Decision Without Hearing by Reason of Default, service was effected upon Respondent on April 11, 2002. The time for filing an answer expired on May 1, 2002, 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 (7 C.F.R. § 1.139).

Findings of Fact

1. C. T. Produce, Inc., is a corporation organized and existing under the laws of the State of California. Its business mailing address is 2225 Avenida Costa Este, Suite 1100, San Diego, California 92173.

2. At all times material herein, Respondent was licensed under the provisions of the PACA. License number 940841 was issued to Respondent on

March 22, 1994. This license terminated on March 22, 2001, 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. The Secretary has jurisdiction over Respondent and the subject matter involved herein.

4. During the period from May 2000 through July 2000, Respondent purchased, received, and accepted in foreign commerce, from 2 sellers, 186 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 $523,917.39.

Conclusions

Respondent's failure to make full payment promptly with respect to the transactions set forth in Finding of Fact No. 4 above, constitutes willful, 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 the 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 December 26, 2002, and effective January 6, 2003. - Editor]

In re: GROWERS PRODUCE, a/t/a WESTERN PRODUCE COMPANY.
PACA Docket No. D-02-0001.
Decision Without Hearing by Reason of Default.
Filed November 25, 2002.

PACA – Default – Payment, failure to make prompt.

Mary Hobbie, for Complainant.
Respondent, Pro se.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the 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 11, 2001, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period August through November 1999, Respondent failed to make full payment promptly to 32 sellers in the total amount of $332,492.99 for 439 lots of perishable agricultural commodities it purchased, received and accepted in interstate and foreign commerce.

A copy of the complaint was mailed to the Respondent by certified mail on October 11, 2001 and received by Respondent on October 18, 2001. This complaint has not been answered. The time for filing an Answer having run, and upon motion of the Complainant for the issuance of a Default Order, the following Decision and Order shall be issued without further investigation or hearing pursuant to Section 1.139 of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (Rules of Practice) (7 C.F.R. §1.139).

Findings of Fact

1. Respondent, Growers Produce, also trading as Western Produce Company, is a corporation organized and existing under the laws of the State of California. Its business address is 380 Third Street, Oakland, California 94607.

2. At all times material herein, Respondent was licensed under the provisions or operating subject to the provisions of the PACA. License number 182180 was issued to Respondent on July 15, 1959. The license terminated on July 15, 2000, when Respondent failed to pay the required annual renewal fee pursuant to Section 4(a) of the PACA (7 U.S.C. § 499d(a)).

3. During the period of August through November 1999, Respondent purchased, received, and accepted in interstate and foreign commerce from 32 sellers, 439 lots of perishable agricultural commodities, but failed to make full

payment promptly of the agreed purchase prices or balance thereof in the total amount of $332,492.99.

Conclusions

Respondent's failure to make full payment promptly with respect to the transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2(4) of the Act (7 U.S.C. §499b(4)), for which the Order below is issued.

Order

A finding is made that Respondent has committed willful, repeated and flagrant violations of Section 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. §499b(4)), and the 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, this Decision will become final without further proceedings thirty-five days after service hereof, unless appealed to the Secretary by a party to the proceedings within thirty-five days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final January 8, 2003, and effective January 19, 2003. - Editor]

In re: BRUNO'S PRODUCE, INC.
PACA Docket No. D-02-0016.
Decision Without Hearing by Reason of Default.
Filed November 1, 2002.

PACA – Default – Payment, failure to make prompt.

David A. Richman, for Complainant.
Respondent, Pro se.
Decision and Order 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 March 29, 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 February 2001 through May 2001, Respondent Bruno's Produce Food, Inc. (hereinafter "Respondent") failed to make full payment promptly to 19 sellers of the agreed purchase prices in the total amount of $812,184.68 for 101 lots of perishable agricultural commodities which it purchased, received and accepted in interstate commerce.

As described in Complainant's Motion for Decision Without Hearing by Reason of Default, service was effected upon Respondent on May 7, 2002. The time for filing an answer expired on May 27, 2002, 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 (7 C.F.R. § 1.139).

Findings of Fact

1. Bruno's Produce Food, Inc., is a corporation organized and existing under the laws of the State of Nevada. Its business mailing addresses are 4425 East Sahara #42, Las Vegas, Nevada 89104-6359; and 3959 Patrick Lane, Las Vegas, Nevada 89120-6219.

2. At all times material herein, Respondent was licensed under the provisions of the PACA. License number 010169 was issued to Respondent on October 25, 2000. This license terminated on October 25, 2001 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. The Secretary has jurisdiction over Respondent and the subject matter involved herein.

4. During the period from February, 2001 through May, 2001, Respondent purchased, received, and accepted in interstate commerce, from 19 sellers, 101 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 $812,184.68.

Conclusions

Respondent's failure to make full payment promptly with respect to the transactions set forth in Finding of Fact No. 4 above, constitutes willful, 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 the 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 January 28, 2003, and effective February 8, 2003. - Editor]

In re: HEARTLAND CITRUS, INC.
PACA Docket No. D-02-0020.
Decision Without Hearing by Reason of Default.
Filed December 20, 2002.

PACA – Default – Payment, failure to make prompt.

Charles Kendall, for Complainant.
Respondent, Pro se.
Decision and Order 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 July 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 December 5, 1999, through July 3,

2000, Respondent Heartland Citrus, Inc. (hereinafter "Respondent") failed to make full payment promptly to five sellers of the agreed purchase prices in the total amount of $119,031.56 for 110 lots of perishable agricultural commodities which it purchased, received, and accepted in interstate commerce, and failed to remit net proceeds to four growers, in the total amount of $86,882.75, for 101 lots of perishable agricultural commodities consigned to and sold by Respondent in interstate commerce.

A copy of the Complaint was mailed to Respondent by certified mail at its last known principal place of business on July 12, 2002, and was returned as refused to the office of the Hearing Clerk on August 19, 2002. A copy of the Complaint was re-mailed to Respondent by regular mail on September 10, 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"). 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 corporation organized and existing in the state of Florida. Its business address is 712 Gooch Road, Fort Meade, Florida 33841. Its mailing address is P.O. Box 10, Fort Meade, Florida 33841.

2. At all times material herein, Respondent was licensed under the PACA. License number 960127 was issued to Respondent on October 18, 1995. This license terminated on October 18, 2000, pursuant to Section 4(a) of the PACA (7 U.S.C. §499d(a)), when Respondent failed to pay the required annual renewal fee.

3. The Secretary has jurisdiction over Respondent and the subject matter involved herein.

4. As set forth in paragraph III of the Complaint, Respondent, during the period January 2000 through June 2000, failed to make full payment promptly to five sellers of the agreed purchase prices in the total amount of $119,031.56 for 110 lots of perishable agricultural commodities, which it purchased, received, and accepted in interstate commerce.

5. As set forth in paragraph IV of the Complaint, Respondent, during the period November 1999 through June 2000, failed to remit net proceeds to four growers, in the total amount of $86,882.75, for 101 lots of perishable

agricultural commodities consigned to and sold by Respondent in interstate commerce.

Conclusions

Respondent's failure to make full payment promptly with respect to the 110 transactions set forth in Finding of Fact No. 4 above, and failure to remit net proceeds to growers with respect to the 101 transactions set forth in Finding of Fact No. 5 above constitute 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 February 7, 2003, and effective February 18, 2003. - Editor]

In re: D & C PRODUCE, INC.
PACA Docket No. D-02-0005.
Decision Without Hearing by Reason of Admissions.
Filed January 21, 2002.

PACA – Default – Payment, failure to make prompt.

Clara Kim, for Complainant
William L. Yaeger, for Respondent
Decision and Order issue by James W. Hunt, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.; hereinafter referred to as the "Act" or "PACA") and the regulations issued thereunder (7 C.F.R. Part 46; hereinafter referred to as the "Regulations"), instituted by a Complaint filed on January 8, 2002, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture.

Complainant alleged that Respondent D & C Produce, Inc., (hereinafter "Respondent"), during the period May 2000 through June 2001, failed to make full payment promptly to 8 sellers of the agreed purchase prices in the total amount of $454,017.20 for 47 lots of perishable agricultural commodities which it purchased, received and accepted in interstate commerce. Complainant also alleged that PACA license number 000960, which was issued to Respondent on April 5, 2000, terminated on April 5, 2001, when it was not renewed. The Complaint requested a finding be made that Respondent committed willful, flagrant and repeated violations of Section 2(4) of the PACA (7 U.S.C. § 499b(4)) and an order that the facts and circumstances of Respondent's violations be published.

On March 21, 2002, Respondent filed a voluntary petition in the United States Bankruptcy Court for the Middle District of North Carolina pursuant to Chapter 7 of the Bankruptcy Code (11 U.S.C. § 701 et seq.), designated Case Number 02-80864, in which Respondent admitted owing the 8 sellers named in the Complaint amounts totaling $545,125.60.

On March 22, 2002, Respondent filed an Answer to the Complaint with the Department hearing clerk. In that Answer, Respondent's counsel William L. Yaeger wrote "It is my understanding that Chad Barnett, the President of the now bankrupt [Respondent] D & C Produce, Inc., *admits to the material allegations* of the complaint and will consent to the sanctions dictated by PACA, including that he will be barred for up to two years from holding a license under PACA regulations (emphasis added)..." In the attachment to that Answer, President Barnett wrote, "I, Chad Barnett, agree to the consent work out [sic] by Bill Yagers [sic] office and the PACA, concerning my rights and responsibilities in any business governed by the PACA."

Complainant also filed a motion with supporting memorandum seeking a Decision Without Hearing by Reason of Admissions made by Respondent in its Answer and in its bankruptcy petition. In that motion, Complainant also noted that official notice may be taken of the documents that Respondent has filed in connection with its Chapter 7 bankruptcy proceeding. Based upon a careful consideration of the pleadings and precedent decisions cited by Complainant, official notice is taken of the bankruptcy documents filed by Respondent and

the following Decision is issued without further procedure or hearing pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Pertinent Statutory Provisions

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

> It shall be unlawful in or in connection with any transaction in interstate or foreign commerce:
>
> . . . .
>
> (4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or *to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in such commodity to the person with whom such transaction is had;* or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 5(c) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this Act. (emphasis added)

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

> (a) Whenever (1) the Secretary determines, as provided in section 6 of this Act (7 U.S.C. § 499f) that any commission merchant, dealer, or broker has violated any of the provisions of section 2 of this Act (7 U.S.C. § 499b), or (2) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 14(b) of this Act (7 U.S.C. § 499n(b)), the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

Pertinent Regulation

Section 46.2(aa) of the Regulations (7 C.F.R. § 46.2(aa)) provides:

(aa) "Full payment promptly" is the term used in the Act in specifying the period of time for making payment without committing a violation of the Act. "Full payment promptly," for the purpose of determining violations of the Act, means:

. . . .

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

. . . .

(11) Parties who elect to use different times of payment than those set forth in paragraphs (aa)(1) through (10) of this section must reduce their agreement to writing before entering into the transaction and maintain a copy of the agreement in their records. If they have so agreed, then payment within the agreed upon time shall constitute "full payment promptly", *Provided*, That the party claiming the existence of such an agreement for time of payment shall have the burden of proving it...

Findings of Fact

1. D & C Produce, Inc., (hereinafter "Respondent") is a corporation organized and existing under the laws of the State of North Carolina. Its business address while operating was 2145 Foxfire Road, Suite 12-B, Jackson Springs, North Carolina 27281. Its mailing address while operating was P.O. Box 1016, Vass, North Carolina 28394. Its current addresses are: c/o Chad Barnett, 1607 Hoffman Road, Jackson Springs, North Carolina 27821; and c/o Chad Barnett, 153 Vivian Street, West End, North Carolina 27376.

2. At all times material herein, Respondent was either licensed or operating subject to license under the provisions of the PACA. PACA license number 000960 was issued to Respondent on April 5, 2000. That license terminated on April 5, 2001, when Respondent failed to pay the applicable annual fee to renew its license.

3. Respondent, during the period May 2000 through June 2001, on or about the dates and in the transactions set forth in paragraph III of the Complaint, failed to make full payment promptly to 8 sellers of the agreed purchase prices in the total amount of $454,017.20 for 47 lots of perishable agricultural commodities which it purchased, received and accepted in interstate commerce.

4. On March 21, 2002, 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 for the Middle District of North Carolina. That petition has been designated Case Number 02-80864.

5. Respondent's bankruptcy documents[1] included Schedule F - Creditors Holding Unsecured Nonpriority Claims (hereinafter "Bankruptcy Schedule F"). In that bankruptcy schedule, Respondent admitted that it owes fixed amounts for debts that total $545,125.60 to the 8 sellers that are alleged to be unpaid for agreed purchase prices in the total amount of $454,017.20 in this proceeding. Bankruptcy Schedule F contains a table with columns for the name and address of the creditor and the amount of the claim. Included among the 55 creditors named are the 8 firms listed in the Complaint, along with the amounts of their respective claims. A comparison with the table set forth in paragraph III of the Complaint reveals that the amounts acknowledged as owed by Respondent are identical for two (2) of the produce sellers, higher for another two (2) of the produce sellers, and lower for four (4) of the produce sellers. The amounts alleged unpaid by Complainant and admitted unpaid by Respondent are as follows:

Seller	Complaint	Schedule F
DiMare Ruskin, Inc.	$ 124,555.55	$120,000.00
DiMare Johns Island	30,008.00	30,008.00
East Coast Brokers & Packers, Inc.	42,640.00	77,000.00
R & V Warren Farms, Inc.	41,727.00	141,571.50
Classie Produce (A Div. of Classie Growers)	104,464.00	90,000.00
Impact Brokerage	50,815.20	29,022.40
Big Red Tomato Packers	10,960.00	10,960.00
Nova Produce, Inc.	48,847.45	46,563.70
	$454,017.20	$545,125.60

6. Respondent reported in the Summary of Schedules to the voluntary petition filed in its bankruptcy proceeding that it had total assets of $56,620.00 and total liabilities of $1,217,502.09 as of March 21, 2002.

7. Respondent's President Chad Barnett declared under penalty of perjury that the information provided in Respondent's bankruptcy petition was true and correct when he signed that petition.

8. On March 22, 2002, Respondent filed an Answer in which it admitted to the material allegations of the Complaint.

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[1]Official notice is hereby taken of those documents as authorized by *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880 (1997); *In re Granoff's Wholesale Fruit & Produce, Inc.*, 54 Agric. Dec. 1375 (1995); *In re Veg-Mix, Inc.,* 44 Agric. Dec. 1583 (1985), remanded on other grounds, *Veg-Mix, Inc. v. U.S. Dept. of Agriculture*, 832 F.2d 601 (D.C. Cir. 1987).

Conclusions

Respondent has admitted, in its Answer, that it purchased, received, and accepted 47 lots of perishable agricultural commodities in interstate commerce from the 8 sellers named in the Complaint. Respondent also admitted that it failed to make full payment promptly, during the period May 2000 through June 2001, to those 8 sellers of the agreed purchase prices in the total amount of $454,017.20. Respondent's admissions in its Answer and the admissions made in Respondent's bankruptcy documents, of which official notice has been taken, establish that the $454,017.20 produce debt that Respondent owes those 8 sellers for 47 lots of perishable agricultural commodities is part of the acknowledged unsecured debt for which Respondent has sought relief from the Bankruptcy Court. By so scheduling that produce debt, Respondent has implicitly asserted that there is no prospect of full payment of that debt at any future date. A decision and order that relies upon such admissions may be issued in disciplinary proceedings brought under the PACA.[2]

Respondent's admitted failures to make full payment promptly are violations of Section 2(4) of the PACA (7 U.S.C. § 499b(4)). Respondent's violations are willful, flagrant and repeated violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)) as a matter of law. The violations are "flagrant" because of the number of violations, the amount of money involved, and the lengthy time period during which the violations occurred. Respondent's violations are "repeated" because repeated means more than one.[3] Also, Respondent's failures

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[2]*See*, *In re Kirby Produce Company*, 58 Agric. Dec. 1011 (1999); *In re Five Star Food Distributors, Inc*., 56 Agric. Dec. 880 (1997); *In re Granoff's Wholesale Fruit & Produce, Inc.*, 54 Agric. Dec. 1375 (1995); *In re Veg-Mix, Inc.*, 44 Agric. Dec. (1985), remanded on other grounds, *Veg-Mix, Inc. v. U.S. Dept. of Agriculture,* 832 F.2d 601 (D.C. Cir. 1987).

[3]*See,* e.g., *Melvin Beene Produce Co. v. Agricultural Marketing Service*, 728 F.2d 347, 351 (6th Cir. 1984) (holding 227 transactions occurring over a 14-month period to be repeated and flagrant violations of the PACA); *Reese Sales Co. v. Hardin*, 458 F. 183 (9th Cir. 1972) (finding 26 violations involving $19,059.08 occurring over 2 ½ months to be repeated and flagrant); *Zwick v. Freeman,* 373 F.2d 110, 115 (2d Cir. 1967) (concluding that because the 295 violations did not occur simultaneously, they must be considered "repeated" violations within the context of the PACA and finding 295 violations to be "flagrant" violations of the PACA in that they occurred over several months and involved more than $250,000); *In re Havana Potatoes of New York Corp. and Havpo, Inc.*, 55 Agric. Dec. 1234 (1996), aff'd, 1997 WL 829211 (2d Cir. December 19, 1997), court decision printed at 56 Agric. Dec. 1790 (1997), (Havana's failure to pay 66 sellers $1, 960, 958.74 for 345 lots of perishable agricultural commodities during the period of February 1993 through January 1994 constitutes willful, flagrant and repeated violations of 7 U.S.C. § 499b(4), (continued...)

to pay for its purchase obligations, which Respondent has acknowledged as liquidated, undisputed and non- contingent debts, within the time limits established by a substantive regulation–7 C.F.R. § 46.2(aa)--duly promulgated under the PACA are willful as a matter of law.[4] Accordingly, Respondent's admitted failures to make full payment promptly, to the 8 sellers named in the Complaint, constitute willful, flagrant and repeated violations of Section 2(4) of the PACA (7 U.S.C. § 499b(4)).

According to the Department Judicial Officer's policy, in any PACA disciplinary proceeding in which it is alleged that a Respondent has failed to pay in accordance with the PACA and Respondent admits the material allegations in the Complaint and makes no assertion that the Respondent has achieved full compliance or will achieve full compliance with the PACA within 120 days after the Complaint was served on Respondent 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.[5]

Currently, Respondent does not have a valid PACA license. As a result, the proper sanction for its admitted violations is a finding that Respondent committed willful, flagrant and repeated violations of Section 2(4) of the PACA (7 U.S.C. § 499b(4)) and an order that the facts and circumstances of Respondent's violations be published.[6] Thus, the following Order is issued.

Order

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[3](...continued)
and Havpo's failure to pay 6 sellers $101, 577.50 for 23 lots of perishable agricultural commodities during the period of August 1993 through January 1994 constitutes willful, flagrant and repeated violations of 7 U.S.C. § 499b(4)); and *In re Five Star Distributors,* 56 Agric. Dec. 880, at 896-97 (1997) (holding that 174 violations involving 14 sellers and at least $238, 374.08 over a 11 month period were "willful, repeated, and flagrant, as a matter of law").

[4]*Id.*

[5]*See, In re Scamcorp, Inc., d/b/a Goodness Greeness*, 57 Agric. Dec. 527, at 562 (1998).

[6]*See, e.g., In re Kirby Produce Company,* 58 Agric. Dec. 1011 (1999); *In re H. Schnell & Company, Inc.*, 58 Agric. Dec. 1002 (1999); *In re Hogan Distributing, Inc.*, 55 Agric. Dec. 622, 633 (1996); *In re National Produce Co., Inc.*, 53 Agric. Dec. 1622, 1626 (1964).

Respondent D & C Produce, Inc., has committed willful, flagrant and repeated violations of Section 2(4) of the PACA (7 U.S.C. § 499b(4)).
The facts and circumstances of such violations set forth herein shall be published.
This order shall become final and effective without further proceeding 35 days after service thereof upon Respondent, unless there is an appeal to the Judicial Officer pursuant to Section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).
Copies hereof shall be served upon the parties.
[This Decision and Order became effective on March 3, 2003. – Editor]

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In re: PELICAN PRODUCE, INC.
PACA Docket No. D-03-0001.
Decision Without Hearing by Reason of Default.
Filed January 21, 2002.

PACA – Default – Payment, failure to make prompt.

Ann Parnes, for Complainant.
Respondent, Pro se.
Decision and Order 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" or "PACA"), instituted by a Notice to Show Cause and Complaint filed on October 8, 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 August 2002, Respondent Pelican Produce, (hereinafter "Respondent") failed to make full payment promptly to 5 sellers of the agreed purchase prices, or balances thereof, in the total amount of $274,690.19 for 84 lots of perishable agricultural commodities that it purchased, received, and accepted in interstate and foreign commerce.

Respondent's PACA license terminated on July 7, 2002, pursuant to Section 4(a) of the Act (7 U.S.C. § 499d(a)), because Respondent failed to pay the required renewal fee. On September 9, 2002, Complainant received Respondent's completed application for a new PACA license. 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. As a result of the investigation, it was determined that Respondent had failed to make full payment promptly for its purchases of perishable agricultural commodities as stated above. Therefore, Complainant alleges that Respondent is unfit to engage in the business of a commission merchant, dealer, or broker because Respondent has engaged in practices of a character prohibited by the PACA.

The Associate Deputy Administrator filed the Notice to Show Cause why Respondent should not be denied a PACA license on October 8, 2002, and a Complaint alleging the payment violations. The Notice to Show Cause and Complaint were sent to Respondent via certified mail on October 9, 2002. On October 10, 2002, the Hearing Clerk re-sent the Complaint along with a cover sheet informing Respondent that the docket number for this case had changed, and that therefore, Respondent had ten (10) days from service of that letter to file an answer. The Complaint and Notice to Show Cause were mailed to both Respondent's business and mailing address. The copy mailed to Respondent's mailing address was served on October 17, 2002. The copy mailed to Respondent's business address was returned undeliverable. On November 5, 2002, the Hearing Clerk re-sent the Notice to Show Cause and Complaint, via regular mail, to a different address for Respondent, 148 Harbor Circle, New Orleans, Louisiana 71026. The Hearing Clerk received no response from Respondent.

Respondent failed to file an answer to the Complaint within the time allowed for that purpose, and thus waived its opportunity for a hearing. Since Respondent was given an opportunity for a hearing to show cause why its application for license should not be denied but failed to avail itself of its right and Respondent failed to file an answer, 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 Louisiana. Its business address is 740 St. George Avenue, Jefferson, Louisiana 70121. Its mailing address is P. O. Box 26336, New Orleans, Louisiana 70126.

2. License number 941514 was issued to Respondent on July 7, 1994. This license terminated on July 7, 2002, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499d(a)), when Respondent failed to pay the required renewal fee.

3. During the period May 6, 2001, through August 20, 2002, Respondent failed to make full payment promptly to five sellers of the agreed purchase prices in the total amount of $274,690.19 for 84 lots of perishable agricultural commodities, which it purchased, received, and accepted in interstate commerce.

4. On September 9, 2002, Complainant received Respondent's completed application for a PACA license.

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, however, failed to avail itself of its right. Moreover, Respondent failed to answer the allegations in the Complaint, which constitutes a waiver of hearing under section 1.139 of the Rules of Practice and is deemed an admission of the allegations of the Complaint (7 C.F.R. 1.136). Respondent's failure to make full payment promptly with respect to the 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(4)). As a result of Respondent's failure to make full payment promptly for its purchases of perishable agricultural commodities, Respondent is unfit to engage in the business of a commission merchant, dealer, or broker because 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)).

Order

A finding is made that Respondent has committed willful, flagrant and repeated violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)), and the facts and circumstances of the violations set forth above shall be published.

Furthermore, a finding is made pursuant to Section 4(d) of the PACA (7 U.S.C. §499d(d)) that Respondent is unfit to be licensed under the PACA because Respondent has engaged in practices of a character prohibited by the PACA. Thus, Respondent's application for a PACA license is refused.

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 the parties.

[This Decision and Order became final on March 3, 2003. – Editor]

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In re: DANNY & SONS, INC., also d/b/a CHESAPEAKE FARMS.
PACA Docket No. D-02-0014.
Decision Without Hearing by Reason of Default.
Filed January 23, 2002.

PACA – Default – Payment, failure to make prompt.

Charles Kendall, for Complainant.
Robert Scarlett, for Respondent.
Decision and Order filed by James W. Hunt, 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 March 29, 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 Danny & Sons, Inc., also doing business as Chesapeake Farms, (hereinafter "Respondent") failed to make full payment promptly to 21 sellers of the agreed purchase prices in the total amount of $1,783,608.03 for 617 lots of perishable agricultural commodities which it purchased, received, and accepted in interstate commerce. A copy of the Complaint was mailed to Respondent by certified mail at its business mailing address on March 29, 2002, and was returned to the office of the Hearing Clerk on April 16, 2002. A copy of the Complaint was re-mailed to Respondent by regular mail on May 7, 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"), and was returned to the office of the Hearing Clerk on May 29, 2002. The time for filing an Answer to the Complaint expired on May 27, 2002. The Hearing Clerk additionally sent a copy of the Complaint by certified mail on July 25, 2002 to the attorney of

record for Respondent, Robert Scarlett, Esq., who received the Complaint on July 29, 2002. 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 corporation organized and existing under the laws of the State of Maryland. Its business address was 4665 Hollins Ferry Road, Baltimore, Maryland 21227. Its mailing address is P.O. Box 18270, Halethorpe, Maryland 21227.

2. At all times material herein, Respondent was licensed under the PACA. License number 940510 was issued to Respondent on January 7, 1994. This license was suspended on April 10, 2001, when the firm failed to pay a reparation order. The license terminated on January 7, 2002, 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. Respondent, during the period November 1998 through July 2001, failed to make full payment promptly to 21 sellers of the agreed purchase prices in the total amount of $1,783,608.03 for 617 lots of perishable agricultural commodities, which it purchased, received, and accepted in interstate commerce.

Conclusions

Respondent's failure to make full payment promptly with respect to the 617 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 became final on March 4, 2003 – Editor]

In re: FURRS SUPERMARKETS, INC.
PACA Docket No. D-02-0028.
Decision Without Hearing Based on Admissions.
Filed February, 6, 2003.

Ann Parnes, for Complainant.
Robert H. Jacobvitz, for Respondent.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

PACA – Default – Payment, failure to make prompt.

In this disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.) (hereinafter, "PACA"), Complainant has filed a Motion for Decision Without Hearing Based on Admissions, pursuant to section 1.139 of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary (7 C.F.R. § 1.139) (hereinafter, "Rules of Practice"). A copy of Complainant's motion has been served upon Respondent, which has not filed a response thereto.

This proceeding was initiated by a complaint filed on September 12, 2002, alleging that Respondent committed willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to one produce seller, Quality Fruit & Veg. Co., El Paso, Texas (hereinafter, "Quality Fruit"), in the amount of $174,105.05, for 910 lots of perishable agricultural commodities which Respondent purchased, received and accepted in interstate or foreign commerce during the period September 1998 through February 2001. The complaint also alleged that, on February 8, 2001, Respondent filed a Voluntary Petition in Bankruptcy pursuant to Chapter 11 of the Bankruptcy Code (11 U.S.C. § 1101 et seq.) in the United States Bankruptcy Court of the District of New Mexico (Case No. 11-01-10779-SA), and that the case was converted to a Chapter 7 Bankruptcy on December 19, 2001. The complaint requested the issuance of a finding that Respondent committed willful, repeated and flagrant violations of section 2(4) of the PACA and publication of that finding.

Respondent, acting through its trustee in bankruptcy, filed an answer in which it admitted that it failed to make full payment promptly for the produce purchases alleged in the complaint, although Respondent made several affirmative defenses. However, none of these defenses have any merit.

Respondent's admission that it failed to make full payment promptly is found in its answer at paragraph 4 of its Third Defense, in which Respondent admitted that it made the sales to Quality Fruit on which the alleged payment violations are based but asserted that it did not pay Quality Fruit because Quality Fruit had failed to perfect its claim under the PACA trust provisions (*see* 7 U.S.C. § 499e(c)). The failure of Quality Fruit to perfect its PACA trust claim has no effect on Respondent's statutory responsibility to make full payment promptly for produce purposes. *In re Great Western Produce, Inc.*, 50 Agric. Dec. 1941, 1942 at note 3 (1991). Additional evidence that Respondent admittedly failed to make full payment promptly to Quality Fruit is found in Schedule F of Respondent's Bankruptcy Petition (attached to Complainant's Motion for Decision Without Hearing Based on Admissions as Exhibit 1), in which Respondent lists Quality Fruit's claim for $174,105.05 as an unsecured indebtedness. Respondent's admission that it has failed to pay Quality Fruit the amount alleged in the complaint warrants the immediate issuance of a Decision Without Hearing Based on Admissions.

The Department's policy with respect to admissions in PACA disciplinary cases with respect to the alleged failure to make full payment promptly is set forth in *In re Scamcorp, Inc., d/b/a Goodness Greeness*, 57 Agric. Dec. 527, 549 (1998), as follows:

> In any PACA disciplinary proceeding in which it is alleged that a respondent has failed to pay in accordance with the PACA and respondent admits the material allegations in the complaint and makes no assertion that the respondent has achieved full compliance or will achieve full compliance with the PACA within 120 days after the complaint was served on the respondent, 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.

Respondent has admitted in its answer that it has failed to pay Quality Fruit the amount alleged in the complaint. Therefore, this case must be treated as a "no-pay" case, which warrants the revocation of Respondent's PACA license. However, since Respondent's license has terminated due to its failure to pay the

annual renewal fee, the appropriate sanction is a finding that Respondent committed willful, flagrant and repeated violations of section 2(4) of the PACA, and publication of that finding.

Respondent has put forward several defenses in its answer, none of which have any merit. In Respondent's First Defense, it claims that this disciplinary proceeding is barred by the automatic stay (11 U.S.C. § 362(a)(1)), which took effect at the time Respondent filed for bankruptcy. However, PACA disciplinary proceedings come within the exception to the automatic stay provisions as an exercise of "police and regulatory power" (11 U.S.C. § 362(b)(4)). *In re Fresh Approach, Inc*., 49 B.R. 494 (N.D. Tex. 1985). It has repeatedly been held that there is no conflict between the maintenance of PACA disciplinary proceedings and a bankruptcy action. *Marvin Tragash Co. v. United States Dep't of Agric.*, 524 F.2d 1255 (5th Cir. 1975); *Zwick v. Freeman,* 373 F.2d 110 (2d Cir. 1967), *cert. denied,* 389 U.S. 835 (1967); *In re Fresh Approach, Inc.*, *supra* at 496. Further, Congress, in 1978, specifically amended section 525 of the Bankruptcy Code (11 U.S.C. § 525) in order to authorize continuation of the Secretary's license suspension or revocation authority under the PACA even where, as here, the violations involve debts that are discharged in bankruptcy. *Melvin Beene Produce Co. v. Agricultural Marketing Service*, 728 F.2d 347, 351 (6th Cir. 1984); *In re Fresh Approach, Inc*., *supra* at 496-98.

In Respondent's Second Defense, it claims that the disciplinary action should name the trustee for Respondent as representative of Respondent's bankruptcy estate. Respondent provides no grounds for such a claim and it is rejected. Complainant is not alleging that the trustee committed any PACA violations, so there is no basis for including the trustee as a party Respondent herein.

In Respondent's Third Defense, it argues that the Department has brought the disciplinary complaint against it not for the sanction requested in the complaint, but to collect the amount Respondent allegedly owes Quality Fruit from Fleming Companies, Inc. (Fleming), Lewisville, Texas, a 35.4% stockholder of Respondent during the period in which the alleged payment violations occurred. Respondent has not provided any evidence to support this allegation. Respondent attached to its answer (as Exhibit II) a September 20, 2002, letter written by Complainant to Fleming in which Fleming is informed that it has been determined to be "responsibly connected" with Respondent under the PACA and thus subject to possible licensing and employment restrictions, as provided by the PACA. The letter invites Fleming to respond to this determination and advises that Fleming has a right to request a formal hearing before an Department Administrative Law Judge to contest this determination. The proceeding referred to in the September 20, 2002, letter

deals only with the issue of whether Fleming meets the statutory criteria making it "responsibly connected" under the PACA (7 U.S.C. § 499a(b)(9)) and does not address the issue of the payment violations alleged to have been committed by Respondent. The responsibly connected proceeding involving Fleming is entirely separate from the disciplinary proceeding against Respondent.

Respondent also argues in its Third Defense that its failures to pay Quality Fruit were not willful, flagrant and repeated violations of the PACA. However, failures to make full payment promptly for produce, such as those admittedly engaged in by Respondent, always constitute willful, flagrant and repeated violations of the PACA. *In re Caito Produce Co*., 48 Agric. Dec. 602 (1989). As stated in *In re Hogan Distributing, Inc*., 55 Agric. Dec. 622, 633 (1996):

> The overriding doctrine set forth in *Caito* is that, because of the peculiar nature of the perishable agricultural commodities industry, and the Congressional purpose that only financially responsible persons should be engaged in the perishable agricultural commodities industry, excuses for nonpayment in a particular case are not sufficient to prevent a license revocation where there have been repeated failures to pay a substantial amount of money over an extended period of time.

As Respondent has admitted all the material allegations of fact contained in the complaint, a the issuance of a Decision Without Hearing Based on Admissions is appropriate, without further procedure or hearing, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent, Furrs Supermarkets, Inc. (hereinafter, "Respondent"), is a corporation organized and existing under the laws of the State of Delaware. Respondent's business address is 4411 The 25 Way N.E., Albuquerque, New Mexico 87109. Respondent's mailing address is P.O. Box 102677, Albuquerque, New Mexico 87184.

2. At all times material herein, Respondent was licensed under the provisions of the PACA. License number 920759 was issued to Respondent on March 2, 1992. This license terminated on March 2, 2002, pursuant to section 4(a) of the PACA (7 U.S.C. § 499d(a)) when Respondent filed to pay the required annual renewal fee.

3. As more fully set forth in paragraph 3 of the complaint, Respondent failed to make full payment promptly to one produce seller, Quality Fruit, the amount of $174,105.05 for 910 lots of perishable agricultural commodities

which Respondent purchased, received and accepted in interstate or foreign commerce during the period September 1998 through February 2001.

Conclusions

Respondent's failure to make full payment promptly with respect to the transactions referred to in Finding of Fact 3 above, constitutes willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), for which the Order below is issued.

Order

Respondent, Furrs Supermarkets, Inc., is found to have committed willful, repeated and flagrant violations of section 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)), and the facts and circumstances set forth above shall be published.

This order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the 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 thirty days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139, 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final on March 21, 2003. – Editor]

In re: MICHIGAN REPACKING & PRODUCE CO., INC.
PACA Docket No. D-02-0015.
Decision Without Hearing Respondent by Reason of Default.
Filed April 21, 2003.

Charles Kendall, for Complainant.
Respondent, Pro se.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

PACA – Default – Payment, failure to make prompt.

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 July 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 December 3, 2000, through November 5, 2001, Respondent Michigan Repacking & Produce Co., Inc. (hereinafter "Respondent") failed to make full payment promptly to 25 sellers of the agreed purchase prices in the total amount of $3,181,829.95 for 340 lots of perishable agricultural commodities 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 March 29, 2002 by certified mail. The Certified Return Receipt (CRR) was returned to the Office of the Hearing Clerk without a signature or date. On April 22, 2002, the Office of the Hearing Clerk sent a letter to the Postmaster requesting further information. The Office of the Hearing Clerk received a response on August 20, 2002, indicating that Michigan Repacking & Produce Co., Inc. had moved in 2001, and that mail to the company was being "forwarded per written instructions." Finally, the Office of the Hearing Clerk sent the Complaint to the home address of the company's president, Mr. Robert Tringale, on September 12, 2002; the receipt was signed on September 20, 2002. 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 corporation organized and existing in the state of Michigan. Its business mailing address is 1903 Wilkins Street, Detroit, Michigan 48207.

2. At all times material herein, Respondent was licensed under the PACA. License number 192773 was issued to Respondent on June 30, 1961. This license terminated on June 30, 2002 , 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, Respondent, during the period December 3, 2000, through November 5, 2001, failed to make full payment promptly to 25 sellers of the agreed purchase prices in the total amount of $3,181,829.95 for 340 lots of perishable agricultural commodities which it purchased, received, and accepted in interstate commerce.

Conclusions

Respondent's failure to make full payment promptly with respect to the 340 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 on April 21, 2003 – Editor]

CONSENT DECISIONS

(Not published herein - Editor)

PERISHABLE AGRICULTURAL COMMODITIES ACT

Conte, Inc. PACA Docket No. 01-0018. 3/19/03.

AGRICULTURE DECISIONS

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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.

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