AGRICULTURE DECISIONS

Volume 64

January – June 2005

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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AGRICULTURE DECISIONS

Volume 64

January - June 2005
Part One (General)
Pages 1 - 854

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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LIST OF DECISIONS REPORTED

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AGRICULTURAL MARKETING AGREEMENT ACT

COURT DECISIONS

J.W. DeWITT FARMS, INC., DeWITT FAMILY FARMS, INC., AND DON NELSON, d/b/a QUALITY WILD RICE v. MINNESOTA CULTIVATED WILD RICE COUNCIL AND MINNESOTA DEPARTMENT OF AGRICULTURE.
No. Civ.03-3264 JNE/JGL.
Filed March 14, 2005.

(Cite as: 393 F. Supp.2d 847).[*]

AMA – Check-off – Rice, cultivated wild – First Amendment – "Color of law".

J.W. DeWitt, wild rice producer and distributor in Minnesota, brought this action against the Minnesota Consolidated Wild Rice Counsel alleging that "check-off" fees from sales are an unconstitutional abridgement of the first Amendment of free speech. Court denied DeWitt's claim and distinguished this case from *United Foods* 533 U.S. 405 (2001) in finding DeWitt failed to prove that any of the collected funds were used for generic advertisement or that any of Producer's first amendment rights were abridged by Wild Rice council.

United States District Court
D. Minnesota.

ORDER

ERICKSEN, District Judge.

J.W. DeWit Farms, Inc., DeWit Family Farms, Inc. (collectively, DeWit Farms), and Don Nelson d/b/a Quality Wild Rice (collectively, Plaintiffs) brought this action against Minnesota Cultivated Wild Rice

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[*]Claims originating in U.S. District Courts relating to abridgement of Constitutional rights do not come within the original jurisdiction of the Office of Administrative Law Judges (OALJ), however the issues surrounding the matter of "check-off" fees impact multiple cases decided by the OALJ.

Council (Council) and Gene Hugoson, in his capacity as the Commissioner of the Minnesota Department of Agriculture (collectively, Defendants), alleging that check-off fees collected pursuant to the Agricultural Commodities Promotion Act (the Act), Minn.Stat. §§ 17.51-.69 (2002), are unconstitutional. The case is before the Court on Defendants' motions for summary judgment. For the reasons set forth below, the Court grants the motions.

I. BACKGROUND

DeWit Farms is a producer of cultivated wild rice in the State of California. Nelson is a Minnesota purchaser of wild rice who purchases and ships wild rice produced in Minnesota, California and elsewhere, including wild rice produced by DeWit Farms.

The purpose of the Act is to promote and stimulate the use, sale and consumption of agricultural commodities and to improve the methods of production, processing and marketing of such commodities. *See* Minn.Stat. § 17.52. Hugoson, as the Commissioner of the Minnesota Department of Agriculture, administers and oversees the enforcement of the Act. The Council is an organization formed in Minnesota pursuant to the Act.[1]

The Council operates pursuant to the Minnesota Cultivated Wild Rice Promotion Order, the purpose of which is:

> to generate funds equitably from cultivated wild rice (Zizania Palustris L.) producers for the establishment of a program for promotion, advertising, production, market research and market development to benefit the Minnesota cultivated wild rice industry in the growing, processing, distributing, sale and handling of its product....

See Affidavit of Stephanie A. Riley, Ex. 1.

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[1]Under the Act, a commodity research and promotion council may be created for the producers of each agricultural commodity as a means to accomplish the objectives of the Act. *See* Minn.Stat. §§ 17.52, 17.54, subd. 1.

More than 65% of the Council's funding for fiscal years 2000-01 through 2002- 03 was derived from federal and state grants.[2] The Council also received private donations and royalties from the sale of seed. In addition, the Council is authorized to and does charge a check-off fee to growers and importers of cultivated wild rice. Presently, the fee is 2.5 cents per finished pound of wild rice delivered into, stored within, or sold in Minnesota. Plaintiffs began paying checkoff fees in fiscal year 2002-03.

II. DISCUSSION

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). In determining whether summary judgment is appropriate, a court must look at the record and any inferences to be drawn from it in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The moving party "bears the initial responsibility of informing the district court of the basis for its motion," and must identify "those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). If the moving party satisfies its burden, Rule 56(e) requires the non-moving party to respond by submitting evidentiary materials that designate "specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

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[2] Most of the facts regarding the Council's collection and expenditure of funds referred to in this Order are supported by the unrebutted affidavit testimony of the President of the Council, Beth Nelson. The Court notes that Plaintiffs did not conduct any discovery in this action and, in particular, did not depose Nelson.

A. Section 1983

In their Complaint, Plaintiffs allege a claim under 42 U.S.C. § 1983 (2000) against Defendants based on a violation of their First Amendment right to free speech. To prevail on this claim, Plaintiffs must establish: (1) that the conduct complained of was committed by a person acting under color of state law; and (2) that the conduct deprived Plaintiffs of rights, privileges, or immunities secured by the Constitution or the laws of the United States. *See Parratt v. Taylor,* 451 U.S. 527, 535, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), *overruled on other grounds by Daniels v. Williams,* 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986); *See also DuBose v. Kelly,* 187 F.3d 999, 1002 (8th Cir.1999).[3] The parties only dispute the second element.

Plaintiffs allege that the collection of check-off fees from Plaintiffs to fund speech-related activities violates their First Amendment rights under *United States v. United Foods, Inc.,* 533 U.S. 405, 121 S.Ct. 2334, 150 L.Ed.2d 438 (2001). In *United Foods,* the United States Supreme Court invalidated a federal statute that imposed fees upon mushroom handlers to fund generic mushroom advertising. 533 U.S. at 412-13, 416, 121 S.Ct. 2334. The statute involved allowed for the assessments to be used for projects for mushroom promotion, research, consumer information, and industry information. *Id.* at 408, 121 S.Ct. 2334. Importantly, however, the assessments in *United Foods* were primarily used to fund generic advertising. *Id.* at 408, 412, 121 S.Ct. 2334 (explaining that "almost all of the funds collected under the mandatory assessments are for one purpose: generic advertising"). *See also Livestock Mktg. Ass'n v. United States Dep't of Agric.,* 335 F.3d 711, 725-26 (8th Cir.2003), *cert. granted in part by Veneman v. Livestock Mktg. Ass'n,* 541 U.S. 1062, 124 S.Ct. 2389, 158 L.Ed.2d 962 (2004) and *Nebraska*

[3]Section 1983 does not create substantive rights; instead, it provides a remedy for the violation of a federal constitutional or statutory right. *See Baker v. McCollan,* 443 U.S. 137, 144 n. 3, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979).

Cattlemen, Inc. v. Livestock Mktg. Ass'n, 541 U.S. 1062, 124 S.Ct. 2390, 158 L.Ed.2d 962 (2004).

The Supreme Court has also addressed the issue of compelled payments for generic commodity advertising that was a part of a larger regulatory scheme in *Glickman v. Wileman Brothers & Elliott, Inc.,* 521 U.S. 457, 117 S.Ct. 2130, 138 L.Ed.2d 585 (1997). There, the Supreme Court rejected a First Amendment challenge to a series of agricultural marketing orders that required producers of certain fruit to pay assessments for product advertising. *Id.* at 477, 117 S.Ct. 2130. In *Glickman,* the challenged assessments were part of a regulatory scheme that restricted market autonomy by displacing aspects of independent business activity. *Id.* at 469, 117 S.Ct. 2130. The Supreme Court reasoned that the purpose of the generic advertising at issue was legitimate and consistent with the regulatory goals of the statutory scheme. *Id.* at 476, 117 S.Ct. 2130.

As a threshold matter, the Court must determine whether Plaintiffs have demonstrated that their First Amendment rights are implicated. Defendants argue that Plaintiffs' objection to paying the check-off fees does not raise a First Amendment concern because the undisputed facts demonstrate that the Council has not used any check-off fees to fund either generic advertising or non-advertising promotion. Hugoson argues further that there is no evidence that Plaintiffs disagree with a message conveyed by any activity undertaken by the Council. Plaintiffs, on the other hand, contend that all of the Council's activities are speech-related activities. As such, Plaintiffs argue the Council's activities are objectionable because they are funded by check-off fees. The Court will consider the categories of the Council's activities separately.

1. Generic Advertising

There is no question that assessments used to fund generic advertisements promoting the sale of a particular agricultural product may violate the First Amendment if the party being compelled to pay the assessment disagrees with the message of the advertisement. *See*

United Foods, 533 U.S. at 416, 121 S.Ct. 2334. Here, however, the undisputed factual record demonstrates that the Council has not spent any funds on advertising (generic or otherwise) since fiscal year 1999-2000, approximately two years before Plaintiffs began paying check-off fees. *See* Affidavit of Beth Nelson ¶¶ 5, 7, 13. Plaintiffs argue that it is "from the Council's perspective only" that the Council has spent no money on advertising, and they attempt to create a factual issue by citing to and explaining the Council's budgets for fiscal years 2001- 02 and 2002-03. Plaintiffs' speculative interpretation of the Council's budgets, however, is not based on personal knowledge and will not be considered by the Court.[4] *See* Fed.R.Civ.P. 56(e) ("[O]pposing affidavits shall be made on personal knowledge...."). Accordingly, the only admissible evidence in the record regarding the Council's expenditures is the sworn and unrebutted statements of the President of the Council. Based on that evidence, the Court concludes that the Council spent no money on advertisements during the time period Plaintiffs paid check-off fees and therefore, Plaintiffs' objection to advertising cannot form the basis of a First Amendment claim.

2. Promotional Activities

Defendants acknowledge that the Council engages in non-advertising promotional projects, such as operating a booth at the Minnesota State Fair, designing its website, holding cooking contests, organizing and attending trade shows, and issuing press releases. Even though these activities do not constitute generic advertising, Plaintiffs nonetheless claim that they are speech-related activities that cannot be funded with check-off fees under *United Foods.*

The Court need not decide whether activities other than generic advertising are governed by the holding of *United Foods* because

[4]The Court notes that by failing to conduct discovery, Plaintiffs have forfeited the opportunity to appropriately inquire into the meaning of the documents they now purport to cite as evidence.

Plaintiffs have failed to meet their initial evidentiary burden. First, Plaintiffs have not submitted any evidence demonstrating that check-off fees fund these promotional activities. Indeed, the only admissible evidence in the record indicates that these activities are funded without check-off fees. *See* Nelson Aff. ¶¶ 3, 16. Second, Plaintiffs have submitted no evidence demonstrating that they disagree with the message of any of the promotional activities.[5] *Compare United Foods,* 533 U.S. at 405, 121 S.Ct. 2334 (noting that the party challenging the assessments claimed that mushroom advertisements conflicted with their message that its brand of mushrooms is superior). For these reasons, the Court concludes that Plaintiffs' objection to these activities cannot form the basis of a First Amendment claim.

3. Research and Other Expenditures

Finally, Plaintiffs hope to extend the fact-specific holding of *United Foods* to cover all of the Council's remaining activities. In particular, Plaintiffs claim that activities, such as research, staff salaries, rent and office equipment, grower activities, and regulatory and legislative work are speech-related and therefore subject to First Amendment scrutiny. Plaintiffs argue generally that:

> Research is useless without the publication of the results, the publication of proposals, discussions about the proposals, etc. That is all communication-speech activity. The amounts spent for "grower activities," as described by Ms. Nelson involve "newsletters, field days, and annual conferences," which are nothing but speech related activities. The amounts spent for

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[5]Indeed, Plaintiffs have not demonstrated that any of these activities convey a message, let alone one with which they disagree. Plaintiffs do allege in the Complaint that the Council "primarily promotes and advertises rice produced in the State of Minnesota, and never advertises rice produced in the State of California, or anywhere outside the State of Minnesota." Comp. ¶ 8. However, Plaintiffs have introduced no evidence to support this allegation and therefore have failed to meet their burden at this stage in the litigation. *See Anderson,* 477 U.S. at 256, 106 S.Ct. 2505 (a party opposing summary judgment may not rest on mere allegations).

> "regulatory and legislative work" are also speech related activity. Ms Nelson describes it as "working with executive agencies to establish programs and policies favorable to wild-rice growers," which is nothing but communication. Furthermore, the $289,000 spent for "contract staff, rent, and office equipment" is all money spent to support the speech related activities as described by Ms. Nelson.

Pls.' Opp'n Mem. at 13-14 (citations omitted).

The Court declines to consider either the issue of whether these activities are speech-related activities or whether they are governed by *United Foods* because Plaintiffs have failed to submit any evidence to support their claim. While the Court acknowledges that many of the Council's research, regulatory, and grower activities could conceivably be used to convey a particular message that would be speech-related, the Court also recognizes that it is equally possible that these activities do not convey any particular message. At this stage of the litigation, particularly after Plaintiffs have been afforded ample opportunity to conduct discovery, the Court will not presume that the above-described activities involve speech. The Court notes once again that it is Plaintiffs' burden to bring forth specific facts establishing not only that these activities involve speech, but that they convey a message with which they disagree. *See, e.g., Celotex,* 477 U.S. at 322-23, 106 S.Ct. 2548 (explaining that Rule 56 mandates the entry of summary judgment "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"). Plaintiffs have failed to do so.

For the reasons explained above, and viewing the record in the light most favorable to Plaintiffs, the Court concludes that as a matter of law, Plaintiffs cannot make the necessary showing of a First Amendment violation to sustain their § 1983 claim. Therefore, summary judgment is appropriate.

B. Declaratory Relief

Plaintiffs also allege a cause of action for declaratory relief. Specifically, Plaintiffs request a declaration from the Court that the check-off fees violate their First Amendment rights. This claim is governed by the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202 (2000). The Declaratory Judgment Act is not an independent source of federal jurisdiction. *See Schilling v. Rogers,* 363 U.S. 666, 677, 80 S.Ct. 1288, 4 L.Ed.2d 1478 (1960). Because the Court has already determined that Plaintiffs' § 1983 claim fails, the Court dismisses Plaintiffs' claim for declaratory relief for lack of jurisdiction. *See id.* Even if the Court retained jurisdiction over this claim, it would necessarily fail on the merits because, on the record before the Court, Plaintiffs cannot demonstrate that a federal right has been violated. *See id*. (explaining that the availability of relief under the Declaratory Judgment Act presupposes the existence of a judicially remediable right).

III. CONCLUSION

Based on the files, records, and proceedings herein, and for the reasons stated above, IT IS ORDERED THAT:

1. The Council's motion for summary judgment [Docket No. 15] is GRANTED.
2. Hugoson's motion for summary judgment [Docket No. 23] is GRANTED.
3. Plaintiffs' Complaint [Docket No. 1] is DISMISSED WITH PREJUDICE.

LET JUDGMENT BE ENTERED ACCORDINGLY.

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LAMERS DAIRY, INC. v. USDA.
No. 04-766.
Filed May 2, 2005.

(Former decision, 125 S.Ct. 1592)

AMAA – Assessments, unpaid – De-pooling, option available to Class III handlers – equal protection – Legitimate governmental interest to regulate – Breadth of regulatory scheme – targeting of suspect class, when not – Price inversion.

Supreme Court of the United States

Petition for rehearing denied.

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AGRICULTURAL MARKETING AGREEMENT ACT

DEPARTMENTAL DECISIONS

In re: LION RAISINS, INC., A CALIFORNIA CORPORATION, AND BOGHOSIAN RAISIN PACKING CO., INC., A CALIFORNIA CORPORATION.
2003 AMA Docket No. F&V 989-7.
Decision and Order.
Filed October 19, 2004.[*]

AMAA – Agricultural Marketing Agreement Act – Raisin order – Petition contents – Cognizable claim – Dismissal with prejudice.

The Judicial Officer affirmed Administrative Law Judge Victor W. Palmer's Order Dismissing Petition with Prejudice. The Judicial Officer stated proceedings under 7 U.S.C. § 608c(15)(A) do not afford a forum to debate questions of policy, desirability, or effectiveness of a marketing order. Moreover, arguments that competitors fare better than Petitioners are not appropriate for consideration in a proceeding under 7 U.S.C. § 608c(15)(A). The Judicial Officer concluded that Petitioners did not state a legally cognizable claim.

Colleen A. Carroll, for Respondent.
Brian C. Leighton and Howard A. Sagaser for Petitioners.
Order Dismissing Petition with Prejudice issued by Victor W. Palmer, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

Lion Raisins, Inc., a California corporation, and Boghosian Raisin Packing Co., Inc., a California corporation [hereinafter Petitioners], instituted this proceeding by filing a petition[1] on September 10, 2003.

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[*]This case was inadvertently left out of *63 Agric. Dec. Jul-Dec. (2004)*. Editor

[1]Petitioners entitle their Petition "Petition to Enforce and/or Modify Raisin Marketing Order Provisions/Regulations and/or Petition to the Secretary of Agriculture to Eliminate as Mandatory the Use of the USDA's Processed Products Inspection (continued...)

Petitioners instituted the proceeding under the Agricultural Marketing Agreement Act of 1937, as amended [hereinafter the AMAA]; the federal marketing order regulating the handling of "Raisins Produced From Grapes Grown In California" (7 C.F.R. pt. 989) [hereinafter the Raisin Order]; 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]. Petitioners request: (1) that the requirement in sections 989.58(d) and 989.59(d) of the Raisin Order (7 C.F.R. §§ 989.58(d), .59(d)) that United States Department of Agriculture inspectors inspect incoming and outgoing raisins be eliminated; (2) that the United States Department of Agriculture charge "by the hour per inspector" for inspection of incoming and outgoing raisins; and (3) that the United States Department of Agriculture "update its outgoing standards to meet the needs of today's market and consumers" (Pet. ¶ 20).

On October 10, 2003, the Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], filed a "Motion to Dismiss Petition." Respondent contends the petition should be dismissed with prejudice because the Petition does not contain: (1) the corporate information required by section 900.52(b)(1) of the Rules of Practice (7 C.F.R. § 900.52(b)(1)); (2) the specific provisions of the Raisin Order that Petitioners claim are not in accordance with law, as required by section 900.52(b)(2) of the Rules of Practice (7 C.F.R. § 900.52(b)(2)); (3) a full statement of the facts upon which the Petition is based, as required by section 900.52(b)(3) of the Rules of Practice (7 C.F.R. § 900.52(b)(3)); and (4) the grounds on which the terms or provisions of the Raisin Order are challenged as not in accordance with law, as required by section 900.52(b)(4) of the Rules of Practice (7 C.F.R. § 900.52(b)(4)) (Mot. to Dismiss Pet.). On November 7, 2003, Petitioner Lion Raisins, Inc., filed "Petitioner Lion Raisins,

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[1](...continued)
Branch Services for All Incoming and Outgoing Raisins, as Currently Required by 7 C.F.R. §§ 989.58 & 989.59, and to Exempt Petitioner from the Mandatory Inspection Services by USDA for Incoming and Outgoing Raisins and/or any Obligations Imposed in Connection Therewith That Are Not in Accordance with Law" [hereinafter Petition].

Inc.'s Opposition to Respondent's Motion to Dismiss Petition", and on December 3, 2003, Petitioner Boghosian Raisin Packing Co., Inc., filed "Petitioner Boghosian Raisin Packing Co., Inc.'s Opposition to Respondent's Motion to Dismiss Petition."

On July 15, 2004, Administrative Law Judge Victor W. Palmer [hereinafter the ALJ] issued an "Order Dismissing Petition with Prejudice" in which the ALJ concluded the Petition did not state a legally cognizable claim and dismissed the Petition with prejudice (Order Dismissing Pet. with Prejudice at 4).

On August 13, 2004, Petitioners appealed the ALJ's Order Dismissing Petition with Prejudice to the Judicial Officer. On August 27, 2004, Respondent filed "Respondent's Response to Petition for Appeal Filed by Petitioners Lion Raisins, Inc., and Boghosian Raisin Packing Co., Inc." On September 7, 2004, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I find the ALJ reached the correct result in dismissing the Petition with prejudice. Therefore, I adopt, with minor modifications, the ALJ's Order Dismissing Petition with Prejudice as the final Decision and Order. Additional conclusions by the Judicial Officer follow the ALJ's Order Dismissing Petition with Prejudice as restated.

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE—7 AGRICULTURE

. . . .

CHAPTER 26—AGRICULTURAL ADJUSTMENT

. . . .

SUBCHAPTER III—COMMODITY BENEFITS

. . . .

§ 608c. Orders regulating handling of commodity

. . . .

(6) Other commodities; terms and conditions of orders

In the case of agricultural commodities and the products thereof, other than milk and its products, specified in subsection (2) of this section orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section), no others:

. . . .

(F) Requiring or providing for the requirement of inspection of any such commodity or product produced during specified periods and marketed by handlers.

. . . .

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

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

(B) The District Courts of the United States in any district in which such handler is an inhabitant, or has his principal

> place of business, are vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 608a(6) of this title. Any proceedings brought pursuant to section 608a(6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection (15)) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15).

7 U.S.C. § 608c(6)(F), (15).

7 C.F.R.:

TITLE 7—AGRICULTURE

. . . .

SUBTITLE B—REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

. . . .

CHAPTER IX—AGRICULTURAL MARKETING SERVICE (MARKETING AGREEMENTS AND ORDERS; FRUITS, VEGETABLES, NUTS),

DEPARTMENT OF AGRICULTURE

PART 900—GENERAL REGULATIONS

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SUBPART—RULES OF PRACTICE GOVERNING PROCEEDINGS ON PETITIONS TO MODIFY OR TO BE EXEMPTED FROM MARKETING ORDERS

. . . .

§ 900.52 Institution of proceeding.

(a) *Filing and service of petition*. Any handler desiring to complain that any marketing order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law, shall file with the hearing clerk, in quadruplicate, a petition in writing addressed to the Secretary. Promptly upon receipt of the petition, the hearing clerk shall transmit a true copy thereof to the Administrator and the General Counsel, respectively.

(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; if an unincorporated association, the names and addresses of its officers, and the respective positions held by them; if a partnership, the name and address of each partner;

(2) Reference to the specific terms or provisions of the marketing order, or the interpretation or application thereof, which are complained of;

(3) A full statement of the facts (avoiding a mere repetition of detailed evidence) upon which the petition is based, and which it is desired that the Secretary consider, setting forth clearly and concisely the nature of the petitioner's business and

the manner in which petitioner claims to be affected by the terms or provisions of the marketing order, or the interpretation or application thereof, which are complained of;

(4) A statement of the grounds on which the terms or provisions of the marketing order, or the interpretation or application thereof, which are complained of, are challenged as not in accordance with law;

(5) Prayers for the specific relief which the petitioner desires the Secretary to grant;

(6) An affidavit by the petitioner, or, if the petitioner is not an individual, by an officer of the petitioner having knowledge of the facts stated in the petition, verifying the petition and stating that it is filed in good faith and not for purposes of delay.

(c) *Motion to dismiss petition*–(1) *Filing, contents, and responses thereto*. If the Administrator is of the opinion that the petition, or any portion thereof, does not substantially comply, in form or content, with the act or with the requirements of paragraph (b) of this section, or is not filed in good faith, or is filed for purposes of delay, the Administrator may, within thirty days after the service of the petition, file with the Hearing Clerk a motion to dismiss the petition, or any portion thereof, on one or more of the grounds stated in this paragraph. Such motion shall specify the grounds of objection to the petition and if based, in whole or in part, on an allegation of fact not appearing on the face of the petition, shall be accompanied by appropriate affidavits or documentary evidence substantiating such allegations of fact. The motion may be accompanied by a memorandum of law. Upon receipt of such motion, the Hearing Clerk shall cause a copy thereof to be served upon the petitioner, together with a notice stating that all papers to be submitted in opposition to such motion including any memorandum of law, must be filed by the petitioner with the hearing clerk not later than 20 days after the service of such notice upon the petitioner. Upon the expiration of the time specified in such notice, or upon receipt of such papers from the petitioner, the hearing clerk shall transmit all

papers which have been filed in connection with the motion to the Judge for consideration.

(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.

PART 989—RAISINS PRODUCED FROM GRAPES GROWN IN CALIFORNIA

. . . .

SUBPART—ORDER REGULATING HANDLING

. . . .

GRADE AND CONDITION STANDARDS

§ 989.58 Natural condition raisins.

. . . .

(d) *Inspection and certification.* (1) Each handler shall cause an inspection and certification to be made of all natural condition raisins acquired or received by him. . . . The handler shall submit or cause to be submitted to the committee a copy of such certification, together with such other documents or records as the committee may require. Such certification shall be issued by inspectors of the Processed Products

Standardization and Inspection Branch of the U.S. Department of Agriculture, unless the committee determines, and the Secretary concurs in such determination, that inspection by another agency would improve the administration of this amended subpart. The committee may require that raisins held on memorandum receipt be reinspected and certified as a condition for their acquisition by a handler.

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§ 989.59 Regulation of the handling of raisins subsequent to their acquisition by handlers.

. . . .

(d) *Inspection and certification*. Unless otherwise provided in this section, each handler shall, at his own expense, before shipping or otherwise making final disposition of raisins, cause and [sic] inspection to be made of such raisins to determine whether they meet the then applicable minimum grade and condition standards for natural condition raisins or the then applicable minimum grade standards for packed raisins. Such handler shall obtain a certificate that such raisins meet the aforementioned applicable minimum standards and shall submit or cause to be submitted to the committee a copy of such certificate together with such other documents or records as the committee may require. The certificate shall be issued by the Processed Products Standardization and Inspection Branch of the United States Department of Agriculture, and unless the committee determines, and the Secretary concurs in such determination, that inspection by another agency will improve the administration of this amended subpart. Any certificate issued pursuant to this paragraph shall be valid only for such period of time as the committee may specify, with the approval of the Secretary, in appropriate rules and regulations.

7 C.F.R. §§ 900.52(a)-(c)(2); 989.58(d), .59(d).

ADMINISTRATIVE LAW JUDGE'S

ORDER DISMISSING PETITION WITH PREJUDICE (AS RESTATED)

Petitioners request elimination of the requirement that the raisins they handle be inspected by the United States Department of Agriculture's Processed Products Standardization and Inspection Branch. Petitioners contend the cost to them of these inspections at the $9-per-ton-applicable-rate is too high. Petitioners allege their plants have fast-moving processing equipment that results in their paying $108 to $135 per hour for United States Department of Agriculture inspection. Petitioners allege the hourly rate they pay for United States Department of Agriculture inspection is excessive and unfair since the United States Department of Agriculture employs at their plants only one inspector and never more than two. Additionally, Petitioners assert the resultant hourly charges to Petitioners by the United States Department of Agriculture are higher than the United States Department of Agriculture charges Petitioners' less efficient competitors with slower processing equipment. Petitioners contend they can obtain cheaper and superior inspection privately, albeit their products would not be "USDA inspected." Petitioners claim most of their customers do not want raisins that are inspected by the United States Department of Agriculture, but, instead, prefer Petitioners' quality control inspection certificate. (Pet. ¶¶ 8-14, 15B.)

The handling of California raisins, at the behest of the California raisin industry, is subject to the requirements of the Raisin Order. Sections 989.58(d) and 989.59(d) of the Raisin Order (7 C.F.R. §§ 989.58(d), .59(d)) require inspection and certification of raisins by the United States Department of Agriculture. Petitioners contend these inspection and certification provisions of the Raisin Order and "related order provisions and regulation provisions mandating USDA Inspection Service . . . are arbitrary, capricious, not in accordance with the law, and . . . over-priced" and request their elimination or modification (Pet. ¶ 17).

Federal marketing orders regulating the handling of various fruits and vegetables come into being only when specifically requested by the industry. Upon industry request, a rulemaking hearing is held

which may result in the formulation of a proposed marketing order. Grower members of the affected industry then must vote on whether they wish the handling of their fruits or vegetables to be subject to the terms of the proposed marketing order. Upon a favorable vote by two-thirds of the growers, the marketing order is promulgated and is then administered, subject to oversight by the Secretary of Agriculture and approval by an industry committee.[2] Under section 989.26 of the Raisin Order (7 C.F.R. § 989.26), the Raisin Administrative Committee was established to consist of 47 members, 35 of whom represent producers (growers), 10 represent handlers, one represents the Cooperative Bargaining Association, and one is a public member. This section of the Raisin Order, together with sections 989.27 through 989.39 of the Raisin Order (7 C.F.R. §§ 989.27-.39), describe the way in which members are selected, their eligibility, term of office, powers, duties, obligations, and other aspects of the Raisin Administrative Committee.

Sections 989.58(d) and 989.59(d) of the Raisin Order (7 C.F.R. §§ 989.58(d), .59(d)) provide that the Raisin Administrative Committee may seek to have inspection of raisins performed by another agency because it would improve the administration of the subpart (7 C.F.R. §§ 989.1-.95). The Raisin Administrative Committee has not sought to have another agency perform raisin inspections. Apparently, the Raisin Administrative Committee finds the inspectors employed by the United States Department of Agriculture's Processed Products Standardization and Inspection Branch to be trustworthy and the certificates they issue to afford industry members and their customers a valuable form of protection that promotes the image of the product.

The actual charges for inspection were negotiated by the Raisin Administrative Committee with the United States Department of Agriculture's Processed Products Standardization and Inspection Branch. The Raisin Administrative Committee is so empowered by section 989.35(a) of the Raisin Order (7 C.F.R. § 989.35(a)). The Processed Products Standardization and Inspection Branch, operated by the Agricultural Marketing Service, is authorized to enter into an

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[2] *See Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 461-62 (1997).

agreement regarding inspection charges by 7 C.F.R. § 52.51(b), a regulation promulgated through notice-and-comment rulemaking. The resulting Memorandum of Understanding between the Raisin Administrative Committee and the United States Department of Agriculture is attached as Exhibit B and the fee schedule established pursuant to the Memorandum of Understanding is attached as Exhibit C to Respondent's Motion to Dismiss Petition. Also, attached to Respondent's Motion to Dismiss Petition is a declaration by Mickey Martinez, the Officer in Charge of the United States Department of Agriculture's Processed Products Branch Inspection Service, Agricultural Marketing Service (Exhibit A).

Compared with these fees negotiated by the Raisin Administrative Committee, which was selected to represent the California raisin industry, Petitioners simply allege the fees are too high and disadvantage them in comparison to their competitors. But whether inspections could be performed more cheaply or more efficiently by others and better assure the quality of California raisins are not matters that may be decided in proceedings instituted pursuant to section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)). Proceedings under section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)) do not afford a forum to debate questions of policy, desirability, or effectiveness of order provisions.[3]

Moreover, Petitioners' arguments that competitors fare better than Petitioners are not appropriate for consideration in these proceedings. As stated in *In re Daniel Strebin*, 56 Agric. Dec. at 1136, *citing Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 461-62 (1997):

> Moreover, the Supreme Court of the United States makes clear that arguments based upon competition are inapposite in the context of a marketing order, where marketing order committee members and handlers are engaged in what the Court describes as "collective action[.]"

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[3]*In re Daniel Strebin*, 56 Agric. Dec. 1095, 1133 (1997); *In re Sunny Hill Farms Dairy Co.*, 26 Agric. Dec. 201, 217 (1967), *aff'd*, 446 F.2d 1124 (8th Cir. 1971), *cert. denied*, 405 U.S. 917 (1972).

Simply put, none of Petitioners arguments can be said to show that the Raisin Order, any regulation pertaining to the Raisin Order, or any action taken under the Raisin Order or in its respect are "not in accordance with law" as section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)) requires for Petitioners' Petition to be successful.

There are also technical deficiencies with the Petition which would require its dismissal and replacement by an amended petition. But the failure to state a legally cognizable claim is the fatal flaw that leads me to dismiss the Petition with prejudice. Petitioners' attorneys are experts in the laws that apply to the legal world of marketing orders. If Petitioners had some legally cognizable claim, I am sure it would have been coherently expressed. To allow future amended petitions on this subject would be a waste of resources.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Petitioners raise five issues in "Petitioners' Appeal Petition to the Judicial Officer from the ALJ Order Dismissing Petition with Prejudice (7 C.F.R. § 900.65(a))" [hereinafter Appeal Petition]. First, Petitioners assert the ALJ erroneously and inadequately summarized Petitioners' claims (Appeal Pet. at 7). Petitioners identify six ALJ statements that Petitioners assert are erroneous and inadequate. However, a comparison of the Petition with the ALJ's Order Dismissing Petition with Prejudice reveals that the ALJ accurately and adequately summarized Petitioners' claims.

Second, Petitioners contend the ALJ erroneously concluded that proceedings under section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)) do not afford a forum to debate questions of policy, desirability, or effectiveness of order provisions and that Petitioners' arguments that competitors fare better than Petitioners are not appropriate considerations in proceedings under section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)) (Appeal Pet. at 7).

I disagree with Petitioners' contention that the ALJ's conclusions are error. Section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)) only provides a forum in which a handler may seek modification of, or exemption from, an order (or any provision of, or any obligation imposed in connection with, an order) that is "not in accordance with

law." Questions of policy, desirability, or effectiveness of an order (or any provision of, or any obligation imposed in connection with, an order) are not appropriate considerations in proceedings under section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)).[4] Moreover, arguments based upon competition are inapposite in the context of a marketing order, where marketing order committee members and handlers are engaged in collective action.[5]

Third, Petitioners contend the ALJ erroneously determined Petitioners' claims merely concern questions of Raisin Order policy, desirability, or effectiveness (Appeal Pet. at 8).

Petitioners allege the United States Department of Agriculture's appointment of "its very own inspectors to inspect all incoming and outgoing raisins" is not in accordance with law (Pet. ¶ 15). However, section 8c(6)(F) of the AMAA (7 U.S.C. § 608c(6)(F)) requires that each agricultural commodity marketing order, other than milk marketing orders, contain a term requiring the inspection of the agricultural commodity subject to the marketing order. Petitioners cite section 8c(6)(F) of the AMAA (7 U.S.C. § 608c(6)(F)) (Pet. ¶ 5) and appear to contradict their allegation that the United States Department of Agriculture's appointment of "its very own inspectors to inspect all incoming and outgoing raisins" is not in accordance with law, as follows:

> 7. Thus, *pursuant to the AMAA*, the Secretary required mandatory incoming inspections and outgoing inspections on all raisins covered by the Raisin Marketing Order, and appointed its very own Processed Products Branch, Fruit and Vegetable Division, Agricultural Marketing Service of the United States Department of Agriculture to provide the "Inspection Service[.]"

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[4] *See* note 3.

[5] *In re Daniel Strebin*, 56 Agric. Dec. 1095, 1136 (1997) (citing *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 461-62 (1997)).

Pet. ¶ 7 (emphasis added).

In light of the plain language of section 8c(6)(F) of the AMAA (7 U.S.C. § 608c(6)(F)) and Petitioners' allegation in paragraph 7 of the Petition, I conclude Petitioners do not state a legally cognizable claim in paragraph 15 of the Petition.

In addition, Petitioners state the facts alleged in paragraphs 1 through 16 of the Petition show that sections 989.58(d) and 989.59(e) of the Raisin Order (7 C.F.R. §§ 989.58(d), .59(e))[6] are not in accordance with law (Pet. ¶ 17). After carefully reviewing the factual allegations in the Petition, I agree with the ALJ's conclusion that the facts alleged in the Petition merely raise questions of Raisin Order policy, desirability, or effectiveness and Petitioners have not alleged facts that support a legally cognizable claim in a proceeding instituted under section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)).

Fourth, Petitioners contend their claims that the United States Department of Agriculture negligently conducted inspections of their raisins and negligently recorded results of those inspections are legally cognizable claims in a proceeding instituted under section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)) and the ALJ erroneously failed to address these claims (Appeal Pet. at 9-10).

I disagree with Petitioners' contention that the ALJ erroneously failed to address their claims of United States Department of Agriculture negligence. The ALJ addressed all of Petitioners' allegations, as follows:

> Simply put, none of the arguments set forth by Petitioners can be said to show that the Marketing Order, any regulation pertaining to it, or any action taken under it or in its respect are "not in accordance with law" as the Act requires for their

[6]Petitioners state their reference to section 989.59(e) of the Raisin Order (7 C.F.R. § 989.59(e)) in the Petition is a typographical error and Petitioners meant to refer to section 989.59(d) of the Raisin Order (7 C.F.R. § 989.59(d)) (Petitioner Lion Raisins, Inc.'s Opposition to Respondent's Motion to Dismiss Petition at 4; Petitioner Boghosian Raisin, Packing Co., Inc.'s Opposition to Respondent's Motion to Dismiss Petition at 3).

Petition to be successful.

Order Dismissing Petition with Prejudice at 4.

Moreover, I conclude Petitioners' allegations of United States Department of Agriculture negligence raise questions of inspector performance, which is not a claim legally cognizable in a proceeding instituted under section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)).

Fifth, Petitioners contend the Petition contains two succinct cognizable claims and, if the ALJ did not understand Petitioners' claims, he should have allowed Petitioners to amend the Petition to make the claims more succinct (Appeal Pet. at 10).

The ALJ's Order Dismissing Petition with Prejudice indicates that the ALJ understood Petitioners' claims. Moreover, Petitioners do not cite, and I cannot locate, any portion of the ALJ's Order Dismissing Petition with Prejudice indicating that the ALJ dismissed the Petition because Petitioners' claims were not succinctly stated.

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

ORDER

1. Petitioners' Petition, filed September 10, 2003, is dismissed with prejudice.

2. This Order shall become effective on the day after service on Petitioners.

RIGHT TO JUDICIAL REVIEW

Petitioners have the right to obtain review of this Order in any district court of the United States in which district Petitioners are inhabitants or have their principal places of business. A bill in equity for the purpose of review of this Order must be filed within 20 days from the date of entry of this Order. Service of process in any such proceeding may be had upon the Secretary of Agriculture by delivering a copy of the bill of complaint to the Secretary of

Agriculture.[7] The date of entry of this Order is October 19, 2004.

In re: LION RAISINS, INC., A CALIFORNIA CORPORATION.
2005 AMA Docket No. F&V 989-1.
Decision and Order.
Filed April 25, 2005.

AMAA – Agricultural Marketing Agreement Act – Raisin order – Premature amended petition – Petition contents – Cognizable claim – Dismissal with prejudice.

The Judicial Officer affirmed Administrative Law Judge Peter M. Davenport's (ALJ's) Order striking Petitioner's Amended Petition and dismissing Petitioner's Petition. The Judicial Officer stated, when a motion to dismiss has been filed, a petitioner may file an amended petition after the Hearing Clerk serves the petitioner with the administrative law judge's order dismissing the petition (7 C.F.R. § 900.52(c)(2)). The Judicial Officer struck Petitioner's Amended Petition as premature because Petitioner filed it 33 days prior to being served with the ALJ's Order dismissing Petitioner's Petition. The Judicial Officer dismissed Petitioner's Petition with prejudice because it did not state a legally-cognizable claim. In addition, the Judicial Officer found Petitioner's Petition did not contain the information required by 7 C.F.R. § 900.52(b).

Colleen A. Carroll, for Respondent.
Brian C. Leighton, Clovis, California, for Petitioner.
Order issued by Peter M. Davenport, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

Lion Raisins, Inc. [hereinafter Petitioner], instituted this proceeding by filing a petition[1] on November 10, 2004. Petitioner

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[7] *See* 7 U.S.C. § 608c(15)(B).

[1]Petitioner entitles its petition "Petition to Enforce and/or Modify Raisin Marketing Order Provisions/Regulations and/or Petition to the Secretary of Agriculture to (continued...)

instituted the proceeding under the Agricultural Marketing Agreement Act of 1937, as amended [hereinafter the AMAA]; the federal marketing order regulating the handling of "Raisins Produced From Grapes Grown In California" (7 C.F.R. pt. 989) [hereinafter the Raisin Order]; and the "Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Marketing Orders" (7 C.F.R. §§ 900.50-.71) [hereinafter the Rules of Practice]. Petitioner requests: (1) that the requirement in sections 989.58(d) and 989.59(d) of the Raisin Order (7 C.F.R. §§ 989.58(d), .59(d)) that United States Department of Agriculture inspect raisins be eliminated and that handlers be allowed to inspect their own raisins or to hire other qualified persons to inspect their raisins; (2)(a) that qualified companies or associations be allowed to conduct processed product inspection, or (b) that each handler be allowed to conduct its own processed products inspection under the observation and supervision of a qualified company or association, or (c) that handlers be allowed to use a program recognized by the United States Department of Agriculture for processed products inspection; and (3) that a finding be made that the United States Department of Agriculture's failure to permit the Dried Fruit Association to conduct raisin inspections is arbitrary and capricious (Pet. ¶ 17).

On December 29, 2004, the Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], filed a "Motion to Dismiss Petition." Respondent contends Petitioner's Petition should be dismissed with prejudice because: (1) Petitioner seeks to re-litigate issues decided in *In re Lion Raisins, Inc.*, 64 Agric. Dec. 11 (2004), and the doctrine of *res judicata* bars re-litigation of those issues; (2) the Judicial Officer's Order dismissing with prejudice the petition filed by Petitioner in *In re Lion Raisins, Inc.*, 64 Agric. Dec. 11 (2004), bars Petitioner from

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[1](...continued)
Eliminate as Mandatory the Use of USDA Processed Products Inspection Branch Services for All Incoming and Outgoing Raisins, as Currently Required by 7 C.F.R. §§ 989.58 & 989.59, to Exempt Petitioners [sic] from the Mandatory Inspection Services by USDA for Incoming and Outgoing Raisins and/or Any Obligations Imposed in Connection Therewith That Are Not in Accordance with Law" [hereinafter Petition].

bringing further suit on the same claim; and (3) Petitioner's Petition does not contain (a) the corporate information required by section 900.52(b)(1) of the Rules of Practice (7 C.F.R. § 900.52(b)(1)), (b) reference to provisions of the Raisin Order Petitioner claims are not in accordance with law, as required by section 900.52(b)(2) of the Rules of Practice (7 C.F.R. § 900.52(b)(2)), (c) a full statement of the facts upon which Petitioner's Petition is based, as required by section 900.52(b)(3) of the Rules of Practice (7 C.F.R. § 900.52(b)(3)), or (d) the grounds upon which the terms or provisions of the Raisin Order are challenged as not in accordance with law, as required by section 900.52(b)(4) of the Rules of Practice (7 C.F.R. § 900.52(b)(4)) (Mot. to Dismiss Pet.).

On February 9, 2005, Petitioner filed an amended petition.[2] On February 14, 2005, Respondent filed a "Motion to Strike Amended Petition, or in The Alternative, Motion for Extension of Time" [hereinafter Motion to Strike Amended Petition].

On March 3, 2005, Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] issued an Order: (1) granting Respondent's Motion to Strike Amended Petition; (2) granting Respondent's Motion to Dismiss Petition; and (3) stating Petitioner may file an amended petition within 20 days of service of the Order (ALJ's March 3, 2005, Order at 3).

On March 11, 2005, Respondent appealed the ALJ's March 3, 2005, Order. On March 30, 2005, Petitioner filed "Petitioner's Response to Respondent's Appeal Petition." On April 11, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I agree with the

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[2]Petitioner entitles its amended petition "Amended Petition to Enforce and/or Modify Raisin Marketing Order Provisions/Regulations; To Exempt Petitioner from the Mandatory Inspection Services by USDA for Incoming and Outgoing Raisins, To Preclude the Raisin Administrative Committee and/or USDA from Receiving the Otherwise Required Raisin Administrative Committee Forms; Petition to Allow Buyers and Producers to Call for Inspection Services, and to Delete Certain Obligations Imposed in Connection Therewith That Are Not in Accordance with Law" [hereinafter Amended Petition].

ALJ's dismissing Petitioner's Petition and striking Petitioner's Amended Petition; however, I find some of the ALJ's discussion irrelevant. Therefore, while I dismiss Petitioner's Petition and strike Petitioner's Amended Petition, I do not adopt the ALJ's March 3, 2005, Order.

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE—7 AGRICULTURE

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CHAPTER 26—AGRICULTURAL ADJUSTMENT

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SUBCHAPTER III—COMMODITY BENEFITS

. . . .

§ 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.

(B) The District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 608a(6) of this title. Any proceedings brought pursuant to section 608a(6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection (15)) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15).

7 U.S.C. § 608c(15).

7 C.F.R.:

TITLE 7—AGRICULTURE

. . . .

SUBTITLE B—REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

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CHAPTER IX—AGRICULTURAL MARKETING SERVICE (MARKETING AGREEMENTS AND ORDERS; FRUITS, VEGETABLES, NUTS), DEPARTMENT OF AGRICULTURE

PART 900—GENERAL REGULATIONS

. . . .

SUBPART—RULES OF PRACTICE GOVERNING PROCEEDINGS ON PETITIONS TO MODIFY OR TO BE EXEMPTED FROM MARKETING ORDERS

. . . .

§ 900.52 Institution of proceeding.

(a) *Filing and service of petition*. Any handler desiring to complain that any marketing order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law, shall file with the hearing clerk, in quadruplicate, a petition in writing addressed to the Secretary. Promptly upon receipt of the petition, the hearing clerk shall transmit a true copy thereof to the Administrator and the General Counsel, respectively.

(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; if an unincorporated association, the names and addresses of its officers, and the respective positions held by them; if a partnership, the name and address of each partner;

(2) Reference to the specific terms or provisions of the marketing order, or the interpretation or application thereof,

which are complained of;

(3) A full statement of the facts (avoiding a mere repetition of detailed evidence) upon which the petition is based, and which it is desired that the Secretary consider, setting forth clearly and concisely the nature of the petitioner's business and the manner in which petitioner claims to be affected by the terms or provisions of the marketing order, or the interpretation or application thereof, which are complained of;

(4) A statement of the grounds on which the terms or provisions of the marketing order, or the interpretation or application thereof, which are complained of, are challenged as not in accordance with law;

(5) Prayers for the specific relief which the petitioner desires the Secretary to grant;

(6) An affidavit by the petitioner, or, if the petitioner is not an individual, by an officer of the petitioner having knowledge of the facts stated in the petition, verifying the petition and stating that it is filed in good faith and not for purposes of delay.

(c) *Motion to dismiss petition*–(1) *Filing, contents, and responses thereto*. If the Administrator is of the opinion that the petition, or any portion thereof, does not substantially comply, in form or content, with the act or with the requirements of paragraph (b) of this section, or is not filed in good faith, or is filed for purposes of delay, the Administrator may, within thirty days after the service of the petition, file with the Hearing Clerk a motion to dismiss the petition, or any portion thereof, on one or more of the grounds stated in this paragraph. Such motion shall specify the grounds of objection to the petition and if based, in whole or in part, on an allegation of fact not appearing on the face of the petition, shall be accompanied by appropriate affidavits or documentary evidence substantiating such allegations of fact. The motion may be accompanied by a memorandum of law. Upon receipt of such motion, the Hearing Clerk shall cause a copy thereof to be served upon the petitioner, together with a notice stating that all papers to be submitted in opposition to such motion

including any memorandum of law, must be filed by the petitioner with the hearing clerk not later than 20 days after the service of such notice upon the petitioner. Upon the expiration of the time specified in such notice, or upon receipt of such papers from the petitioner, the hearing clerk shall transmit all papers which have been filed in connection with the motion to the Judge for consideration.

(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.

PART 989—RAISINS PRODUCED FROM GRAPES GROWN IN CALIFORNIA

. . . .

SUBPART—ORDER REGULATING HANDLING

. . . .

GRADE AND CONDITION STANDARDS

§ 989.58 Natural condition raisins.

. . . .

(d) *Inspection and certification.* (1) Each handler shall cause an inspection and certification to be made of all natural

condition raisins acquired or received by him. . . . The handler shall submit or cause to be submitted to the committee a copy of such certification, together with such other documents or records as the committee may require. Such certification shall be issued by inspectors of the Processed Products Standardization and Inspection Branch of the U.S. Department of Agriculture, unless the committee determines, and the Secretary concurs in such determination, that inspection by another agency would improve the administration of this amended subpart. The committee may require that raisins held on memorandum receipt be reinspected and certified as a condition for their acquisition by a handler.

. . . .

§ 989.59 Regulation of the handling of raisins subsequent to their acquisition by handlers.

. . . .

(d) *Inspection and certification*. Unless otherwise provided in this section, each handler shall, at his own expense, before shipping or otherwise making final disposition of raisins, cause and [sic] inspection to be made of such raisins to determine whether they meet the then applicable minimum grade and condition standards for natural condition raisins or the then applicable minimum grade standards for packed raisins. Such handler shall obtain a certificate that such raisins meet the aforementioned applicable minimum standards and shall submit or cause to be submitted to the committee a copy of such certificate together with such other documents or records as the committee may require. The certificate shall be issued by the Processed Products Standardization and Inspection Branch of the United States Department of Agriculture, unless the committee determines, and the Secretary concurs in such determination, that inspection by another agency will improve the administration of this amended subpart. Any certificate issued pursuant to this paragraph shall be valid only for such period of time as the committee may specify, with the approval

of the Secretary, in appropriate rules and regulations.

7 C.F.R. §§ 900.52(a)-(c)(2); 989.58(d), .59(d).

DECISION

Respondent's Motion to Strike Amended Petition

Section 900.52(c)(2) of the Rules of Practice (7 C.F.R. § 900.52(c)(2)) provides, when a motion to dismiss has been filed, a petitioner may file an amended petition after the Hearing Clerk serves the petitioner with the administrative law judge's order dismissing the petitioner's petition or any portion of the petitioner's petition. Petitioner filed the Amended Petition on February 9, 2005, 33 days prior to the date the Hearing Clerk served Petitioner with the ALJ's March 3, 2005, Order dismissing Petitioner's Petition.[3] Therefore, Petitioner's Amended Petition should be stricken as premature.

Respondent's Motion to Dismiss Petition

Petitioner's Petition raises the same claims Petitioner raised in the petition filed by Petitioner in *In re Lion Raisins, Inc.*, 64 Agric. Dec. 11 (2004). I dismissed with prejudice the petition filed by Petitioner in *In re Lion Raisins, Inc.*, 64 Agric. Dec. 11 (2004). A dismissal with prejudice has the effect of a final adjudication on the merits favorable to the defendant and bars future suits brought by the plaintiff on the same cause of action.[4] A dismissal with prejudice constitutes a final judgment with the preclusive effect of *res judicata*

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[3] *See* United States Postal Service Domestic Return Receipt for Article 7004 1160 0001 9221 3106 establishing the Hearing Clerk served Petitioner with the ALJ's March 3, 2005, Order on March 14, 2005.

[4] *Lawlor v. National Screen Serv. Corp.*, 349 U.S. 322, 327 (1955); *FEC v. Al Salvi For Senate Comm.*, 205 F.3d 1015, 1020 (7th Cir. 2000); *Nemaizer v. Baker*, 793 F.2d 58, 60-61 (2d Cir. 1986); *Wainwright Securities, Inc. v. Wall Street Transcript*, 80 F.R.D. 103, 105 (S.D.N.Y. 1978).

not only as to all matters litigated and decided by the dismissal, but as to all relevant issues that could have been raised and litigated in the suit.[5] Therefore, Petitioner's Petition is barred by *res judicata* and should be dismissed with prejudice.

Moreover, Petitioner's Petition does not comply with the requirements of section 900.52(b)(1)-(2), (4) of the Rules of Practice (7 C.F.R. § 900.52(b)(1)-(2), (4)). Specifically, section 900.52(b)(1) of the Rules of Practice (7 C.F.R. § 900.52(b)(1)) requires that a petition contain the names, addresses, and respective positions held by a corporate petitioner's officers. Petitioner identifies one officer, its president Alfred Lion, Jr. (Pet. ¶ 1A). Petitioner's Amended Petition identifies multiple officers, each officer's position, and each officer's address (Amended Pet. ¶ 2). Therefore, I find Petitioner's Petition does not comply with the requirements of section 900.52(b)(1) of the Rules of Practice (7 C.F.R. § 900.52(b)(1)).

Section 900.52(b)(2) of the Rules of Practice (7 C.F.R. § 900.52(b)(2)) requires that each petition contain a reference to the specific terms or provisions of the marketing order, or the interpretation or application of the marketing order, about which the petitioner complains. Petitioner "challenges §§ 989.58(d) & 989.59(d) and any corollary marketing order provisions or regulation provisions that depend upon §§ 989.58(d) & 989.59(d), such as 989.102" (Pet. ¶ 6). I find Petitioner's Petition does not comply with the requirements of section 900.52(b)(2) of the Rules of Practice (7 C.F.R. § 900.52(b)(2)) because the Petition does not specifically reference all of the "corollary" Raisin Order terms or provisions which Petitioner challenges.

Section 900.52(b)(4) of the Rules of Practice (7 C.F.R. § 900.52(b)(4)) requires that each petition contain a statement of the grounds upon which the terms or provisions of the marketing order, or the interpretation or application of the marketing order, about which the petitioner complains, are challenged as not in accordance

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[5] *Heiser v. Woodruff*, 327 U.S. 726, 735 (1946); *Nemaizer v. Baker*, 793 F.2d 58, 60-61 (2d Cir. 1986); *Teltronics v. L M Ericsson Telecommunications, Inc.*, 642 F.2d 31, 35 (2d Cir. 1981).

with law.

Petitioner requests elimination of the requirement that the raisins it handles be inspected by the United States Department of Agriculture's Processed Products Standardization and Inspection Branch. Petitioner contends the cost of United States Department of Agriculture inspections, at the $10-per-ton rate, is too high. Petitioner alleges it processes about 15 tons of raisins per hour resulting in the payment of approximately $135 per hour for United States Department of Agriculture inspection. Petitioner alleges the hourly rate it pays for United States Department of Agriculture inspection is excessive and unfair since the United States Department of Agriculture generally provides two inspectors and, on many occasions, one inspector for the inspection of Petitioner's raisins. Additionally, Petitioner asserts the resultant hourly charges to Petitioner by the United States Department of Agriculture are higher than the United States Department of Agriculture charges "consumer-pack oriented" processors and handlers. Further still, Petitioner contends the United States Department of Agriculture provides better inspection service to Petitioner's competitors, the United States Department of Agriculture negligently performs inspections, and Petitioner's quality control program is better than the inspection service provided by the United States Department of Agriculture. (Pet. ¶¶ 8-14.)

The handling of California raisins, at the behest of the California raisin industry, is subject to the requirements of the Raisin Order. Sections 989.58(d) and 989.59(d) of the Raisin Order (7 C.F.R. §§ 989.58(d), .59(d)) require inspection and certification of raisins by the United States Department of Agriculture. Petitioner requests elimination of these inspections and certification provisions of the Raisin Order (Pet. ¶ 17A).

Marketing orders regulating the handling of various fruits and vegetables come into being only when specifically requested by the industry. Upon industry request, a rulemaking hearing is held which may result in the formulation of a proposed marketing order. Grower members of the affected industry then must vote on whether they wish the handling of their fruits or vegetables to be subject to the terms of the proposed marketing order. Upon a favorable vote by

two-thirds of the growers, the marketing order is promulgated and is then administered, subject to oversight by the Secretary of Agriculture and approval by an industry committee.[6] Under section 989.26 of the Raisin Order (7 C.F.R. § 989.26), the Raisin Administrative Committee was established to consist of 47 members, 35 of whom represent producers (growers), 10 represent handlers, 1 represents the Cooperative Bargaining Association, and 1 is a public member. This section of the Raisin Order, together with sections 989.27 through 989.39 of the Raisin Order (7 C.F.R. §§ 989.27-.39), describe the way in which members are selected, their eligibility, term of office, powers, duties, obligations, and other aspects of the Raisin Administrative Committee.

Sections 989.58(d) and 989.59(d) of the Raisin Order (7 C.F.R. §§ 989.58(d), .59(d)) provide that the Raisin Administrative Committee may seek to have inspection of raisins performed by another agency because it would improve the administration of the subpart (7 C.F.R. §§ 989.1-.95). The Raisin Administrative Committee has not sought to have another agency perform raisin inspections. Apparently, the Raisin Administrative Committee finds the inspectors employed by the United States Department of Agriculture's Processed Products Standardization and Inspection Branch to be trustworthy and the certificates they issue to afford industry members and their customers a valuable form of protection that promotes the image of the product.

The actual charges for inspection were negotiated by the Raisin Administrative Committee with the United States Department of Agriculture's Processed Products Standardization and Inspection Branch. The Raisin Administrative Committee is so empowered by section 989.35(a) of the Raisin Order (7 C.F.R. § 989.35(a)). The Processed Products Standardization and Inspection Branch, operated by the Agricultural Marketing Service, is authorized to enter into an agreement regarding inspection charges by 7 C.F.R. § 52.51(b), a regulation promulgated through notice-and-comment rulemaking.

Compared with these fees negotiated by the Raisin Administrative Committee, which was selected to represent the California raisin

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[6] *See Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 461-62 (1997).

industry, Petitioner simply alleges the fees are too high, disadvantage Petitioner in comparison to its competitors, have not been properly adopted, and are arbitrary and capricious. But whether inspections could be performed more cheaply or more efficiently by others and better assure the quality of California raisins are not matters that may be decided in proceedings instituted pursuant to section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)). Proceedings under section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)) do not afford a forum to debate questions of policy, desirability, or effectiveness of order provisions.[7]

Moreover, Petitioner's argument that competitors fare better than Petitioner is not appropriate for consideration in these proceedings. As stated in *In re Daniel Strebin*, 56 Agric. Dec. at 1136, *citing Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 461-62 (1997):

> Moreover, the Supreme Court of the United States makes clear that arguments based upon competition are inapposite in the context of a marketing order, where marketing order committee members and handlers are engaged in what the Court describes as "collective action[.]"

Simply put, none of Petitioner's arguments can be said to show that the Raisin Order, any regulation pertaining to the Raisin Order, or any action taken under the Raisin Order, or in its respect, are "not in accordance with law" as section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)) requires for Petitioner's Petition to be successful. The failure to state a legally-cognizable claim is the fatal flaw that leads me to dismiss Petitioner's Petition with prejudice.

RESPONDENT'S APPEAL PETITION

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[7] *In re Lion Raisins, Inc.*, 64 Agric. Dec. 11, 22-3, (2004); *In re Daniel Strebin*, 56 Agric. Dec. 1095, 1133 (1997); *In re Sunny Hill Farms Dairy Co.*, 26 Agric. Dec. 201, 217 (1967), *aff'd*, 446 F.2d 1124 (8th Cir. 1971), *cert. denied*, 405 U.S. 917 (1972).

Respondent raises five issues in Respondent's Appeal Petition. First, Respondent contends "[t]he ALJ erred in assuming an 'oversight or omission' in the Rules of Practice" (Respondent's Appeal Pet. at 2).

Section 1.137(a) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes provides that a pleading may be amended, as follows:

> **§ 1.137 Amendment of complaint, petition for review, or answer; joinder of related matters.**
>
> (a) *Amendment.* At any time prior to the filing of a motion for a hearing, the complaint, petition for review, answer, or response to petition for review may be amended. Thereafter, such an amendment may be made with consent of the parties, or as authorized by the Judge upon a showing of good cause.

7 C.F.R. § 1.137(a).

The ALJ correctly states the Rules of Practice does not include a provision for the amendment of pleadings identical to that found in section 1.137(a) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.137(a)). The ALJ asserts the absence of such a provision in the Rules of Practice is "an apparent oversight or omission." (ALJ's March 3, 2005, Order at 2.)

I find irrelevant the reason for the absence in the Rules of Practice of a provision for the amendment of pleadings identical to that found in section 1.137(a) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.137(a)). Therefore, I do not adopt the ALJ's assertion regarding the apparent reason for the absence of a provision in the Rules of Practice identical to that found in section 1.137(a) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.137(a)).

Second, Respondent contends the ALJ erroneously refers to the

Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.130-.151) as "the usual provisions of the rules" and erroneously characterizes the Rules of Practice that apply to petitions to modify or to be exempted from marketing orders as "obscure" (Respondent's Appeal Pet. at 2-3).

The ALJ refers to section 1.137 of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.137), under which a party may amend a pleading, as "the usual provisions of the rules" and characterizes the provisions relating to the amendment of petitions in the Rules of Practice as "the more obscure provisions" (ALJ's March 3, 2005, Order at 2).

The Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) are applicable to adjudicatory proceedings instituted under more than 40 statutes.[8] The Rules of Practice (7 C.F.R. §§ 900.50-.71) are only applicable to proceedings instituted under section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)) to modify or to be exempted from marketing orders. United States Department of Agriculture administrative law judges conduct substantially more proceedings in accordance with the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes than they conduct in accordance with the Rules of Practice that apply to petitions to modify or to be exempted from marketing orders. I infer the ALJ's reference to section 1.137 of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.137) as "the usual provisions of the rules" and the ALJ's characterization of provisions relating to the amendment of petitions in the Rules of Practice as "the more obscure provisions" merely reflect the frequency with which the ALJ conducts proceedings under the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various

[8]7 C.F.R. § 1.131.

Statutes as compared to the frequency with which the ALJ conducts proceedings under the Rules of Practice. Therefore, while I do not adopt the ALJ's references to "the usual provisions of the rules" and "the more obscure provisions," I reject Respondent's contention that the ALJ's reference to "the usual provisions of the rules" and "the more obscure provisions" are error.

Third, Respondent contends the ALJ erroneously ignored Respondent's principal argument in Respondent's Motion to Dismiss Petition: namely, the Petition filed in the instant proceeding is the same as the petition filed by Petitioner in *In re Lion Raisins, Inc.*, 64 Agric. Dec. 11 (2004), and should be dismissed with prejudice (Respondent's Appeal Pet. at 4-5).

The ALJ did not directly address Respondent's argument that the Petition filed in the instant proceeding is the same as the petition filed by Petitioner in *In re Lion Raisins, Inc.*, 64 Agric. Dec. 11 (2004). However, I infer from the ALJ's March 3, 2005, Order that he found the Petition in the instant proceeding was not the same as the petition filed by Petitioner in *In re Lion Raisins, Inc.*, 64 Agric. Dec. 11 (2004), because the ALJ refers to the "ultimate resolution of this case" and states Petitioner may, consistent with section 900.52(c)(2) of the Rules of Practice (7 C.F.R. § 900.52(c)(2)), "file any amended petition" (ALJ's March 3, 2005, Order at 3). Therefore, I reject Respondent's contention that the ALJ erroneously ignored Respondent's principal argument in Respondent's Motion to Dismiss Petition.

Fourth, Respondent contends, although the ALJ agreed with Respondent that the Petition did not comply with the requirements of the Rules of Practice, the ALJ erroneously failed to clearly state his reasons for the March 3, 2005, Order (Respondent's Appeal Pet. at 5).

I disagree with Respondent. The ALJ granted Respondent's Motion to Strike Amended Petition, granted Respondent's Motion to Dismiss Petition, and clearly stated the reasons for granting Respondent's motions. I find no reason to reiterate the ALJ's reasons for the March 3, 2005, Order here.

Fifth, Respondent contends the ALJ erroneously refers to procedures applicable in other jurisdictions or forums and erroneously states Respondent sought strict compliance with procedural

requirements. Respondent states the Secretary of Agriculture promulgated the Rules of Practice which apply exclusively to petitions to modify or to be exempted from marketing orders and requires petitions initiating proceedings under the Rules of Practice to contain certain specified information. (Respondent's Appeal Pet. at 5.)

The ALJ references "other forums" and states Respondent sought strict compliance with procedural requirements, as follows:

> The Petitioner failed to directly respond to the Motion to Dismiss, but rather sought to correct the deficiencies with the Amended Petition. Such a failure likely would not be fatal in other forums or for that matter in most federal practice; however, strict compliance with procedural requirements has been sought by the Respondent.

ALJ's March 3, 2005, Order at 3.

I agree with Respondent's contention that the Secretary of Agriculture promulgated the Rules of Practice to apply to proceedings to modify or to be exempted from marketing orders and rules of practice applicable in other forums are not relevant to this proceeding. Moreover, I agree with Respondent that each petition to modify or to be exempted from a marketing order must comply with section 900.52(b) of the Rules of Practice (7 C.F.R. § 900.52(b)) because the Rules of Practice state that each petition "shall" contain certain specified information, not because strict compliance with procedural requirements has been sought by a respondent. However, I do not find the ALJ erred. I agree with the ALJ that Respondent's Motion to Dismiss Petition sought strict compliance with the Rules of Practice. Moreover, I agree with the ALJ that Petitioner's filing an Amended Petition, rather than a response to Respondent's Motion to Dismiss Petition, would not be fatal in all forums. Therefore, while I do not adopt the ALJ's discussion, I do not conclude the ALJ's references to other forums and Respondent's request in Respondent's Motion to Dismiss Petition, are error.

PETITIONER'S RESPONSE TO RESPONDENT'S APPEAL PETITION

Petitioner filed very helpful responses to each of the specific issues raised by Respondent in Respondent's Appeal Petition. In addition, Petitioner raises two fundamental issues regarding the Respondent's Appeal Petition. First, Petitioner contends Respondent's Appeal Petition should be dismissed because "Respondent, in an effort to waste judicial (and party) resources, has filed an appeal from the ruling in Respondent's favor" (Petitioner's Response to Respondent's Appeal Pet. at 1).

The ALJ's March 3, 2005, Order is favorable to Respondent. Nonetheless, Respondent disagreed with parts of the ALJ's March 3, 2005, Order. Section 900.65(a) of the Rules of Practice (7 C.F.R. § 900.65(a)) provides "[a]ny party who disagrees with a judge's decision *or any part thereof*, may appeal the decision to the Secretary" (emphasis added). Further, nothing on the record before me establishes that Respondent filed Respondent's Appeal Petition in an effort to waste judicial and party resources, as Petitioner asserts. Therefore, while I find some of Respondent's disagreements with the ALJ's March 3, 2005, Order trivial, I find no basis upon which to dismiss Respondent's Appeal Petition merely because it is an appeal from a ruling favorable to Respondent.

Second, Petitioner contends Respondent's Appeal Petition should be dismissed because Respondent did not number each issue set forth in the appeal petition, as required by section 900.65(a) of the Rules of Practice (7 C.F.R. § 900.65(a)) (Petitioner's Response to Respondent's Appeal Pet. at 4-5).

I agree with Petitioner that Respondent did not properly number each of Respondent's issues in Respondent's Appeal Petition. However, I find Respondent's Appeal Petition substantially conforms to the requirements of section 900.65(a) of the Rules of Practice (7 C.F.R. § 900.65(a)); therefore, I reject Petitioner's request that I

dismiss Respondent's Appeal Petition.[9]

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

ORDER

1. Petitioner's Amended Petition, filed February 9, 2005, is stricken.

2. Petitioner's Petition, filed November 10, 2004, is dismissed with prejudice.

3. This Order shall become effective on the day after service on Petitioner.

RIGHT TO JUDICIAL REVIEW

Petitioner has the right to obtain review of this Order in any district court of the United States in which district Petitioner is an inhabitant or has its principal place of business. A bill in equity for the purpose of review of this Order must be filed within 20 days from the date of entry of this Order. Service of process in any such proceeding may be had upon the Secretary of Agriculture by delivering a copy of the bill of complaint to the Secretary of Agriculture.[10] The date of entry of this Order is April 25, 2005.

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[9]Generally, appeal petitions which do not remotely conform to the requirements of the applicable rules of practice are dismissed. *E.g., In re Kermit Breed*, 50 Agric. Dec. 675, 676 (1991); *In re Bihari Lall*, 49 Agric. Dec. 895 (1990). However, requests to dismiss appeal petitions which do not precisely, but substantially, conform to the requirements of the applicable rules of practice are rejected *See, e.g., In re Norea Ivelisse Abreu*, 61 Agric. Dec. 259, 265-66 (2002) (rejecting the complainant's request that I dismiss the respondent's appeal petition on the ground that the respondent failed to number the issues raised in the appeal petition).

[10]7 U.S.C. § 608c(15)(B).

ANIMAL QUARANTINE ACT

DEPARTMENTAL DECISIONS

In re: JOSZET MOKOS.
A.Q. Docket No. 03-0003.
Decision and Order.
Filed April 25, 2005.

A.Q. – Importation of Processed meats – False declaration.

James A. Booth for Complainant.
Respondent (no appearance).
Decision and Order filed by Chief Administrative Law Judge, Marc. R. Hillson.

Decision

This is a proceeding under the Animal Health Protection Act, initiated by a complaint filed November 18th, 2002, by the Administrator of APHIS.

Following presentation of evidence in an oral hearing today, April 28th, 2005, I am granting Complainant's motion pursuant to Section 1.142(c)(1) of the Rules of Procedure for an Oral Decision.

I find that on September 3rd, 2000, Respondent, Jozset Mokos, committed violations of the regulations that were then encoded at 9 CFR 94.9B, 94.13, 94.13A, and 94.13B.

Under the Civil Penalty Assessment Authority in 7 USC § 8313B, I find that a penalty of $500.00 per violation, for a total of $2,000.00 is appropriate. My findings of fact are as follows:

[1] Jozset Mokos (Respondent) is a United States citizen currently residing in Oakland Park, Florida

[2] Respondent returned to the United States at Miami International Airport, from a trip to Hungary on September 3rd, 2000.

[3] Respondent's Customs Declaration indicated that he was not bringing in any meat products to the United States.

[4] [I]nspection by Noel Colon, C-o-l-o-n, as U.S. Department of

Agriculture employee, disclosed that Respondent had an approximately five kilogram pork salami in his suitcase.
[5] The salami, a product of Hungary, did not bear any certificate or other indications of compliance with the cited regulations.
[6] Inspector Colon seized the salami, which was subsequently incinerated.
[7] Respondent was given the option of paying a $50.00 penalty to close the matter. He told Inspector Colon he would go to an ATM and get the cash. He never returned, abandoning his passport, which was subsequently returned to Immigration.
[8] After the filing of the complaint, Respondent filed an answer which was received by the Hearing Clerk's office on December 18th, 2002.
[9] Respondent has refused to cooperate in these proceedings. In several instances he hung up on my Secretary, Diane Green, when she had tried contacting him to attempt to schedule a hearing in this matter.
He has also refused to cooperate when Counsel for Complainant has attempted to contact him. At 8:45 this morning he told Ms. Green that he would not participate in this hearing.

Conclusions of Law

[1] Respondent has violated the meat importation portions of the Animal Health Protection Act, 7 USC § 8301, *et seq.* In particular, Respondent's actions on September 3, 2000, violated 9 CFR § 94.9B, 94.13, 94.13A, and 94.13B, as they were in effect on that date.
[2] [T]he Respondent's actions in making a false declaration and making a false promise to pay the original penalty and repeatedly refusing to cooperate in these proceedings merit a significant civil penalty.
[3] I find that a penalty of $500.00 per violation, for a total of $2,000.00 is appropriate.

Order

Respondent is assessed a $2,000.00 civil penalty. This penalty shall be sent to the United States Department of Agriculture, APHIS Field Servicing Office, Accounting Section, Post Office Box 3334, Minneapolis, Minnesota 55403, within 60 days after service of this

order.

This decision and order shall be final and effective 35 days after service upon Respondent, unless an appeal is filed to the Judicial Officer with 30 days after service, pursuant to 1.1, Rule 1.145 of the Rules of Practice.

[C]opies of this decision and hearing order, this decision and order, which, in this context, is actually the pages of the transcript that this order it reflected in, shall be served on each of the parties.

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In re: MARLA GARCIA GONZALEZ.
A.Q. Docket No. 05-0004.
Decision and Order.
Filed April 27, 2005.

A.Q. – Failure to file answer – Waiver of right to hearing – Civil penalty.

The Judicial Officer affirmed the Default Decision by Administrative Law Judge Peter M. Davenport concluding Respondent imported 1.5 kilograms of pork into the United States from Spain in violation of the Animal Health Protection Act and regulations issued under the Animal Health Protection Act (9 C.F.R. § 94.9(b) (2002)) and assessing Respondent a $500 civil penalty. The Judicial Officer rejected Respondent's contention that she had previously paid a $100 civil penalty, stating Respondent failed to file a timely answer to the complainant and failed to file timely objections to Complainant's motion for a default decision; therefore, Respondent is deemed to have admitted the allegations in the complaint, waived her defense to the assessment of a civil penalty, and waived opportunity for hearing (7 C.F.R. §§ 1.136(c), .139, .141(a)).

Krishna Ramaraju for Complainant.
Respondent, Pro se.
Initial decision issued by Peter M. Davenport, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by

filing a Complaint on November 17, 2004. Complainant instituted the proceeding under the Animal Health Protection Act (7 U.S.C. §§ 8301-8320 (Supp. II 2002)); regulations issued under the Animal Health Protection Act (9 C.F.R. pt. 94 (2002)) [hereinafter the Regulations];[1] 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 or about August 13, 2002, Marla Garcia Gonzalez [hereinafter Respondent] violated section 94.9(b) of the Regulations (9 C.F.R. § 94.9(b) (2002)) by importing into the United States approximately 1.5 kilograms of pork from Spain, where classical swine fever is known to exist,[2] without the specified treatment, certificates, processing, or inspection by a representative of the United States Department of Agriculture (Compl. ¶ II).

The Hearing Clerk served Respondent with the Complaint, the Rules of Practice, and a service letter on November 23, 2004.[3] Respondent failed to respond to the Complaint within 20 days after service, as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)).

On December 22, 2004, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for

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[1]The Animal Health Protection Act was enacted on May 13, 2002. Effective June 4, 2002, the Animal and Plant Health Inspection Service, United States Department of Agriculture, revised the authority citation applicable to 9 C.F.R. pt. 94 (2002) to add a reference to the Animal Health Protection Act (67 Fed. Reg. 47,243 (July 18, 2002)).

[2]At all times material to this proceeding, section 94.9 of the Regulations (9 C.F.R. § 94.9 (2002)) regulated the importation of pork and pork products into the United States from regions where hog cholera was known to exist. However, veterinary practitioners in the international community refer to hog cholera as "classical swine fever" and effective April 7, 2003, the term "hog cholera" was removed from section 94.9 of the Regulations (9 C.F.R. § 94.9 (2002)) and the term "classical swine fever" was added in its place. (68 Fed. Reg. 16,922 (Apr. 7, 2003).)

[3]See United States Postal Service Domestic Return Receipt for Article Number 7004 1160 0001 9221 3663 establishing that the Hearing Clerk served Respondent with the Complaint, the Rules of Practice, and a service letter on November 23, 2004.

Adoption of Proposed Default Decision and Order and a Proposed Default Decision and Order. The Hearing Clerk served Respondent with Complainant's Motion for Adoption of Proposed Default Decision and Order, Complainant's Proposed Default Decision and Order, and a service letter on December 27, 2004.[4] Respondent failed to file objections to Complainant's Motion for Adoption of Proposed Default Decision and Order and Complainant's Proposed Default Decision and Order within 20 days after service, as required by section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). On February 4, 2005, the Hearing Clerk sent a letter to Respondent informing her that she failed to file timely objections to Complainant's Motion for Adoption of Proposed Default Decision and Order and Complainant's Proposed Default Decision and Order and that the file was being referred to an administrative law judge for consideration and decision.[5]

On February 11, 2005, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] issued a Decision and Order [hereinafter Initial Decision and Order] concluding Respondent violated the Animal Health Protection Act and the Regulations as alleged in the Complaint and assessing Respondent a $500 civil penalty (Initial Decision and Order at 2-3).

On March 30, 2005, Respondent appealed to the Judicial Officer. On April 20, 2005, Complainant filed a response to Respondent's appeal petition. On April 22, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I agree with the ALJ's Initial Decision and Order. Therefore, pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt, with

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[4] See United States Postal Service Track and Confirm for Article Number 7004 1160 0001 9221 2529 establishing that the Hearing Clerk served Respondent with Complainant's Motion for Adoption of Proposed Default Decision and Order, Complainant's Proposed Default Decision and Order, and a service letter on December 27, 2004.

[5] Letter dated February 4, 2005, from Joyce A. Dawson, Hearing Clerk, to Marla Garcia Gonzalez.

minor modifications, the 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.

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 109—ANIMAL HEALTH PROTECTION

. . . .

§ 8303. Restrictions on importation or entry

(a) In general

With notice to the Secretary of the Treasury and public notice as soon as practicable, the Secretary may prohibit or restrict—

(1) the importation or entry of any animal, article, or means of conveyance, or use of any means of conveyance or facility, if the Secretary determines that the prohibition or restriction is necessary to prevent the introduction into or dissemination within the United States of any pest or disease of livestock[.]

. . . .

(b) Regulations

(1) Restrictions on import and entry

The Secretary may issue such orders and promulgate such regulations as are necessary to carry out subsection (a) of this section.

. . . .

§ 8313. Penalties

. . . .

(b) Civil penalties

(1) In general

Except as provided in section 8309(d) of this title, any person that violates this chapter, or that forges, counterfeits, or, without authority from the Secretary, uses, alters, defaces, or destroys any certificate, permit, or other document provided under this chapter may, after notice and opportunity for a hearing on the record, be assessed a civil penalty by the Secretary that does not exceed the greater of—

(A)(i) $50,000 in the case of any individual, except that the civil penalty may not exceed $1,000 in the case of an initial violation of this chapter by an individual moving regulated articles not for monetary gain;

(ii) $250,000 in the case of any other person for each violation; and

(iii) $500,000 for all violations adjudicated in a single proceeding; or

(B) twice the gross gain or gross loss for any violation or forgery, counterfeiting, or unauthorized use, alteration, defacing or destruction of a certificate, permit, or other document provided under this chapter that results in the person's deriving pecuniary gain or causing pecuniary loss to another person.

(2) Factors in determining civil penalty

In determining the amount of a civil penalty, the Secretary shall take into account the nature, circumstance, extent, and gravity of the violation or violations and the

Secretary may consider, with respect to the violator—

(A) the ability to pay;

(B) the effect on ability to continue to do business;

(C) any history of prior violations;

(D) the degree of culpability; and

(E) such other factors the Secretary considers to be appropriate.

. . . .

(4) Finality of orders

(A) Final order

The order of the Secretary assessing a civil penalty shall be treated as a final order reviewable under chapter 158 of title 28.

(B) Review

The validity of the order of the Secretary may not be reviewed in an action to collect the civil penalty.

(C) Interest

Any civil penalty not paid in full when due under an order assessing the civil penalty shall thereafter accrue interest until paid at the rate of interest applicable to civil judgments of the courts of the United States.

7 U.S.C. §§ 8303(a)(1), (b)(1), 8313(b)(1)-(2), (4) (Supp. II 2002).

9 C.F.R.:

TITLE 9—ANIMALS AND ANIMAL PRODUCTS

CHAPTER I—ANIMAL AND PLANT HEALTH INSPECTION SERVICE,

DEPARTMENT OF AGRICULTURE

. . . .

SUBCHAPTER D—EXPORTATION AND IMPORTATION OF ANIMALS (INCLUDING POULTRY) AND ANIMAL PRODUCTS

. . . .

PART 94—RINDERPEST, FOOT-AND-MOUTH DISEASE, FOWL PEST (FOWL PLAGUE), EXOTIC NEWCASTLE DISEASE, AFRICAN SWINE FEVER, HOG CHOLERA, AND BOVINE SPONGIFORM ENCEPHALOPATHY: PROHIBITED AND RESTRICTED IMPORTATIONS

. . . .

§ 94.9 Pork and pork products from regions where hog cholera exists.

(a) Hog cholera is known to exist in all regions of the world except Australia; Canada; Denmark; England, except for East Anglia (Essex, Norfolk, and Suffolk counties); Fiji; Finland; Iceland; Isle of Man; New Zealand; Northern Ireland; Norway; Republic of Ireland; Scotland; Sweden; Trust Territory of the Pacific Islands; and Wales.

(b) No pork or pork product may be imported into the United States from any region where hog cholera is known to exist unless it complies with the following requirements:

(1) Such pork or pork product has been treated in accordance with one of the following procedures:

(i) Such pork or pork product has been fully cooked by a commercial method in a container hermetically sealed promptly after filling but before such cooking, so that such cooking and sealing produced a fully sterilized product which is shelf-stable

without refrigeration;

(ii) Such pork or pork product is in compliance with the following requirements:

(A) All bones were completely removed prior to cooking; and

(B) Such pork or pork product was heated by other than a flash-heating method to an internal temperature of 69 °C. (156 °F.) throughout; or

(iii) Such pork or pork product is in compliance with the following requirements:

(A) All bones have been completely removed in the region of origin, and

(B) The meat has been held in an unfrozen, fresh condition for at least 3 days immediately following the slaughter of the animals from which it was derived, and

(C) The meat has been thoroughly cured and fully dried for a period of not less than 90 days so that the product is shelf stable without refrigeration: *Provided*, That the period of curing and drying shall be 45 days if the pork or pork product is accompanied to the processing establishment by a certificate of an official of the national government of a hog cholera free region which specifies that:

(*1*) The pork involved originated in that region and the pork or pork product was consigned to a processing establishment in _____ (a region not listed in paragraph (a) of this section as free of hog cholera), in a closed container sealed by the national veterinary authorities of the hog cholera free region by seals of a serially numbered type; and

(*2*) The numbers of the seals used were entered on the meat inspection certificate of the hog cholera free region which accompanied the shipment from such free region: *And provided further*, That the certificate required by paragraph (b)(3) of this section also states that: The container seals specified in paragraph (b)(1)(iii)(C)(*1*) of this section were found intact and free of any evidence of tampering on arrival at the processing establishment by a national veterinary inspector; and the processing establishment from which the pork or pork product is shipped to the United States does not receive or process any live

swine, and uses only pork or pork product which originates in regions listed in paragraph (a) of this section as free of hog cholera and processes all such pork or pork products in accordance with paragraph (b)(1)(i), (ii), or (iii) of this section.

(2) Articles under paragraph (b)(1)(ii) or (iii) of this section were prepared in an inspected establishment that is eligible to have its products imported into the United States under the Federal Meat Inspection Act and § 327.2 of this title; and,

(3) In addition to the foreign meat inspection certificate required by § 327.4 of this title, pork and pork products prepared under paragraph (b)(1)(ii) or (iii) of this section shall be accompanied by a certificate that states that the provisions of paragraph (b)(1)(ii) or (iii) of this section have been met. This certificate shall be issued by an official of the national government of the region of origin who is authorized to issue the foreign meat inspection certificate required by § 327.4 of this title. Upon arrival of the pork or pork products in the United States, the certificate must be presented to an authorized inspector at the port of arrival.

(4) Small amounts of pork or pork product, subject to the restrictions in this section, may in specific cases be imported for purposes of examination, testing, or analysis if the importer applies for and receives written approval for such importation from the Administrator. Approval will be granted only when the Administrator determines that the articles have been processed by heat in a manner so that such importation will not endanger the livestock of the United States.

(c) Thoroughly cured and fully dried pork and pork products from regions where both hog cholera and swine vesicular disease are known to exist need not comply with paragraph (b)(1)(iii) of this section if they are in compliance with the provisions of § 94.12(b)(1)(iii) of this part.

9 C.F.R. § 94.9 (2002) (footnotes omitted).

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION AND ORDER

(AS RESTATED)

Statement of the Case

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 the failure to file an answer within the time provided in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) and the failure to deny or otherwise respond to an allegation of the complaint shall be deemed, for purposes of the proceeding, an admission of the allegations in the complaint. Further, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the failure to file an answer constitutes a waiver of hearing. Accordingly, the material allegations in the Complaint are adopted as Findings of Fact. This Decision and Order is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent is an individual with a mailing address of 8600 SW 101st Avenue, Miami, Florida 33173.

2. On or about August 13, 2002, Respondent violated section 94.9(b) of the Regulations (9 C.F.R. § 94.9(b) (2002)) by importing into the United States approximately 1.5 kilograms of pork from Spain, where classical swine fever is known to exist,[6] without the specified treatment, certificates, processing, or inspection by a representative of the United States Department of Agriculture.

Conclusions of Law

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

2. By reason of the Findings of Fact, Respondent has violated the Animal Health Protection Act and the Regulations.

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[6] See note 2.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent raises one issue in her appeal petition. Respondent admits she imported into the United States pork sausages from Spain on August 13, 2002, but states she previously paid a civil penalty for her violation of the Regulations. Specifically, Respondent asserts she "was . . . given a written citation with instructions to pay a fine of $100 which [she] did within a month." (Letter dated March 17, 2005, from Respondent to Joyce A. Dawson, Hearing Clerk.) Complainant asserts he has searched his files in a vain attempt to find a record of Respondent's alleged payment (Complainant's Response to Respondent's Letter dated March 17, 2005, at 5).

Respondent's assertion that she previously paid a $100 civil penalty for her August 13, 2002, violation of section 94.9(b) of the Regulations (9 C.F.R. § 94.9(b) (2002)) comes far too late to be considered. Respondent is deemed, for purposes of this proceeding, to have admitted the allegations in the Complaint and waived her defense to the assessment of a civil penalty because she failed to file an answer to the Complaint within 20 days after the Hearing Clerk served her with the Complaint. The Hearing Clerk served Respondent with the Complaint, the Rules of Practice, and the Hearing Clerk's service letter on November 23, 2004.[7] Sections 1.136(a), 1.136(c), 1.139, and 1.141(a) of the Rules of Practice state the time within which an answer must be filed and the consequences of failing to file a timely answer, as follows:

> **§ 1.136 Answer.**
>
> (a) *Filing and service*. Within 20 days after the service of the complaint . . ., the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding . . . .
>
> . . . .
>
> (c) *Default*. Failure to file an answer within the time provided under paragraph (a) of this section shall be deemed, for purposes

[7] *See* note 3.

of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.

§ 1.139 Procedure upon failure to file an answer or admission of facts.

The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk. Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.

§ 1.141 Procedure for hearing.

(a) *Request for hearing*. Any party may request a hearing on the facts by including such request in the complaint or answer, or by a separate request, in writing, filed with the Hearing Clerk within the time in which an answer may be filed . . . . Failure to request a hearing within the time allowed for the filing of the answer shall constitute a waiver of such hearing.

7 C.F.R. §§ 1.136(a), (c), .139, .141(a).

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

[T]his complaint shall be served upon the respondent. The

> respondent shall have twenty (20) days after service of this complaint in which to file an answer with the Hearing Clerk, United States Department of Agriculture, Room 1081 South Building, Washington, D.C. 20250-1400, in accordance with the applicable Rules of Practice (7 C.F.R. § 1.136). Failure to deny or otherwise respond to any allegation in this complaint shall constitute an admission of the allegation. Failure to file an answer within the prescribed time shall constitute an admission of the allegations in this complaint and a waiver of hearing.

Compl. at 2.

Similarly, the Hearing Clerk informed Respondent in the November 17, 2004, service letter that a timely answer must be filed pursuant to the Rules of Practice, that the answer must set forth any defense Respondent wishes to assert, and that failure to file a timely answer to any allegation in the Complaint would constitute an admission of that allegation, as follows:

> November 17, 2004
>
> Ms. Marla Garcia Gonzales
> 8600 SW 101st Avenue
> Miami, Florida 33173
>
> Dear Ms. Gonzalez:
>
> Subject: In re: Marla Garcia Gonzalez, Respondent -
> A.Q. Docket No. 05-0004
>
> Enclosed is a copy of a Complaint, which has been filed with this office under the [sic] Section 2 of the Act of February 2, 1903, as amended.
>
> Also enclosed is a copy of the Rules of Practice which govern the conduct of these proceedings. You should familiarize yourself with the rules in that the comments which follow are not a

substitute for their exact requirements.

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

Respondent's answer was due no later than December 13, 2004. Respondent's first and only filing in this proceeding is dated March 17, 2005, and was filed March 30, 2005, 3 months 17 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 purposes of this proceeding, to have admitted the allegations of the Complaint and waived her defense that she previously paid a civil penalty.

On December 22, 2004, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for Adoption of Proposed Default Decision and Order and a Proposed Default Decision and Order. The Hearing Clerk served Respondent with Complainant's Motion for Adoption of Proposed Default Decision and Order, Complainant's Proposed Default Decision and Order, and a service letter on December 27, 2004.[8] Section 1.139 of the Rules of Practice states the time within which objections to a proposed decision and a motion for adoption of the proposed decision must be filed and the consequences of failing to file timely meritorious objections, as follows:

> **§ 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

[8] See note 4.

> respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.

7 C.F.R. § 1.139.

Moreover, the Hearing Clerk informed Respondent in the December 22, 2004, service letter that Respondent's objections must be filed within 20 days after service of Complainant's Motion for Adoption of Proposed Default Decision and Order and Complainant's Proposed Default Decision and Order, as follows:

> December 22, 2004
>
> Ms. Marla Garcia Gonzales
> 8600 SW 101st Avenue
> Miami, Florida 33173
>
> Dear Ms. Gonzalez:
>
> Subject: In re: Marla Garcia Gonzalez, Respondent -
> A.Q. Docket No. 05-0004
>
> Enclosed is a copy of Complainant's Motion for Adoption of Proposed Default Decision and Order together with Default Decision and Order, which have been filed with this office in the above-captioned proceeding.
>
> In accordance with the applicable Rules of Practice, you will have 20 days from the receipt of this letter in which to file with this office an original and three copies of objections to the Motion for Decision.
>
> Sincerely,
> /s/

Joyce A. Dawson
Hearing Clerk

Respondent's objections were due no later than January 18, 2005.[9] On February 4, 2005, the Hearing Clerk sent a letter to Respondent informing her that she failed to file timely objections to Complainant's Motion for Adoption of Proposed Default Decision and Order and Complainant's Proposed Default Decision and Order and that the file was being referred to an administrative law judge for consideration and decision. Respondent's first and only filing in this proceeding is dated March 17, 2005, and was filed March 30, 2005, 2 months 12 days after Respondent's objections were due.

On February 11, 2005, the ALJ issued the Initial Decision and Order in which the ALJ found Respondent admitted the allegations in the Complaint by reason of default and assessed a $500 civil penalty against Respondent.

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[9]Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139) provides that objections to a proposed decision and motion for adoption of the proposed decision must be filed within 20 days after service of the proposed decision and motion for adoption of the proposed decision. Twenty days after December 27, 2004, was January 16, 2005. However, January 16, 2005, was a Sunday, and January 17, 2005, was a legal public holiday (5 U.S.C. § 6103(a)). Section 1.147(h) of the Rules of Practice provides that when the time for filing a document or paper expires on a Sunday or legal public holiday, 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 Sunday, January 16, 2005, and Monday, January 17, 2005, was Tuesday, January 18, 2005. Therefore, Respondent was required to file her objections to Complainant's Motion for Adoption of Default Decision and Order and Complainant's Proposed Default Decision and Order no later than January 18, 2005.

Although, on rare occasions, default decisions have been set aside for good cause shown or where the complainant states the complainant does not object to setting aside the default decision,[10] generally there is no basis for setting aside a default decision that is based upon a respondent's failure to file a timely answer.[11] The Rules of Practice

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[10]*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 Perishable Agricultural Commodities Act 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).

[11]*See, e.g., In re Salvador Sanchez-Gomez*, 61 Agric. Dec. 99 (2002) (holding the administrative law judge properly issued a default decision where the respondent filed his answer more than 5 months after the Hearing Clerk served him with the complaint and holding the respondent is deemed, by his failure to file a timely answer, to have

(continued...)

provides 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 3 months 17 days after Respondent's answer was due. Respondent's failure to file a timely answer is deemed, for 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 her rights under the due process clause of the Fifth Amendment to the Constitution of the United States.[12]

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[11](...continued)
admitted violating 9 C.F.R. §§ 93.101(a), .104(a), and .105(a), regulations issued under the Act of February 2, 1903, as alleged in the complaint); *In re Daniel E. Murray*, 58 Agric. Dec. 64 (1999) (holding the administrative law judge properly issued a default decision where the respondent filed his answer 9 months 3 days after the Hearing Clerk served him with the complaint and holding the respondent is deemed, by his failure to file a timely answer, to have admitted violating 9 C.F.R. § 78.8(a)(2)(ii), a regulation issued under the Act of February 2, 1903, as alleged in the complaint); *In Conrad Payne*, 57 Agric. Dec. 921 (1998) (holding the administrative law judge properly issued the default decision where the respondent failed to file a timely answer to the complaint and holding the respondent is deemed, by his failure to file a timely answer, to have admitted violating the Act of February 2, 1903, and 9 C.F.R. § 94.0 *et seq*., as alleged in the complaint); *In re Eddie Benton*, 50 Agric. Dec. 428 (1991) (adopting the administrative law judge's default decision where the respondent failed to file an answer after the Hearing Clerk served the complaint on the respondent and holding the respondent is deemed, by the failure to file an answer, to have admitted violating 9 C.F.R. § 78.9(c)(2)(ii)(B), a regulation issued under the Act of February 2, 1903, as alleged in the complaint); *In re Daniel Cano*, 50 Agric. Dec. 383 (1991) (adopting the administrative law judge's default decision where the respondent failed to file a timely answer after the Hearing Clerk served the complaint on the respondent and holding the respondent is deemed, by the failure to file a timely answer, to have admitted violating the Act of February 2, 1903, and the regulations promulgated under the Act of February 2, 1903).

[12]*See United States v. Hulings*, 484 F. Supp. 562, 567-68 (D. Kan. 1980) (concluding 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 (continued...)

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

ORDER

Respondent is assessed a $500 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the Treasurer of the United States and sent to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Payment of the civil penalty shall be sent to, and received by, the United States Department of Agriculture, APHIS Field Servicing Office, Accounting Section, within 60 days after service of this Order on Respondent. Respondent shall state on the certified check or money order that payment is in reference to A.Q. Docket No. 05-0004.

RIGHT TO JUDICIAL REVIEW

The Order assessing Respondent a civil penalty is a final order reviewable under 28 U.S.C. §§ 2341-2351.[13] Respondent must seek

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[12](...continued)
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 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).

[13]7 U.S.C. § 8313(b)(4)(A).

judicial review within 60 days after entry of the Order.[14] The date of entry of the Order is April 27, 2005.

_____

[14]28 U.S.C. § 2344.

ANIMAL WELFARE ACT

DEPARTMENTAL DECISIONS

In re: ERICA NICOLE deHAAN, formerly known as, ERICA NICOLE MASHBURN, formerly known as, ERICA NICOLE AVERY, AN INDIVIDUAL, d/b/a BUNDLE OF JOY KENNEL; AND RICKY deHAAN, AN INDIVIDUAL.
AWA Docket No. 04-0004.
Decision and Order as to Erica Nicole deHaan.
Filed August 18, 2004.[*]

AWA – Animal Welfare Act – Failure to file answer – Waiver of right to hearing – Default – Admission during teleconference – Dealer – Civil penalty – Cease and desist order.

The Judicial Officer affirmed two decisions issued by Administrative Law Judge Jill S. Clifton finding that Erica Nicole deHaan (Respondent) operated as a dealer, as defined in 7 U.S.C. § 2132(f) and 9 C.F.R. § 1.1, without an Animal Welfare Act license, in willful violation of 7 U.S.C. § 2134 and 9 C.F.R. § 2.1(a)(1). The Judicial Officer held, pursuant to 7 U.S.C. § 2149(b), each dog Respondent sold and each day during which Respondent sold dogs without an Animal Welfare Act license constituted a separate violation, and the Judicial Officer increased the $3,840 civil penalties assessed against Respondent by the ALJ to $18,000. The Judicial Officer stated Respondent's failure to file a timely answer is deemed an admission of the allegations in the Complaint (7 C.F.R. § 1.136(c)) and constitutes a waiver of hearing (7 C.F.R. § 1.139). In addition, the Judicial Officer based the decision on Respondent's admissions, during a teleconference with the ALJ and counsel for Complainant, that she committed violations alleged in the Complaint to have been committed by another respondent.

Bernadette R. Juarez for Complainant.
Respondent Erica Nicole deHaan, Pro se.
Initial decisions issued by Jill S. Clifton, Administrative Law Judge.
Decision and Order as to Erica Nicole deHaan issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

The Administrator, Animal and Plant Health Inspection Service,

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[*]This case was inadvertently left out of *63 Agric. Dec. Jul-Dec. (2004)*. Editor

United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a "Complaint" on December 5, 2003. Complainant instituted the proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations and Standards]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges: (1) on April 1, 2003, and April 8, 2003, Respondent Ricky deHaan operated as a dealer, as defined in the Animal Welfare Act, without an Animal Welfare Act license, in willful violation of section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations and Standards (9 C.F.R. § 2.1(a)(1)); and (2) on June 3, 2003, June 10, 2003, July 1, 2003, July 8, 2003, July 29, 2003, August 5, 2003, August 6, 2003, August 12, 2003, August 13, 2003, August 19, 2003, August 20, 2003, August 21, 2003, August 26, 2003, October 6, 2003, October 7, 2003, and October 14, 2003, and on or about September 30, 2003, and October 6, 2003, Respondent Erica Nicole deHaan operated as a dealer, as defined in the Animal Welfare Act, without an Animal Welfare Act license, in willful violation of section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations and Standards (9 C.F.R. § 2.1(a)(1)) (Compl. ¶¶ 4-26).

The Hearing Clerk served Respondent Ricky deHaan and Respondent Erica Nicole deHaan with the Complaint, the Rules of Practice, and a service letter on December 13, 2003.[1] Neither Respondent Ricky deHaan nor Respondent Erica Nicole deHaan filed an answer to the Complaint within 20 days after service as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)).

On January 8, 2004, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a "Motion for Adoption

[1]United States Postal Service Domestic Return Receipts for Article Number 7001 0360 0000 0304 6569 and Article Number 7001 0360 0000 0304 6552.

of Decision and Order as to Erica Nicole deHaan By Reason of Admission of Facts" [hereinafter Motion for Default Decision] and a proposed "Decision and Order as to Erica Nicole deHaan By Reason of Admission of Facts" [hereinafter Proposed Default Decision]. On January 21, 2004, the Hearing Clerk served Respondent Erica Nicole deHaan with Complainant's Motion for Default Decision and Complainant's Proposed Default Decision.[2] On January 26, 2004, Respondent Erica Nicole deHaan filed two motions to dismiss, and on February 4, 2004, Complainant filed "Complainant's Response to Respondent's Motions to Dismiss Complaint."

On March 25, 2004, 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 by Reason of Admission of Facts, as to Erica Nicole deHaan, formerly known as Erica Nicole Mashburn, formerly known as Erica Nicole Avery, an individual, doing business as Bundle of Joy Kennel" [hereinafter First Initial Decision and Order]: (1) concluding that Respondent Erica Nicole deHaan willfully violated the Animal Welfare Act and the Regulations and Standards as alleged in the Complaint; (2) directing Respondent Erica Nicole deHaan to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; and (3) assessing Respondent Erica Nicole deHaan a $3,480 civil penalty (First Initial Decision and Order at 4-8).

On April 5, 2004, the ALJ issued a "Second Decision and Order by Reason of Admission of Facts, as to Erica Nicole deHaan, formerly known as Erica Nicole Mashburn, formerly known as Erica Nicole Avery, an individual, doing business as Bundle of Joy Kennel" [hereinafter Second Initial Decision and Order]: (1) stating she conducted a teleconference with Respondent Erica Nicole deHaan and counsel for Complainant in which Respondent Erica Nicole deHaan took responsibility for the violations of the Animal Welfare Act and the Regulations and Standards alleged in the Complaint to have been committed by Respondent Ricky deHaan; (2) concluding Respondent

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[2]United States Postal Service Track & Confirm for Article Number 7001 0360 0000 0310 4030.

Erica Nicole deHaan committed the violations of the Animal Welfare Act and the Regulations and Standards alleged in the Complaint to have been committed by Respondent Ricky deHaan; (3) directing Respondent Erica Nicole deHaan to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; and (4) assessing Respondent Erica Nicole deHaan a $360 civil penalty (Second Initial Decision and Order at 1, 4-6).

On April 19, 2004, Complainant appealed to the Judicial Officer. Respondent Erica Nicole deHaan failed to file a response to Complainant's appeal petition, and on June 2, 2004, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful review of the record, I agree with the ALJ's First Initial Decision and Order and Second Initial Decision and Order, except for the amount of the civil penalty the ALJ assessed against Respondent Erica Nicole deHaan. Therefore, except for the amount of the civil penalty assessed against Respondent Erica Nicole deHaan and minor modifications, I adopt the ALJ's First Initial Decision and Order and Second Initial Decision and Order as the final Decision and Order as to Erica Nicole deHaan. 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 54—TRANSPORTATION, SALE, AND HANDLING OF CERTAIN ANIMALS

§ 2131. Congressional statement of policy

The Congress finds that animals and activities which are

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

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

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

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

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

§ 2132. Definitions

When used in this chapter—

. . . .

(f) The term "dealer" means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of, (1) any dog or other animal whether alive or dead for research, teaching, exhibition, or use as a pet, or (2) any dog for hunting, security, or breeding purposes, except that this term does not include—

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

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

more than $500 gross income from the sale of other animals during any calendar year[.]

§ 2134. Valid license for dealers and exhibitors required

No dealer or exhibitor shall sell or offer to sell or transport or offer for transportation, in commerce, to any research facility or for exhibition or for use as a pet any animal, or buy, sell, offer to buy or sell, transport or offer for transportation, in commerce, to or from another dealer or exhibitor under this chapter any animals, unless and until such dealer or exhibitor shall have obtained a license from the Secretary and such license shall not have been suspended or revoked.

§ 2149. Violations by licensees

. . . .

(b) Civil penalties for violation of any section, etc.; separate offenses; notice and hearing; appeal; considerations in assessing penalty; compromise of penalty; civil action by Attorney General for failure to pay penalty; district court jurisdiction; failure to obey cease and desist order

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, that violates any provision of this chapter, or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than $2,500 for each such violation, and the Secretary may also make an order that such person shall cease and desist from continuing such violation. Each violation and each day during which a violation continues shall be a separate offense. No penalty shall be assessed or cease and desist order issued unless such person is given notice and opportunity for a hearing with respect to the alleged violation, and the order of the Secretary assessing a penalty and making a cease and desist order shall be final and

conclusive unless the affected person files an appeal from the Secretary's order with the appropriate United States Court of Appeals. The Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations. . . .

(c) Appeal of final order by aggrieved person; limitations; exclusive jurisdiction of United States Courts of Appeals

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, aggrieved by a final order of the Secretary issued pursuant to this section may, within 60 days after entry of such an order, seek review of such order in the appropriate United States Court of Appeals in accordance with the provisions of sections 2341, 2343 through 2350 of title 28, and such court shall have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of the Secretary's order.

§ 2151. Rules and regulations

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

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

28 U.S.C.:

TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE

. . . .

PART VI—PARTICULAR PROCEEDINGS

. . . .

CHAPTER 163—FINES, PENALTIES AND FORFEITURES

§ 2461. Mode of recovery

. . . .

FEDERAL CIVIL PENALTIES INFLATION ADJUSTMENT

SHORT TITLE

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

FINDINGS AND PURPOSE

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

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

(2) the impact of many civil monetary penalties has been and is diminished due to the effect of inflation;

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

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

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

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

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

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

DEFINITIONS

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

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

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

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

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

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

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

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

CIVIL MONETARY PENALTY INFLATION ADJUSTMENT REPORTS

SEC. 4. The head of each agency shall, not later than 180 days after the date of enactment of the Debt Collection Improvement Act of 1996 [Apr. 26, 1996], and at least once every 4 years thereafter–

(1) by regulation adjust each civil monetary penalty provided by law within the jurisdiction of the Federal agency, except for any penalty (including any addition to tax and additional amount) under the Internal Revenue Code of 1986 [26 U.S.C. 1 *et seq.*.], the Tariff Act of 1930 [19 U.S.C. 1202 *et seq.*.], the Occupational Safety and Health Act of 1970 [29 U.S.C. 651 *et seq.*.], or the Social Security Act [42 U.S.C. 301 *et seq*.], by the inflation adjustment described under section 5 of this Act; and

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

COST-OF-LIVING ADJUSTMENTS OF CIVIL MONETARY PENALTIES

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

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

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

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

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

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

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

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

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

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

ANNUAL REPORT

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

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

28 U.S.C. § 2461 (note).

7 C.F.R.:

TITLE 7—AGRICULTURE

SUBTITLE A—OFFICE OF THE SECRETARY OF AGRICULTURE

. . . .

PART 3—DEBT MANAGEMENT

. . . .

SUBPART E—ADJUSTED CIVIL MONETARY PENALTIES

§ 3.91 Adjusted civil monetary penalties.

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

(b) *Penalties*—. . . .

. . . .

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

. . . .

(v) Civil penalty for a violation of Animal Welfare Act, codified at 7 U.S.C. 2149(b), has a maximum of $2,750; and knowing failure to obey a cease and desist order has a civil penalty of $1,650.

7 C.F.R. § 3.91(a), (b)(2)(v).

9 C.F.R.:

TITLE 9—ANIMALS AND ANIMAL PRODUCTS

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

SUBCHAPTER A—ANIMAL WELFARE

PART 1—DEFINITION OF TERMS

§ 1.1 Definitions.

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

. . . .

Dealer means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of: Any dog or other animal whether alive or dead (including unborn animals, organs, limbs, blood, serum, or other parts) for research, teaching, testing, experimentation, exhibition, or for use as a pet; or any dog at the wholesale level for hunting, security, or breeding purposes. This term does not include: A retail pet store, as defined in this section, unless such store sells any animal to a research facility, an exhibitor, or a dealer (wholesale); any retail outlet where dogs are sold for hunting, breeding, or security purposes; or any person who does not sell or negotiate the purchase or sale of any wild or exotic animal, dog, or cat and who

derives no more than $500 gross income from the sale of animals other than wild or exotic animals, dogs, or cats, during any calendar year.

PART 2—REGULATIONS

SUBPART A—LICENSING

§ 2.1 Requirements and application.

(a)(1) Any person operating or desiring to operate as a dealer, exhibitor, or operator of an auction sale, except persons who are exempted from the licensing requirements under paragraph (a)(3) of this section, must have a valid license. A person must be 18 years of age or older to obtain a license. A person seeking a license shall apply on a form which will be furnished by the AC Regional Director in the State in which that person operates or intends to operate. The applicant shall provide the information requested on the application form, including a valid mailing address through which the licensee or applicant can be reached at all times, and a valid premises address where animals, animal facilities, equipment, and records may be inspected for compliance. The applicant shall file the completed application form with the AC Regional Director.

9 C.F.R. §§ 1.1; 2.1(a)(1).

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

Statement of Case

Respondent Erica Nicole deHaan 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 prescribed

time provided in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) and the failure to deny or otherwise respond to an allegation in the complaint shall be deemed, for purposes of the proceeding, an admission of the allegations in the complaint. Further, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the failure to file and answer constitutes a waiver of hearing. This Decision and Order as to Erica Nicole deHaan is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139) and is issued based on Respondent Erica Nicole deHaan's admissions during the April 5, 2004, teleconference with the ALJ and counsel for Complainant.[3]

Findings of Fact

1. Respondent Erica Nicole deHaan, doing business as Bundle of Joy Kennel, an unincorporated association, is an individual whose mailing address is Rt. #3, Box 209-A, Ava, Missouri 65608.

2. Respondent Erica Nicole deHaan, at all times material to this proceeding, operated as a dealer as defined in section 2(f) of the Animal Welfare Act (7 U.S.C. § 2132(f)) and section 1.1 of the Regulations and Standards (9 C.F.R. § 1.1).

3. On April 1, 2003, Respondent Erica Nicole deHaan operated as a dealer, as defined in the Animal Welfare Act and the Regulations and Standards, without an Animal Welfare Act license, and sold, in commerce, three Labradors, four Pugs, and three Eskimos to Puppy Love of Virginia, Inc., for resale, for use as pets.

4. On April 8, 2003, Respondent Erica Nicole deHaan operated as a dealer, as defined in the Animal Welfare Act and the Regulations and Standards, without an Animal Welfare Act license, and sold, in commerce, one Pug and one Golden Retriever to Puppy Love of Virginia, Inc., for resale, for use as pets.

5. On June 3, 2003, Respondent Erica Nicole deHaan operated as

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[3] *In re H. Schnell & Co.*, 57 Agric. Dec. 1722, 1730-31 (1998) (Remand Order) (stating that oral statements made by a respondent during a conference that clearly constitute admissions of allegations in a complaint may constitute a basis for findings of fact and for issuance of a default decision).

a dealer, as defined in the Animal Welfare Act and the Regulations and Standards, without an Animal Welfare Act license, and sold, in commerce, four Boston Terriers to Puppy Love of Virginia, Inc., for resale, for use as pets.

6. On June 10, 2003, Respondent Erica Nicole deHaan operated as a dealer, as defined in the Animal Welfare Act and the Regulations and Standards, without an Animal Welfare Act license, and sold, in commerce, one Pug, one Eskimo, four Chihuahuas, and two Bichon Frises to Puppy Love of Virginia, Inc., for resale, for use as pets.

7. On July 1, 2003, Respondent Erica Nicole deHaan operated as a dealer, as defined in the Animal Welfare Act and the Regulations and Standards, without an Animal Welfare Act license, and sold, in commerce, three Golden Retrievers and two Maltese to Puppy Love of Virginia, Inc., for resale, for use as pets.

8. On July 8, 2003, Respondent Erica Nicole deHaan operated as a dealer, as defined in the Animal Welfare Act and the Regulations and Standards, without an Animal Welfare Act license, and sold, in commerce, six Eskimos to Puppy Love of Virginia, Inc., for resale, for use as pets.

9. On July 29, 2003, Respondent Erica Nicole deHaan operated as a dealer, as defined in the Animal Welfare Act and the Regulations and Standards, without an Animal Welfare Act license, and sold, in commerce, one Basset Hound, one Bichon Frise, and two Boston Terriers to the National Breeders Association, Inc., for resale, for use as pets.

10. On August 5, 2003, Respondent Erica Nicole deHaan operated as a dealer, as defined in the Animal Welfare Act and the Regulations and Standards, without an Animal Welfare Act license, and sold, in commerce, one Chihuahua, three Pekingese, and one Cocker Spaniel to Puppy Love of Virginia, Inc., for resale, for use as pets.

11. On August 6, 2003, Respondent Erica Nicole deHaan operated as a dealer, as defined in the Animal Welfare Act and the Regulations and Standards, without an Animal Welfare Act license, and sold, in commerce, one Doberman Pinscher, one Wheaten Terrier, one Old English Sheepdog, one Shiba Inu, one Schnauzer, one Chihuahua, two Bichon Frises, four Labradors, one Cocker Spaniel, and one Wheaten Terrier to National Breeders Association, Inc., for resale,

for use as pets.

12. On August 12, 2003, Respondent Erica Nicole deHaan operated as a dealer, as defined in the Animal Welfare Act and the Regulations and Standards, without an Animal Welfare Act license, and sold, in commerce, four Shih Tzus, two Golden Retrievers, one Pomeranian, one Poodle, one Dachshund, and two West Highland White Terriers to Puppy Love of Virginia, Inc., for resale, for use as pets.

13. On August 13, 2003, Respondent Erica Nicole deHaan operated as a dealer, as defined in the Animal Welfare Act and the Regulations and Standards, without an Animal Welfare Act license, and sold, in commerce, one Golden Retriever, one Pug, two Cocker Spaniels, two Boxers, one Sheltie, one Pomeranian, two Shih Tzus, two Labradors, and one Poodle to National Breeders Association, Inc., for resale, for use as pets.

14. On August 13, 2003, Respondent Erica Nicole deHaan operated as a dealer, as defined in the Animal Welfare Act and the Regulations and Standards, without an Animal Welfare Act license, and sold, in commerce, one Basset Hound to Bahuaka, Inc., for resale, for use as a pet.

15. On August 13, 2003, Respondent Erica Nicole deHaan operated as a dealer, as defined in the Animal Welfare Act and the Regulations and Standards, without an Animal Welfare Act license, and sold, in commerce, five Shih Tzus to Stillwell Pets & Quality Pups, for resale, for use as pets.

16. On August 19, 2003, Respondent Erica Nicole deHaan operated as a dealer, as defined in the Animal Welfare Act and the Regulations and Standards, without an Animal Welfare Act license, and sold, in commerce, two Poodles and two Dachshunds to Puppy Love of Virginia, Inc., for resale, for use as pets.

17. On August 20, 2003, Respondent Erica Nicole deHaan operated as a dealer, as defined in the Animal Welfare Act and the Regulations and Standards, without an Animal Welfare Act license, and sold, in commerce, one Basset Hound, three Labradors, two Bichon Frises, one Poodle, two Chihuahuas, two Shih Tzus, two Golden Retrievers, and one Cocker Spaniel to National Breeders Association, Inc., for resale, for use as pets.

18. On August 21, 2003, Respondent Erica Nicole deHaan operated

as a dealer, as defined in the Animal Welfare Act and the Regulations and Standards, without an Animal Welfare Act license, and sold, in commerce, one Shih Tzu to Stillwell Pets & Quality Pups, for resale, for use as a pet.

19. On August 26, 2003, Respondent Erica Nicole deHaan operated as a dealer, as defined in the Animal Welfare Act and the Regulations and Standards, without an Animal Welfare Act license, and sold, in commerce, two Yorkshire Terriers, one Sheltie, and two Chi to National Breeders Association, Inc., for resale, for use as pets.

20. On or about September 30, 2003, Respondent Erica Nicole deHaan operated as a dealer, as defined in the Animal Welfare Act and the Regulations and Standards, without an Animal Welfare Act license, and sold, in commerce, one Rat Terrier to Pets and the City, Inc., for resale, for use as a pet.

21. On or about October 6, 2003, Respondent Erica Nicole deHaan operated as a dealer, as defined in the Animal Welfare Act and the Regulations and Standards, without an Animal Welfare Act license, and sold, in commerce, six dogs, including one Sky Terrier, to Pets and the City, Inc., for resale, for use as pets.

22. On October 6, 2003, Respondent Erica Nicole deHaan operated as a dealer, as defined in the Animal Welfare Act and the Regulations and Standards, without an Animal Welfare Act license, and sold, in commerce, one Rat Terrier and one American Eskimo to United Pet Supply, Inc., for resale, for use as pets.

23. On October 7, 2003, Respondent Erica Nicole deHaan operated as a dealer, as defined in the Animal Welfare Act and the Regulations and Standards, without an Animal Welfare Act license, and sold, in commerce, three Dachshunds and one Jack Russell Terrier to Precious Pet Cottage, Inc., for resale, for use as pets.

24. On October 7, 2003, Respondent Erica Nicole deHaan operated as a dealer, as defined in the Animal Welfare Act and the Regulations and Standards, without an Animal Welfare Act license, and sold, in commerce, one Rat Terrier to PetLand, Inc., Orlando East, for resale, for use as a pet.

25. On October 14, 2003, Respondent Erica Nicole deHaan operated as a dealer, as defined in the Animal Welfare Act and the Regulations and Standards, without an Animal Welfare Act license, and sold, in

commerce, two Dachshunds to Precious Pet Cottage, Inc., for resale, for use as pets.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. As shown by the Findings of Fact, Respondent Erica Nicole deHaan operated as a dealer, as defined in section 2(f) of the Animal Welfare Act (7 U.S.C. § 2132(f)) and section 1.1 of the Regulations and Standards (9 C.F.R. § 1.1), without an Animal Welfare Act license, in willful violation of section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations and Standards (9 C.F.R. § 2.1(a)(1)).

3. As shown by the Findings of Fact, Respondent Erica Nicole deHaan sold 128 dogs, in commerce, for resale, for use as pets, without an Animal Welfare Act license.

4. Each of the 128 dogs sold by Respondent Erica Nicole deHaan during the period April 1, 2003, through October 14, 2003, constitutes a separate violation of the Animal Welfare Act and the Regulations and Standards (7 U.S.C. § 2149(b)).

5. Each of 19 days during the period April 1, 2003, through October 14, 2003, when Respondent Erica Nicole deHaan operated as a dealer without an Animal Welfare Act license constitutes a separate violation of the Animal Welfare Act and the Regulations and Standards (7 U.S.C. § 2149(b)).

6. The assessment of an $18,000 civil penalty against Respondent Erica Nicole deHaan is reasonable and appropriate for her 147 violations the Animal Welfare Act and the Regulations and Standards.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Complainant raises one issue in "Complainant's Petition for Appeal of Decision and Order and Second Decision and Order By Reason of Admission of Facts as to Erica Nicole deHaan" [hereinafter Complainant's Appeal Petition]. Complainant appeals the $3,480 and $360 civil penalties the ALJ assessed against Respondent Erica Nicole deHaan and requests the assessment of an $18,000 civil penalty against

Respondent Erica Nicole deHaan.

Respondent Erica Nicole deHaan, by her failure to file an answer within 20 days after the Hearing Clerk served her with the Complaint, is deemed to have admitted the allegations in the Complaint.[4] In addition, during a teleconference with the ALJ and counsel for Complainant, Respondent Erica Nicole deHaan admitted that she committed the violations alleged in the Complaint to have been committed by Respondent Ricky deHaan. Thus, Respondent Erica Nicole deHaan is deemed to have admitted that she committed 147 willful violations of the Animal Welfare Act and the Regulations and Standards during the period April 1, 2003, through October 14, 2003.

With respect to the civil monetary penalty, the Secretary of Agriculture is required to give due consideration to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations.[5]

Respondent Erica Nicole deHaan sold 128 dogs to 8 different buyers on 19 days during the period April 1, 2003, through October 14, 2003. Based on the number of dogs sold, the number of buyers, and the time during which these sales took place, I infer Respondent Erica Nicole deHaan operates a large business.

Respondent Erica Nicole deHaan's violations are serious. The failure to obtain an Animal Welfare Act license before operating as a dealer is a serious violation because enforcement of the Animal Welfare Act and the Regulations and Standards depends upon the identification of persons operating as dealers as defined by section 2(f) of the Animal Welfare Act (7 U.S.C. § 2132(f)) and section 1.1 of the Regulations and Standards (9 C.F.R. § 1.1). Respondent Erica Nicole deHaan's failure to obtain the required Animal Welfare Act license thwarted the Secretary of Agriculture's ability to carry out the purposes of the Animal Welfare Act.

Respondent Erica Nicole deHaan's willful violations on 19 days during the period April 1, 2003, through October 14, 2003, reveals a

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[4] See 7 C.F.R. § 1.136(c).

[5] See 7 U.S.C. § 2149(b).

consistent disregard for, and unwillingness to abide by, the requirements of the Animal Welfare Act and the Regulations and Standards. An ongoing pattern of violations establishes a "history of previous violations" for the purposes of section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) and a lack of good faith.

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

> [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.

Complainant seeks the assessment of an $18,000 civil penalty against Respondent Erica Nicole deHaan and a cease and desist order (Complainant's Appeal Pet. at 5).

Respondent Erica Nicole deHaan could be assessed a maximum civil penalty of $404,250 for her 147 violations of the Animal Welfare Act and the Regulations and Standards.[6] After examining all the relevant

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[6]Section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) provides that the Secretary of Agriculture may assess a civil penalty of not more than $2,500 for each violation of the Animal Welfare Act and the Regulations and Standards. Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), the Secretary of Agriculture adjusted the civil penalty that may be assessed under (continued...)

circumstances, in light of the United States Department of Agriculture's sanction policy, and taking into account the requirements of section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)), the remedial purposes of the Animal Welfare Act, and the recommendations of the administrative officials, I conclude that a cease and desist order and assessment of an $18,000 civil penalty are appropriate and necessary to ensure Respondent Erica Nicole deHaan's compliance with the Animal Welfare Act and the Regulations and Standards in the future, to deter others from violating the Animal Welfare Act and the Regulations and Standards, and to fulfill the remedial purposes of the Animal Welfare Act.

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

ORDER

1. Respondent Erica Nicole deHaan, her agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards, and in particular, shall cease and desist from engaging in any activity for which an Animal Welfare Act license is required without an Animal Welfare Act license.

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

2. Respondent Erica Nicole deHaan is assessed an $18,000 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the Treasurer of the United States and sent to:

Bernadette R. Juarez
United States Department of Agriculture
Office of the General Counsel

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[6](...continued)
section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) for each violation of the Animal Welfare Act and the Regulations and Standards by increasing the maximum civil penalty from $2,500 to $2,750 (7 C.F.R. § 3.91(b)(2)(v)).

Marketing Division
1400 Independence Avenue, SW
Room 2343-South Building
Washington, DC 20250-1417

Payment of the civil penalty shall be sent to, and received by, Bernadette R. Juarez within 60 days after service of this Order on Respondent Erica Nicole deHaan. Respondent Erica Nicole deHaan shall state on the certified check or money order that payment is in reference to AWA Docket No. 04-0004.

RIGHT TO JUDICIAL REVIEW

Respondent Erica Nicole deHaan has the right to seek judicial review of this Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341, 2343-2350. Such court has exclusive jurisdiction to enjoin, to set aside, to suspend (in whole or in part), or to determine the validity of this Order. Respondent Erica Nicole deHaan must seek judicial review within 60 days after entry of this Order. 7 U.S.C. § 2149(c). The date of entry of this Order is August 18, 2004.

In re: DENNIS HILL, AN INDIVIDUAL, d/b/a WHITE TIGER FOUNDATION; AND WILLOW HILL CENTER FOR RARE & ENDANGERED SPECIES, LLC, AN INDIANA DOMESTIC LIMITED LIABILITY COMPANY, d/b/a HILL'S EXOTICS.
AWA Docket No. 04-0012.
Decision and Order.
Filed October 8, 2004.[*]

AWA – Animal Welfare Act – Failure to file timely answer – Default decision –

[*]This case was inadvertently left out of *63 Agric. Dec. Jul.-Dec. (2004*). - Editor

Bases for denial of motion for default – Sanction – Cease and desist order – Civil penalty – License revocation.

The Judicial Officer reversed Administrative Law Judge Victor W. Palmer's denial of Complainant's motion for a default decision. The Judicial Officer issued a decision in which he found Respondents violated the Animal Welfare Act and the regulations and standards issued under the Animal Welfare Act. The Judicial Officer concluded Respondents filed a late answer to the Amended Complaint and, under the Rules of Practice (7 C.F.R. §§ 1.136(c), .139), were deemed to have admitted the allegations in the Amended Complaint and waived the opportunity for a hearing. The Judicial Officer rejected Respondents' contention that they had filed meritorious objections to Complainant's motion for a default decision. The Judicial Officer issued a cease and desist order against Respondents, assessed Respondents a $20,000 civil penalty, and revoked Respondent Dennis Hill's Animal Welfare Act license.

Bernadette R. Juarez, for Complainant.
M. Michael Stephenson, Shelbyville, IN, for Respondents.
Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a "Complaint" on March 4, 2004. Complainant instituted the proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations and Standards]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges Dennis Hill, d/b/a White Tiger Foundation, and Willow Hill Center for Rare & Endangered Species, LLC, d/b/a Hill's Exotics [hereinafter Respondents], willfully violated the Animal Welfare Act and the Regulations and Standards.[1]

The Hearing Clerk served Respondents with the Complaint, the

[1]Complaint.

Rules of Practice, and a service letter on March 15, 2004.[2] Respondents were required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) to answer the Complaint within 20 days after service. On March 26, 2004, Respondents requested an additional 30 days within which to file an answer.[3] On March 30, 2004, Chief Administrative Law Judge Marc R. Hillson extended the time for filing Respondents' answer to May 5, 2004.[4]

On April 23, 2004, Complainant filed an "Amended Complaint." On April 27, 2004, Respondents filed an "Answer" in which Respondents deny the material allegations of the Complaint. The Hearing Clerk sent Respondents a letter dated April 27, 2004, stating "Respondents' Amended Answer to Amended Complaint, has been received and filed in the above-captioned proceeding." On April 30, 2004, the Hearing Clerk served Respondents with the Amended Complaint.[5] Respondents failed to file a response to the Amended Complaint within 20 days after service, as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)).

On June 3, 2004, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a "Motion for Adoption of Proposed Decision and Order" [hereinafter Motion for Default Decision] and a proposed "Decision and Order as to Dennis Hill and Willow Hill Center for Rare & Endangered Species, LLC, By Reason of Admission of Facts" [hereinafter Proposed Default Decision]. On June 7, 2004, the Hearing Clerk served Respondents with Complainant's Motion for Default Decision and Complainant's Proposed Default

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[2]United States Postal Service Domestic Return Receipts for Article Number 7003 0500 0000 1056 0083 and Article Number 7003 0500 0000 1056 0090.

[3]Request for Extension of Time to Respond to Complaint.

[4]Extension of Time.

[5]United States Postal Service Domestic Return Receipt for Article Number 7003 0500 0000 1056 0458.

Decision.[6] On June 15, 2004, and June 23, 2004, Respondents filed objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision.[7]

On July 13, 2004, during a teleconference with counsel for Respondents and counsel for Complainant, Administrative Law Judge Victor W. Palmer [hereinafter the ALJ] denied Complainant's Motion for Default Decision and provided Respondents until August 2, 2004, to file a response to the Amended Complaint.[8] On August 3, 2004, Respondents filed "Answer to Amended Complaint."

On August 27, 2004, Complainant appealed the ALJ's denial of Complainant's Motion for Default Decision to the Judicial Officer.[9] On September 15, 2004, Respondents filed "Response in Opposition to Complainant's Appeal Petition." On September 22, 2004, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful review of the record, I disagree with the ALJ's denial of Complainant's Motion for Default Decision. Therefore, I: (1) reverse the ALJ's July 13, 2004, denial of Complainant's Motion for Default Decision; and (2) issue this Decision and Order based on Respondents' failure to file a timely answer to the Amended Complaint.

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

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[6]United States Postal Service Domestic Return Receipt for Article Number 7003 0500 0000 1056 0656.

[7]Objection to Motion for Adoption of Proposed Decision and Order, filed June 15, 2004, and Supplemental Objection to Motion for Adoption of Proposed Decision and Order, filed June 23, 2004.

[8]Notice of Hearing and Exchange Deadlines at 1, filed by the ALJ on July 14, 2004.

[9]Complainant's Appeal Petition.

TITLE 7—AGRICULTURE

. . . .

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

§ 2131. Congressional statement of policy

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

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

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

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

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

§ 2132. Definitions

When used in this chapter—

. . . .

(f) The term "dealer" means any person who, in commerce,

for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of, (1) any dog or other animal whether alive or dead for research, teaching, exhibition, or use as a pet, or (2) any dog for hunting, security, or breeding purposes, except that this term does not include—

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

(ii) any person who does not sell, or negotiate the purchase or sale of any wild animal, dog, or cat, and who derives no more than $500 gross income from the sale of other animals during any calendar year[.]

§ 2149. Violations by licensees

. . . .

(b) Civil penalties for violation of any section, etc.; separate offenses; notice and hearing; appeal; considerations in assessing penalty; compromise of penalty; civil action by Attorney General for failure to pay penalty; district court jurisdiction; failure to obey cease and desist order

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, that violates any provision of this chapter, or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than $2,500 for each such violation, and the Secretary may also make an order that such person shall cease and desist from continuing such violation. Each violation and each day during which a violation continues shall be a separate offense. No penalty shall be assessed or cease and desist order issued unless such person is given notice and opportunity for a hearing with respect to the alleged violation, and the order of the Secretary assessing a penalty and making a cease and desist order shall be final and conclusive unless the affected person files an appeal from the

Secretary's order with the appropriate United States Court of Appeals. The Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations. . . .

(c) Appeal of final order by aggrieved person; limitations; exclusive jurisdiction of United States Courts of Appeals

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, aggrieved by a final order of the Secretary issued pursuant to this section may, within 60 days after entry of such an order, seek review of such order in the appropriate United States Court of Appeals in accordance with the provisions of sections 2341, 2343 through 2350 of title 28, and such court shall have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of the Secretary's order.

§ 2151. Rules and regulations

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

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

28 U.S.C.:

TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE

. . . .

PART VI—PARTICULAR PROCEEDINGS

. . . .

CHAPTER 163—FINES, PENALTIES AND FORFEITURES

§ 2461. Mode of recovery

. . . .

FEDERAL CIVIL PENALTIES INFLATION ADJUSTMENT

SHORT TITLE

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

FINDINGS AND PURPOSE

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

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

(2) the impact of many civil monetary penalties has been and is diminished due to the effect of inflation;

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

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

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

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

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

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

DEFINITIONS

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

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

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

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

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

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

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

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

CIVIL MONETARY PENALTY INFLATION ADJUSTMENT REPORTS

SEC. 4. The head of each agency shall, not later than 180 days after the date of enactment of the Debt Collection Improvement Act of 1996 [Apr. 26, 1996], and at least once every 4 years thereafter–

(1) by regulation adjust each civil monetary penalty provided by law within the jurisdiction of the Federal agency, except for any penalty (including any addition to tax and additional amount) under the Internal Revenue Code of 1986 [26 U.S.C. 1 *et seq*.], the Tariff Act of 1930 [19 U.S.C. 1202 *et seq*.], the Occupational Safety and Health Act of 1970 [29 U.S.C. 651 *et seq*.], or the Social Security Act [42 U.S.C. 301 *et seq*.], by the inflation adjustment described under section 5 of this Act; and

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

COST-OF-LIVING ADJUSTMENTS OF CIVIL MONETARY PENALTIES

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

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

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

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

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

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

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

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

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

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

ANNUAL REPORT

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

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

28 U.S.C. § 2461 (note).

7 C.F.R.:

TITLE 7—AGRICULTURE

SUBTITLE A—OFFICE OF THE SECRETARY OF AGRICULTURE

. . . .

PART 3—DEBT MANAGEMENT

. . . .

SUBPART E—ADJUSTED CIVIL MONETARY PENALTIES

§ 3.91 Adjusted civil monetary penalties.

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

(b) *Penalties*—. . . .

. . . .

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

. . . .

(v) Civil penalty for a violation of Animal Welfare Act, codified at 7 U.S.C. 2149(b), has a maximum of $2,750; and knowing failure to obey a cease and desist order has a civil penalty of $1,650.

7 C.F.R. § 3.91(a), (b)(2)(v).

9 C.F.R.:

TITLE 9—ANIMALS AND ANIMAL PRODUCTS

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

SUBCHAPTER A—ANIMAL WELFARE

PART 1—DEFINITION OF TERMS

§ 1.1 Definitions.

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

. . . .

Dealer means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of: Any dog or other animal whether alive or dead (including unborn animals, organs, limbs, blood, serum, or other parts) for research, teaching, testing, experimentation, exhibition, or for use as a pet; or any dog at the wholesale level for hunting, security, or breeding purposes. This term does not include: A retail pet store, as defined in this section, unless such store sells any animal to a research facility, an exhibitor, or a dealer (wholesale); any retail outlet where dogs are sold for hunting, breeding, or security purposes; or any person who does not sell or negotiate the purchase or sale of any wild or exotic animal, dog, or cat and who

derives no more than $500 gross income from the sale of animals other than wild or exotic animals, dogs, or cats, during any calendar year.

PART 2—REGULATIONS

. . . .

SUBPART D—ATTENDING VETERINARIAN AND ADEQUATE VETERINARY CARE

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

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

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

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

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

. . . .

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

(3) Daily observation of all animals to assess their health and well-being; *Provided, however*, That daily observation of animals may be accomplished by someone other than the attending veterinarian; and *Provided, further*, That a mechanism of direct

and frequent communication is required so that timely and accurate information on problems of animal health, behavior, and well-being is conveyed to the attending veterinarian[.]

SUBPART G—RECORDS

§ 2.75 Records: Dealers and exhibitors.

. . . .

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

(i) The name and address of the person from whom the animals were purchased or otherwise acquired;

(ii) The USDA license or registration number of the person if he or she is licensed or registered under the Act;

(iii) The vehicle license number and state, and the driver's license number and state of the person, if he or she is not licensed or registered under the Act;

(iv) The name and address of the person to whom an animal was sold or given;

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

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

(vii) The number of animals in the shipment.

SUBPART H—COMPLIANCE WITH STANDARDS AND HOLDING PERIOD

§ 2.100 Compliance with standards.

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

SUBPART I—MISCELLANEOUS

. . . .

§ 2.126 Access and inspection of records and property.

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

(1) To enter its place of business;

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

(3) To make copies of the records;

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

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

PART 3—STANDARDS

. . . .

SUBPART D—SPECIFICATIONS FOR THE HUMANE HANDLING, CARE, TREATMENT, AND TRANSPORTATION OF NONHUMAN PRIMATES

FACILITIES AND OPERATING STANDARDS

§ 3.75 Housing facilities, general.

(a) *Structure*: construction. Housing facilities for nonhuman primates must be designed and constructed so that they are structurally sound for the species of nonhuman primates housed in them. They must be kept in good repair, and they must protect the animals from injury, contain the animals securely, and restrict other animals from entering.

. . . .

§ 3.76 Indoor housing facilities.

(a) *Heating, cooling, and temperature*. Indoor housing facilities must be sufficiently heated and cooled when necessary to protect nonhuman primates from temperature extremes and to provide for their health and well-being. The ambient temperature in the facility must not fall below 45 °F (7.2 °C) for more than 4 consecutive hours when nonhuman primates are present, and must not rise above 85 °F (29.5 °C) for more than 4 consecutive hours when nonhuman primates are present. The ambient temperature must be maintained at a level that ensures the health and well-being of the species housed, as directed by the attending veterinarian, in accordance with generally accepted professional and husbandry practices.

. . . .

§ 3.80 Primary enclosures.

Primary enclosures for nonhuman primates must meet the following minimum requirements:

(a) *General requirements*. . . .

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

. . . .

(v) Enable the nonhuman primates to remain dry and clean;

. . . .

(viii) Provide the nonhuman primates with easy and convenient access to clean food and water;

. . . .

(b) *Minimum space requirements.* Primary enclosures must meet the minimum space requirements provided in this subpart. These minimum space requirements must be met even if perches, ledges, swings, or other suspended fixtures are placed in the enclosure. Low perches and ledges that do not allow the space underneath them to be comfortably occupied by the animal will be counted as part of the floor space.

(1) Prior to February 15, 1994:

(i) Primary enclosures must be constructed and maintained so as to provide sufficient space to allow each nonhuman primate to make normal postural adjustments with adequate freedom of movement; and

(ii) Each nonhuman primate housed in a primary enclosure must be provided with a minimum floor space equal to an area at least three times the area occupied by the primate when standing on four feet.

(2) On and after February 15, 1994:

(i) The minimum space that must be provided to *each* nonhuman primate, whether housed individually or with other nonhuman primates, will be determined by the typical weight of animals of its species, except for brachiating species and great apes and will be calculated by using the following table [table omitted]:

(ii) Dealers[,] exhibitors, and research facilities, including Federal research facilities, must provide great apes weighing over 110 lbs. (50 kg) an additional volume of space in excess of that required for Group 6 animals as set forth in paragraph (b)(2)(i) of this section, to allow for normal postural adjustments.

(iii) In the case of research facilities, any exemption from these standards must be required by a research proposal or in the judgment of the attending veterinarian and must be approved by the Committee. In the case of dealers and exhibitors, any exemption from these standards must be required in the judgment of the attending veterinarian and approved by the Administrator.

(iv) When more than one nonhuman primate is housed in a primary enclosure, the minimum space requirement for the

enclosure is the sum of the minimum floor area space required for each individual nonhuman primate in the table in paragraph (b)(2)(i) of this section, and the minimum height requirement for the largest nonhuman primate housed in the enclosure. Provided however, that mothers with infants less than 6 months of age may be maintained together in primary enclosures that meet the floor area space and height requirements of the mother.

. . . .

§ 3.81 Environment enhancement to promote psychological well-being.

Dealers, exhibitors, and research facilities must develop, document, and follow an appropriate plan for environment enhancement adequate to promote the psychological well-being of nonhuman primates. The plan must be in accordance with the currently accepted professional standards as cited in appropriate professional journals or reference guides, and as directed by the attending veterinarian. This plan must be made available to APHIS upon request, and, in the case of research facilities, to officials of any pertinent funding agency. The plan, at a minimum, must address each of the following:

(a) *Social grouping*. The environment enhancement plan must include specific provisions to address the social needs of nonhuman primates of species known to exist in social groups in nature. Such specific provisions must be in accordance with currently accepted professional standards, as cited in appropriate professional journals or reference guides, and as directed by the attending veterinarian. The plan may provide for the following exceptions:

(1) If a nonhuman primate exhibits vicious or overly aggressive behavior, or is debilitated as a result of age or other conditions (e.g., arthritis), it should be housed separately;

(2) Nonhuman primates that have or are suspected of having a contagious disease must be isolated from healthy animals in the colony as directed by the attending veterinarian. When an entire group or room of nonhuman primates is known to have or

believed to be exposed to an infectious agent, the group may be kept intact during the process of diagnosis, treatment, and control.

(3) Nonhuman primates may not be housed with other species of primates or animals unless they are compatible, do not prevent access to food, water, or shelter by individual animals[,] and are not known to be hazardous to the health and well-being of each other. Compatibility of nonhuman primates must be determined in accordance with generally accepted professional practices and actual observations, as directed by the attending veterinarian, to ensure that the nonhuman primates are in fact compatible. Individually housed nonhuman primates must be able to see and hear nonhuman primates of their own or compatible species unless the attending veterinarian determines that it would endanger their health, safety, or well-being.

(b) *Environmental enrichment.* The physical environment in the primary enclosures must be enriched by providing means of expressing noninjurious species-typical activities. Species differences should be considered when determining the type or methods of enrichment. Examples of environmental enrichments include providing perches, swings, mirrors, and other increased cage complexities; providing objects to manipulate; varied food items; using foraging or task-oriented feeding methods; and providing interaction with the care giver or other familiar and knowledgeable person consistent with personnel safety precautions.

(c) *Special considerations*. Certain nonhuman primates must be provided special attention regarding enhancement of their environment, based on the needs of the individual species and in accordance with the instructions of the attending veterinarian. Nonhuman primates requiring special attention are the following:

(1) Infants and young juveniles;

(2) Those that show signs of being in psychological distress through behavior or appearance;

(3) Those used in research for which the Committee-approved protocol requires restricted activity;

(4) Individually housed nonhuman primates that are unable to see and hear nonhuman primates of their own or compatible

species; and

(5) Great apes weighing over 110 lbs. (50 kg). Dealers, exhibitors, and research facilities must include in the environment enhancement plan special provisions for great apes weighing over 110 lbs. (50 kg), including additional opportunities to express species-typical behavior.

(d) *Restraint devices*. Nonhuman primates must not be maintained in restraint devices unless required for health reasons as determined by the attending veterinarian or by a research proposal approved by the Committee at research facilities. Maintenance under such restraint must be for the shortest period possible. In instances where long-term (more than 12 hours) restraint is required, the nonhuman primate must be provided the opportunity daily for unrestrained activity for at least one continuous hour during the period of restraint, unless continuous restraint is required by the research proposal approved by the Committee at research facilities.

(e) *Exemptions*. (1) The attending veterinarian may exempt an individual nonhuman primate from participation in the environment enhancement plan because of its health or condition, or in consideration of its well-being. The basis of the exemption must be recorded by the attending veterinarian for each exempted nonhuman primate. Unless the basis for the exemption is a permanent condition, the exemption must be reviewed at least every 30 days by the attending veterinarian.

(2) For a research facility, the Committee may exempt an individual nonhuman primate from participation in some or all of the otherwise required environment enhancement plans for scientific reasons set forth in the research proposal. The basis of the exemption shall be documented in the approved proposal and must be reviewed at appropriate intervals as determined by the Committee, but not less than annually.

(3) Records of any exemptions must be maintained by the dealer, exhibitor, or research facility and must be made available to USDA officials or officials of any pertinent funding Federal agency upon request.

§ 3.82 Feeding.

(a) The diet for nonhuman primates must be appropriate for the species, size, age, and condition of the animal, and for the conditions in which the nonhuman primate is maintained, according to generally accepted professional and husbandry practices and nutritional standards. The food must be clean, wholesome, and palatable to the animals. It must be of sufficient quantity and have sufficient nutritive value to maintain a healthful condition and weight range of the animal and to meet its normal daily nutritional requirements.

(b) Nonhuman primates must be fed at least once each day except as otherwise might be required to provide adequate veterinary care. Infant and juvenile nonhuman primates must be fed as often as necessary in accordance with generally accepted professional and husbandry practices and nutritional standards, based upon the animals' age and condition.

. . . .

(d) Food and food receptacles, if used, must be located so as to minimize any risk of contamination by excreta and pests. Food receptacles must be kept clean and must be sanitized in accordance with the procedures listed in § 3.84(b)(3) of this subpart at least once every 2 weeks. Used food receptacles must be sanitized before they can be used to provide food to a different nonhuman primate or social grouping of nonhuman primates. Measures must be taken to ensure there is no molding, deterioration, contamination, or caking or wetting of food placed in self-feeders.

§ 3.83 Watering.

Potable water must be provided in sufficient quantity to every nonhuman primate housed at the facility. If potable water is not continually available to the nonhuman primates, it must be offered to them as often as necessary to ensure their health and

well-being, but no less than twice daily for at least l hour each time, unless otherwise required by the attending veterinarian, or as required by the research proposal approved by the Committee at research facilities. Water receptacles must be kept clean and sanitized in accordance with methods provided in § 3.84(b)(3) of this subpart at least once every 2 weeks or as often as necessary to keep them clean and free from contamination. Used water receptacles must be sanitized before they can be used to provide water to a different nonhuman primate or social grouping of nonhuman primates.

§ 3.84 Cleaning, sanitization, housekeeping, and pest control.

(a) *Cleaning of primary enclosures*. Excreta and food waste must be removed from inside each indoor primary enclosure daily and from underneath them as often as necessary to prevent an excessive accumulation of feces and food waste, to prevent the nonhuman primates from becoming soiled, and to reduce disease hazards, insects, pests, and odors. Dirt floors, floors with absorbent bedding, and planted areas in primary enclosures must be spot-cleaned with sufficient frequency to ensure all animals the freedom to avoid contact with excreta, or as often as necessary to reduce disease hazards, insects, pests, and odors. When steam or water is used to clean the primary enclosure, whether by hosing, flushing, or other methods, nonhuman primates must be removed, unless the enclosure is large enough to ensure the animals will not be harmed, wetted, or distressed in the process. Perches, bars, and shelves must be kept clean and replaced when worn. If the species of the nonhuman primates housed in the primary enclosure engages in scent marking, hard surfaces in the primary enclosure must be spot-cleaned daily.

. . . .

(c) *Housekeeping for premises*. Premises where housing facilities are located, including buildings and surrounding grounds, must be kept clean and in good repair in order to protect the nonhuman primates from injury, to facilitate the husbandry practices required in this subpart, and to reduce or eliminate

breeding and living areas for rodents, pests, and vermin. Premises must be kept free of accumulations of trash, junk, waste, and discarded matter. Weeds, grass, and bushes must be controlled so as to facilitate cleaning of the premises and pest control.

§ 3.85 Employees.

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

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

FACILITIES AND OPERATING STANDARDS

§ 3.125 Facilities, general.

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

. . . .

(c) *Storage*. Supplies of food and bedding shall be stored in facilities which adequately protect such supplies against deterioration, molding, or contamination by vermin.

Refrigeration shall be provided for supplies of perishable food.

(d) *Waste disposal.* Provision shall be made for the removal and disposal of animal and food wastes, bedding, dead animals, trash and debris. Disposal facilities shall be so provided and operated as to minimize vermin infestation, odors, and disease hazards. The disposal facilities and any disposal of animal and food wastes, bedding, dead animals, trash, and debris shall comply with applicable Federal, State, and local laws and regulations relating to pollution control or the protection of the environment.

. . . .

§ 3.127 Facilities, outdoor.

(a) *Shelter from sunlight.* When sunlight is likely to cause overheating or discomfort of the animals, sufficient shade by natural or artificial means shall be provided to allow all animals kept outdoors to protect themselves from direct sunlight.

(b) *Shelter from inclement weather.* Natural or artificial shelter appropriate to the local climatic conditions for the species concerned shall be provided for all animals kept outdoors to afford them protection and to prevent discomfort to such animals. Individual animals shall be acclimated before they are exposed to the extremes of the individual climate.

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

(d) *Perimeter fence.* On or after May 17, 2000, all outdoor housing facilities (*i.e.*, facilities not entirely indoors) must be enclosed by a perimeter fence that is of sufficient height to keep animals and unauthorized persons out. Fences less than 8 feet high for potentially dangerous animals, such as, but not limited to, large felines (*e.g.*, lions, tigers, leopards, cougars, etc.), bears, wolves, rhinoceros, and elephants, or less than 6 feet high for other animals must be approved in writing by the Administrator. The fence must be constructed so that it protects the animals in

the facility by restricting animals and unauthorized persons from going through it or under it and having contact with the animals in the facility, and so that it can function as a secondary containment system for the animals in the facility. It must be of sufficient distance from the outside of the primary enclosure to prevent physical contact between animals inside the enclosure and animals or persons outside the perimeter fence. Such fences less than 3 feet in distance from the primary enclosure must be approved in writing by the Administrator. A perimeter fence is not required:

(1) Where the outside walls of the primary enclosure are made of sturdy, durable material, which may include certain types of concrete, wood, plastic, metal, or glass, and are high enough and constructed in a manner that restricts entry by animals and unauthorized persons and the Administrator gives written approval; or

(2) Where the outdoor housing facility is protected by an effective natural barrier that restricts the animals to the facility and restricts entry by animals and unauthorized persons and the Administrator gives written approval; or

(3) Where appropriate alternative security measures are employed and the Administrator gives written approval; or

(4) For traveling facilities where appropriate alternative security measures are employed; or

(5) Where the outdoor housing facility houses only farm animals, such as, but not limited to, cows, sheep, goats, pigs, horses (for regulated purposes), or donkeys, and the facility has in place effective and customary containment and security measures.

§ 3.128 Space requirements.

Enclosures shall be constructed and maintained so as to provide sufficient space to allow each animal to make normal postural and social adjustments with adequate freedom of movement. Inadequate space may be indicated by evidence of malnutrition, poor condition, debility, stress, or abnormal behavior patterns.

ANIMAL HEALTH AND HUSBANDRY STANDARDS

§ 3.129 Feeding.

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

(b) Food, and food receptacles, if used, shall be sufficient in quantity and located so as to be accessible to all animals in the enclosure and shall be placed so as to minimize contamination. Food receptacles shall be kept clean and sanitary at all times. If self-feeders are used, adequate measures shall be taken to prevent molding, contamination, and deterioration or caking of food.

§ 3.130 Watering.

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

§ 3.131 Sanitation.

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

. . . .

(c) *Housekeeping*. Premises (buildings and grounds) shall be

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

(d) *Pest control.* A safe and effective program for the control of insects, ectoparasites, and avian and mammalian pests shall be established and maintained.

§ 3.132 Employees.

A sufficient number of adequately trained employees shall be utilized to maintain the professionally acceptable level of husbandry practices set forth in this subpart. Such practices shall be under a supervisor who has a background in animal care.

9 C.F.R. §§ 1.1; 2.40(a), (b)(2)-(3), .75(b)(1), .100(a), .126(a); 3.75(a), .76(a), .80(a)(2)(v), (viii), (b), .81, .82(a)-(b), (d), .83, .84(a), (c), .85, .125(a), (c)-(d), .127, .128, .129, .130, .131(a), (c)-(d), .132 (footnotes omitted).

DECISION

Statement of the Case

Respondents failed to file an answer to the Amended Complaint within the time prescribed in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) and the failure to deny or otherwise respond to an allegation of the complaint shall be deemed, for purposes of the proceeding, an admission of the allegations in the complaint. Further, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the failure to file an answer constitutes a waiver of hearing. Accordingly, the material allegations in the Amended Complaint are adopted as findings of fact. This Decision and Order is issued pursuant to section 1.139 of the Rules

of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent Dennis Hill is an individual, d/b/a White Tiger Foundation, whose mailing address is 3050 West Willow Road, Flat Rock, Indiana 47234. At all times material to this proceeding, Respondent Dennis Hill was licensed and operating as a "dealer," as that term is defined in the Animal Welfare Act and the Regulations, and held Animal Welfare Act license number 32-A-0160, issued to "Dennis Hill, DBA Willow Hill Center for Rare And Endangered Species."

2. Between April 8, 1998, and March 12, 2002, Respondent Willow Hill Center for Rare & Endangered Species, LLC, was an Indiana domestic limited liability company, d/b/a Hill's Exotics, whose agent for service of process was M. Michael Stephenson, 30 East Washington Street, Suite 400, Shelbyville, Indiana 46176. At all times material to this proceeding, Respondent Willow Hill Center for Rare & Endangered Species, LLC, operated as a "dealer," as that term is defined in the Animal Welfare Act and the Regulations. On March 12, 2002, the Indiana Secretary of State administratively dissolved Respondent Willow Hill Center for Rare & Endangered Species, LLC.

3. Animal and Plant Health Inspection Service personnel conducted inspections of Respondents' facilities, records, and animals for the purpose of determining Respondents' compliance with the Animal Welfare Act and the Regulations and Standards on August 30, 2002 (42 animals), August 31, 2002 (approximately 42 animals), September 5, 2002 (41 animals), October 8, 2002 (39 animals), October 22, 2002, November 4, 2002, November 8, 2002, March 12, 2003, March 14, 2003, July 1, 2003, September 22, 2003, September 23, 2003, and January 22, 2004.

4. On August 30, 2002, Respondents failed to establish and maintain programs of adequate veterinary care that included a written program of veterinary care and regularly scheduled visits to the premises. Specifically, the attending veterinarian had not regularly visited Respondents' facility. (9 C.F.R. § 2.40(a)(1).)

5. On August 30, 2002, Respondents failed to have their attending veterinarian provide adequate veterinary care to their animals

that included the use of appropriate methods to treat diseases and injuries. Specifically, Respondents failed to obtain veterinary treatment for an injured lemur, a British Columbian wolf that exhibited lameness in its left front leg, a tiger ("Patty") that had a chronic draining abscess on the left side of its mandible, and a black leopard ("Dangerous") with hair loss on a majority of its tail. (9 C.F.R. § 2.40(a), (b)(2).)

6. On August 30, 2002, Respondents failed to have their attending veterinarian provide adequate veterinary care to their animals that included the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries. Specifically, three wolves ("Two Way," "Predator," and "Tundra") had fly invested ear edges with open lesions. (9 C.F.R. § 2.40(b)(2).)

7. On August 30, 2002, Respondents failed to establish and maintain programs of adequate veterinary care that included daily observation of all animals to assess their health and well-being. Specifically, Respondents failed to observe and record accurate information related to an injured lemur, three wolves ("Two Way," "Predator," and "Tundra") that had fly invested ear edges with open lesions, a British Columbian wolf that exhibited lameness in its left front leg, a tiger ("Patty") that had a chronic draining abscess on the left side of its mandible, and a black leopard ("Dangerous") with hair loss on a majority of its tail. Respondents were, therefore, unable to convey accurate information as to the animals' health, behavior, and well-being to their attending veterinarian. (9 C.F.R. § 2.40(b)(3).)

8. On August 31, 2002, Respondents failed to establish and maintain programs of adequate veterinary care that included a written program of veterinary care and regularly scheduled visits to the premises. Specifically, the attending veterinarian had not regularly visited Respondents' facility. (9 C.F.R. § 2.40(a)(1).)

9. On August 31, 2002, Respondents failed to have their attending veterinarian provide adequate veterinary care to their animals that included the use of appropriate methods to treat diseases and injuries. Specifically, Respondents failed to obtain veterinary treatment for an injured lemur, a British Columbian wolf that exhibited lameness in its left front leg, a tiger ("Patty") that had a chronic draining abscess on the left side of its mandible, a black leopard ("Dangerous") with hair loss on a majority of its tail, and a tiger ("Vixie") with hair loss on its

face, chest, front legs, and the inside of its back legs. (9 C.F.R. § 2.40(a), (b)(2).)

10. On August 31, 2002, Respondents failed to have their attending veterinarian provide adequate veterinary care to their animals that included the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries. Specifically, three wolves ("Two Way," "Predator," and "Tundra") had fly invested ear edges with open lesions. (9 C.F.R. § 2.40(b)(2).)

11. On August 31, 2002, Respondents failed to establish and maintain programs of adequate veterinary care that included daily observation of all animals to assess their health and well-being. Specifically, Respondents failed to observe and record accurate information related to an injured lemur, a British Columbian wolf that exhibited lameness in its left front leg, a tiger ("Patty") that had a chronic draining abscess on the left side of its mandible, a black leopard ("Dangerous") with hair loss on a majority of its tail, and a tiger ("Vixie") with hair loss on its face, chest, front legs, and the inside of its back legs. Respondents were, therefore, unable to convey accurate information as to the animals' health, behavior, and well-being to their attending veterinarian. (9 C.F.R. § 2.40(b)(3).)

12. On September 4, 2002, Respondents failed to maintain a written program of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine. Specifically, Respondents failed to complete and maintain a written program of veterinary care. (9 C.F.R. § 2.40(a)(1).)

13. On October 8, 2002, Respondents failed to maintain a written program of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine. Specifically, Respondents failed to complete and maintain a written program of veterinary care. (9 C.F.R. § 2.40(a)(1).)

14. On November 4, 2002, Respondents failed to have their attending veterinarian provide adequate veterinary care to their animals that included the use of appropriate methods to treat diseases and injuries. Specifically, Respondents failed to obtain veterinary treatment for a black leopard ("Dangerous") with hair loss on a majority of its tail and a tiger ("Megan") with generalized hair loss and skin lesions. (9 C.F.R. § 2.40(a), (b)(2).)

15. On November 4, 2002, Respondents failed to establish and maintain programs of adequate veterinary care that included daily observation of all animals to assess their health and well-being. Specifically, Respondents failed to observe and record accurate information related to a black leopard ("Dangerous") with hair loss on a majority of its tail and a tiger ("Megan") with generalized hair loss and skin lesions. Respondents were, therefore, unable to convey accurate information as to the animals' health, behavior, and well-being to their attending veterinarian. (9 C.F.R. § 2.40(b)(3).)

16. On September 23, 2003, Respondents failed to maintain a written program of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine. Specifically, Respondents failed to complete and maintain a written program of veterinary care. (9 C.F.R. § 2.40(a)(1).)

17. On September 23, 2003, Respondents failed to establish and maintain programs of adequate veterinary care that included a written program of veterinary care and regularly scheduled visits to the premises. Specifically, the attending veterinarian had not regularly visited Respondents' facility. (9 C.F.R. § 2.40(a)(1).)

18. On January 22, 2004, Respondents failed to establish and maintain programs of adequate veterinary care that included the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries. Specifically, Respondents failed to provide annual vaccinations and fecal exams to felids and tetanus vaccinations to four ring-tailed lemurs, in accordance with Respondents' program of veterinary care. (9 C.F.R. § 2.40(a)(1).)

19. On August 30, 2002, Respondents failed to make, keep, and maintain records which fully and correctly disclose information regarding the acquisition and disposition of each animal. Specifically, Respondents failed to maintain, and make available for inspection, records disclosing information concerning animals in their possession. (9 C.F.R. § 2.75(b)(1).)

20. On August 31, 2002, Respondents failed to make, keep, and maintain records which fully and correctly disclose information regarding the acquisition and disposition of each animal. Specifically, Respondents failed to maintain, and make available for inspection, records disclosing information concerning animals in their possession.

(9 C.F.R. § 2.75(b)(1).)

21. On September 4, 2002, Respondents failed to make, keep, and maintain records which fully and correctly disclose information regarding the acquisition and disposition of each animal. Specifically, Respondents failed to maintain, and make available for inspection, records disclosing information concerning animals in their possession. (9 C.F.R. § 2.75(b)(1).)

22. On September 22, 2003, Respondents failed to have a responsible party available during business hours to permit Animal and Plant Health Inspection Service officials to conduct an inspection of Respondents' animal facilities (9 C.F.R. § 2.126(a)).

23. On August 30, 2002, Respondents failed to provide food of sufficient quantity and nutritive value to maintain a healthful condition and weight range and to meet normal daily nutritional requirements for nonhuman primates. Specifically, Respondents failed to provide food to eight lemurs. (9 C.F.R. § 3.82(a), (b).)

24. On August 30, 2002, Respondents failed to keep food receptacles clean and sanitary. Specifically, the food receptacle used by the injured lemur was caked with old food, attracted numerous flies, and was in need of sanitation. (9 C.F.R. § 3.82(d).)

25. On August 30, 2002, Respondents failed to keep premises, where housing facilities are located, clean and in good repair. Specifically, the floor and area around the injured lemur's enclosure was covered with feces and debris. (9 C.F.R. § 3.84(c).)

26. On August 30, 2002, Respondents failed to utilize a sufficient number of adequately trained employees to maintain a professionally acceptable level of husbandry practices and care for nonhuman primates. Specifically, Respondents failed to have any employees that were able to handle, or provide husbandry practices and care to, eight lemurs. (9 C.F.R. § 3.85.)

27. On October 8, 2002, Respondents failed to develop, document, and follow an appropriate plan for environment enhancement to promote the psychological well-being of nonhuman primates that is in accordance with the currently accepted professional journals or reference guides, or as directed by the attending veterinarian. Specifically, Respondents failed to provide environment enhancement to seven lemurs. (9 C.F.R. § 3.81.)

28. On November 4, 2002, Respondents failed to provide food of sufficient quantity and nutritive value to maintain a healthful condition and weight range and to meet normal daily nutritional requirements for nonhuman primates. Specifically, Respondents failed to provide a sufficient amount of food to seven lemurs that appeared thin with poor haircoats. (9 C.F.R. § 3.82(a), (b).)

29. On November 4, 2002, Respondents failed to provide potable water to every nonhuman primate, when potable water was not accessible to the nonhuman primates at all times, as often as necessary for their health and well-being. Specifically, Respondents failed to provide potable water to seven lemurs. (9 C.F.R. § 3.83.)

30. On November 4, 2002, Respondents failed to develop, document, and follow an appropriate plan for environment enhancement to promote the psychological well-being of nonhuman primates that is in accordance with the currently accepted professional journals or reference guides, or as directed by the attending veterinarian. Specifically, Respondents failed to provide environment enhancement to seven lemurs. (9 C.F.R. § 3.81.)

31. On November 4, 2002, Respondents failed to remove excreta and food waste from inside each indoor primary enclosure daily and from underneath each primary enclosure as often as necessary to prevent excessive accumulation of feces and food waste, to prevent the nonhuman primate from becoming soiled, and to reduce disease hazards, insects, pests, and odors. Specifically, Respondents housed seven lemurs in soiled primary enclosures. (9 C.F.R. § 3.84(a).)

32. On November 4, 2002, Respondents failed to construct and maintain the primary enclosures for seven lemurs so as to enable the nonhuman primates to remain dry and clean and failed to provide the nonhuman primates with easy and convenient access to clean food and water (9 C.F.R. § 3.80(a)(2)(v), (viii)).

33. On November 4, 2002, Respondents failed to utilize a sufficient number of adequately trained employees to maintain a professionally acceptable level of husbandry practices and care for nonhuman primates. Specifically, Respondents failed to have any employees that were able to handle, or provide husbandry and care to, seven lemurs. (9 C.F.R. § 3.85.)

34. On March 12, 2003, Respondents failed to construct and maintain

the primary enclosures for nonhuman primates so as to meet the minimum space requirements. Specifically, Respondents housed six lemurs in enclosures that provided each lemur approximately 2 square feet of space and 14 inches of height. (9 C.F.R. § 3.80(b).)

35. On March 12, 2003, Respondents failed to develop, document, and follow an appropriate plan for environment enhancement to promote the psychological well-being of nonhuman primates that is in accordance with the currently accepted professional journals or reference guides, or as directed by the attending veterinarian. Specifically, Respondents failed to provide or follow a plan of environment enhancement for six lemurs. (9 C.F.R. § 3.81.)

36. On March 12, 2003, Respondents failed to provide potable water to every nonhuman primate, when potable water was not accessible to the nonhuman primates at all times, as often as necessary for their health and well-being. Specifically, Respondents failed to provide potable water to six lemurs. (9 C.F.R. § 3.83.)

37. On March 12, 2003, Respondents failed to remove excreta and food waste from inside each indoor primary enclosure daily and from underneath each primary indoor enclosure as often as necessary to prevent excessive accumulation of feces and food waste, to prevent the nonhuman primate from becoming soiled, and to reduce disease hazards, insects, pests, and odors. Specifically, Respondents housed six lemurs in primary enclosures with excessive accumulations of feces and food waste. (9 C.F.R. § 3.84(a).)

38. On March 12, 2003, Respondents failed to construct and maintain the primary enclosures for nonhuman primates so as to enable the nonhuman primates to remain dry and clean. Specifically, Respondents housed six lemurs in enclosures so contaminated with excessive feces and food waste that some of the lemurs had feces on their haircoats and could not avoid the overwhelming contamination of wet filth. (9 C.F.R. § 3.80(a)(2)(v).)

39. On January 22, 2004, Respondents failed to design and construct primate facilities so they were structurally sound and failed to keep the primate facilities in good repair to protect the animals from injury, contain the animals securely, and restrict other animals from entering. Specifically, the enclosure housing four ring-tailed lemurs had a leaking roof, exposed electrical wires, and door that was off its hinge. (9 C.F.R.

§ 3.75(a).)

40. On January 22, 2004, Respondents failed to construct the surfaces of housing facilities in a manner, and made of material, that allow the surfaces to be readily cleaned and sanitized, or removed or replaced when worn or soiled. Specifically, Respondents constructed the walls and flooring in the lemurs' enclosure of unsealed wood. (9 C.F.R. § 3.75(a).)

41. On January 22, 2004, Respondents failed to sufficiently heat indoor housing facilities when necessary to protect nonhuman primates from temperature extremes and to provide for their health and well-being. Specifically, the heating device in the enclosure housing four ring-tailed lemurs provided insufficient heat to prevent the ambient temperature from dropping below 45 degrees Fahrenheit for more than 4 hours. (9 C.F.R. § 3.76(a).)

42. On January 22, 2004, Respondents failed to provide potable water to every nonhuman primate, when potable water was not accessible to the nonhuman primates at all times, as often as necessary for their health and well-being. Specifically, Respondents failed to provide potable water to four ring-tailed lemurs. (9 C.F.R. § 3.83.)

43. On January 22, 2004, Respondents failed to clean and sanitize water receptacles as often as necessary to keep them clean and free from contamination. Specifically, the water receptacle used by four ring-tailed lemurs contained green algae, fecal material, and floating monkey biscuits. (9 C.F.R. § 3.83.)

44. On August 30, 2002, Respondents failed to construct indoor and outdoor housing facilities so they were structurally sound and failed to maintain the housing facilities in good repair to protect the animals from injury and to contain the animals. Specifically, Respondents failed to fill the large holes and repair the retainer device in an enclosure housing two wolves ("Two Way" and "Tundra"). (9 C.F.R. § 3.125(a).)

45. On August 30, 2002, Respondents failed to construct indoor and outdoor housing facilities so they were structurally sound and failed to maintain the housing facilities in good repair to protect the animals from injury and to contain the animals. Specifically, Respondents failed to repair the sagging fencing material in the top, southeast corner of the black bears' enclosure. (9 C.F.R. § 3.125(a).)

46. On August 30, 2002, Respondents failed to construct indoor and

outdoor housing facilities so they were structurally sound and failed to maintain the housing facilities in good repair to protect the animals from injury and to contain the animals. Specifically, Respondents failed to repair the chainlink fence that was detached from the horizontal foundational bar in the spotted leopard's ("Maya") enclosure. (9 C.F.R. § 3.125(a).)

47. On August 30, 2002, Respondents failed to construct indoor and outdoor housing facilities so they were structurally sound and failed to maintain the housing facilities in good repair to protect the animals from injury and to contain the animals. Specifically, Respondents failed to repair the damaged chainlink fence on the front of the Timber wolf's enclosure and used torn and bent chainlink fencing with sharp edges to patch the damaged east-side area of the cougar's ("Maurice") enclosure. (9 C.F.R. § 3.125(a).)

48. On August 30, 2002, Respondents failed to construct indoor and outdoor housing facilities so they were structurally sound and failed to maintain the housing facilities in good repair to protect the animals from injury and to contain the animals. Specifically, two tigers ("Thor" and "Dixie") escaped from their primary enclosure through an unsound gate. (9 C.F.R. § 3.125(a).)

49. On August 30, 2002, Respondents failed to construct indoor and outdoor housing facilities so they were structurally sound and failed to maintain the housing facilities in good repair to protect the animals from injury and to contain the animals. Specifically, Respondents constructed an 8-foot-high, open-top outdoor enclosure for two tigers ("Sophie" and "Bubba"). (9 C.F.R. § 3.125(a).)

50. On August 30, 2002, Respondents failed to construct indoor and outdoor housing facilities so they were structurally sound and failed to maintain the housing facilities in good repair to protect the animals from injury. Specifically, Respondents failed to remove an exposed, sharp nail in a black bear's ("Teddy") primary enclosure. (9 C.F.R. § 3.125(a).)

51. On August 30, 2002, Respondents failed to store food supplies in facilities that adequately protect the food supplies against deterioration, molding, or contamination by vermin. Specifically, the freezer used for food storage was non-functional and meat, which was thawing in a wheel barrow, exhibited putrefaction and fly infestation. (9 C.F.R. §

3.125(c).)

52. On August 30, 2002, Respondents failed to make provisions for the removal and disposal of animal and food wastes, trash, and debris. Specifically, decomposing food was found in several enclosures, empty feed boxes were scattered throughout the facility, and boxes containing rotting, maggot infested meat, and debris associated with the boxes, were found behind the wolves' enclosures. (9 C.F.R. § 3.125(d).)

53. On August 31, 2002, Respondents failed to construct indoor and outdoor housing facilities so they were structurally sound and failed to maintain the housing facilities in good repair to protect the animals from injury and to contain the animals. Specifically, Respondents failed to fill the large holes and repair the retainer device in a wolf's ("Two Way") enclosure. (9 C.F.R. § 3.125(a).)

54. On August 31, 2002, Respondents failed to construct indoor and outdoor housing facilities so they were structurally sound and failed to maintain the housing facilities in good repair to protect the animals from injury and to contain the animals. Specifically, Respondents failed to repair the chainlink fence that was detached from the horizontal foundational bar in the spotted leopard's ("Maya") enclosure. (9 C.F.R. § 3.125(a).)

55. On August 31, 2002, Respondents failed to construct indoor and outdoor housing facilities so they were structurally sound and failed to maintain the housing facilities in good repair to protect the animals from injury and to contain the animals. Specifically, Respondents failed to repair the damaged chainlink fence on the front of the Timber wolf's enclosure and used torn and bent chainlink fencing with sharp edges to patch the damaged east-side area of the cougar's ("Maurice") enclosure. (9 C.F.R. § 3.125(a).)

56. On August 31, 2002, Respondents failed to construct indoor and outdoor housing facilities so they were structurally sound and failed to maintain the housing facilities in good repair to protect the animals from injury and to contain the animals. Specifically, Respondents failed to remove an exposed, sharp nail in a black bear's ("Teddy") primary enclosure. (9 C.F.R. § 3.125(a).)

57. On August 31, 2002, Respondents failed to construct indoor and outdoor housing facilities so they were structurally sound and failed to maintain the housing facilities in good repair to protect the animals from

injury and to contain the animals. Specifically, Respondents used 11.5 gauge chainlink to construct the enclosures for nine young tigers housed in the barn. (9 C.F.R. § 3.125(a).)

58. On August 31, 2002, Respondents failed to store food supplies in facilities that adequately protect the food supplies against deterioration, molding, or contamination by vermin. Specifically, the freezer used for food storage was non-functional and meat, which was thawing in a wheel barrow, exhibited putrefaction and fly infestation. (9 C.F.R. § 3.125(c).)

59. On August 31, 2002, Respondents failed to make provisions for the removal and disposal of animal and food wastes, trash, and debris. Specifically, decomposing food was found in several enclosures for wolves, tigers, and leopards. (9 C.F.R. § 3.125(d).)

60. On September 4, 2002, Respondents failed to construct indoor and outdoor housing facilities so they were structurally sound and failed to maintain the housing facilities in good repair to protect the animals from injury. Specifically, Respondents failed to remove an exposed, sharp nail in a black bear's ("Teddy") primary enclosure. (9 C.F.R. § 3.125(a).)

61. On September 4, 2002, Respondents failed to construct indoor and outdoor housing facilities so they were structurally sound and failed to maintain the housing facilities in good repair to protect the animals from injury and to contain the animals. Specifically, Respondents used 11.5 gauge chainlink to construct the enclosures for nine young tigers housed in the barn. (9 C.F.R. § 3.125(a).)

62. On September 4, 2002, Respondents failed to store food supplies in facilities that adequately protect the food supplies against deterioration, molding, or contamination by vermin. Specifically, the freezer used for food storage was non-functional. (9 C.F.R. § 3.125(c).)

63. On October 8, 2002, Respondents failed to construct indoor and outdoor housing facilities so they were structurally sound and failed to maintain the housing facilities in good repair to protect the animals from injury. Specifically, Respondents failed to remove an exposed, sharp nail in the black bears' ("Boo Boo" and "Apache") primary enclosure. (9 C.F.R. § 3.125(a).)

64. On October 8, 2002, Respondents failed to construct indoor and outdoor housing facilities so they were structurally sound and failed to

maintain the housing facilities in good repair to protect the animals from injury and to contain the animals. Specifically, Respondents used 11.5 gauge chainlink to construct the enclosures for five young tigers housed in the barn. (9 C.F.R. § 3.125(a).)

65. On October 8, 2002, Respondents failed to construct indoor and outdoor housing facilities so they were structurally sound and failed to maintain the housing facilities in good repair to protect the animals from injury and to contain the animals. Specifically, Respondents failed to fill the large holes and repair the retainer device in a wolf's ("Tundra") enclosure. (9 C.F.R. § 3.125(a).)

66. On October 8, 2002, Respondents failed to store food supplies in facilities that adequately protect the food supplies against deterioration, molding, or contamination by vermin. Specifically, the freezer used for food storage was non-functional. (9 C.F.R. § 3.125(c).)

67. On November 4, 2002, Respondents failed to store food supplies in facilities that adequately protect the food supplies against deterioration, molding, or contamination by vermin. Specifically, the freezer used for food storage was non-functional. (9 C.F.R. § 3.125(c).)

68. On November 4, 2002, Respondents failed to make provisions for the removal and disposal of animal and food wastes, trash, and debris. Specifically, Respondents allowed piles of manure packs to accumulate outside the tigers' enclosures. (9 C.F.R. § 3.125(d).)

69. On March 12, 2003, Respondents failed to construct indoor and outdoor housing facilities so they were structurally sound and failed to maintain the housing facilities in good repair to protect the animals from injury and to contain the animals. Specifically, Respondents failed to repair the roof of a tiger's ("Sierra") enclosure (two sections of the fencing that comprised the roof were disconnected). (9 C.F.R. § 3.125(a).)

70. On March 12, 2003, Respondents failed to store food supplies in facilities that adequately protect the food supplies against deterioration, molding, or contamination by vermin. Specifically, the freezer used for food storage was non-functional. (9 C.F.R. § 3.125(c).)

71. On January 22, 2004, Respondents failed to construct indoor and outdoor housing facilities so they were structurally sound and failed to maintain the housing facilities in good repair to protect the animals from injury and to contain the animals. Specifically, Respondents failed to

secure the perimeter fence with a locking device to prevent unauthorized access. (9 C.F.R. § 3.125(a).)

72. On January 22, 2004, Respondents failed to construct indoor and outdoor housing facilities so they were structurally sound and failed to maintain the housing facilities in good repair to protect the animals from injury and to contain the animals. Specifically, Respondents failed to repair the top of the shelter box used by two tigers ("Thor" and "Vixie") that had become detached. (9 C.F.R. § 3.125(a).)

73. On January 22, 2004, Respondents failed to construct indoor and outdoor housing facilities so they were structurally sound and failed to maintain the housing facilities in good repair to protect the animals from injury and to contain the animals. Specifically, Respondents failed to repair the detached panel on the top east side of the enclosure housing two bears. (9 C.F.R. § 3.125(a).)

74. On January 22, 2004, Respondents failed to construct indoor and outdoor housing facilities so they were structurally sound and failed to maintain the housing facilities in good repair to protect the animals from injury and to contain the animals. Specifically, Respondents failed to adequately secure chainlink fencing panels in enclosures housing three tigers ("Rachel," Sophie," and "Bubba"). (9 C.F.R. § 3.125(a).)

75. On January 22, 2004, Respondents failed to construct indoor and outdoor housing facilities so they were structurally sound and failed to maintain the housing facilities in good repair to protect the animals from injury and to contain the animals. Specifically, Respondents failed to repair or remove the fallen resting platform in a leopard's enclosure ("Pepper"). (9 C.F.R. § 3.125(a).)

76. On January 22, 2004, Respondents failed to construct indoor and outdoor housing facilities so they were structurally sound and failed to maintain the housing facilities in good repair to protect the animals from injury and to contain the animals. Specifically, Respondents failed to repair the sharp, exposed wire ends in a tiger cub's enclosure ("Bolbar"). (9 C.F.R. § 3.125(a).)

77. On January 22, 2004, Respondents failed to store food supplies in facilities that adequately protect the food supplies against deterioration, molding, or contamination by vermin. Specifically, Respondents stored turkey legs (being fed to animals) on the ground outside. (9 C.F.R. § 3.125(c).)

78. On August 30, 2002, Respondents failed to provide sufficient shade by natural or artificial means to allow all animals kept outdoors to protect themselves from direct sunlight. Specifically, the damaged tarp, used as a shade structure for a tiger ("Ozzie"), was pulled away from its enclosure and failed to provide shelter from direct sunlight. (9 C.F.R. § 3.127(a).)

79. On August 30, 2002, Respondents failed to provide appropriate natural or artificial shelter for all animals kept outdoors to afford them protection and to prevent discomfort of the animals. Specifically, a wolf ("Predator") was without any shelter. (9 C.F.R. § 3.127(b).)

80. On August 30, 2002, Respondents failed to provide a suitable method to rapidly eliminate excess water. Specifically, excess water in a tiger's ("Tony") enclosure resulted in the animal being unable to remain clean and dry. (9 C.F.R. § 3.127(c).)

81. On August 30, 2002, Respondents failed to construct a perimeter fence around dangerous animals maintained on the premises, including nine tigers and one leopard housed in the barn (9 C.F.R. § 3.127(d)).

82. On August 30, 2002, Respondents failed to construct a perimeter fence so that it protected the animals in the facility by restricting animals and unauthorized persons from going through or under it and having contact with animals in the facility. Specifically, the west-side gate of Respondents' perimeter fence was damaged and there was a large hole under the perimeter fence in the northeast corner of the facility. (9 C.F.R. § 3.127(d).)

83. On August 30, 2002, Respondents failed to construct a perimeter fence so that it protected the animals in the facility by restricting animals and unauthorized persons from going through or under it and having contact with animals in the facility. Specifically, the security of the perimeter fence was compromised; the key used to secure the padlock was lost and, therefore, the padlock was non-functional. (9 C.F.R. § 3.127(d).)

84. On August 31, 2002, Respondents failed to provide sufficient shade by natural or artificial means to allow all animals kept outdoors to protect themselves from direct sunlight. Specifically, the damaged tarp, used as a shade structure for a tiger ("Ozzie"), was pulled away from its enclosure and failed to provide shelter from direct sunlight. (9 C.F.R. § 3.127(a).)

85. On August 31, 2002, Respondents failed to provide sufficient shade by natural or artificial means to allow all animals kept outdoors to protect themselves from direct sunlight. Specifically, the damaged tarp, used as a shade structure for a wolf ("Predator"), failed to provide shelter from direct sunlight. (9 C.F.R. § 3.127(a).)

86. On August 31, 2002, Respondents failed to provide appropriate natural or artificial shelter for all animals kept outdoors to afford them protection and to prevent discomfort of the animals. Specifically, a wolf's ("Two Way") igloo-style enclosure was damaged above the entrance and did not protect against inclement weather. (9 C.F.R. § 3.127(b).)

87. On August 31, 2002, Respondents failed to provide a suitable method to rapidly eliminate excess water. Specifically, Respondents failed to eliminate excess water in a tiger's ("Tony") enclosure. (9 C.F.R. § 3.127(c).)

88. On August 31, 2002, Respondents failed to construct a perimeter fence around dangerous animals maintained on the premises, including nine tigers and one leopard housed in the barn (9 C.F.R. § 3.127(d)).

89. On September 4, 2002, Respondents failed to construct a perimeter fence around dangerous animals maintained on the premises, including nine tigers and one leopard housed in the barn (9 C.F.R. § 3.127(d)).

90. On October 8, 2002, Respondents failed to provide a suitable method to rapidly eliminate excess water. Specifically, Respondents failed to eliminate excess water in three tiger enclosures ("Munchkin," "Ozzie," and "Sierra"). (9 C.F.R. § 3.127(c).)

91. On October 8, 2002, Respondents failed to construct a perimeter fence around dangerous animals maintained on the premises, including seven tigers and three leopards housed in the barn (9 C.F.R. § 3.127(d)).

92. On March 12, 2003, Respondents failed to provide adequate natural or artificial shelter for animals kept outdoors. Specifically, the wet bedding used by the tigers and bears provided inadequate shelter from inclement weather. (9 C.F.R. § 3.127(b).)

93. On March 12, 2003, Respondents failed to provide a suitable method to rapidly eliminate excess water. Specifically, standing water and mud covered 100% of the enclosure for two tigers ("Sophie" and "Bubba") and 60% of the enclosure for two other tigers ("Zinny" and

"Montrose"). (9 C.F.R. § 3.127(c).)

94. July 1, 2003, Respondents failed to provide a suitable method to rapidly eliminate excess water. Specifically, standing water and mud covered 100% of the enclosure for two tigers (southeast enclosures) and 60% of the enclosure for two other tigers (southeast enclosures). (9 C.F.R. § 3.127(c).)

95. On September 23, 2003, Respondents failed to provide a suitable method to rapidly eliminate excess water. Specifically, standing water and mud was found in two tiger enclosures housing three tigers. (9 C.F.R. § 3.127(c).)

96. On January 22, 2004, Respondents failed to provide appropriate natural or artificial shelter for all animals kept outdoors to afford them protection and to prevent discomfort of the animals. Specifically, Respondents provided a shelter box for two tigers ("Ozzie" and "Sierra") that was too small to contain both animals. (9 C.F.R. § 3.127(b).)

97. On August 30, 2002, Respondents failed to construct enclosures so as to provide sufficient space to allow each animal to make normal postural and social adjustments with adequate freedom of movement. Specifically, four enclosures, each housing two tigers, measured less than 12 feet by 12 feet. (9 C.F.R. § 3.128.)

98. On August 31, 2002, Respondents failed to construct enclosures so as to provide sufficient space to allow each animal to make normal postural and social adjustments with adequate freedom of movement. Specifically, four enclosures, each housing two tigers, measured less than 12 feet by 12 feet. (9 C.F.R. § 3.128.)

99. On September 4, 2002, Respondents failed to construct enclosures so as to provide sufficient space to allow each animal to make normal postural and social adjustments with adequate freedom of movement. Specifically, four enclosures, each housing two tigers, measured less than 12 feet by 12 feet. (9 C.F.R. § 3.128.)

100. On September 4, 2002, Respondents failed to construct enclosures so as to provide sufficient space to allow each animal to make normal postural and social adjustments with adequate freedom of movement. Specifically, Respondents housed a spotted leopard in an enclosure that measured 3 feet by 12 feet. (9 C.F.R. § 3.128.)

101. On October 8, 2002, Respondents failed to construct enclosures so as to provide sufficient space to allow each animal to make

normal postural and social adjustments with adequate freedom of movement. Specifically, two enclosures, each housing two tigers, measured less than 12 feet by 12 feet. (9 C.F.R. § 3.128.)

102. On January 22, 2004, Respondents failed to construct enclosures so as to provide sufficient space to allow each animal to make normal postural and social adjustments with adequate freedom of movement. Specifically, Respondents housed a 9-month old tiger ("Darley"), that weighed between 150 pounds and 175 pounds, in an enclosure that measured 4 feet by 8 feet. (9 C.F.R. § 3.128.)

103. On August 30, 2002, Respondents failed to provide food that was wholesome, palatable, and free from contamination and of sufficient quantity and nutritive value to maintain all animals in good health. Specifically, wholesome, palatable food was not available for 16 tigers, 7 leopards, 1 cougar, 1 jaguar, 3 bears, and 6 wolves. (9 C.F.R. § 3.129.)

104. On October 8, 2002, Respondents failed to provide food that was wholesome, palatable, and free from contamination and of sufficient quantity and nutritive value to maintain all animals in good health. Specifically, no food was available for 14 tigers, 7 leopards, 1 cougar, 1 jaguar, 3 bears, and 6 wolves. (9 C.F.R. § 3.129.)

105. On November 4, 2002, Respondents failed to provide food that was wholesome, palatable, and free from contamination and of sufficient quantity and nutritive value to maintain all animals in good health. Specifically, no food was available for approximately 14 tigers, 10 of which ("Dixie," "Thor," "Sophie," "Bubba," "Zinni," "Montrose," "Megan," "Luna," "Shantra," and "Ozzie") appeared thin and gaunt with thin brittle haircoats. (9 C.F.R. § 3.129.)

106. On November 4, 2002, Respondents failed to provide food that was wholesome, palatable, and free from contamination and of sufficient quantity and nutritive value to maintain all animals in good health. Specifically, no food was available for approximately three bears, one of which (the singly housed bear) appeared thin with a poor quality haircoat. (9 C.F.R. § 3.129.)

107. On November 4, 2002, Respondents failed to provide food that was wholesome, palatable, and free from contamination and of sufficient quantity and nutritive value to maintain all animals in good health. Specifically, no food was available for approximately one

cougar, one jaguar, and seven leopards, six of which (excepting "Pepper") appeared thin with poor quality haircoats. (9 C.F.R. § 3.129.)

108. On March 12, 2003, Respondents failed to provide food that was wholesome, palatable, and free from contamination and of sufficient quantity and nutritive value to maintain all animals in good health. Specifically, no food was available for the large felids. (9 C.F.R. § 3.129.)

109. On August 30, 2002, Respondents failed to ensure that water receptacles were clean and sanitary. Specifically, all of the water receptacles used by the animals were in need of cleaning and sanitation. (9 C.F.R. § 3.130.)

110. On October 8, 2002, Respondents failed to provide access to potable water and ensure that water receptacles were clean and sanitary. Specifically, a tiger's ("Munchkin") water and water receptacle were contaminated with maggots. (9 C.F.R. § 3.130.)

111. On October 22, 2002, Respondents failed to provide potable water to animals, when potable water was not accessible to the animals at all times, as often as necessary for the health and comfort of the animals. Specifically, water receptacles used by the tigers contained insufficient water. (9 C.F.R. § 3.130.)

112. On November 4, 2002, Respondents failed to provide potable water to animals, when potable water was not accessible to the animals at all times, as often as necessary for the health and comfort of the animals and failed to ensure that water receptacles were clean and sanitary. Specifically, water receptacles used by the animals at Respondents' facility contained insufficient water contaminated with debris and were in need of sanitation. (9 C.F.R. § 3.130.)

113. On March 12, 2003, Respondents failed to provide access to potable water and failed to ensure that water receptacles were clean and sanitary. Specifically, the water and water receptacle used by two tigers ("Ozzy" and "Luna") was filled with feces. (9 C.F.R. § 3.130.)

114. On January 22, 2004, Respondents failed to provide potable water to animals, when potable water was not accessible to the animals at all times, as often as necessary for the health and comfort of the animals. Specifically, all the outdoor water receptacles were frozen, several of which were completely iced to the top; four cubs housed in the building had no water; and the water and water receptacle used by

one tiger ("Rachel") contained bird droppings. (9 C.F.R. § 3.130.)

115. On August 30, 2002, Respondents failed to remove excreta from primary enclosures to prevent contamination of animals, minimize disease hazards, and reduce odor. Specifically, liquid excreta and urine seeped from the enclosures housing nine tigers in the barn. (9 C.F.R. § 3.131(a).)

116. On August 30, 2002, Respondents failed to remove excreta from primary enclosures to prevent contamination of animals, minimize disease hazards, and reduce odor. Specifically, Respondents housed bears in an enclosure with excessive feces. (9 C.F.R. § 3.131(a).)

117. On August 30, 2002, Respondents failed to remove excreta from primary enclosures to prevent contamination of animals, minimize disease hazards, and reduce odor. Specifically, Respondents housed six wolves and seven tigers in enclosures with accumulated piles of manure. (9 C.F.R. § 3.131(a).)

118. On August 30, 2002, Respondents failed to keep premises clean and in good repair. Specifically, diffused piles of debris and trash were within and outside of Respondents' facility and the trash cans and dumpsters were at full capacity and needed to be emptied. (9 C.F.R. § 3.131(c).)

119. On August 30, 2002, Respondents failed to establish and maintain an adequate program of pest control. Specifically, Respondents failed to take minimally-adequate steps to control avian and mammalian pests. (9 C.F.R. § 3.131(d).)

120. On August 31, 2002, Respondents failed to remove excreta from primary enclosures to prevent contamination of animals, minimize disease hazards, and reduce odor. Specifically, liquid excreta and urine seeped from the enclosures housing nine tigers in the barn. (9 C.F.R. § 3.131(a).)

121. On August 31, 2002, Respondents failed to remove excreta from primary enclosures to prevent contamination of animals, minimize disease hazards, and reduce odor. Specifically, Respondents housed bears in an enclosure with excessive feces. (9 C.F.R. § 3.131(a).)

122. On August 31, 2002, Respondents failed to remove excreta from primary enclosures to prevent contamination of animals, minimize disease hazards, and reduce odor. Specifically, Respondents housed six wolves and seven tigers in enclosures with accumulated piles of manure.

(9 C.F.R. § 3.131(a).)

123. On August 31, 2002, Respondents failed to keep premises clean and in good repair. Specifically, trash cans and dumpsters were at full capacity and needed to be emptied. (9 C.F.R. § 3.131(c).)

124. On August 31, 2002, Respondents failed to establish and maintain an adequate program of pest control. Specifically, Respondents failed to take minimally-adequate steps to control avian and mammalian pests. (9 C.F.R. § 3.131(d).)

125. On September 4, 2002, Respondents failed to remove excreta from primary enclosures to prevent contamination of animals, minimize disease hazards, and reduce odor. Specifically, Respondents housed bears, wolves, and tigers in enclosures with excessive feces. (9 C.F.R. § 3.131(a).)

126. On October 8, 2002, Respondents failed to remove excreta from primary enclosures to prevent contamination of animals, minimize disease hazards, and reduce odor. Specifically, Respondents housed six wolves, four tigers, and two bears in enclosures with accumulated piles of manure and/or excessive feces. (9 C.F.R. § 3.131(a).)

127. On October 8, 2002, Respondents failed to keep premises clean and in good repair. Specifically, Respondents left pieces of chainlink fencing, unused water tubs, portions of a partially dismantled enclosure, and other debris throughout the facility. (9 C.F.R. § 3.131(c).)

128. On October 8, 2002, Respondents failed to establish and maintain an adequate program of pest control. Specifically, Respondents failed to take minimally-adequate steps to control mammalian pests. (9 C.F.R. § 3.131(d).)

129. On November 4, 2002, Respondents failed to remove excreta from primary enclosures to prevent contamination of animals, minimize disease hazards, and reduce odor. Specifically, liquid excreta and urine seeped from the enclosures housing the large felids. (9 C.F.R. § 3.131(a).)

130. On March 12, 2003, Respondents failed to remove excreta from primary enclosures to prevent contamination of animals, minimize disease hazards, and reduce odor. Specifically, Respondents housed three bears in enclosures with excessive accumulation of feces. (9 C.F.R. § 3.131(a).)

131. On January 22, 2004, Respondents failed to remove excreta

from primary enclosures to prevent contamination of animals, minimize disease hazards, and reduce odor. Specifically, Respondents housed five tigers ("Montrose," "Zinni," "Ozzie," "Seirra," and "Zeus") in enclosures with excessive accumulations of feces on top of, and behind, the shelter boxes. (9 C.F.R. § 3.131(a).)

132. On August 30, 2002, Respondents failed to utilize a sufficient number of adequately trained employees to maintain a professionally acceptable level of husbandry practices. Specifically, Respondents failed to have any employees that were able to handle, or provide husbandry and care to, 34 animals. (9 C.F.R. § 3.132.)

133. On August 31, 2002, Respondents failed to utilize a sufficient number of adequately trained employees to maintain a professionally acceptable level of husbandry practices. Specifically, Respondents failed to have any employees that were able to handle, or provide husbandry and care to, 34 animals. (9 C.F.R. § 3.132.)

Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. By reason of the Findings of Fact set forth in this Decision and Order, *supra*, I conclude Respondents willfully violated the Animal Welfare Act and the Regulations and Standards as set forth in paragraphs 3 through 34 of these Conclusions of Law.

3. On August 30, 2002, August 31, 2002, September 4, 2002, October 8, 2002, September 23, 2003, and January 22, 2004, Respondents willfully violated section 2.40(a)(1) of the Regulations and Standards (9 C.F.R. § 2.40(a)(1)).

4. On August 30, 2002, August 31, 2002, and November 4, 2002, Respondents willfully violated section 2.40(a) of the Regulations and Standards (9 C.F.R. § 2.40(a)).

5. On August 30, 2002, August 31, 2002, and November 4, 2002, Respondents willfully violated section 2.40(b)(2) of the Regulations and Standards (9 C.F.R. § 2.40(b)(2)).

6. On August 30, 2002, August 31, 2002, and November 4, 2002, Respondents willfully violated section 2.40(b)(3) of the Regulations and Standards (9 C.F.R. § 2.40(b)(3)).

7. On August 30, 2002, August 31, 2002, and September 4,

2002, Respondents willfully violated section 2.75(b)(1) of the Regulations and Standards (9 C.F.R. § 2.75(b)(1)).

8. On September 22, 2003, Respondents willfully violated section 2.126(a) of the Regulations and Standards (9 C.F.R. § 2.126(a)).

9. On August 30, 2002, and November 4, 2002, Respondents willfully violated sections 2.100(a) and 3.82(a) and (b) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.82(a)-(b)).

10. On August 30, 2002, Respondents willfully violated sections 2.100(a) and 3.82(d) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.82(d)).

11. On August 30, 2002, Respondents willfully violated sections 2.100(a) and 3.84(c) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.84(c)).

12. On August 30, 2002, and November 4, 2002, Respondents willfully violated sections 2.100(a) and 3.85 of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.85).

13. On October 8, 2002, November 4, 2002, and March 12, 2003, Respondents willfully violated sections 2.100(a) and 3.81 of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.81).

14. On November 4, 2002, March 12, 2003, and January 22, 2004, Respondents willfully violated sections 2.100(a) and 3.83 of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.83).

15. On November 4, 2002, and March 12, 2003, Respondents willfully violated sections 2.100(a) and 3.84(a) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.84(a)).

16. On November 4, 2002, Respondents willfully violated sections 2.100(a) and 3.80(a)(2)(v) and (viii) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.80(a)(2)(v), (viii)).

17. On March 12, 2003, Respondents willfully violated sections 2.100(a) and 3.80(b) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.80(b)).

18. On March 12, 2003, Respondents willfully violated sections 2.100(a) and 3.80(a)(2)(v) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.80(a)(2)(v)).

19. On January 22, 2004, Respondents willfully violated sections 2.100(a) and 3.75(a) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.75(a)).

20. On January 22, 2004, Respondents willfully violated sections 2.100(a) and 3.76(a) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.76(a)).

21. On August 30, 2002, August 31, 2002, September 4, 2002, October 8, 2002, March 12, 2003, and January 22, 2004, Respondents willfully violated sections 2.100(a) and 3.125(a) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.125(a)).

22. On August 30, 2002, August 31, 2002, September 4, 2002, October 8, 2002, November 4, 2002, March 12, 2003, and January 22, 2004, Respondents willfully violated sections 2.100(a) and 3.125(c) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.125(c)).

23. On August 30, 2002, August 31, 2002, and November 4, 2002, Respondents willfully violated sections 2.100(a) and 3.125(d) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.125(d)).

24. On August 30, 2002, and August 31, 2002, Respondents willfully violated sections 2.100(a) and 3.127(a) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.127(a)).

25. On August 30, 2002, August 31, 2002, March 12, 2003, and January 22, 2004, Respondents willfully violated sections 2.100(a) and 3.127(b) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.127(b)).

26. On August 30, 2002, August 31, 2002, October 8, 2002, March 12, 2003, July 1, 2003, and September 23, 2003, Respondents willfully violated sections 2.100(a) and 3.127(c) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.127(c)).

27. On August 30, 2002, August 31, 2002, September 4, 2002, and October 8, 2002, Respondents willfully violated sections 2.100(a) and 3.127(d) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.127(d)).

28. On August 30, 2002, August 31, 2002, September 4, 2002, October 8, 2002, and January 22, 2004, Respondents willfully violated sections 2.100(a) and 3.128 of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.128).

29. On August 30, 2002, October 8, 2002, November 4, 2002, and March 12, 2003, Respondents willfully violated sections 2.100(a) and 3.129 of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.129).

30. On August 30, 2002, October 8, 2002, October 22, 2002,

November 4, 2002, March 12, 2003, and January 22, 2004, Respondents willfully violated sections 2.100(a) and 3.130 of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.130).

31. On August 30, 2002, August 31, 2002, September 4, 2002, October 8, 2002, November 4, 2002, March 12, 2003, and January 22, 2004, Respondents willfully violated sections 2.100(a) and 3.131(a) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.131(a)).

32. On August 30, 2002, August 31, 2002, and October 8, 2002, Respondents willfully violated sections 2.100(a) and 3.131(c) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.131(c)).

33. On August 30, 2002, August 31, 2002, and October 8, 2002, Respondents willfully violated sections 2.100(a) and 3.131(d) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.131(d)).

34. On August 30, 2002, and August 31, 2002, Respondents willfully violated sections 2.100(a) and 3.132 of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.132).

COMPLAINANT'S APPEAL PETITION

Complainant contends the ALJ's denial of Complainant's Motion for Default Decision is error. Complainant requests that I issue an order reversing the ALJ's July 13, 2004, denial of Complainant's Motion for Default Decision or that I issue an order vacating the ALJ's denial of Complainant's Motion for Default Decision and remanding the proceeding to the ALJ for issuance of a decision in accordance with the Rules of Practice. (Complainant's Appeal Pet. at 3-9.)

During a July 13, 2004, teleconference with counsel for Respondents and counsel for Complainant, the ALJ denied Complainant's Motion for Default Decision and provided Respondents until August 2, 2004, to file a response to the Amended Complaint. In a July 14, 2004, filing, the ALJ made reference to his July 13, 2004, denial of Complainant's Motion for Default Decision, as follows:

> Motion for Adoption of Proposed Decision and Order, filed June 3, 2004, was denied during the teleconference. Respondent [sic] is allowed to file his [sic] Answer to the Amended Complaint no later than **Monday, August 2, 2004.**

Notice of Hearing and Exchange Deadlines at 1 (emphasis in original).

The ALJ did not explicitly conclude that Respondents filed meritorious objections to Complainant's Motion for Default Decision. However, section 1.139 of the Rules of Practice (7 C.F.R. § 1.139) requires that an administrative law judge deny, with supporting reasons, a complainant's motion for a default decision if the administrative law judge finds the respondent has filed meritorious objections to the motion, and requires that an administrative law judge issue a decision, without further procedure or hearing, if the administrative law judge finds the respondent has failed to file meritorious objections to the motion. Therefore, I infer, based on the ALJ's July 13, 2004, denial of Complainant's Motion for Default Decision, the ALJ found meritorious some or all of Respondents' June 15, 2004, and June 23, 2004, objections to Complainant's Motion for Default Decision. I disagree with the ALJ's finding that Respondents filed meritorious objections to Complainant's Motion for Default Decision. Instead, I find Respondents' objections, filed June 15, 2004, and June 23, 2004, are without merit, and I conclude a decision, without further procedure or hearing, must be issued.

Respondents are deemed, for purposes of this proceeding, to have admitted the allegations in the Amended Complaint because they failed to file an answer to the Amended Complaint within 20 days after the Hearing Clerk served them with the Amended Complaint. The Hearing Clerk served Respondents with the Amended Complaint and the Hearing Clerk's April 23, 2004, service letter on April 30, 2004.[10] Sections 1.136(a), 1.136(c), 1.139, and 1.141(a) of the Rules of Practice state the time within which an answer must be filed and the consequences of failing to file a timely answer, as follows:

§ 1.136 Answer.

(a) *Filing and service*. Within 20 days after the service of the complaint . . ., the respondent shall file with the Hearing Clerk an

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[10] See note 5.

answer signed by the respondent or the attorney of record in the proceeding . . . .

. . . .

(c) *Default*. Failure to file an answer within the time provided under paragraph (a) of this section shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.

§ 1.139 Procedure upon failure to file an answer or admission of facts.

The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk. Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.

§ 1.141 Procedure for hearing.

(a) *Request for hearing*. Any party may request a hearing on the facts by including such request in the complaint or answer, or by a separate request, in writing, filed with the Hearing Clerk within the time in which an answer may be filed . . . . Failure to request a hearing within the time allowed for the filing of the answer shall constitute a waiver of such hearing.

7 C.F.R. §§ 1.136(a), (c), .139, .141(a).

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

> The respondents shall file an answer with the Hearing Clerk, United States Department of Agriculture, Washington, D.C. 20250-9200, in accordance with the Rules of Practice governing proceedings under the Act (7 C.F.R. § 1.130 *et seq*.). Failure to file an answer shall constitute an admission of all the material allegations of this amended complaint.

Amended Compl. at 29.

Similarly, the Hearing Clerk informed Respondents in the April 23, 2004, service letter that a timely answer must be filed pursuant to the Rules of Practice and that failure to file a timely answer to any allegation in the Amended Complaint would constitute an admission of that allegation, as follows:

> April 23, 2004
>
> Mr. Michael Stephenson, Esq.
> McNeely, Stephenson, Thopy & Harrold
> 30 East Washington Street, Suite 400
> Shelbyville, Indiana 46176
>
> Dear Mr. Stephenson:
>
> **Subject: In re: Dennis Hill, an individual d/b/a White Tiger Foundation and Willow Hill Center for Rare & Endangered Species, LLC, an Indiana domestic limited liability company d/b/a Hill's Exotics**
> **AWA Docket No. 04-0012**
>
> Enclosed is a copy of Complainant's Amended Complaint, which has been filed with this office in the above-captioned proceeding.
>
> Inasmuch as Complainant has filed the Amended Complaint prior

to the filing of a motion for hearing, the amendment is effective upon filing.

You will have 20 days from service of this letter in which to file an answer to the amended complaint. Failure to file a timely Answer to or plead specifically to any allegation of the Amended Complaint shall constitute an admission of such allegation.

Your answer, as well as any motion or requests that you may wish to file hereafter in this proceeding, should be submitted to the Hearing Clerk, Room 1081, South Building, United States Department of Agriculture, Washington, D.C. 20250. An original and 3 copies are required for each document submitted.

Sincerely,
/s/
Joyce A. Dawson
Hearing Clerk

On April 27, 2004, 3 days before the Hearing Clerk served Respondents with the Amended Complaint, Respondents filed an Answer in response to the Complaint. The Hearing Clerk sent Respondents a letter dated April 27, 2004, informing Respondents that their response to the Amended Complaint had been received, as follows:

April 27, 2004

Mr. Michael Stephenson, Esquire
McNeely, Stephenson, Thopy & Harrold
30 East Washington Street
Suite 400
Shelbyville, Indiana 46176

Dear Mr. Stephenson:

Subject: In re: Dennis Hill, an individual d/b/a White Tiger Foundation and Willow Hill Center for Rare &

Endangered Species, LLC, an Indiana domestic limited liability company d/b/a Hill's Exotics., Respondents
AWA Docket No. 04-0012

Respondents' Amended Answer To Amended Complaint, has been received and filed in the above-captioned proceeding.

You will be informed of any future action taken in this matter[.]

Sincerely,
/s/
Joyce A. Dawson
Hearing Clerk

Notwithstanding the Hearing Clerk's April 27, 2004, letter, the record establishes that Respondents' April 27, 2004, filing was neither an amended answer nor a response to the Amended Complaint. As an initial matter, the Hearing Clerk did not serve Respondents with the Amended Complaint until April 30, 2004,[11] 3 days after Respondents filed their Answer. Moreover, Respondents entitle their April 27, 2004, filing "Answer." Further still, Respondents state in the April 27, 2004, filing that the filing is a response to the "Complaint" and pray that the ALJ deny the "Complaint." In addition, Respondents' letter transmitting the April 27, 2004, filing is dated April 22, 2004, the April 27, 2004, filing contains a certificate of service stating counsel for Respondents placed the filing "in the United States Mail, first class, postage prepaid, this 22nd day of April, 2004[,]"[12] and the envelope containing the April 27, 2004, filing is postmarked April 22, 2004, 1 day prior to the date Complainant filed the Amended Complaint and 8 days prior to the date the Hearing Clerk served Respondents with the Amended Complaint. Based on the record before me, I find Respondents' April 27, 2004, filing is an answer filed in response to the Complaint and

[11] See note 5.

[12] Answer at second unnumbered page.

Complainant's operative pleading is the Amended Complaint.

Respondents rely on the Hearing Clerk's April 27, 2004, mischaracterization of Respondents' April 27, 2004, filing as the basis for their Objection to Motion for Adoption of Proposed Decision and Order. The Rules of Practice, the Amended Complaint, and the Hearing Clerk's April 23, 2004, service letter clearly inform Respondents of the requirement for a timely response to the Amended Complaint and the consequences of a failure to file a timely response to the Amended Complaint. Therefore, I find Respondents' reliance on the Hearing Clerk' s April 27, 2004, mischaracterization of Respondents' April 27, 2004, filing, misplaced.

Moreover, I find Respondents' 13 objections to Complainant's Motion for Default Decision in Respondents' Supplemental Objection to Motion for Adoption of Proposed Decision and Order, without merit. The length of time Respondents maintained an Animal Welfare Act license; the request that Respondent Dennis Hill testify on the United State Department of Agriculture's behalf as an expert on large cats; the failure of any animal to escape from Respondents' property; the failure of any animal to injure Respondents; Respondents' disposal, or intention to dispose, of animals after the Animal Welfare Act violations occurred;[13] and Respondents' short-term economic downturn (Supplemental Objection to Motion for Adoption of Proposed Decision and Order ¶¶ 1-5, 8, 10-11, 13) are neither meritorious bases for denying Complainant's Motion for Default Decision nor relevant to this proceeding. Further, while Respondents' corrections of their Animal Welfare Act violations (Supplemental Objection to Motion for Adoption of Proposed Decision and Order ¶¶ 6-7, 9, 12) are commendable and can be taken into account when determining the sanction to be imposed, they neither eliminate the fact that violations of the Animal Welfare Act and

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[13]*In re Mary Meyers*, 56 Agric. Dec. 322, 348 (1997) (stating the respondent's disposal of animals under the jurisdiction of the Secretary of Agriculture under the Animal Welfare Act is not a defense to a violation of the Animal Welfare Act or the Regulations and Standards); *In re Dora Hampton*, 56 Agric. Dec. 301, 320 (1997) (stating the respondent's intention to dispose of animals under the jurisdiction of the Secretary of Agriculture under the Animal Welfare Act is not a defense to a violation of the Animal Welfare Act or the Regulations and Standards).

the Regulations and Standards occurred[14] nor constitute meritorious bases for denying Complainant's Motion for Default Decision.

The Rules of Practice provide that an answer must be filed within 20 days after service of the amended complaint (7 C.F.R. § 1.136(a)), and Respondents' answer to the Amended Complaint was required to be filed no later than May 20, 2004. Respondents filed an Answer to Amended Complaint on August 3, 2004, 3 months 4 days after the Hearing Clerk served Respondents with the Amended Complaint. Respondents' failure to file a timely answer to the Amended Complaint is deemed, for purposes of this proceeding, an admission of the allegations in the Amended Complaint and constitutes a waiver of hearing (7 C.F.R. §§ 1.136(c), .139, .141(a)).

Accordingly, there are no issues of fact on which a meaningful hearing could be held in this proceeding. Application of the default provisions of the Rules of Practice does not deprive Respondents of rights under the due process clause of the Fifth Amendment to the Constitution of the United States.[15]

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[14]*In re Reginald Dwight Parr*, 59 Agric. Dec. 601, 644 (2000), *aff'd per curiam*, 273 F.3d 1095 (5th Cir. 2001) (Table); *In re Susan DeFrancesco*, 59 Agric. Dec. 97, 112 n.12 (2000); *In re Michael A. Huchital*, 58 Agric. Dec. 763, 805 n.6 (1999); *In re James E. Stephens*, 58 Agric. Dec. 149, 184-85 (1999); In *re Marilyn Shepherd*, 57 Agric. Dec. 242, 274 (1998); *In re John D. Davenport*, 57 Agric. Dec. 189, 219 (1998), *appeal dismissed*, No. 98-60463 (5th Cir. Sept. 25, 1998); *In re Samuel Zimmerman*, 56 Agric. Dec. 1419, 1456 n.8 (1997), *aff'd*, 173 F.3d 422 (3d Cir. 1998) (Table), printed in 57 Agric. Dec. 869 (1998); *In re David M. Zimmerman*, 56 Agric. Dec. 433, 466 (1997), *aff'd*, 156 F.3d 1227 (3d Cir. 1998) (Table), printed in 57 Agric. Dec. 46 (1998); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 269, 272-73 (1997) (Order Denying Pet. for Recons.); *In re John Walker*, 56 Agric. Dec. 350, 367 (1997); *In re Mary Meyers*, 56 Agric. Dec. 322, 348 (1997); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 254 (1997), *aff'd*, 172 F.3d 51, 1999 WL 16562 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206) (Table), printed in 58 Agric. Dec. 85 (1999); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 142 (1996); *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1070 (1992), *aff'd*, 61 F.3d 907, 1995 WL 309637 (7th Cir. 1995) (not to be cited per 7th Circuit Rule 53(b)(2)).

[15]*See United States v. Hulings*, 484 F. Supp. 562, 567-68 (D. Kan. 1980) (concluding that a hearing was not required under the Fifth Amendment to the Constitution of the United States where the respondent was notified that failure to deny the allegations of

(continued...)

SANCTION

Respondents, by their failure to file an answer within 20 days after the Hearing Clerk served them with the Amended Complaint, are deemed to have admitted the allegations in the Amended Complaint.[16]

With respect to the civil monetary penalty, the Secretary of Agriculture is required to give due consideration to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations.[17]

During 3 of the 11 days on which Respondents violated the Animal Welfare Act and the Regulations and Standards, Respondents maintained between 39 and 42 animals at Respondents' facility.[18] The limited record before me does not provide me with any other indication of the size of Respondents' business; therefore, for the purposes of determining the amount of the civil penalty, I give Respondents the benefit of the lack of a record and assume for purposes of this Decision and Order that Respondents' business is a small business.

Many of Respondents' violations are serious violations which directly jeopardized the health and well-being of Respondents' animals.

Respondents' willful violations on 11 days during the period August 30, 2002, through January 22, 2004, reveals a consistent

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

[16] See 7 C.F.R. § 1.136(c).

[17] See 7 U.S.C. § 2149(b).

[18]Amended Compl. ¶ 6.

disregard for, and unwillingness to abide by, the requirements of the Animal Welfare Act and the Regulations and Standards. An ongoing pattern of violations establishes a "history of previous violations" for the purposes of section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) and a lack of good faith.

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

> [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. 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 Geo. A. Heimos Produce Co.*, 62 Agric. Dec.763, 787 (2003), *appeal dismissed*, No. 03-4008 (8th Cir. Aug. 31, 2004); *In re Excel Corp.*, 62 Agric. Dec. 196, 234 (2003), *appeal docketed*, No. 04-9540 (10th Cir. Apr. 24, 2004); *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), *aff'd*, 342 F.3d 584 (6th Cir. 2003); *In re Karl Mitchell*, 60 Agric. Dec. 91, 130 (2001), *aff'd*, 42 Fed. Appx. 991, 2002 WL 1941189 (9th Cir. 2002); *In re American Raisin Packers, Inc.*, 60 Agric. Dec.

(continued...)

Complainant seeks revocation of Respondent Dennis Hill's Animal Welfare Act license, assessment of a $27,775 civil penalty against Respondents, and a cease and desist order (Complainant's Motion for Default Decision at 1).

Respondents committed more than 500 violations of the Animal Welfare Act and the Regulations and Standards. Respondents could be assessed a maximum civil penalty of $2,750 for each of their violations of the Animal Welfare Act and the Regulations and Standards.[20] After examining all the relevant circumstances, in light of the United States Department of Agriculture's sanction policy, and taking into account the

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[19](...continued)
165, 190 n.8 (2001), *aff'd*, No. CIV F 015606 AWI SMS (E.D. Cal. May 18, 2001), *aff'd*, No. 02-15602, 2003 WL 21259771 (9th Cir. May 29, 2003); *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), *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]Section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) provides that the Secretary of Agriculture may assess a civil penalty of not more than $2,500 for each violation of the Animal Welfare Act and the Regulations and Standards. Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), the Secretary of Agriculture adjusted the civil penalty that may be assessed under section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) for each violation of the Animal Welfare Act and the Regulations and Standards by increasing the maximum civil penalty from $2,500 to $2,750 (7 C.F.R. § 3.91(b)(2)(v)).

requirements of section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)), the remedial purposes of the Animal Welfare Act, and the recommendations of the administrative officials, I conclude that a cease and desist order, assessment of a $20,000 civil penalty,[21] and revocation of Respondent Dennis Hill's Animal Welfare Act license are appropriate and necessary to ensure Respondents' compliance with the Animal Welfare Act and the Regulations and Standards in the future, to deter others from violating the Animal Welfare Act and the Regulations and Standards, and to fulfill the remedial purposes of the Animal Welfare Act.

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

ORDER

1. Respondents, their agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards.

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

2. Respondents are jointly and severally assessed a $20,000 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the Treasurer of the United States and sent to:

Bernadette R. Juarez
United States Department of Agriculture
Office of the General Counsel
Marketing Division
1400 Independence Avenue, SW

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[21]I did not adopt Complainant's recommendation that I assess Respondents a $27,775 civil penalty only because Complainant's recommendation is based, in part, on his contention that "Respondents have a moderate size business" (Complainant's Motion for Default Decision at 2). The limited record before me does not allow me to conclude that Respondents have a moderate size business. Therefore, I give Respondents the benefit of the lack of a record and assume for purposes of this Decision and Order that Respondents' business is a small business.

Room 2343-South Building
Washington, DC 20250-1417

Payment of the civil penalty shall be sent to, and received by, Bernadette R. Juarez within 60 days after service of this Order on Respondents. Respondents shall state on the certified check or money order that payment is in reference to AWA Docket No. 04-0012.

3. Respondent Dennis Hill's Animal Welfare Act license (Animal Welfare Act license number 32-A-0160) is revoked.

The Animal Welfare Act license revocation provisions of this Order shall become effective on the 60th day after service of this Order on Respondent Dennis Hill.

RIGHT TO JUDICIAL REVIEW

Respondents have the right to seek judicial review of this Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341, 2343-2350. Such court has exclusive jurisdiction to enjoin, to set aside, to suspend (in whole or in part), or to determine the validity of this Order. Respondents must seek judicial review within 60 days after entry of this Order. 7 U.S.C. § 2149(c). The date of entry of this Order is October 8, 2004.

In re: NELLIE L. BABB, a/k/a NELLIE L. STANBAUGH or STAMBAUGH.
AWA DOCKET No. 03-0026.
Decision and Order.
Filed February 18, 2005.

AWA – Intrastate activity covered by AWA – Retail sales – Expired APHIS license.

Robert Ertman, for Complainant.
Respondent Pro se.
Decision and Order issued by Administrative Law Judge Peter M. Davenport.

DECISION AND ORDER

This action was brought by the Administrator of the Animal and Plant Health Inspection Service ("APHIS") against the Respondent, Nellie L. Babb, also known as Nellie L. Stanbaugh or Stambaugh, for violations of the Animal Welfare Act, as amended, (7 U.S.C. 2131, *et seq*.), hereinafter referred to as the "Act" and the Regulations issued pursuant to the Act. The Respondent has generally denied the allegations of the Complaint and an Oral Hearing was held in Tulsa, Oklahoma on Wednesday, February 16, 2005.

The Respondent failed to appear and although a Decision by Reason of Default could have been entered, the Complainant introduced the testimony of witnesses and produced documentary evidence fully supporting the allegations contained in the Complaint. A brief summary of the evidence follows.

The Complainant first called Leon Robertson, the former owner of Pine Spring Pets who testified concerning his dealings with the Respondent, identifying specific purchases from the Respondent on January 2, 2001 (Exhibits CX 1 and 2), January 9, 2001 (Exhibit CX 5), January 11, 2001 (Exhibit CX 6), August 21,2001 (Exhibit CX 12, 13 and 14), November 13, 2001 (Exhibit CX 17), February 19, 2002 (Exhibit CX 18), May 21, 2002 (Exhibit CX 3) and June 4, 2002 (Exhibit CX 3) as well as confirming the contents of his affidavit given to Investigator Bob Stiles on July 1, 2002 (Exhibit CX 3).

Kenneth Josserand, a licensed dealer under the Act, was next called to identify an invoice dated July 16, 2001 for the purchase of six puppies from the Respondent (Exhibit CX 7) and to confirm the specifics contained on an affidavit given to Senior Investigator Daniel Hutchings on April 16, 2002 (Exhibit CX 8).

Daniel Hutchings, a APHIS Senior Investigator, testified that, during the course of the investigation, he had interviewed Mr. Josserand (Exhibit CX 8) and Joyce Walters, the owner of Select Pets, another dealer who had purchased Pomeranian puppies from the Respondent on two separate occasions, June 26, 2001 and August 6, 2001 and identified the affidavit he took from Ms. Walters on March 28, 2002. (Exhibits CX 9, 10 and 11) Senior Investigator Hutchings then testified that he had obtained documentary evidence of the Respondent's dealings

with Southwest Kennel Auctions and the sale of six dogs through that facility on September 21, 2001. He concluded his testimony by identifying the Respondent's application for her dealer license (Exhibit CX 23), a copy of the license (Exhibit CX 25) and a copy of the letter notifying the Respondent that her license had expired (Exhibit CX 21).

The last witness, Bob Stiles, an APHIS Investigator, testified that as part of his duties in this investigation, he had interviewed both Leon Robertson and the Respondent and secured affidavits from Mr. Robertson on July 1, 2002 (Exhibit CX 3) and the Respondent on June 24, 2002 (Exhibit CX 4) and a summary of his investigation was contained in a Memorandum sent to Senior Investigator Hutchings which was dated June 26, 2002 (Exhibit CX 26).

Section 2131 of Title 7, United States Code provides:

> The Congress finds that animals and activities which are regulated under this chapter are either in interstate or foreign commerce or substantially affect such commerce or the free flow thereof, and that regulation of animals and activities as provided in this chapter is necessary to prevent and eliminate burdens upon such commerce and to effectively regulate such commerce, in order –
>
> > (1) to insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment;
> > (2) to assure the humane treatment of animals during transportation in commerce; and
> > (3) to protect the owners of animals from the theft of their animals by preventing the sale or use of animals which have been stolen.
> >
> > The Congress further finds that it is essential to regulate, as provided in this chapter, the transportation, purchase, sale, housing, care, handling, and treatment of animals by carriers or by persons or organizations engaged in using them for research or experimental purposes or for exhibition purposes or holding them for sale as pets or for any such purpose or use.

The implementing regulations found at 9 C.F.R. 1.1, *et seq*. define a Dealer as:

> ...any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of: Any dog or other animal whether alive or dead (including unborn animals, organs, limbs, blood, serum, or other parts) for research, teaching, testing, experimentation, exhibition, or use as a pet; or any dog at the wholesale level for hunting, security, or breeding purposes.....
>
> and who derives no more than $500 gross income from the sale of animals other than wild or exotic animals, dogs, or cats during any calendar year.

Section 2.1 sets forth the requirements for licensing, describes the application process and contains the exemptions from licensing requirements:

(a)(1) Any person operating or desiring to operate as a dealer…except persons who are exempted from the licensing requirements…must have a valid license. …

(3) The following persons are exempt from the licensing requirements…

(i) Retail pet stores which sell…at retail only: *Provided, That* Anyone wholesaling any animals, selling any animals for research or exhibition…must have a license.

(ii) Any person who sells or negotiates the sale or purchase of any animal…and who derives no more than $500 gross income from the sale of such animals …during any calendar year and is not otherwise required to obtain a license. …

(iv) Any person who sells fewer than 25 dogs and/or cats per year which were raised on his or her premises…

Section 2.2 contains the requirement of acknowledgement of the regulations and standards before a license will be issued and again before it may be renewed. The signature on the application form constitutes an agreement to comply with the regulations and standards.

The transactions detailed in the testimony and documentary evidence

above expressly come within the above provisions of the Act and the Regulations. By failing to renew her license but continuing to operate as a dealer, it is clear that the Respondent repeatedly and willfully violated the Regulations. The Respondent seeks to excuse her conduct by claiming an exemption by an "explicit reservation of rights" under the Uniform Commercial Code provisions; however federal preemption precludes such a claim. She also publicly denies the Fourteenth Amendment and indicates that she cannot be compelled to perform under edicts and accordingly is not subject to regulation. Her assertions while imaginative and possibly novel are without merit.

Having heard the testimony of the witnesses and considered the exhibits and the entire record, the violations alleged in the Complaint have been established and the following Findings of Fact are made.

FINDINGS OF FACT

1. That the Respondent, Nellie L. Babb, also known as Nellie L. Stanbaugh, is an individual formerly residing at Route 1, Box 70, San Antonio, Texas.
2. That at all times material herein, the Respondent was operating as a dealer as defined in the Act and the Regulations.
3. That on May 15, 1999 Respondent applied for and received a license as a “Class A Dealer”, which license expired on May 26, 2000.
4. That by letter dated August 9, 2000, the Respondent was advised in writing that her license had expired.
5. That the Respondent, in willful violation of the Act and the Regulations, continued to operate as a dealer without renewing her license, selling at least forty (40) dogs to licensed dealers on at least ten occasions, to wit:

DATE	NUMBER OF ANIMALS	PURCHASER
January 2, 2001	7	Pine Springs Pets
January 9, 2001	5	Pine Springs Pets
January 11, 2001	1	Pine Springs Pets
July 16, 2001	6	Kenneth Josserand
August 6, 2001	2	Select Pets
August 21, 2001	6	Pine Springs Pets

November 13, 2001	1	Pine Springs Pets
February 19, 2002	6	Pine Springs Pets
May 21, 2002	3	Pine Springs Pets
June 4, 2004	3	Pine Springs Pets

ORDER

Being sufficiently advised, it is **ORDERED** as follows:

1. That the Respondent, Nellie L. Babb, also known as Nellie L. Stanbaugh or Stambaugh, shall cease and desist from any and all further violations of the Act and the Regulations.
2. That by reason of her willful violations of the Act and the Regulations, the Respondent, Nellie L. Babb, also known as Nellie L. Stanbaugh or Stambaugh, is **PERMANENTLY** disqualified from becoming licensed under the Act and Regulations.
3. That the Respondent, Nellie L. Babb, also known as Nellie L. Stanbaugh, is assessed a civil penalty in the amount of THIRTY THOUSAND DOLLARS ($30,000.00); however, of this amount, the amount of TWENTY-FIVE THOUSAND DOLLARS ($25,000.00) of the civil penalty shall be suspended on the condition that the Respondent commit no further violations of the Act and Regulations.

This civil penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded with thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
Office of General Counsel
Attention: Robert Ertman
Room 2343, South Building
Washington, D.C. 20250

Respondent shall indicate on the certified check or money order that payment is in reference to AWA Docket No. 03-0026.

Copies of this Order shall be served upon the Parties by the Hearing Clerk's Office.

In re: RICKY M. WATSON, AN INDIVIDUAL; CHERI WATSON, AN INDIVIDUAL; TIGER'S EYES, INC., A TEXAS DOMESTIC NONPROFIT CORPORATION, d/b/a NOAH'S LAND WILDLIFE PARK; AND RICHARD J. BURNS, AN INDIVIDUAL.
AWA Docket No. 04-0017.
Decision and Order as to Ricky M. Watson and Cheri Watson.
Filed February 23, 2005.

AWA – Animal Welfare Act – Failure to file timely answer – Default decision – Bases for denial of motion for default – Sanction – Cease and desist order – Civil penalty.

The Judicial Officer reversed Administrative Law Judge Victor W. Palmer's denial of Complainant's motion for a default decision. The Judicial Officer issued a decision in which he found Respondents Ricky M. Watson and Cheri Watson violated the Animal Welfare Act and the regulations and standards issued under the Animal Welfare Act. The Judicial Officer concluded Respondents Ricky M. Watson and Cheri Watson filed a late answer to the Complaint and, under the Rules of Practice (7 C.F.R. §§ 1.136(c), .139), were deemed to have admitted the allegations in the Complaint and waived the opportunity for hearing. The Judicial Officer rejected Respondents Ricky M. Watson's and Cheri Watson's contention that they had filed meritorious objections to Complainant's motion for a default decision. The Judicial Officer issued a cease and desist order against Respondents Ricky M. Watson and Cheri Watson and assessed each of them a $17,050 civil penalty.

Bernadette R. Juarez, for Complainant.
Respondents Ricky M. Watson & Cheri Watson, Pro se.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a "Complaint" on May 19, 2004. Complainant instituted the proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations and standards

issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations and Standards]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges Ricky M. Watson, Cheri Watson, Tiger's Eyes, Inc., and Richard J. Burns [hereinafter Respondents] willfully violated the Animal Welfare Act and the Regulations and Standards (Compl. ¶¶ 6-12).

The Hearing Clerk served Respondents Ricky M. Watson and Cheri Watson with the Complaint, the Rules of Practice, and a service letter on May 26, 2004.[1] Respondents Ricky M. Watson and Cheri Watson were required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) to file an answer to the Complaint within 20 days after service. Respondents Ricky M. Watson and Cheri Watson filed an answer to the Complaint on June 22, 2004, 27 days after the Hearing Clerk served them with the Complaint.

On September 3, 2004, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a "Motion for Adoption of Proposed Decision and Order" [hereinafter Motion for Default Decision] and a proposed "Decision and Order as to Ricky M. Watson and Cheri Watson By Reason of Admission of Facts" [hereinafter Proposed Default Decision as to Ricky M. Watson and Cheri Watson]. On September 20, 2004, the Hearing Clerk served Respondents Ricky M. Watson and Cheri Watson with Complainant's Motion for Default Decision and Complainant's Proposed Default Decision as to Ricky M. Watson and Cheri Watson.[2] On October 12, 2004, Respondents Ricky M. Watson and Cheri Watson filed objections

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[1]United States Postal Service Domestic Return Receipts for Article Number 7001 0360 0000 0304 8488 and Article Number 7001 0360 0000 0304 8471.

[2]United States Postal Service Domestic Return Receipts for Article Number 7003 2260 0005 5721 4318 and Article Number 7003 2260 0005 5721 4325.

to Complainant's Motion for Default Decision.

On November 17, 2004, during a teleconference with Respondents Ricky M. Watson and Cheri Watson, representatives of Tiger's Eyes, Inc., counsel for Respondent Richard J. Burns, and counsel for Complainant, Administrative Law Judge Victor W. Palmer [hereinafter the ALJ] denied Complainant's Motion for Default Decision.[3]

On November 26, 2004, Complainant appealed the ALJ's denial of Complainant's Motion for Default Decision to the Judicial Officer.[4] On January 5, 2005, Respondent Ricky M. Watson filed a response in opposition to Complainant's Appeal Petition. On January 18, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful review of the record, I disagree with the ALJ's denial of Complainant's Motion for Default Decision. Therefore, I: (1) reverse the ALJ's November 17, 2004, denial of Complainant's Motion for Default Decision; and (2) issue this Decision and Order as to Ricky M. Watson and Cheri Watson based on Respondent Ricky M. Watson's and Respondent Cheri Watson's failure to file a timely answer to the Complaint.

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

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[3]Summary of Teleconference; Hearing Notice and Exchange Deadlines at 1, filed by the ALJ on November 22, 2004.

[4]Complainant's Appeal Petition.

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

§ 2131. Congressional statement of policy

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

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

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

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

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

§ 2132. Definitions

When used in this chapter—

. . . .

(h) The term "exhibitor" means any person (public or private) exhibiting any animals, which were purchased in commerce or

the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary, and such term includes carnivals, circuses, and zoos exhibiting such animals whether operated for profit or not; but such term excludes retail pet stores, organizations sponsoring and all persons participating in State and country fairs, livestock shows, rodeos, purebred dog and cat shows, and any other fairs or exhibitions intended to advance agricultural arts and sciences, as may be determined by the Secretary[.]

§ 2149. Violations by licensees

. . . .

(b) Civil penalties for violation of any section, etc.; separate offenses; notice and hearing; appeal; considerations in assessing penalty; compromise of penalty; civil action by Attorney General for failure to pay penalty; district court jurisdiction; failure to obey cease and desist order

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, that violates any provision of this chapter, or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than $2,500 for each such violation, and the Secretary may also make an order that such person shall cease and desist from continuing such violation. Each violation and each day during which a violation continues shall be a separate offense. No penalty shall be assessed or cease and desist order issued unless such person is given notice and opportunity for a hearing with respect to the alleged violation, and the order of the Secretary assessing a penalty and making a cease and desist order shall be final and conclusive unless the affected person files an appeal from the

Secretary's order with the appropriate United States Court of Appeals. The Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations. . . .

(c) Appeal of final order by aggrieved person; limitations; exclusive jurisdiction of United States Courts of Appeals

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, aggrieved by a final order of the Secretary issued pursuant to this section may, within 60 days after entry of such an order, seek review of such order in the appropriate United States Court of Appeals in accordance with the provisions of sections 2341, 2343 through 2350 of title 28, and such court shall have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of the Secretary's order.

§ 2151. Rules and regulations

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

7 U.S.C. §§ 2131, 2132(h), 2149(b)-(c), 2151.

28 U.S.C.:

TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE

. . . .

PART VI—PARTICULAR PROCEEDINGS

. . . .

CHAPTER 163—FINES, PENALTIES AND FORFEITURES

§ 2461. Mode of recovery

. . . .

FEDERAL CIVIL PENALTIES INFLATION ADJUSTMENT

SHORT TITLE

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

FINDINGS AND PURPOSE

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

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

(2) the impact of many civil monetary penalties has been and is diminished due to the effect of inflation;

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

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

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

(1) allow for regular adjustment for inflation of civil

monetary penalties;

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

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

DEFINITIONS

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

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

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

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

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

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

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

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

CIVIL MONETARY PENALTY INFLATION ADJUSTMENT REPORTS

SEC. 4. The head of each agency shall, not later than 180 days after the date of enactment of the Debt Collection Improvement Act of 1996 [Apr. 26, 1996], and at least once every 4 years thereafter–

(1) by regulation adjust each civil monetary penalty provided by law within the jurisdiction of the Federal agency, except for any penalty (including any addition to tax and additional amount) under the Internal Revenue Code of 1986 [26 U.S.C. 1 *et seq*.], the Tariff Act of 1930 [19 U.S.C. 1202 *et seq*.], the Occupational Safety and Health Act of 1970 [29 U.S.C. 651 *et seq*.], or the Social Security Act [42 U.S.C. 301 *et seq*.], by the inflation adjustment described under section 5 of this Act; and

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

COST-OF-LIVING ADJUSTMENTS OF CIVIL MONETARY PENALTIES

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

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

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

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

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

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

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

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

civil monetary penalty by which–

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

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

ANNUAL REPORT

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

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

28 U.S.C. § 2461 (note).

7 C.F.R.:

TITLE 7—AGRICULTURE

SUBTITLE A—OFFICE OF THE SECRETARY OF AGRICULTURE

. . . .

PART 3—DEBT MANAGEMENT

. . . .

SUBPART E—ADJUSTED CIVIL MONETARY PENALTIES

§ 3.91 Adjusted civil monetary penalties.

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

(b) *Penalties*—. . . .

. . . .

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

. . . .

(v) Civil penalty for a violation of Animal Welfare Act, codified at 7 U.S.C. 2149(b), has a maximum of $2,750; and knowing failure to obey a cease and desist order has a civil penalty of $1,650.

7 C.F.R. § 3.91(a), (b)(2)(v).

9 C.F.R.:

TITLE 9—ANIMALS AND ANIMAL PRODUCTS

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

SUBCHAPTER A—ANIMAL WELFARE

PART 1—DEFINITION OF TERMS

§ 1.1 Definitions.

For the purposes of this subchapter, unless the context otherwise requires, the following terms shall have the meanings assigned to them in this section. The singular form shall also

signify the plural and the masculine form shall also signify the feminine. Words undefined in the following paragraphs shall have the meaning attributed to them in general usage as reflected by definitions in a standard dictionary.

. . . .

Exhibitor means any person (public or private) exhibiting any animals, which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary. This term includes carnivals, circuses, animal acts, zoos, and educational exhibits, exhibiting such animals whether operated for profit or not. This term excludes retail pet stores, horse and dog races, organizations sponsoring and all persons participating in State and county fairs, livestock shows, rodeos, field trials, coursing events, purebred dog and cat shows and any other fairs or exhibitions intended to advance agricultural arts and sciences as may be determined by the Secretary.

PART 2—REGULATIONS

. . . .

SUBPART D—ATTENDING VETERINARIAN AND ADEQUATE VETERINARY CARE

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

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

(1) Each dealer and exhibitor shall employ an attending veterinarian under formal arrangements. In the case of a part-time attending veterinarian or consultant arrangements, the formal

arrangements shall include a written program of veterinary care and regularly scheduled visits to the premises of the dealer or exhibitor; and

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

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

. . . .

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

. . . .

SUBPART H—COMPLIANCE WITH STANDARDS AND HOLDING PERIOD

§ 2.100 Compliance with standards.

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

. . . .

SUBPART I—MISCELLANEOUS

. . . .

§ 2.126 Access and inspection of records and property.

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

(1) To enter its place of business;

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

(3) To make copies of the records;

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

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

. . . .

PART 3—STANDARDS

. . . .

SUBPART D—SPECIFICATIONS FOR THE HUMANE HANDLING, CARE, TREATMENT, AND TRANSPORTATION OF NONHUMAN PRIMATES

FACILITIES AND OPERATING STANDARDS

. . . .

§ 3.77 Sheltered housing facilities.

. . . .

(c) *Lighting*. The sheltered part of sheltered housing facilities must be lighted well enough to permit routine inspection and cleaning of the facility, and observation of the nonhuman

primates. Animal areas must be provided a regular diurnal lighting cycle of either natural or artificial light. Lighting must be uniformly diffused throughout animal facilities and provide sufficient illumination to aid in maintaining good housekeeping practices, adequate cleaning, adequate inspection of animals, and for the well-being of the animals. Primary enclosures must be placed in the housing facility so as to protect the nonhuman primates from excessive light.

. . . .

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

FACILITIES AND OPERATING STANDARDS

. . . .

§ 3.126 Facilities, indoor.

. . . .

(c) *Lighting.* Indoor housing facilities shall have ample lighting, by natural or artificial means, or both, of good quality, distribution, and duration as appropriate for the species involved. Such lighting shall be uniformly distributed and of sufficient intensity to permit routine inspection and cleaning. Lighting of primary enclosures shall be designed to protect the animals from excessive illumination.

. . . .

§ 3.127 Facilities, outdoor.

. . . .

(b) *Shelter from inclement weather.* Natural or artificial shelter appropriate to the local climatic conditions for the species concerned shall be provided for all animals kept outdoors to afford them protection and to prevent discomfort to such animals. Individual animals shall be acclimated before they are exposed to the extremes of the individual climate.

. . . .

§ 3.128 Space requirements.

Enclosures shall be constructed and maintained so as to provide sufficient space to allow each animal to make normal postural and social adjustments with adequate freedom of movement. Inadequate space may be indicated by evidence of malnutrition, poor condition, debility, stress, or abnormal behavior patterns.

ANIMAL HEALTH AND HUSBANDRY STANDARDS

§ 3.129 Feeding.

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

. . . .

§ 3.130 Watering.

If potable water is not accessible to the animals at all times, it

must be provided as often as necessary for the health and comfort of the animal. Frequency of watering shall consider age, species, condition, size, and type of the animal. All water receptacles shall be kept clean and sanitary.

§ 3.131 Sanitation.

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

. . . .

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

. . . .

§ 3.133 Separation.

Animals housed in the same primary enclosure must be compatible. Animals shall not be housed near animals that interfere with their health or cause them discomfort.

9 C.F.R. §§ 1.1; 2.40(a), (b)(3), .100(a), .126(a); 3.77(c), .126(c), .127(b), .128, .129(a), .130, .131(a), (c), .133.

DECISION

Statement of the Case

Respondents Ricky M. Watson and Cheri Watson failed to file an answer to the Complaint 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 the failure to file an answer within the time provided in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) and the failure to deny or otherwise respond to an allegation of the complaint shall be deemed, for purposes of the proceeding, an admission of the allegations in the complaint. Further, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the failure to file an answer constitutes a waiver of hearing. Accordingly, the material allegations in the Complaint are adopted as findings of fact. This Decision and Order as to Ricky M. Watson and Cheri Watson is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent Ricky M. Watson is an individual whose mailing address is 1832 Chalk Road, Harwood, Texas 78632. At all times material to this proceeding, Respondent Ricky M. Watson operated as an exhibitor, as that term is defined in the Animal Welfare Act and the Regulations and Standards. Respondent Ricky M. Watson is an executive director of Respondent Tiger's Eyes, Inc., and directed, managed, and controlled its business activities. The acts, omissions, and failures to act by Respondent Ricky M. Watson alleged in the Complaint were within the scope of Respondent Ricky M. Watson's office and are deemed the acts, omissions, and failures of Respondent Tiger's Eyes, Inc., as well as Respondent Ricky M. Watson, for the purpose of construing or enforcing the Animal Welfare Act and the Regulations and Standards.

2. Respondent Cheri Watson is an individual whose mailing address is 1832 Chalk Road, Harwood, Texas 78632. At all times material to

this proceeding, Respondent Cheri Watson operated as an exhibitor, as that term is defined in the Animal Welfare Act and the Regulations and Standards. Respondent Cheri Watson is an executive director of Respondent Tiger's Eyes, Inc., and directed, managed, and controlled its business activities. The acts, omissions, and failures to act by Respondent Cheri Watson alleged in the Complaint were within the scope of Respondent Cheri Watson's office and are deemed the acts, omissions, and failures of Respondent Tiger's Eyes, Inc., as well as Respondent Cheri Watson, for the purpose of construing or enforcing the Animal Welfare Act and the Regulations and Standards.

3. Animal and Plant Health Inspection Service personnel conducted inspections of Respondents' facilities, records, and animals for the purpose of determining Respondents' compliance with the Animal Welfare Act and the Regulations and Standards on March 13, 2001 (213 animals), September 7, 2001, December 18, 2001, February 4, 2002 (280 animals), February 6, 2002, February 21, 2002, March 27, 2002 (217 animals), July 31, 2002, and December 18, 2002 (unable to inspect).

4. On June 24, 2001, Respondents Ricky M. Watson and Cheri Watson, d/b/a Noah's Land Wildlife, entered into a settlement agreement for alleged violations of the Animal Welfare Act and the Regulations and Standards, documented in Animal Welfare investigation No. TX01015-AC.

Noncompliance with Regulations Governing
Attending Veterinarian and Adequate Veterinary Care

5. Respondents Ricky M. Watson and Cheri Watson willfully failed to have an attending veterinarian provide adequate veterinary care to their animals, as follows:

a. On March 13, 2001, Respondents Ricky M. Watson and Cheri Watson failed to obtain treatment for a camel with a draining area on the right side of its neck.

b. On September 7, 2001, Respondents Ricky M. Watson and

Cheri Watson failed to obtain treatment for a thin black bear (enclosure with wood floor), two tigers with hair loss, and an emaciated pig (drive-thru).

c. On February 4, 2002, Respondents Ricky M. Watson and Cheri Watson failed to obtain treatment for a caracal with hair loss on both sides of his body.

6. On February 4, 2002, Respondents Ricky M. Watson and Cheri Watson willfully failed to establish and maintain a program of adequate veterinary care that included daily observation of all animals to assess their health and well-being, including a mechanism of direct and frequent communication. Specifically, Respondents Ricky M. Watson and Cheri Watson willfully failed to observe and assess the daily health of a caracal with hair loss on both sides of his body and were, therefore, unable to covey accurate information regarding the caracal's health and well-being to the attending veterinarian.

Noncompliance with Regulations Governing
Miscellaneous Licensee Requirements

7. On December 18, 2002, Respondents Ricky M. Watson and Cheri Watson willfully failed to have a responsible party available during business hours to permit Animal and Plant Health Inspection Service officials to conduct an inspection of Respondents' animal facilities.

Noncompliance with Regulations Governing
Humane Handling, Care, and Treatment of Nonhuman Primates

8. On March 27, 2002, Respondents Ricky M. Watson and Cheri Watson willfully failed to meet the minimum facilities and operating standards for nonhuman primates by failing to provide nonhuman primates with a regular diurnal lighting cycle of either natural or artificial means. Specifically, Respondents Ricky M. Watson and Cheri Watson willfully failed to adequately light the primates' enclosure.

Noncompliance with Standards Governing Humane Handling, Care, and Treatment of Animals Other Than Dogs, Cats, Rabbits, Hamsters, Guinea Pigs, Nonhuman Primates, and Marine Mammals

9. Respondents Ricky M. Watson and Cheri Watson willfully failed to meet the minimum facilities and operating standards for other animals, as follows:

a. Respondents willfully failed to construct indoor and outdoor housing facilities so that they were structurally sound and failed to maintain housing facilities in good repair to protect the animals from injury and contain them in the housing facilities, as follows:

(i) On March 13, 2001, Respondents Ricky M. Watson and Cheri Watson failed to repair the jagged, clawed east-side board of a leopard's shelter box and failed to fill the holes in the bears' enclosure (drive-thru).

(ii) On February 21, 2002, the fencing was detached from the bottom support pole in an enclosure housing two tigers ("Ishon" and "Kisha").

(iii) On March 27, 2002, Respondents Ricky M. Watson and Cheri Watson failed to repair or replace the loose fencing in the new guinea hogs' enclosure, the rusted chain securing the lock in the tigers' enclosure (by the pavilion), and the chain-link fencing that was detached from the cattle panel in the tigers' enclosure (drive-thru).

(iv) On July 31, 2002, Respondents Ricky M. Watson and Cheri Watson failed to repair or replace the rusted pole supporting the shared wall between the leopard's ("Cybil") enclosure and the tiger's enclosure and failed to repair the deteriorated wood floor in a bear's enclosure ("Sugar").

b. Respondents Ricky M. Watson and Cheri Watson willfully failed to store supplies of food in facilities that adequately protected the supplies of food from deterioration, molding, or contamination by vermin, as follows:

(i) On March 13, 2001, Respondents Ricky M. Watson and Cheri Watson stored sacks of cattle feed on the floor and used a food storage bin with a non-fitting lid.

(ii) On September 7, 2001, Respondents Ricky M. Watson and Cheri Watson failed to clean and sanitize the freezer (food storage room) that was littered with old meat wrappers and meat juices and stored thawing meat on the floor.

c. Respondents Ricky M. Watson and Cheri Watson willfully failed to remove and dispose of animal and food wastes, bedding, dead animals, trash, and debris, as follows:

(i) On March 13, 2001, Respondents Ricky M. Watson and Cheri Watson failed to remove decaying animal carcasses, rotting produce and meat, and trash from the food storage room.

(ii) On February 21, 2002, Respondents Ricky M. Watson and Cheri Watson failed to remove approximately 19 boxes of unused soy milk from the food storage room; the milk was present for, at least, 2 weeks.

d. On March 13, 2001, Respondents Ricky M. Watson and Cheri Watson willfully failed to provide ample lighting, by natural or artificial means, or both, of good quality, distribution, and duration as appropriate for the species involved. Specifically, Respondents Ricky M. Watson and Cheri Watson housed two tigers ("Caesar" and "Kisha") in an enclosure covered with tarpaulins.

e. On or about February 4, 2002, through February 6, 2002, Respondents Ricky M. Watson and Cheri Watson willfully failed to provide adequate natural or artificial shelter to animals kept outdoors. Specifically, Respondents Ricky M. Watson and Cheri Watson provided two tigers ("Ishon" and "Kisha") with an open-front, metal shelter box that failed to restrict air flow, rain, and snow and failed to help maintain body heat and that was too small to house both animals.

f. On March 27, 2002, Respondents Ricky M. Watson and Cheri Watson willfully failed to construct enclosures so as to provide sufficient space to allow each animal to make normal postural adjustments with adequate freedom of movement. Specifically, Respondents Ricky M.

Watson and Cheri Watson housed four adult tigers (drive-thru) in the "lockout" portion of the enclosure measuring approximately 9 feet by 9 feet.

g. On February 21, 2002, Respondents Ricky M. Watson and Cheri Watson willfully failed to provide animals with food that was of sufficient quantity and nutritive value to maintain good animal health and that was prepared with consideration for the age, species, condition, size, and type of animal. Specifically, the oryx (drive-thru) appeared to be malnourished and chased vehicles for food.

h. Respondents Ricky M. Watson and Cheri Watson willfully failed to make potable water accessible to the animals at all times, or as often as necessary for the animals' health and comfort, and failed to keep water receptacles clean and sanitary, as follows:

(i) On September 7, 2001, the water and water troughs provided to two tigers (pavilion) were contaminated with feces, black water, and debris.

(ii) On February 21, 2002, the water and water troughs provided to a leopard contained floating algae.

i. Respondents Ricky M. Watson and Cheri Watson willfully failed to remove excreta from primary enclosures to prevent contamination of animals, minimize disease hazards, and reduce odors, as follows:

(i) On March 13, 2001, Respondents Ricky M. Watson and Cheri Watson failed to remove excessive feces and old bone from the tiger enclosure in the drive-thru and the enclosure "on the hill" housing two tigers.

(ii) On December 18, 2001, Respondents Ricky M. Watson and Cheri Watson housed two muntjacs in an enclosure littered with fecal pellets and a urine-soaked rug.

(iii) On February 4, 2002, Respondents Ricky M. Watson and Cheri Watson failed to remove excessive feces and old bones from the enclosure "on the hill" housing two tigers ("Jean Paul" and "Henrietta") and housed ferrets in an enclosure with excessive feces.

(iv) On February 6, 2002, Respondents Ricky M. Watson

and Cheri Watson failed to remove excessive feces and old bones from the enclosure "on the hill" housing two tigers ("Jean Paul" and "Henrietta") and from the enclosure housing two tigers in the drive-thru.

(v) On February 21, 2002, Respondents Ricky M. Watson and Cheri Watson failed to remove excessive feces and old bones from two enclosures housing tigers in the drive-thru.

(vi) On March 27, 2002, Respondents Ricky M. Watson and Cheri Watson failed to remove excessive feces and old bones from two tiger enclosures (the end enclosure and "Puppy's" lockout).

j. Respondents Ricky M. Watson and Cheri Watson willfully failed to keep premises clean and in good repair, as follows:

(i) On September 7, 2001, Respondents Ricky M. Watson and Cheri Watson failed to remove the decaying meat, old meat wrappers, and thawed but unfed meat from the food storage room.

(ii) On December 18, 2001, spilled feed littered the floor in the food storage room.

k. On January 12, 2002, Respondents Ricky M. Watson and Cheri Watson willfully housed incompatible animals together. Specifically, a white female tiger ("Jewel") was attacked and severely injured by her cage mate.

Conclusions of Law

Violations of Regulations Governing
Attending Veterinarians and Adequate Veterinary Care

1. On March 13, 2001, September 7, 2001, and February 4, 2002, Respondents Ricky M. Watson and Cheri Watson willfully violated section 2.40(a) of the Regulations and Standards (9 C.F.R. § 2.40(a)) by failing to have their attending veterinarian provide adequate care to their animals.

2. On February 4, 2002, Respondents Ricky M. Watson and Cheri Watson willfully violated section 2.40(b)(3) of the Regulations and Standards (9 C.F.R. § 2.40(b)(3)) by failing to establish and maintain a

program of adequate veterinary care that included daily observation of all animals to assess their health and well-being, including a mechanism of direct and frequent communication with the attending veterinarian.

Violations of Regulations Governing
Miscellaneous Licensee Requirements

3. On December 18, 2002, Respondents Ricky M. Watson and Cheri Watson willfully violated sections 2.100(a) and 2.126(a) of the Regulations and Standards (9 C.F.R. §§ 2.100(a), .126(a)) by failing to have a responsible party available during business hours to permit Animal and Plant Health Inspection Service officials to conduct an inspection of Respondents' animal facilities.

Violations of Regulations Governing
Humane Handling, Care, and Treatment of Nonhuman Primates

4. On March 27, 2002, Respondents Ricky M. Watson and Cheri Watson willfully violated sections 2.100(a) and 3.77(c) of the Regulations and Standards (9 C.F.R. §§ 2.100(a), 3.77(c)) by failing to provide nonhuman primates with a regular diurnal lighting cycle of either natural or artificial means.

Violations of Standards Governing
Humane Handling, Care, and Treatment of Animals
Other Than Dogs, Cats, Rabbits, Hamsters, Guinea Pigs,
Nonhuman Primates, and Marine Mammals

5. Respondents Ricky M. Watson and Cheri Watson willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum facilities and operating standards for other animals, as follows:

a. *Structural strength*

On March 13, 2001, February 21, 2002, March 27, 2002, and July 31, 2002, Respondents Ricky M. Watson and Cheri Watson willfully failed to comply with sections 2.100(a) and 3.125(a) of the Regulations and Standards (9 C.F.R. §§ 2.100(a), 3.125(a)).

b. *Storage*

On March 13, 2001, and September 7, 2001, Respondents Ricky M. Watson and Cheri Watson willfully failed to comply with sections 2.100(a) and 3.125(c) of the Regulations and Standards (9 C.F.R. §§ 2.100(a), 3.125(c)).

c. *Waste disposal*

On March 13, 2001, and February 21, 2002, Respondents Ricky M. Watson and Cheri Watson willfully failed to comply with sections 2.100(a) and 3.125(d) of the Regulations and Standards (9 C.F.R. §§ 2.100(a), 3.125(d)).

d. *Lighting*

On March 13, 2001, Respondents Ricky M. Watson and Cheri Watson willfully failed to comply with sections 2.100(a) and 3.126(c) of the Regulations and Standards (9 C.F.R. §§ 2.100(a), 3.126(c)).

e. *Shelter from inclement weather*

On or about February 4, 2002, through February 6, 2002, Respondents Ricky M. Watson and Cheri Watson willfully failed to comply with sections 2.100(a) and 3.127(b) of the Regulations and Standards (9 C.F.R. §§ 2.100(a), 3.127(b)).

f. *Space*

On March 27, 2002, Respondents Ricky M. Watson and Cheri Watson willfully failed to comply with sections 2.100(a) and 3.128 of the Regulations and Standards (9 C.F.R. §§ 2.100(a), 3.128).

g. *Feeding*

On February 21, 2002, Respondents Ricky M. Watson and Cheri Watson willfully failed to comply with sections 2.100(a) and 3.129(a) of the Regulations and Standards (9 C.F.R. § 2.100(a), 3.129(a)).

h. *Watering*

On September 7, 2001, and February 21, 2002, Respondents

Ricky M. Watson and Cheri Watson willfully failed to comply with sections 2.100(a) and 3.130 of the Regulations and Standards (9 C.F.R. §§ 2.100(a), 3.130).

i. *Cleaning of enclosures*

On March 13, 2001, December 18, 2001, February 4, 2002, February 6, 2002, February 21, 2002, and March 27, 2002, Respondents Ricky M. Watson and Cheri Watson willfully failed to comply with sections 2.100(a) and 3.131(a) of the Regulations and Standards (9 C.F.R. §§ 2.100(a), 3.131(a)).

j. *Housekeeping*

On September 7, 2001, and December 18, 2001, Respondents Ricky M. Watson and Cheri Watson willfully failed to comply with sections 2.100(a) and 3.131(c) of the Regulations and Standards (9 C.F.R. §§ 2.100(a), 3.131(c)).

k. *Separation*

On January 12, 2002, Respondents Ricky M. Watson and Cheri Watson willfully failed to comply with sections 2.100(a) and 3.133 of the Regulations and Standards (9 C.F.R. §§ 2.100(a), 3.133).

COMPLAINANT'S APPEAL PETITION

Complainant contends the ALJ's denial of Complainant's Motion for Default Decision is error. Complainant requests that I issue an order reversing the ALJ's November 17, 2004, denial of Complainant's Motion for Default Decision and issue a decision and order in accordance with the Rules of Practice. (Complainant's Appeal Pet. at 3-9.)

During a November 17, 2004, teleconference with, *inter alia*, Complainant's counsel, Respondent Ricky M. Watson, and Respondent Cheri Watson, the ALJ denied Complainant's Motion for Default Decision. In a November 22, 2004, filing, the ALJ made reference to his November 17, 2004, denial of Complainant's Motion for Default Decision, as follows:

Complainant's Motion for Adoption of Proposed Decision and Order, filed September 3, 2004, is **DENIED**.

Summary of Teleconference; Hearing Notice and Exchange Deadlines at 1 (emphasis in original).

The ALJ did not explicitly conclude that Respondents Ricky M. Watson and Cheri Watson filed meritorious objections to Complainant's Motion for Default Decision. However, section 1.139 of the Rules of Practice (7 C.F.R. § 1.139) requires that an administrative law judge deny, with supporting reasons, a complainant's motion for a default decision if the administrative law judge finds the respondent has filed meritorious objections to the motion, and requires that an administrative law judge issue a decision, without further procedure or hearing, if the administrative law judge finds the respondent has failed to file meritorious objections to the motion. Therefore, I infer, based on the ALJ's November 17, 2004, denial of Complainant's Motion for Default Decision, the ALJ found meritorious some or all of Respondents Ricky M. Watson's and Respondent Cheri Watson's October 12, 2004, objections to Complainant's Motion for Default Decision. I disagree with the ALJ's finding that Respondent Ricky M. Watson and Respondent Cheri Watson filed meritorious objections to Complainant's Motion for Default Decision. Instead, I find Respondent Ricky M. Watson's and Respondent Cheri Watson's objections, filed October 12, 2004, are without merit, and I conclude a decision, without further procedure or hearing, must be issued.

Respondents Ricky M. Watson and Cheri Watson are deemed, for purposes of this proceeding, to have admitted the allegations in the Complaint because they failed to file an answer to the Complaint within 20 days after the Hearing Clerk served them with the Complaint. The Hearing Clerk served Respondents Ricky M. Watson and Cheri Watson with the Complaint, the Rules of Practice, and the Hearing Clerk's

service letter on May 26, 2004.[5] Sections 1.136(a), 1.136(c), 1.139, and 1.141(a) of the Rules of Practice state the time within which an answer must be filed and the consequences of failing to file a timely answer, as follows:

§ 1.136 Answer.

(a) *Filing and service.* Within 20 days after the service of the complaint . . ., the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding . . . .

. . . .

(c) *Default.* Failure to file an answer within the time provided under paragraph (a) of this section 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

[5]See note 1.

> the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.
>
> **§ 1.141 Procedure for hearing.**
>
> (a) *Request for hearing*. Any party may request a hearing on the facts by including such request in the complaint or answer, or by a separate request, in writing, filed with the Hearing Clerk within the time in which an answer may be filed . . . . Failure to request a hearing within the time allowed for the filing of the answer shall constitute a waiver of such hearing.

7 C.F.R. §§ 1.136(a), (c), .139, .141(a).

Moreover, the Complaint informs Respondents Ricky M. Watson and Cheri Watson 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 10.

Similarly, the Hearing Clerk informed Respondents Ricky M. Watson and Cheri Watson in the May 19, 2004, service letter that a timely answer must be filed pursuant to the Rules of Practice and that failure to file a timely answer to any allegation in the Complaint would constitute an admission of that allegation, as follows:

May 19, 2004

Mr. Ricky M. Watson
1832 Chalk Road
Harwood, Texas 78632

Ms. Cheri Watson
1832 Chalk Road
Harwood, Texas 78632

Tiger's Eyes, Inc.
d/b/a Noah's Land Wildlife Park
c/o Ricky M. Watson
1033 Highway 304
Harwood, Texas 78632

Mr. Richard J. Burns
719 Laurel Grove Lane
Pearland, Texas 77584

Dear Sir/Madame:

Subject: In re: Ricky M. Watson, an individual; Cheri Watson, an individual; Tiger's Eyes, Inc., a Texas domestic nonprofit corporation, doing business as Noah's Land Wildlife Park; and Richard J. Burns, an individual - AWA Docket No. 04-0017

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

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

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

On June 22, 2004, 27 days after the Hearing Clerk served

Respondents Ricky M. Watson and Cheri Watson with the Complaint, Respondents Ricky M. Watson and Cheri Watson filed an answer dated June 21, 2004.

On September 3, 2004, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for Default Decision and a Proposed Default Decision as to Ricky M. Watson and Cheri Watson. On September 20, 2004, the Hearing Clerk served Respondents Ricky M. Watson and Cheri Watson with Complainant's Motion for Default Decision and Complainant's Proposed Default Decision as to Ricky M. Watson and Cheri Watson.[6] On October 12, 2004, Respondents Ricky M. Watson and Cheri Watson filed objections to Complainant's Motion for Default Decision.

Respondents Ricky M. Watson and Cheri Watson raise five objections to Complainant's Motion for Default Decision. First, Respondent Cheri Watson contends Respondent Richard J. Burns was never associated with the business of Respondent Ricky M. Watson's and Respondent Cheri Watson's "sanctuary" (Respondent Cheri Watson's Oct. 12, 2004, filing at 1).

Respondent Ricky M. Watson's and Respondent Cheri Watson's business relationship with Respondent Richard J. Burns is not relevant to Complainant's Motion for Default Decision. Therefore, even if I were to find Respondent Richard J. Burns was never associated with Respondent Ricky M. Watson's and Respondent Cheri Watson's sanctuary, I would not find Respondent Cheri Watson's objection to Complainant's Motion for Default Decision meritorious.

Second, Respondents Ricky M. Watson and Cheri Watson contend, due to Respondent Cheri Watson's being out of town when the Hearing Clerk served them with the Complaint, they were not able to file a timely response to the Complaint (Respondent Ricky M. Watson's Oct. 12, 2004, filing at 1; Respondent Cheri Watson's Oct. 12, 2004, filing at 1).

Section 1.147(f) of the Rules of Practice specifically provides that the

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[6]See note 2.

time for filing any document authorized under the Rules of Practice may be extended, as follows:

> **§ 1.147 Filing; service; extensions of time; and computation of time.**
>
> . . . .
>
> (f) *Extensions of time.* The time for the filing of any document or paper required or authorized under the rules in this part to be filed may be extended by the Judge or the Judicial Officer as provided in §1.143, if, in the judgment of the Judge or the Judicial Officer, as the case may be, there is good reason for the extension. In all instances in which time permits, notice of the request for extension of the time shall be given to the other party with opportunity to submit views concerning the request.

7 C.F.R. § 1.147(f).

Respondents Ricky M. Watson and Cheri Watson could have, but did not, file a motion to extend the time for filing a response to the Complaint. Moreover, Respondents Ricky M. Watson and Cheri Watson admit Respondent Cheri Watson returned home 10 days prior to the date their response to the Complaint was required to be filed with the Hearing Clerk (Respondent Ricky M. Watson's Oct. 12, 2004, filing at 1; Respondent Cheri Watson's Oct. 12, 2004, filing at 1). Under these circumstances, I do not find Respondent Ricky M. Watson's and Cheri Watson's excuse for failing to file a timely response to the Complaint a meritorious basis for denying Complainant's Motion for Default Decision.

Third, Respondent Cheri Watson contends she tried to contact the Hearing Clerk's Office, but the telephone number listed was not valid and she could not find the correct telephone number through directory assistance (Respondent Cheri Watson's Oct. 12, 2004, filing at 1).

The Hearing Clerk's service letter, which the Hearing Clerk served

on Respondents Ricky M. Watson and Cheri Watson on May 26, 2004, along with the Complaint and the Rules of Practice, provides the correct telephone number, fax number, and address for the Office of the Hearing Clerk. Moreover, the Rules of Practice describes how a party may obtain an extension of time. Therefore, I reject Respondent Cheri Watson's contention that she was not able to contact the Office of the Hearing Clerk. Moreover, I conclude Respondent Cheri Watson's purported inability to contact the Office of the Hearing Clerk by telephone is not a meritorious basis for denying Complainant's Motion for Default Decision.

Fourth, Respondents Ricky M. Watson and Cheri Watson contend their violations of the Animal Welfare Act and the Regulations and Standards resulted from a lack of adequate financial resources (Respondent Ricky M. Watson's Oct. 12, 2004, filing at 1; Respondent Cheri Watson's Oct. 12, 2004, filing at 1-2).

Respondents Ricky M. Watson's and Cheri Watson's lack of financial resources to comply with the Animal Welfare Act and the Regulations and Standards is neither a meritorious basis for denying Complainant's Motion for Default Decision nor relevant to this proceeding.[7]

Fifth, Respondents Ricky M. Watson and Cheri Watson contend they disposed of their animals, ceased all activities governed by the United States Department of Agriculture, and have not requested renewal of their Animal Welfare Act license (Respondent Ricky M. Watson's Oct. 12, 2004, filing at 1; Respondent Cheri Watson's Oct. 12, 2004, filing at 1-2).

Respondents Ricky M. Watson's and Cheri Watson's disposal of animals after the violations of the Animal Welfare Act and the Regulations and Standards occurred, ceasing all activities governed by the United States Department of Agriculture, and failure to renew their

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[7]*See In re Dennis Hill*, 64 Agric. Dec. 91, 147 (2004) (stating the respondent's short-term economic downturn is neither a meritorious basis for denying the complainant's motion for a default decision nor relevant to the proceeding).

Animal Welfare Act license are not meritorious bases for denying Complainant's Motion for Default Decision.[8]

The Rules of Practice provide that an answer must be filed within 20 days after service of the complaint (7 C.F.R. § 1.136(a)), and Respondent Ricky M. Watson's and Cheri Watson's answer to the Complaint was required to be filed no later than June 15, 2004. Respondents Ricky M. Watson and Cheri Watson filed an Answer to the Complaint on June 22, 2004, 27 days after the Hearing Clerk served Respondents Ricky M. Watson and Cheri Watson with the Complaint. Respondents Ricky M. Watson's and Cheri Watson's failure to file a timely answer to the Complaint is deemed, for purposes of this proceeding, an admission of the allegations in the Complaint and constitutes a waiver of hearing (7 C.F.R. §§ 1.136(c), .139, .141(a)).

Accordingly, there are no issues of fact on which a meaningful hearing could be held in this proceeding. Application of the default provisions of the Rules of Practice does not deprive Respondents Ricky M. Watson and Cheri Watson of rights under the due process clause of the Fifth Amendment to the Constitution of the United States.[9]

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[8]*See In re Dennis Hill*, 64 Agric. Dec. 91, 147 (2004) (the respondent's disposal, or intention to dispose, of animals after the Animal Welfare Act violations occurred is neither a meritorious basis for denying the complainant's motion for a default decision nor relevant to the proceeding).

[9]*See United States v. Hulings*, 484 F. Supp. 562, 567-68 (D. Kan. 1980) (concluding a hearing was not required under the Fifth Amendment to the Constitution of the United States where the respondent was notified that failure to deny the allegations of the complaint would constitute an admission of those allegations under the Rules of Practice and the respondent failed to specifically deny the allegations). *See also Father & Sons Lumber and Building Supplies, Inc. v. NLRB*, 931 F.2d 1093, 1096 (6th Cir. 1991) (stating 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

(continued...)

SANCTION

Respondents Ricky M. Watson and Cheri Watson, by their failure to file an answer within 20 days after the Hearing Clerk served them with the Complaint, are deemed to have admitted the allegations in the Complaint.[10]

With respect to the civil monetary penalty, the Secretary of Agriculture is required to give due consideration to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations.[11]

During 3 of the 9 days on which Respondents Ricky M. Watson and Cheri Watson violated the Animal Welfare Act and the Regulations and Standards, they maintained between 213 and 280 animals at Respondents' facility.[12] Therefore, I find Respondents Ricky M. Watson and Cheri Watson had a large business.

Many of Respondents Ricky M. Watson's and Cheri Watson's violations are serious violations which directly jeopardized the health and well-being of Respondents Ricky M. Watson's and Cheri Watson's animals.

Respondents Ricky M. Watson's and Cheri Watson's willful violations on 9 days during the period March 13, 2001, through December 18, 2002, reveals a consistent disregard for, and unwillingness to abide by, the requirements of the Animal Welfare Act and the Regulations and Standards. An ongoing pattern of violations establishes a "history of previous violations" for the purposes of section 19(b) of the

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[9](...continued)
answer).

[10]See 7 C.F.R. § 1.136(c).

[11]See 7 U.S.C. § 2149(b).

[12]Compl. ¶ 5.

Animal Welfare Act (7 U.S.C. § 2149(b)) and a lack of good faith.

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

> [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.

Complainant seeks assessment of a $28,600 civil penalty against Respondent Ricky M. Watson, assessment of a $28,600 civil penalty against Respondent Cheri Watson, and a cease and desist order. Complainant also proposes that Respondents Ricky M. Watson and Cheri Watson be assessed a civil penalty that represents 20 percent of the maximum possible civil penalty. (Complainant's Motion for Default Decision at 3.)

I find that Respondent Ricky M. Watson and Respondent Cheri Watson each committed 31 violations of the Animal Welfare Act and the Regulations and Standards. Respondents Ricky M. Watson and Cheri Watson could be assessed a maximum civil penalty of $2,750 for each of their violations of the Animal Welfare Act and the Regulations

and Standards.[13] After examining all the relevant circumstances, in light of the United States Department of Agriculture's sanction policy, and taking into account the requirements of section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)), the remedial purposes of the Animal Welfare Act, and the recommendations of the administrative officials, I conclude that a cease and desist order, assessment of a $17,050 civil penalty against Respondent Ricky M. Watson,[14] and assessment of a $17,050 civil penalty against Respondent Cheri Watson[15] are appropriate and necessary to ensure Respondents Ricky M. Watson's and Cheri Watson's compliance with the Animal Welfare Act and the Regulations and Standards in the future, to deter others from violating the Animal Welfare Act and the Regulations and Standards, and to fulfill the remedial purposes of the Animal Welfare Act.

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

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[13]Section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) provides that the Secretary of Agriculture may assess a civil penalty of not more than $2,500 for each violation of the Animal Welfare Act and the Regulations and Standards. Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), the Secretary of Agriculture adjusted the civil penalty that may be assessed under section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) for each violation of the Animal Welfare Act and the Regulations and Standards by increasing the maximum civil penalty from $2,500 to $2,750 (7 C.F.R. § 3.91(b)(2)(v)). Therefore, Respondents Ricky M. Watson and Cheri Watson could each be assessed a maximum civil penalty of $85,250.

[14]The $17,050 civil penalty which I assess against Respondent Ricky M. Watson represents 20 percent of the maximum civil penalty which I conclude could be assessed against Respondent Ricky M. Watson for his 31 violations of the Animal Welfare Act and the Regulations and Standards.

[15]The $17,050 civil penalty which I assess against Respondent Cheri Watson represents 20 percent of the maximum civil penalty which I conclude could be assessed against Respondent Cheri Watson for her 31 violations of the Animal Welfare Act and the Regulations and Standards.

ORDER

1. Respondents Ricky M. Watson and Cheri Watson, their agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards.

The cease and desist provisions of this Order shall become effective on the day after service of this Order on Respondents Ricky M. Watson and Cheri Watson.

2. Respondents Ricky M. Watson and Cheri Watson are each assessed a $17,050 civil penalty. The civil penalties shall be paid by certified checks or money orders made payable to the Treasurer of the United States and sent to:

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

Payment of the civil penalties shall be sent to, and received by, Bernadette R. Juarez within 60 days after service of this Order on Respondents Ricky M. Watson and Cheri Watson. Respondents Ricky M. Watson and Cheri Watson shall state on the certified checks or money orders that payment is in reference to AWA Docket No. 04-0017.

RIGHT TO JUDICIAL REVIEW

Respondents Ricky M. Watson and Cheri Watson have the right to seek judicial review of this Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341, 2343-2350. Such court has exclusive jurisdiction to enjoin, to set aside, to suspend (in

whole or in part), or to determine the validity of this Order. Respondents Ricky M. Watson and Cheri Watson must seek judicial review within 60 days after entry of this Order.[16] The date of entry of this Order is February 23, 2005.

In re: FOR THE BIRDS, INC., AN IDAHO CORPORATION; JERRY L. KORN AND SUSAN F. KORN, INDIVIDUALLY AND d/b/a FOR THE BIRDS; AND BEN KORN.
AWA DOCKET NO. 04-0033.
Decision and Order.
Filed February 25, 2005.

AWA – Veterinary care, failure to provide adequate – License, operating without – Injury and death of exotic animals - Veterinary plan, lack of – Housing, inadequate animal.

Colleen Carroll, for Complainant.
Karen L. Silva, for Respondent.
Decision and Order issued by Administrative Law Judge Peter M. Davenport.

DECISION AND ORDER

This proceeding was commenced by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture on September 8, 2004 by the filing of a Complaint alleging violations of the Animal Welfare Act, as amended (7 U.S.C. § 2131, *et seq.*) (the "Act").

On September 9, 2004, the Hearing Clerk sent copies of the Complaint and the Rules of Practice governing the proceedings under the Act (7 C.F.R. § 1.130 *et seq.*) to the addresses contained in the

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[16]See 7 U.S.C. § 2149(c).

Complaint via certified mail. The record contains the postal Domestic Service Receipts (PS Forms 3811) reflecting delivery of the mailings to the Respondents For the Birds, Inc. and Jerry L. Korn, d/b/a For the Birds on September 14, 2004 at 1506 Happy Valley Road, Nampa, Idaho 83687.[1] Delivery of the certified mail was made to the Respondent Susan F. Korn on September 29, 2004. Delivery of the certified mail to the Respondent Ben Korn was never made and it is unclear whether actual notice of the proceedings has ever been given to him.[2]

Each of the Respondents were informed in the accompanying letter of service that an answer should be filed pursuant to the Rules of Practice and that a timely failure to answer any allegation of the Complaint would constitute an admission of that allegation. An untimely Answer generally denying the allegations of the Complaint was filed on behalf of the Respondents Jerry L. Korn, Ben Korn and For the Birds on October 12, 2004.[3] No Answer has been filed on behalf of the corporate Respondents, For the Birds, Inc.[4] or Susan F. Korn. On January 29, 2005, the Complainant filed separate Motions seeking adoption of three separate tendered Decisions and Orders against the Respondents For the Birds, Inc., Jerry L. Korn and Susan F. Korn.

An Objection to the Motion for Adoption of Decision and Order and

[1] Attached to the Decision and Order is a copy of the registered address for the corporation at 1506 Happy Valley Rd, Nampa, ID 83687 as reflected by the Idaho Secretary of State's Office. The PS Forms 8311 reflect that the certified mail was delivered as addressed.

[2] The Answer filed by Jerry L. Korn indicates that the Answer included Jerry L. Korn individually and d/b/a For the Birds as well as Ben Korn.

[3] The Answer alleges that Ben Korn is a dependent child and appears to suggest that some unspecified mail was misdelivered or accepted by unauthorized individuals; however, the PS 3811s reflect delivery of the Complaint and a copy of the Rules of Practice as indicated. The Answer was received thirteen days late.

[4] The Objection to the Motion for Adoption of Decision and Order purports to respond for the corporate respondent however the Answer as originally filed failed to include it.

Request for Telephonic Hearing was filed by counsel for Jerry L. Korn, For the Birds, Inc. and Ben Korn on February 22, 2005 which incorrectly asserts that a timely answer was filed. Although the Answer is in fact dated October 1, 2004, the file contains the envelope in which it was mailed bearing a post mark of October 7, 2004 which was received by the Hearing Clerk's Office on October 12, 2004.

As the Respondents have failed to file an Answer within the time prescribed by the Rules of Practice, the material facts alleged in the Complaint are deemed admitted and are adopted and set forth herein in the Findings of Fact and this Decision and Order are issued pursuant to Section 1.139 of the Rule of Practice.

FINDINGS OF FACT

1. The Respondent, For the Birds, Inc. is an Idaho corporation with a registered address of 1506 Happy Valley Road, Nampa, Idaho 83687. At all times material to the allegations contained in the Complaint, the corporate Respondent was an "exhibitor" as that term is defined in the Act and the implementing Regulations.

2. The Respondent Jerry L. Korn is an individual doing business as For the Birds and whose address is 1506 Happy Valley Road, Nampa, Idaho 83687. At all times material to the allegations contained in the Complaint, the said Respondent was an "exhibitor" as that term is defined in the Act and the implementing Regulations. Between 2001 and May 23, 2003, the said Respondent jointly held Animal Welfare Act License Number 82-C-0035 issued to "JERRY L. AND SUSAN F. KORN DBA FOR THE BIRDS," which license was cancelled on May 23, 2003 and has not been reinstated.

3. The Respondent Susan F. Korn is an individual doing business as For the Birds and whose address is Post Office Box 72, Nampa, Idaho 83653. At all times material to the allegations contained in the Complaint, the said Respondent was an "exhibitor" as that term is defined in the Act and the implementing Regulations. Between 2001 and May 23, 2003, the said Respondent jointly held Animal Welfare Act

License Number 82-C-0035 issued to "JERRY L. AND SUSAN F. KORN DBA FOR THE BIRDS" which license was cancelled on May 23, 2003 and has not been reinstated.

4. The Respondents have a moderate-sized business, with approximately fifty animals, including farm, wild and exotic animals: goats, llamas, giraffe, a camel, a bear, tigers, a mountain lion, lemurs, eland, elk, prairie dogs, rabbits, cats, dogs and a kangaroo. The gravity of the violations alleged in this complaint is great. They include repeated instances in which Respondents knowingly exhibited animals without having a valid license, and continuing instances of a failure by the Respondents to provide minimally-adequate veterinary care, food, water or housing to animals and to handle animals carefully and in compliance with the Regulations (which failures have resulted in serious injuries and death to animals in Respondents' custody). The Respondents have continually failed to comply with the Regulations, after having been repeatedly advised of deficiencies.

5. The Respondents do not have a history of previous violations.

6. Between March 15, 2001 until May 23, 2003, the Respondents Jerry L. Korn and Susan F. Korn d/b/a For the Birds were licensed under the Animal Welfare Act, having been issued License Number 82-C-0035 until the license was cancelled. From and after May 23, 2003 until at least August 24, 2003, the Respondents continued to exhibit animals without having been licensed by the Secretary to do so, and specifically, said Respondents continuously kept the animals kept at 1506 Happy Valley Road, Nampa, Idaho 83687, on display to the public.

7. Between May 23, 2003 and at least August 16, 2003, the Respondent Jerry L. Korn operated as a "dealer" as that term is defined in the Act and the Regulations without being licensed by the Secretary to do so, specifically delivering for transportation or transported, sold or negotiated the sale of a zebra, multiple elk and llamas.

8. On or about the following dates, the Respondents violated the Act and Regulations by failing to have an attending veterinarian provide adequate veterinary care to its animals:

a.October 2002 through August 12, 2003. Respondents failed to obtain any veterinary care for a giraffe whose hooves were overgrown.

b.Approximately May 2003 through August 2003. Respondents failed to obtain any veterinary care for a white Bengal tiger that was experiencing a rapid and extreme weight loss.

c. Approximately August 1, 2003 through August 16, 2003.

Respondents failed to employ an attending veterinarian to provide adequate veterinary care to its animals, and specifically, Respondents failed to obtain any veterinary care for a tiger that was limping and whose left front paw was severely swollen.

d. Approximately May 2003 through August 2003.

Respondents failed to employ an attending veterinarian to provide adequate veterinary care to its animals, and specifically, Respondents failed to obtain any veterinary care for a camel having a golf-ball sized abscess on its lower left jaw. The Respondent Jerry F. Korn lanced the abscess, causing it to become a seeping, open wound that attracted a large number of flies.

e. On or about July 7, 2003 through July 9, 2003.

Respondents failed to employ an attending veterinarian to provide adequate veterinary care to its animals, and specifically, on July 7, 2003, Respondents failed to obtain any veterinary care for a female snow leopard in obvious severe distress and bleeding from her vaginal and rectal area and whose condition was reported directly to Respondent Jerry F. Korn, who took no action, which inaction resulted in or contributed to the animal's death on or about July 9, 2003.

f. Spring 2002.

Respondents failed to employ an attending veterinarian to provide adequate veterinary care to its animals, and specifically, Respondents failed to obtain any veterinary care for a pregnant llama, resulting in or contributing to the death of the animal and her baby.

g. On or about August 12, 2003.

Respondents failed to employ an attending veterinarian to provide adequate veterinary care to its animals, and specifically, Respondents failed to obtain any veterinary care for an eland whose hooves were overgrown.

9. On or about the following dates, Respondents failed to employ a full-

time attending veterinarian or a part-time attending veterinarian under formal arrangements that include a written program of veterinary care, in willful violation of section 2.40(a)(1) of the Regulations. 9 C.F.R. § 2.40(a)(1):

a. March 7, 2001
b. April 3, 2002
c. May 22, 2002
d. July 2, 2002
e. August 27, 2002
f. February 12, 2003

10. Between March 7, 2001, and August 24, 2003, Respondents failed to ensure that their attending veterinarian or attending veterinarians had appropriate authority to ensure the provision of adequate veterinary care and to oversee the adequacy of other aspects of animal care and use.

11. Between March 7, 2001, and August 24, 2003, Respondents failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate facilities, including adequate enclosures and secure perimeter fences.

12. Between March 7, 2001, and August 24, 2003, Respondents failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate personnel, including an adequate number of employees trained in species-specific animal care and husbandry, and specifically, on or about August 2002, failed to have sufficient personnel to remove mud and excreta in the elk enclosure, and allowed an aged elk to become trapped therein for several days, subjecting the elk to injury by a bull elk.

13. Between March 7, 2001, and August 24, 2003, Respondents failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate equipment, in willful violation of section 2.40(b)(1) of the Regulations. 9 C.F.R. § 2.40(b)(1).

14. Between March 7, 2001, and August 24, 2003, Respondents failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate services, including veterinary services, and specifically, failed to have any veterinary services available for, *inter alia*, a snow leopard, a camel, two tigers, an elk, a giraffe, an

eland, a pregnant llama and her baby.

15. Between March 7, 2001, and August 24, 2003, Respondents failed to establish and maintain a program of adequate veterinary care that included the use of appropriate methods to prevent, control, diagnose and treat diseases and injuries, and the availability of emergency, weekend, and holiday care, and specifically, failed to use appropriate methods to treat, *inter alia*, a snow leopard, a camel, two tigers, an elk, a giraffe, an eland, a pregnant llama and her baby.

16. Between March 7, 2001, and August 24, 2003, Respondents failed to establish and maintain a program of adequate veterinary care that included a mechanism of direct and frequent communication with the attending veterinarian or attending veterinarians, so that timely and accurate information on problems of animal health, behavior, and well-being would be conveyed to the attending veterinarian or attending veterinarians, and specifically, failed to communicate to its attending veterinarian animal heath information regarding, *inter alia*, a snow leopard, a camel, two tigers, an elk, a giraffe, an eland, a pregnant llama and her baby.

17. Between March 7, 2001, and August 24, 2003, Respondents failed to establish and maintain a program of adequate veterinary care that included daily observation of all animals to assess their health and well-being, and specifically, failed to observe on a daily basis, *inter alia*, a snow leopard, a camel, two tigers, an elk, a giraffe, an eland, a pregnant llama and her baby, to assess their health and well-being.

18. Between March 7, 2001, and August 24, 2003, Respondents failed to establish and maintain a program of adequate veterinary care that included adequate guidance to personnel involved in the care and use of animals regarding handling, immobilization, anesthesia, and tranquilization, and specifically, failed to train personnel (including Respondent Jerry F. Korn) in the care and handling of animals.

19. On or about the following dates, Respondents failed to make, keep, and maintain records that fully and correctly disclose information concerning animals in Respondents' possession or under Respondents' control, or disposed of by Respondents.

a. March 7, 2001
b. August 27, 2002.

c. February 11, 2003
d. February 12, 2003

20. On April 3, 2002, Respondents failed to allow APHIS officials, during business hours, to examine records required to be kept by the Act and the Regulations.

21. On or about the following dates, Respondents failed to handle animals as expeditiously and carefully as possible in a manner that would not cause trauma, unnecessary discomfort, behavioral stress, or physical harm.

a. May 1, 2001 (tigers)
b. May 10, 2001 (tiger- Raja)
c. April 3, 2002 (giraffe)
d. June 4, 2002 (tiger)
e. June 2002 (tiger - Raja)
f. June 25, 2002 (bear)
g. February 19, 2003 (tigers)
h. May 6, 2003 (tigers, hoofstock, kangaroo)
i. May 8, 2003 (tigers)
j. May 13, 2003 (tigers)
k. July 23, 2003 (tiger)
l. August 2002 (elk)

22. On May 6, 2003, Respondents used physical abuse to handle a tiger during an exhibition to the public.

23. On several occasions, including May 1, 2001, May 10, 2001, February 19, 2003 and May 13, 2003, Respondents failed to handle animals during public exhibitions so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public, and specifically exhibited adult tigers to the public without sufficient barrier or distance.

24. On June 4, 2002 and July 23, 2003, Respondents failed to handle animals during public exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public, and specifically exhibited adult tigers to children without any barrier or distance.

25. On May 6, 2003, Respondents failed to handle animals during public exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public, and specifically, said Respondents exhibited two adult tigers to the public without any distance or barriers between the animals and the public (resulting in at least one injury to a member of the public).
26. On May 6, 2003, Respondents failed to handle animals during public exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public, and specifically, said Respondents exhibited adult and juvenile goats, a juvenile kangaroo, an eland, a giraffe, and a camel to the public, without sufficient distance or barriers to protect the animals from the public.
27. On May 8, 2003, Respondents failed to handle animals during public exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public.
28. On August 12, 2003, Respondents failed to handle animals during public exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public, and specifically, said Respondents exhibited an adult giraffe and an adult eland to the public, without any distance or barriers between the animals and the public.
29. Between approximately May 2003 and August 16, 2003, Respondents failed to handle animals during public exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public, and specifically, said Respondents regularly allowed customers to enter the primary enclosure containing two tigers, without any distance or barriers between the animals and the public.
30. On May 6, 2003, Respondents exhibited animals under conditions

that were inconsistent with the animals' well-being, and specifically, said Respondents exhibited tigers to the public outside of any enclosures, and allowed personnel and the public to touch, tease and harass animals, including adult goat and her kids, an adult eland, a giraffe and a juvenile kangaroo.

31. On or about the following dates, Respondents failed to meet the minimum facilities and operating standards for nonhuman primates, as follows:

a. On August 24, 2003, Respondents failed to provide food or potable water to non-human primates, two lemurs.

b. On August 27, 2002, Respondents failed to keep the premises clean and in good repair, specifically, the building housing two lemurs needed cleaning, and the lemur enclosures had a large accumulation of cobwebs.

c. On February 12, 2003, Respondents failed to keep the premises clean and in good repair, specifically, the building housing two lemurs needed cleaning, and the lemur enclosures had a large accumulation of cobwebs.

d. Between August 27, 2002, and August 24, 2003, Respondents failed to have enough employees to carry out the level of husbandry practices and care for non-human primates required by the Regulations and Standards.

32. On or about the following dates, Respondents failed to meet the minimum general facilities standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates and marine mammals, regarding structural strength, as follows:

a. On April 3, 2002, Respondents failed to maintain their housing facilities structurally sound and in good repair to protect the animals housed therein from injury and to contain them, and specifically, failed to repair torn metal in the eland enclosure.

b. On July 2, 2002, Respondents failed to maintain their housing facilities structurally sound and in good repair to protect the animals housed therein from injury and to contain them, and specifically, failed to construct the bear enclosure so that it contained the bear securely.

c. On July 2, 2002, Respondents failed to maintain their housing facilities structurally sound and in good repair to protect the animals housed therein from injury and to contain them, and specifically, failed to construct the tiger enclosure so that it contained the tigers securely.

d. On August 12, 2002, Respondents failed to maintain their housing facilities structurally sound and in good repair to protect the animals housed therein from injury and to contain them, and specifically, failed to repair exposed nails in camel enclosure.

e. On August 27, 2002, Respondents failed to maintain their housing facilities structurally sound and in good repair to protect the animals housed therein from injury and to contain them, specifically failing to repair jagged wire mesh or the gap between the frame and the wire in the tiger cub enclosure.

f. On May 6, 2003, Respondents failed to maintain their housing facilities structurally sound and in good repair to protect the animals housed therein from injury and to contain them, and specifically, failed to repair broken wire in the enclosure housing a juvenile kangaroo.

g. On February 11, 2003, Respondents failed to maintain their housing facilities structurally sound and in good repair to protect the animals housed therein from injury and to contain them, and specifically, failed to repair the gate and handling chute in the enclosure housing a bull elk and a cow elk.

h. On February 12, 2003, Respondents failed to maintain their housing facilities structurally sound and in good repair to protect the animals housed therein from injury and to contain them, and specifically, failed to repair the gate and handling chute in the enclosure housing a bull elk and a cow elk.

33. On or about the following dates, Respondents failed to meet the minimum general facilities standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates and marine mammals, regarding storage, as follows:

a. On August 27, 2002, Respondents failed to store supplies of food in facilities that adequately protected them from

contamination.

b. In approximately June 2003, Respondents failed to store supplies of food and bedding in facilities that adequately protected them from contamination, and specifically failed to protect food supplies from vermin, including the three to four rats found in the food preparation area.

c. In approximately June 2003, Respondents failed to store supplies of food and bedding in facilities that adequately protected them from contamination, and specifically failed to dispose of rancid food in the food preparation area, leaving it out for days at a time.

e. In approximately June 2003, Respondents failed to store supplies of food and bedding in facilities that adequately protected them from deterioration and contamination, and specifically failed to protect animal bedding supplies, which contained countless live maggots.

34. On or about the following dates, Respondents failed to meet the minimum general facilities standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates and marine mammals, regarding waste disposal, as follows:

a. On April 3, 2002 and August 27, 2002, Respondents failed to provide for the removal and disposal of animal and food wastes, bedding, dead animals, trash and debris, and specifically, failed to remove debris, food waste and old bones from the tiger enclosure.

b. On April 3, 2002, August 27, 2002, February 12, 2003 and in June of 2003, Respondents failed to provide for the removal and disposal of animal and food wastes, bedding, dead animals, trash and debris, and specifically, failed to remove excreta from the giraffe enclosure

c. On July 2, 2002, Respondents failed to provide for the removal and disposal of animal and food wastes, bedding, dead animals, trash and debris, and specifically, failed to remove debris from the prairie dog enclosure.

d. On August 12, 2002, Respondents failed to provide for the removal and disposal of animal and food wastes, bedding, dead

animals, trash and debris, and specifically, failed to remove waste and debris from the moat adjacent to the bear enclosure.

e. On August 27, 2002 and February 12, 2002, Respondents failed to provide for the removal and disposal of animals and food wastes, bedding, dead animals, trash and debris, and specifically, failed to remove excreta and debris from the eland enclosure.

f. On August 27, 2002, Respondents failed to provide for the removal and disposal of animals and food wastes, bedding, dead animals, trash and debris, and specifically, failed to remove excreta and debris from the elk enclosure.

g. On August 27, 2002 and February 12, 2003, Respondents failed to provide for the removal and disposal of animals and food wastes, bedding, dead animals, trash and debris, and specifically, failed to remove mouse droppings from the food preparation area.

h. On August 27, 2002, February 12, 2003 and August 12, 2003, Respondents failed to provide for the removal and disposal of animals and food wastes, bedding, dead animals, trash and debris, and specifically, failed to remove debris from the camel enclosure.

i. On May 6, 2003, Respondents failed to provide for the removal and disposal of animals and food wastes, bedding, dead animals, trash and debris, and specifically, failed to remove debris from the goat enclosure.

j. On August 12, 2002, Respondents failed to provide for the removal and disposal of animal and food wastes, bedding, dead animals, trash and debris, and specifically, failed to remove waste and debris from the moat adjacent to the cougar enclosure.

35. On or about the following dates, Respondents failed to meet the minimum facilities and operating standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates and marine mammals, by failing to comply with the general facilities standards, specifically on August 27, 2003, Respondents failed to provide a suitable and sanitary method to eliminate rapidly excess water from

indoor housing facilities for tigers.

36. On or about the following dates, Respondents failed to meet the minimum the general facilities and operating standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates and marine mammals, as follows:

a. Between at least August 27, 2002 and August 12, 2003, Respondents failed to provide a bear housed outdoors with appropriate natural or artificial shelter.

b. On February 11, 2003, Respondents failed to provide a suitable method to rapidly eliminate excess water from the elk enclosure.

c. On March 15, 2001, Respondents failed to construct a perimeter fence so that it protects the animals in the facility by restricting animals and unauthorized persons from going through it, and specifically, there was no perimeter fence around the tiger and bear enclosures.

d. On April 3, 2002, Respondents failed to construct a perimeter fence so that it protects the animals in the facility by restricting animals and unauthorized persons from going through it, and specifically, there was no perimeter fence around the mountain lion enclosure.

e. On April 3, 2002, Respondents failed to construct a perimeter fence so that it protects the animals in the facility by restricting animals and unauthorized persons from going through it, and specifically, there was no perimeter fence around the snow leopard enclosure.

f. That from at least May 22, 2003 through July 2, 2002, Respondents failed to construct a perimeter fence so that it protects the animals in the facility by restricting animals and unauthorized persons from going through it, and specifically, there was no perimeter fence around the tiger enclosure.

g. That from at least May 22, 2002 through August 27, 2002, Respondents failed to construct a perimeter fence so that it protects the animals in the facility by restricting animals and unauthorized persons from going through it, and specifically, there was no perimeter fence around the bear enclosure.

37. On or about the following dates, Respondents failed to meet the minimum facilities and operating standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates and marine mammals regarding space requirements, as follows:

a. Between October 2002 and May 30, 2003, Respondents failed to construct and maintain enclosures so as to provide sufficient space to allow each animal contained therein to make normal postural and social adjustments, and specifically, failed to construct the giraffe enclosure so as to provide sufficient space for the animal to make normal postural adjustments.

b. On August 12, 2003, Respondents failed to construct and maintain enclosures so as to provide sufficient space to allow each animal contained therein to make normal postural and social adjustments, and specifically, failed to construct the giraffe enclosure so as to provide sufficient space for the animal to make normal postural adjustments.

38. On or about the following dates, Respondents failed to meet the minimum animal health and husbandry standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates and marine mammals regarding feeding, as follows:

a. Between March 2002 and February 2003, Respondents repeatedly failed to provide tigers with a sufficient quantity of wholesome, palatable food, and routinely failed to feed tigers any food for four days in a row.

b. On or about April 3, 2002, Respondents failed to minimize contamination of food, and specifically, provided spoiled meat to tigers.

c. On or about August 15, 2003, Respondents failed to minimize contamination of food, and specifically, food for tigers was putrified and contained maggots.

d. On or about August 24, 2003, Respondents failed to provide animals with food that was wholesome, palatable and free from contamination and of sufficient quantity, and specifically, failed to feed sufficient food to a giraffe, an eland, rabbits, a kangaroo, elk, tigers, and domestic cats, which animals were thin and hungry.

39. On or about the following dates, Respondents failed to meet the minimum animal health and husbandry standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates and marine mammals regarding watering, as follows:

a. On at least three occasions, including May 22, 2002, April 3, 2003 and July 2, 2002, Respondents failed to maintain water receptacles for the eland clean and sanitary, and specifically allowed large clumps of algae to grow in the eland's water trough.[5]

b. On or about July 2, 2002, Respondents failed to minimize maintain water receptacles for the snow leopards clean and sanitary.

c. On or about August 24, 2003, Respondents failed to provide animals with potable water as often as necessary, and specifically failing to provide adequate water to the rabbits.

40. On or about the following dates, Respondents failed to meet the minimum animal health and husbandry standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates and marine mammals, regarding sanitation, and specifically, the cleaning of enclosures, as follows:

a. On numerous occasions, including April 3, 2002, February 12, 2003 and August 24, 2003, Respondents failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals contained therein and to minimize disease hazards and reduce odors, and specifically, the giraffe enclosure had contained excessive fecal material.

b. On February 12, 2003, Respondents failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals contained therein and to minimize disease hazards and reduce odors, and specifically, the eland enclosure contained excessive fecal material.

c. On February 11 and 12, 2003, Respondents failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals contained therein and to minimize

[5] On July 2, 2002, in addition to the algae a dead bird was not removed from the water trough.

disease hazards and reduce odors, specifically, the enclosure housing the cow elk and bull elk contained excessive excreta.

d. On August 12, 2003, Respondents failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals contained therein and to minimize disease hazards and reduce odors, and specifically, the enclosure housing the camel contained excessive excreta.

41. On or about the following dates, Respondents failed to meet the minimum animal health and husbandry standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates and marine mammals, regarding employees during 2002 and 2003, and specifically on July 2, 2002, Respondents failed to have a sufficient number of adequately-trained employees to carry out the level of husbandry practices and care required by the Regulations and Standards.

42. On or about the following dates, Respondents failed to meet the minimum animal health and husbandry standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates and marine mammals, regarding the separation of animals, specifically during Spring and Summer 2002, Respondents housed incompatible animals in the same enclosure, and specifically housed a cow elk (which became trapped in mud and excreta) in the same enclosure as a bull elk which harassed and attacked the trapped elk.

CONCLUSIONS OF LAW

1. Between March 15, 2001 and May 23, 2003, the Respondents Jerry L. Korn and Susan F. Korn d/b/a For the Birds were "exhibitors" as that term is defined in the Act and the implementing Regulations and held Animal Welfare Act License Number 82-C-0035. That license was cancelled on May 23, 2003 and has not been reissued or otherwise reinstated. The corporate Respondent, For the Birds, Inc. was not licensed.

2. After May 23, 2003, the Respondents exhibited animals without having been licensed by the Secretary to do so, specifically, said Respondents continuously kept the animals kept at 1506 Happy Valley

Road, Nampa, Idaho 83687, on display to the public, in willful violation of sections 2.10(c) and 2.100(a) of the Regulations. 9 C.F.R. §§ 2.1(a), 2.100(a).

3. Between May 23, 2003 and at least August 16, 2003, the Respondent Jerry L. Korn operated as a "dealer" as that term is defined in the Act and the Regulations without having been licensed by the Secretary to do so by delivering for transport or transported, sold or negotiated the sale of a zebra, multiple elk and llamas.

4. That between Spring of 2002 and as late as August 16, 2003, as previously detailed, Respondents failed to have an attending veterinarian provide adequate veterinary care to its animals, in willful violation of section 2.40(a) of the Regulations (9 C.F.R. § 2.40(a)).

5. That between March 7, 2001 and February 12, 2003, Respondents failed to employ a full-time attending veterinarian or a part-time attending veterinarian under formal arrangements that include a written program of veterinary care, in willful violation of section 2.40(a)(1) of the Regulations. 9 C.F.R. § 2.40(a)(1).

6. Between March 7, 2001, and August 24, 2003, Respondents failed to ensure that their attending veterinarian or attending veterinarians had appropriate authority to ensure the provision of adequate veterinary care and to oversee the adequacy of other aspects of animal care and use, in willful violation of section 2.40(a)(2) of the Regulations. 9 C.F.R. § 2.40(a)(2).

7. Between March 7, 2001, and August 24, 2003, Respondents failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate facilities, including adequate enclosures and secure perimeter fences, in willful violation of section 2.40(b)(1) of the Regulations. 9 C.F.R. § 2.40(b)(1).

8. Between March 7, 2001, and August 24, 2003, Respondents failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate personnel, including an adequate number of employees trained in species-specific animal care and husbandry, and specifically, on or about August 2002, failed to have sufficient personnel to remove mud and excreta in the elk enclosure, and allowed an aged elk to become trapped therein for several days, subjecting the elk to injury by a bull elk, in willful violation of section

2.40(b)(1) of the Regulations. 9 C.F.R. § 2.40(b)(1).

9. Between March 7, 2001, and August 24, 2003, Respondents failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate equipment, in willful violation of section 2.40(b)(1) of the Regulations. 9 C.F.R. § 2.40(b)(1).

10. Between March 7, 2001, and August 24, 2003, Respondents failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate services, including veterinary services, and specifically, failed to have any veterinary services available for, *inter alia*, a snow leopard, a camel, two tigers, an elk, a giraffe, an eland, a pregnant llama and her baby, in willful violation of section 2.40(b)(1) of the Regulations. 9 C.F.R. § 2.40(b)(1).

11. Between March 7, 2001, and August 24, 2003, Respondents failed to establish and maintain a program of adequate veterinary care that included the use of appropriate methods to prevent, control, diagnose and treat diseases and injuries, and the availability of emergency, weekend, and holiday care, and specifically, failed to use appropriate methods to treat, *inter alia*, a snow leopard, a camel, two tigers, an elk, a giraffe, an eland, a pregnant llama and her baby, in willful violation of section 2.40(b)(2) of the Regulations. 9 C.F.R. § 2.40(b)(2).

12. Between March 7, 2001, and August 24, 2003, Respondents failed to establish and maintain a program of adequate veterinary care that included a mechanism of direct and frequent communication with the attending veterinarian or attending veterinarians, so that timely and accurate information on problems of animal health, behavior, and well-being is conveyed to the attending veterinarian or attending veterinarians, and specifically, failed to communicate to their attending veterinarian animal heath information regarding, *inter alia*, a snow leopard, a camel, two tigers, an elk, a giraffe, an eland, a pregnant llama and her baby, in willful violation of section 2.40(b)(3) of the Regulations. 9 C.F.R. § 2.40(b)(3).

13. Between March 7, 2001, and August 24, 2003, Respondents failed to establish and maintain a program of adequate veterinary care that included daily observation of all animals to assess their health and well-being, and specifically, failed to observe on a daily basis, *inter alia*, a snow leopard, a camel, two tigers, an elk, a giraffe, an eland, a pregnant

llama and her baby, to assess their health and well-being, in willful violation of section 2.40(b)(3) of the Regulations. 9 C.F.R. § 2.40(b)(3).

14. Between March 7, 2001, and August 24, 2003, Respondents failed to establish and maintain a program of adequate veterinary care that included adequate guidance to personnel involved in the care and use of animals regarding handling, immobilization, anesthesia, and tranquilization, and specifically, failed to train personnel (including Respondent Jerry F. Korn) in the care and handling of animals, in willful violation of section 2.40(b)(4) of the Regulations. 9 C.F.R. § 2.40(b)(4).

15. Between March 7, 2001 and February 12, 2003, Respondents failed to make, keep, and maintain records that fully and correctly disclose information concerning animals in Respondents' possession or under Respondents' control, or disposed of by Respondents, in willful violation of section 2.75(b)(1) of the Regulations. 9 C.F.R. § 2.75(b)(1).

16. On April 3, 2002, Respondents failed to allow APHIS officials, during business hours, to examine records required to be kept by the Act and the Regulations, in willful violation of section 2.136(a)(2) of the Regulations. 9 C.F.R. § 2.126(a)(2).

17. Between May 1, 2001 and July 23, 2003 as previously detailed, the Respondents failed to handle animals as expeditiously and carefully as possible in a manner that would not cause trauma, unnecessary discomfort, behavioral stress, or physical harm, in willful violation of the handling regulations. 9 C.F.R. § 2.131(a)(1).

18. On May 6, 2003, Respondents used physical abuse to handle a tiger during an exhibition to the public, in willful violation of the handling regulations. 9 C.F.R. § 2.131(a)(2)(i).

19. Between May 1, 2001 and July 23, 2003, Respondents failed to handle animals during public exhibitions so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public, in willful violation of the handling regulations, and specifically exhibiting adult tigers to the public, including children, without sufficient barrier or distance. 9 C.F.R. § 2.131(b)(1).

20. On May 6, 2003, Respondents failed to handle animals during public

exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public, and specifically, said Respondents exhibited two adult tigers to the public without any distance or barriers between the animals and the public (resulting in at least one injury to a member of the public), in willful violation of the handling regulations. 9 C.F.R. § 2.131(b)(1).

21. On May 6, 2003 and August 12, 2003, Respondents failed to handle animals during public exhibitions so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public, specifically, said Respondents exhibited adult and juvenile goats, a juvenile kangaroo, an eland, a giraffe, and a camel to the public, without sufficient distance or barriers to protect the animals from the public, in willful violation of the handling regulations. 9 C.F.R. § 2.131(b)(1).

22. Between approximately May 2003 and August 16, 2003, Respondents failed to handle animals during public exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public, and specifically, said Respondents regularly allowed customers to enter the primary enclosure containing two tigers, without any distance or barriers between the animals and the public, in willful violation of the handling regulations. 9 C.F.R. § 2.131(b)(1).

23. On May 6, 2003, Respondents exhibited animals under conditions that were inconsistent with the animals' well-being, and specifically, said Respondents exhibited tigers to the public outside of any enclosures, and allowed personnel and the public to touch, tease and harass animals, including adult goat and her kids, an adult eland, a giraffe and a juvenile kangaroo, in willful violation of the handling regulations. 9 C.F.R. § 2.131(c)(1).

24. Between February 12, 2003 and August 27, 2003, as previously detailed, Respondents willfully violated section 2.100(a) of the Regulations by failing to meet the minimum facilities and operating standards for nonhuman primates (9 C.F.R. §§ 3.75-3.92).

25. Between April 3, 2002 and August 27, 2003, as previously detailed, the Respondents willfully violated section 2.100(a) of the Regulations by failing to meet the minimum general facilities standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates and marine mammals, regarding structural strength (9 C.F.R. § 3.125(a)).
26. Between August 27, 2002 and sometime in June of 2003, as previously detailed, the Respondents willfully violated section 2.100(a) of the Regulations by failing to meet the minimum general facilities standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates and marine mammals, regarding storage (9 C.F.R. § 3.125(c)).
27. Between April 3, 2002 and May 6, 2003, as previously detailed, the Respondents willfully violated section 2.100(a) of the Regulations by failing to meet the minimum general facilities standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates and marine mammals, regarding waste disposal (9 C.F.R. § 3.125(d)).
28. On or about the following dates, Respondents willfully violated section 2.100(a) of the Regulations by failing to meet the minimum facilities and operating standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates and marine mammals (9 C.F.R. §§ 3.125-3.142), by failing to comply with the general facilities standards (9 C.F.R. § 3.126) on August 27, 2003 by failing to provide a suitable and sanitary method to eliminate rapidly excess water from indoor housing facilities for tigers. 9 C.F.R. § 3.126(d).
29. Between March 15, 2001 and August 12, 2003, as previously detailed, the Respondents willfully violated section 2.100(a) of the Regulations by failing to meet the minimum general facilities standards facilities and operating standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates and marine mammals (9 C.F.R.§§ 3.127).
30. Between October of 2002 and August 12, 2003, the Respondents willfully violated section 2.100(a) of the Regulations by failing to meet the minimum facilities and operating standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates and marine mammals regarding space requirements (9 C.F.R. § 3.128), by

failing to construct and maintain enclosures so as to provide sufficient space to allow each animal contained therein to make normal postural and social adjustments, and specifically, failed to construct the giraffe enclosure so as to provide sufficient space for the animal to make normal postural adjustments.

31. Between March of 2002 and August 24, 2003, as previously detailed, the Respondents willfully violated section 2.100(a) of the Regulations by failing to meet the minimum animal health and husbandry standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates and marine mammals regarding feeding (9 C.F.R. § 3.129).

32. Between May 22, 2002 and August 24, 2003, as previously detailed, the Respondents willfully violated section 2.100(a) of the Regulations by failing to meet the minimum animal health and husbandry standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates and marine mammals regarding watering (9 C.F.R. § 3.130).

33. Between April 3, 2002 and August 24, 2003, as previously detailed, the Respondents willfully violated section 2.100(a) of the Regulations by failing to meet the minimum animal health and husbandry standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates and marine mammals, regarding sanitation, and specifically, the cleaning of enclosures (9 C.F.R. § 3.131(a)).

34. Between 2002 and 2003 and specifically on July 2, 2002, the Respondents willfully violated section 2.100(a) of the Regulations regarding the minimum animal health and husbandry standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates and marine mammals, regarding employees (9 C.F.R. § 3.132), by failing to have a sufficient number of adequately-trained employees to carry out the level of husbandry practices and care required by the Regulations and Standards.

35. During the Spring and Summer of 2002, the Respondents willfully violated section 2.100(a) of the Regulations regarding the minimum animal health and husbandry standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates and marine mammals, regarding the separation of animals (9 C.F.R. § 3.133), by

housing incompatible animals in the same enclosure, and specifically housed a cow elk (which became trapped in mud and excreta) in the same enclosure as a bull elk which harassed and attacked the trapped elk.

ORDER

1. The Respondents, their agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the Regulations and Standards.

2. The Respondents, For the Birds, Inc., Jerry L. Korn and Susan F. Korn, jointly and severally, are assessed a civil penalty of TWENTY-EIGHT THOUSAND FIFTY DOLLARS ($28,050.00), to be paid by certified check or money order made payable to the Treasurer of the United States. The said civil penalty shall be delivered to Counsel for the Complainant, Office of the General Counsel, United States Department of Agriculture, 1400 Independence Avenue, SW, Washington, D.C. 20250.

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 by the Hearing Clerk's Office.

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In re: DIANA R. McCOURT, AN INDIVIDUAL FORMERLY KNOWN AS DIANA R. CZIRAKY; AND SIBERIAN TIGER CONSERVATION ASSOCIATION, A DELAWARE CORPORATION.
AWA Docket No. 05-0003.
Decision and Order.
Filed March 29, 2005.

AWA – Animal Welfare Act – Failure to file timely answer – Failure to file timely motion for extension of time – Default decision – Bases for denial of motion for default – Argument raised for first time on appeal – Inappropriate argument – Cease and desist order – Civil penalty.

The Judicial Officer reversed Chief Administrative Law Judge Marc R. Hillson's denial of Complainant's motion for a default decision. The Judicial Officer issued a decision in which he found Respondents violated the Animal Welfare Act and the regulations issued under the Animal Welfare Act. The Judicial Officer concluded Respondents filed a late answer to the Complaint and, under the Rules of Practice (7 C.F.R. §§ 1.136(c), .139), were deemed to have admitted the allegations in the Complaint and waived opportunity for hearing. The Judicial Officer issued a cease and desist order against Respondents, assessed Respondent Diana R. McCourt an $18,070 civil penalty, and assessed Respondent Siberian Tiger Conservation Association a $16,420 civil penalty.

Colleen A. Carroll, for Complainant.
Richard D. Rogovin, Columbus, Ohio, for Respondents.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on October 14, 2004. Complainant instituted the proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-2.133) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R.

§§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges Diana R. McCourt and Siberian Tiger Conservation Association [hereinafter Respondents] knowingly failed to obey the Secretary of Agriculture's cease and desist order issued in *In re Diana R. Cziraky*, 61 Agric. Dec. 327 (2002) (Consent Decision) (unpublished) and willfully violated the Animal Welfare Act and the Regulations (Compl. ¶¶ 4-11).

The Hearing Clerk served Respondents with the Complaint, the Rules of Practice, and a service letter on October 21, 2004.[1] Respondents were required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) to file an answer to the Complaint within 20 days after service. Respondents filed a motion to extend the time to answer the Complaint[2] and an answer to the Complaint[3] on November 24, 2004, 34 days after the Hearing Clerk served Respondents with the Complaint. On January 13, 2005, Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] granted Respondents' request to extend the time to file an answer and deemed Respondents' answer timely filed.[4]

On January 19, 2005, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for Adoption of Decision and Order as to Diana McCourt and Siberian Tiger Conservation Association [hereinafter Motion for Default Decision] and a proposed Decision and Order as to Diana McCourt and Siberian Tiger Conservation Association [hereinafter Proposed Default Decision]. On January 28, 2005, Respondents filed objections to Complainant's Motion for Default Decision and Complainant's Proposed

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[1]United States Postal Service Domestic Return Receipts for Article Number 7000 1670 0003 5453 1013 and Article Number 7000 1670 0003 5453 1020.

[2]Motion for Extension of Time to Answer the Complaint by Respondents Diana R. McCourt ("McCourt") and the Siberian Tiger Conservation Association ("Association") [hereinafter Motion for Extension of Time to File Answer].

[3]Answer of Respondents Diana R. McCourt ("McCourt) and Siberian Tiger Conservation Association ("Association") [hereinafter Answer].

[4]Order Granting Request for Extension of Time to File Answer.

Default Decision.[5] On February 9, 2005, the Chief ALJ denied Complainant's Motion for Default Decision.[6]

On February 22, 2005, Complainant appealed the Chief ALJ's denial of Complainant's Motion for Default Decision to the Judicial Officer.[7] On March 9, 2005, Respondents filed a response in opposition to Complainant's Appeal Petition.[8] On March 16, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful review of the record, I disagree with the Chief ALJ's denial of Complainant's Motion for Default Decision. Therefore, I: (1) reverse the Chief ALJ's February 9, 2005, denial of Complainant's Motion for Default Decision; and (2) issue this Decision and Order based upon Respondents' failure to file a timely answer to the Complaint.

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

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

§ 2131. Congressional statement of policy

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[5]Respondents' Memorandum in Opposition to Motion for Adoption of Decision and Order.

[6]Ruling Denying Motion for Adoption of Decision and Order.

[7]Complainant's Appeal Petition.

[8]Respondents' Memo Contra Complainant's Appeal Petition.

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

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

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

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

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

§ 2132. Definitions

When used in this chapter—

. . . .

(h) The term "exhibitor" means any person (public or private) exhibiting any animals, which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary, and such term includes carnivals, circuses, and zoos exhibiting such animals whether operated for profit or not; but such term excludes retail pet stores, organizations sponsoring and all persons participating in State and country fairs, livestock

shows, rodeos, purebred dog and cat shows, and any other fairs or exhibitions intended to advance agricultural arts and sciences, as may be determined by the Secretary[.]

§ 2149. Violations by licensees

. . . .

(b) Civil penalties for violation of any section, etc.; separate offenses; notice and hearing; appeal; considerations in assessing penalty; compromise of penalty; civil action by Attorney General for failure to pay penalty; district court jurisdiction; failure to obey cease and desist order

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, that violates any provision of this chapter, or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than $2,500 for each such violation, and the Secretary may also make an order that such person shall cease and desist from continuing such violation. Each violation and each day during which a violation continues shall be a separate offense. No penalty shall be assessed or cease and desist order issued unless such person is given notice and opportunity for a hearing with respect to the alleged violation, and the order of the Secretary assessing a penalty and making a cease and desist order shall be final and conclusive unless the affected person files an appeal from the Secretary's order with the appropriate United States Court of Appeals. The Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations. Any such civil penalty may be compromised by the Secretary. Upon any failure to pay the penalty assessed by a final order under this section, the Secretary shall request the Attorney General to

institute a civil action in a district court of the United States or other United States court for any district in which such person is found or resides or transacts business, to collect the penalty, and such court shall have jurisdiction to hear and decide any such action. Any person who knowingly fails to obey a cease and desist order made by the Secretary under this section shall be subject to a civil penalty of $1,500 for each offense, and each day during which such failure continues shall be deemed a separate offense.

(c) Appeal of final order by aggrieved person; limitations; exclusive jurisdiction of United States Courts of Appeals

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, aggrieved by a final order of the Secretary issued pursuant to this section may, within 60 days after entry of such an order, seek review of such order in the appropriate United States Court of Appeals in accordance with the provisions of sections 2341, 2343 through 2350 of title 28, and such court shall have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of the Secretary's order.

§ 2151. Rules and regulations

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

7 U.S.C. §§ 2131, 2132(h), 2149(b)-(c), 2151.

28 U.S.C.:

TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE

. . . .

PART VI—PARTICULAR PROCEEDINGS

. . . .

CHAPTER 163—FINES, PENALTIES AND FORFEITURES

§ 2461. Mode of recovery

. . . .

FEDERAL CIVIL PENALTIES INFLATION ADJUSTMENT

SHORT TITLE

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

FINDINGS AND PURPOSE

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

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

(2) the impact of many civil monetary penalties has been and is diminished due to the effect of inflation;

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

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

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

(1) allow for regular adjustment for inflation of civil

monetary penalties;

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

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

DEFINITIONS

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

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

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

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

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

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

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

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

CIVIL MONETARY PENALTY INFLATION ADJUSTMENT REPORTS

SEC. 4. The head of each agency shall, not later than 180 days after the date of enactment of the Debt Collection Improvement Act of 1996 [Apr. 26, 1996], and at least once every 4 years thereafter–

(1) by regulation adjust each civil monetary penalty provided by law within the jurisdiction of the Federal agency,

except for any penalty (including any addition to tax and additional amount) under the Internal Revenue Code of 1986 [26 U.S.C. 1 *et seq*.], the Tariff Act of 1930 [19 U.S.C. 1202 *et seq*.], the Occupational Safety and Health Act of 1970 [29 U.S.C. 651 *et seq*.], or the Social Security Act [42 U.S.C. 301 *et seq*.], by the inflation adjustment described under section 5 of this Act; and

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

COST-OF-LIVING ADJUSTMENTS OF CIVIL MONETARY PENALTIES

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

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

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

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

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

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

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

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

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

(2) the Consumer Price Index for the month of June of the

calendar year in which the amount of such civil monetary penalty was last set or adjusted pursuant to law.

ANNUAL REPORT

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

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

28 U.S.C. § 2461 (note).

7 C.F.R.:

TITLE 7—AGRICULTURE

SUBTITLE A—OFFICE OF THE SECRETARY OF AGRICULTURE

. . . .

PART 3—DEBT MANAGEMENT

. . . .

SUBPART E—ADJUSTED CIVIL MONETARY PENALTIES

§ 3.91 Adjusted civil monetary penalties.

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

L. No. 104-134).

(b) *Penalties*—. . . .

. . . .

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

. . . .

(v) Civil penalty for a violation of Animal Welfare Act, codified at 7 U.S.C. 2149(b), has a maximum of $2,750; and knowing failure to obey a cease and desist order has a civil penalty of $1,650.

7 C.F.R. § 3.91(a), (b)(2)(v).

9 C.F.R.:

TITLE 9—ANIMALS AND ANIMAL PRODUCTS

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

SUBCHAPTER A—ANIMAL WELFARE

PART 1—DEFINITION OF TERMS

§ 1.1 Definitions.

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

. . . .

Exhibitor means any person (public or private) exhibiting any animals, which were purchased in commerce or the intended

distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary. This term includes carnivals, circuses, animal acts, zoos, and educational exhibits, exhibiting such animals whether operated for profit or not. This term excludes retail pet stores, horse and dog races, organizations sponsoring and all persons participating in State and county fairs, livestock shows, rodeos, field trials, coursing events, purebred dog and cat shows and any other fairs or exhibitions intended to advance agricultural arts and sciences as may be determined by the Secretary.

PART 2—REGULATIONS

SUBPART A—LICENSING

§ 2.1 Requirements and application.

(a)(1) Any person operating or desiring to operate as a dealer, exhibitor, or operator of an auction sale, except persons who are exempt from the licensing requirements under paragraph (a)(3) of this section, must have a valid license. A person must be 18 years of age or older to obtain a licence. A person seeking a license shall apply on a form which will be furnished by the AC Regional Director in the State in which that person operates or intends to operate. The applicant shall provide the information requested on the application form, including a valid mailing address through which the licensee or applicant can be reached at all times, and a valid premises address where animals, animal facilities, equipment, and records may be inspected for compliance. The applicant shall file the completed application form with the AC Regional Director.

. . . .

SUBPART D—ATTENDING VETERINARIAN AND ADEQUATE VETERINARY CARE

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

. . . .

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

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

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

. . . .

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

. . . .

SUBPART I—MISCELLANEOUS

. . . .

§ 2.131 Handling of animals.

(a)(1) Handling of all animals shall be done as expeditiously and carefully as possible in a manner that does not cause trauma, overheating, excessive cooling, behavioral stress, physical harm, or unnecessary discomfort.

. . . .

(b)(1) During public exhibition, any animal must be handled so there is minimal risk of harm to the animal and to the public, with sufficient distance and/or barriers between the animal and the general viewing public so as to assure the safety of animals and the public.

9 C.F.R. §§ 1.1; 2.1(a)(1), .40(b)(1)-(2), (4), .131(a)(1), (b)(1) (2004).

DECISION

Statement of the Case

Respondents failed to file an answer to the Complaint 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 the failure to file an answer within the time provided in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) shall be deemed, for purposes of the proceeding, an admission of the allegations in the complaint. Further, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the failure to file an answer or the admission by the answer of all the material allegations of fact contained in the complaint, constitutes a waiver of hearing. Accordingly, the material allegations in the Complaint are adopted as findings of fact. This Decision and Order is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent Diana R. McCourt is an individual formerly known as Diana R. Cziraky, and whose address is 22143 Deal Road, Gambier, Ohio 43022. At all times material to this proceeding, Respondent Diana R. McCourt was an exhibitor, as that term is defined in the Animal Welfare Act and the Regulations.

2. Respondent Siberian Tiger Conservation Association is a Delaware corporation whose agent for service of process is The Corporation Trust Company, Corporation Trust Center, 1209 Orange Street, Wilmington, Delaware 19801. At all times material to this proceeding, Respondent Siberian Tiger Conservation Association was an exhibitor, as that term is defined in the Animal Welfare Act and the Regulations.

3. Respondents exhibit exotic felines (lions and tigers) to the public. Respondents' exhibition business is significant. According to

their website, Respondents charge each customer $200 to be a "day-trainer," which program involves no meaningful "training" of either the animal or human participants and is simply an exhibition of Respondents' animals to the public in the guise of "training." Respondents purport to have thousands of customers each year and also solicit and accept donations from the public.

The gravity of Respondents' violations is great, and Respondents' violations involve willful, deliberate violations of the licensing and handling regulations. The violations demonstrate a lack of good faith on the part of Respondents.

Respondent Diana R. McCourt has been the subject of two previous administrative enforcement cases under the Animal Welfare Act, and Respondent Siberian Tiger Conservation Association has been the subject of one previous administrative enforcement case. *In re The International Siberian Tiger Foundation* (Decision as to The International Siberian Tiger Foundation, Diana Cziraky, The Siberian Tiger Foundation, and Tiger Lady), 61 Agric. Dec. 53 (2002) (where the Secretary of Agriculture found that the respondents repeatedly violated section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1)), found that Respondent Diana R. McCourt exhibited animals while her Animal Welfare Act license was suspended, in violation of section 2.10 of the Regulations (9 C.F.R. § 2.10), and revoked Respondent Diana R. McCourt's Animal Welfare Act license - number 31-C-0123); *In re Diana R. Cziraky*, 61 Agric. Dec. 327 (2002) (Consent Decision) (unpublished) (where the respondents admitted all of the violations and agreed to a liquidated civil penalty of $10,000).

4. On November 2, 2003, Respondents knowingly failed to obey the cease and desist order issued by the Secretary of Agriculture pursuant to section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) in *In re Diana R. Cziraky*, 61 Agric. Dec. 327 (2002) (Consent Decision) (unpublished). The cease and desist order specifically provides that "Respondents, their agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the Regulations and Standards, and shall not engage in activities for which a license under the Act is required." Pursuant to section 19(b) of the Animal Welfare Act

(7 U.S.C. § 2149(b)) and 7 C.F.R. § 3.91(b)(2)(v), any person who knowingly fails to obey a cease and desist order shall be subject to a civil penalty of $1,650 for each offense, and each day during which the failure to obey a cease and desist order continues shall be deemed a separate offense.

5. From February 15, 2002, to the date of the filing of the Complaint, Respondent Diana R. McCourt operated as an exhibitor, as that term is defined in the Regulations, without having obtained an Animal Welfare Act license from the Secretary of Agriculture.

6. From February 15, 2002, to the date of the filing of the Complaint, Respondent Siberian Tiger Conservation Association operated as an exhibitor, as that term is defined in the Regulations, without having obtained an Animal Welfare Act license from the Secretary of Agriculture.

7. On November 2, 2003, Respondents failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate personnel, and specifically, personnel capable of handling tigers safely.

8. On November 2, 2003, Respondents failed to establish and maintain a program of adequate veterinary care that included the use of appropriate methods to prevent and control injuries, and specifically, Respondents allowed members of the public (customers) to handle juvenile and adult lions and tigers inside the animals' enclosure.

9. On November 2, 2003, Respondents failed to establish and maintain a program of adequate veterinary care that included adequate guidance to personnel involved in the care and use of animals regarding handling, and specifically, Respondents themselves lacked the ability to adequately care for and handle two tigers safely and humanely, and failed to employ personnel capable of doing so.

10. On November 2, 2003, Respondents failed to handle animals as expeditiously and carefully as possible in a manner that would not cause trauma, unnecessary discomfort, behavioral stress, or physical harm, and specifically, Respondents allowed members of the public (customers) to enter the enclosure housing juvenile and adult tigers and lions, while the animals were inside the enclosure, thus placing themselves in a position where the animals could easily injure them, and

in turn, be injured or killed.

11. On November 2, 2003, Respondents, during public exhibition, failed to handle animals so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public, and specifically, under the guise of "day-training," Respondents invited groups of customers to enter the primary enclosure housing juvenile and adult lions and tigers (while the animals were inside the enclosure) and allowed customers to handle the juvenile and adult lions and tigers neither with a barrier between the animals and the people nor with any distance between the animals and the people.

Conclusions of Law

1. On November 2, 2003, Respondents knowingly failed to obey the cease and desist order issued by the Secretary of Agriculture pursuant to section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) in *In re Diana R. Cziraky*, 61 Agric. Dec. 327 (2002) (Consent Decision) (unpublished). The cease and desist order specifically provides that "Respondents, their agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the Regulations and Standards, and shall not engage in activities for which a license under the Act is required." Pursuant to section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) and 7 C.F.R. § 3.91(b)(2)(v), any person who knowingly fails to obey such a cease and desist order shall be subject to a civil penalty of $1,650 for each offense, and each day during which the failure to obey a cease and desist order continues shall be deemed a separate offense.

2. From February 15, 2002, to the date of the filing of the Complaint, Respondent Diana R. McCourt operated as an exhibitor, as that term is defined in the Regulations, without having obtained an Animal Welfare Act license from the Secretary of Agriculture, in willful violation of section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1)).

3. From February 15, 2002, to the date of the filing of the Complaint, Respondent Siberian Tiger Conservation Association

operated as an exhibitor, as that term is defined in the Regulations, without having obtained an Animal Welfare Act license from the Secretary of Agriculture, in willful violation of section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1)).

4. On November 2, 2003, Respondents failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate personnel, and specifically, personnel capable of handling tigers safely, in willful violation of section 2.40(b)(1) of the Regulations (9 C.F.R. § 2.40(b)(1)).

5. On November 2, 2003, Respondents failed to establish and maintain a program of adequate veterinary care that included the use of appropriate methods to prevent and control injuries, and specifically, Respondents allowed members of the public (customers) to handle juvenile and adult lions and tigers inside the animals' enclosure, in willful violation of section 2.40(b)(2) of the Regulations (9 C.F.R. § 2.40(b)(2)).

6. On November 2, 2003, Respondents failed to establish and maintain a program of adequate veterinary care that included adequate guidance to personnel involved in the care and use of animals regarding handling, and specifically, Respondents themselves lacked the ability to adequately care for and handle two tigers safely and humanely, and failed to employ personnel capable of doing so, in willful violation of section 2.40(b)(4) of the Regulations (9 C.F.R. § 2.40(b)(4)).

7. On November 2, 2003, Respondents failed to handle animals as expeditiously and carefully as possible in a manner that would not cause trauma, unnecessary discomfort, behavioral stress, or physical harm, and specifically, Respondents allowed members of the public (customers) to enter the enclosure housing juvenile and adult tigers and lions, while the animals were inside the enclosure, thus placing themselves in a position where the animals could easily injure them, and in turn, be injured or killed, in willful violation of the handling regulations (9 C.F.R. § 2.131(a)(1) (2004)).

8. On November 2, 2003, Respondents, during public exhibition, failed to handle animals so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the

safety of animals and the public, and specifically, under the guise of "day-training," Respondents invited groups of customers to enter the primary enclosure housing juvenile and adult lions and tigers (while the animals were inside the enclosure) and allowed customers to handle the juvenile and adult lions and tigers neither with a barrier between the animals and the people nor with any distance between the animals and the people, in willful violation of the handling regulations (9 C.F.R. § 2.131(b)(1) (2004)).

COMPLAINANT'S APPEAL PETITION

Complainant contends the Chief ALJ's denial of Complainant's Motion for Default Decision is error. Complainant requests that I reverse the Chief ALJ's ruling denying Complainant's Motion for Default Decision or vacate the Chief ALJ's ruling denying Complainant's Motion for Default Decision and remand the proceeding to the Chief ALJ for issuance of a decision and order in accordance with the Rules of Practice. (Complainant's Appeal Pet. at 5-15.)

The Chief ALJ denied Complainant's Motion for Default Decision on the ground that he had granted Respondents' Motion for Extension of Time to File Answer and had deemed Respondents' Answer timely filed (Ruling Denying Motion for Adoption of Decision and Order). I find the Chief ALJ's Order Granting Request for Extension of Time to File Answer, in which the Chief ALJ deemed Respondents' Answer timely filed, and the Chief ALJ's Ruling Denying Motion for Adoption of Decision and Order, error.

Respondents filed a Motion for Extension of Time to File Answer on November 24, 2004, 14 days after Respondents' Answer was required to be filed. Motions for extensions of time filed after the deadline for filing the document for which the extension is sought have been consistently rejected in proceedings conducted under the Rules of Practice.[9]

[9] *In re Lion Raisins, Inc.*, 63 Agric. Dec. 271, 280 (2004) (Order Vacating the ALJ's Denial of Complainant's Motion for Default Decision and Remand Order) (concluding the respondents' request to file an answer to the complaint and respondents' answer to the complaint, filed 50 days after the time expired for filing respondents' answer, do not (continued...)

Therefore, I find the Chief ALJ's Order Granting Request for Extension of Time to File Answer, error. Moreover, a late-filed answer cannot cure a default[10] or be deemed to be timely filed.[11] Therefore, I find the Chief ALJ erred when he deemed Respondents' late-filed Answer timely filed. Instead, I find Respondents' Answer, which was filed 14 days after the due date, untimely.

Respondents are deemed, for purposes of this proceeding, to have admitted the allegations in the Complaint because they failed to file an answer to the Complaint within 20 days after the Hearing Clerk served them with the Complaint. The Hearing Clerk served Respondents with the Complaint, the Rules of Practice, and the Hearing Clerk's service letter on October 21, 2004.[12] Sections 1.136(a), 1.136(c), 1.139, and 1.141(a) of the Rules of Practice state the time within which an answer must be filed and the consequences of failing to file a timely answer, as follows:

§ 1.136 Answer.

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[9](...continued)
cure the respondents' default); *In re Heartland Kennels, Inc.*, 61 Agric. Dec. 492, 536 (2002) (holding, where the respondents were required to file their answer no later than November 4, 2001, the respondents' request for an extension of time within which to file their answer, filed September 16, 2002, comes far too late to be considered); *In re Everflora, Inc.*, 57 Agric. Dec. 1314, 1318 n.3 (1998) (Ruling Denying Respondents' Motion for Extension of Time) (denying a motion to extend the time for filing an appeal petition where the motion was filed 1 day after the time expired for filing the appeal petition); *In re Peter A. Lang*, 57 Agric. Dec. 59, 61 n.2 (denying the complainant's motion for an extension of time to file a response to the respondent's appeal petition filed 13 minutes late), *aff'd*, 189 F.3d 473, 1999 WL 512009 (9th Cir. 1999) (Table) (not to be cited as precedent under 9th Circuit Rule 36–3), *printed in* 58 Agric. Dec. 742 (1999).

[10]*In re Lion Raisins, Inc.*, 63 Agric. Dec. 271, 280 (2004) (Order Vacating the ALJ's Denial of Complainant's Motion for Default Decision and Remand Order).

[11]*In re Jack Stepp*, 59 Agric. Dec. 265, 269 n.2 (2000) (Ruling Denying Respondents' Pet. for Recons.) (stating the Judicial Officer is bound by the Rules of Practice and cannot deem the respondents' late-filed reply to a motion to lift stay to have been timely filed).

[12]See note 1.

(a) *Filing and service*. Within 20 days after the service of the complaint . . ., the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding . . . .

. . . .

(c) *Default*. Failure to file an answer within the time provided under paragraph (a) of this section shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.

§ 1.139 Procedure upon failure to file an answer or admission of facts.

The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk. Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.

§ 1.141 Procedure for hearing.

(a) *Request for hearing*. Any party may request a hearing on the facts by including such request in the complaint or answer, or by a separate request, in writing, filed with the Hearing Clerk within the time in which an answer may be filed . . . . Failure to request a hearing within the time allowed for the filing of the

answer shall constitute a waiver of such hearing.

7 C.F.R. §§ 1.136(a), (c), .139, .141(a).

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

> [T]his complaint shall be served upon the respondents, who 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 5.

Similarly, the Hearing Clerk informed Respondents in the October 14, 2004, service letter that a timely answer must be filed pursuant to the Rules of Practice and that failure to file a timely answer to any allegation in the Complaint would constitute an admission of that allegation, as follows:

October 14, 2004

Diana R. McCourt	The Corporation Trust Company
f/k/a Diana R. Cziraky	Corporation Trust Center
22143 Deal Raod [sic]	1209 Orange Street
Gambier, Ohio 43022	Wilmington, Delaware 19801

Dear Sir or Madam:

Subject: In re: DIANA R. McCOURT, an individual formerly known as Diana R. Cziraky; and SIBERIAN TIGER CONSERVATION ASSOCIATION, a Delaware corporation; Respondents - AWA Docket No. 05-0003

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

On November 24, 2004, 34 days after the Hearing Clerk served Respondents with the Complaint, Respondents filed a Motion for Extension of Time to File Answer and an Answer.

On January 19, 2005, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for Default Decision and a Proposed Default Decision. On January 28, 2005, Respondents filed an objection to Complainant's Motion for Default Decision stating the Chief ALJ had granted Respondents' motion for an extension of time to answer the Complaint and had deemed Respondents' Answer timely filed.[13]

As discussed in this Decision and Order, *supra*, the Chief ALJ's ruling granting Respondents' late-filed motion for extension of time to file an answer and the Chief ALJ's ruling that Respondents' late-filed answer was timely filed, are error. Therefore, Respondents' objection to Complainant's Motion for Default Decision is without merit and the Chief ALJ's Ruling Denying Motion for Adoption of Decision and Order is error.

The Rules of Practice provides that an answer must be filed within 20 days after service of the complaint (7 C.F.R. § 1.136(a)), and Respondents' Answer to the Complaint was required to be filed no later than November 10, 2004. Respondents filed an Answer to the

[13]Respondents' Memorandum in Opposition to Motion for Adoption of Decision and Order.

Complaint on November 24, 2004, 34 days after the Hearing Clerk served Respondents with the Complaint. Respondents' failure to file a timely answer to the Complaint is deemed, for purposes of this proceeding, an admission of the allegations in the Complaint and constitutes a waiver of hearing (7 C.F.R. §§ 1.136(c), .139, .141(a)).

Accordingly, there are no issues of fact on which a meaningful hearing could be held in this proceeding. Application of the default provisions of the Rules of Practice does not deprive Respondents of rights under the due process clause of the Fifth Amendment to the Constitution of the United States.[14]

RESPONDENTS' RESPONSE TO COMPLAINANT'S APPEAL PETITION

Respondents state four bases for their opposition to Complainant's Appeal Petition. First, Respondents contend Complainant did not oppose Respondents' Motion for Extension of Time to File Answer (Respondents' Memo Contra Complainant's Appeal Pet. at 1-2).

Complainant's failure to file a response to Respondents' Motion for Extension of Time to File Answer is not a basis for granting a motion for an extension of time filed after the expiration of the time for filing the document which is the subject of the motion for extension of time. As stated in this Decision and Order, *supra*, motions for extensions of time filed after the deadline for filing the document for which the extension is

[14] *See United States v. Hulings*, 484 F. Supp. 562, 567-68 (D. Kan. 1980) (concluding a hearing was not required under the Fifth Amendment to the Constitution of the United States where the respondent was notified that failure to deny the allegations of the complaint would constitute an admission of those allegations under the Rules of Practice and the respondent failed to specifically deny the allegations). *See also Father & Sons Lumber and Building Supplies, Inc. v. NLRB*, 931 F.2d 1093, 1096 (6th Cir. 1991) (stating 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).

sought have been consistently rejected in proceedings conducted under the Rules of Practice.[15] Moreover, the record indicates that Complainant conveyed his opposition to Respondents' Motion for Extension of Time to File Answer to the Chief ALJ's secretary, who subsequently informed the Chief ALJ of Complainant's opposition (Order Granting Request for Extension of Time to File Answer at 1).

Second, Respondents contend the Rules of Practice should be construed liberally to permit the parties to plead their respective positions and not so strictly as to prevent a respondent from going to trial and making its defense on the merits. Respondents contend liberal construction is particularly appropriate where no prejudice to Complainant can be demonstrated. (Respondents' Memo Contra Complainant's Appeal Pet. at 2.)

Respondents are deemed, for purposes of this proceeding, to have admitted the allegations of the Complaint. Under these circumstances, there are no issues of fact on which a meaningful hearing could be held in this proceeding. Therefore, even if I found that Complainant would not be prejudiced by my remanding the proceeding to the Chief ALJ for a hearing, that finding would not constitute a basis for remanding the proceeding to the Chief ALJ for a hearing.[16]

Third, Respondents contend Complainant should not be permitted to raise issues that could have been raised in an opposition to Respondents'

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[15]See note 9.

[16]*See In re Heartland Kennels, Inc.*, 61 Agric. Dec. 492, 538-39 (2002) (stating, even if the complainant would not be prejudiced by remanding the proceeding to the chief administrative law judge for a hearing, that finding would not constitute a basis for setting aside the chief administrative law judge's decision and remanding the proceeding to the chief administrative law judge for a hearing); *In re Anna Mae Noell*, 58 Agric. Dec. 130, 146 (1999) (stating, even if the complainant would not be prejudiced by allowing the respondents to file a late answer, that finding would not constitute a basis for setting aside the default decision), *appeal dismissed sub nom. The Chimp Farm, Inc. v. United States Dep't of Agric.*, No. 00-10608-A (11th Cir. July 20, 2000); *In re Dean Byard*, 56 Agric. Dec. 1543, 1561-62 (1997) (rejecting the respondent's contention that the complainant must allege or prove prejudice to complainant's ability to present its case before an administrative law judge may issue a default decision; stating the Rules of Practice does not require, as a prerequisite to the issuance of a default decision, that a respondent's failure to file a timely answer has prejudiced the complainant's ability to present its case).

Motion for Extension of Time to File Answer (Respondents' Memo Contra Complainant's Appeal Pet. at 2-3).

It is well-settled that new arguments cannot be raised for the first time on appeal to the Judicial Officer.[17] However, Complainant appeals the Chief ALJ's February 9, 2005, Ruling Denying Motion for Adoption of Decision and Order, not the Chief ALJ's January 13, 2005, Order Granting Request for Extension of Time to File Answer, as Respondents

[17] *In re William J. Reinhart*, 60 Agric. Dec. 241, 257 (2001) (Order Denying William J. Reinhart's Pet. for Recons.); *In re Marysville Enterprises, Inc.* (Decision as to Marysville Enterprises, Inc., d/b/a Marysville Hog Buying Co., and James L. Breeding), 59 Agric. Dec. 299, 329 (2000); *In re Mary Meyers*, 58 Agric. Dec. 861, 866 (1999) (Order Denying Pet. for Recons.); *In re Anna Mae Noell*, 58 Agric. Dec. 855, 859-60 (1999) (Order Denying the Chimp Farm, Inc.'s Motion to Vacate); *In re Kreider Dairy Farms, Inc.*, 57 Agric. Dec. 413, 423-24 (1998) (Order Denying Pet. for Recons.); In *re Michael Norinsberg*, 57 Agric. Dec. 791, 795 (1998) (Order Denying Pet. for Recons.); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1911 (1997), *aff'd*, 178 F.3d 743 (5th Cir. 1999), *cert. denied*, 528 U.S. 1021 (1999); *In re David M. Zimmerman*, 56 Agric. Dec. 433, 473-74 (1997), *aff'd*, 156 F.3d 1227 (3d Cir. 1998) (Table), printed in 57 Agric. Dec. 46 (1998); *In re Barry Glick*, 55 Agric. Dec. 275, 282 (1996); *In re Jeremy Byrd*, 55 Agric. Dec. 443, 448 (1996); *In re Bama Tomato Co.*, 54 Agric. Dec. 1334, 1342 (1995), *aff'd*, 112 F.3d 1542 (11th Cir. 1997); *In re Stimson Lumber Co.*, 54 Agric. Dec. 155, 166 n.5 (1995); *In re Johnny E. Lewis*, 53 Agric. Dec. 1327, 1354-55 (1994), *aff'd in part, rev'd & remanded in part*, 73 F.3d 312 (11th Cir. 1996), *decision on remand*, 55 Agric. Dec. 246 (1996), *aff'd per curiam sub nom. Morrison v. Secretary of Agric.*, 111 F.3d 897 (11th Cir. 1997) (Table); *In re Craig Lesser*, 52 Agric. Dec. 155, 167 (1993), *aff'd*, 34 F.3d 1301 (7th Cir. 1994); *In re Rudolph J. Luscher*, 51 Agric. Dec. 1026, 1026 (1992); *In re Lloyd Myers Co.*, 51 Agric. Dec. 782, 783 (1992) (Order Denying Pet. for Recons.), *aff'd*, 15 F.3d 1086 (9th Cir. 1994), 1994 WL 20019 (9th Cir. 1994) (not to be cited as precedent under 9th Circuit Rule 36–3), *printed in* 53 Agric. Dec. 686 (1994); *In re Van Buren County Fruit Exchange, Inc.*, 51 Agric. Dec. 733, 740 (1992); *In re Conesus Milk Producers*, 48 Agric. Dec. 871, 880 (1989); *In re James W. Hickey*, 47 Agric. Dec. 840, 851 (1988), *aff'd*, 878 F.2d 385, 1989 WL 71462 (9th Cir. 1989) (not to be cited as precedent under 9th Circuit Rule 36–3), *printed in* 48 Agric. Dec. 107 (1989); *In re Dean Daul*, 45 Agric. Dec. 556, 565 (1986); *In re E. Digby Palmer*, 44 Agric. Dec. 248, 253 (1985); *In re Evans Potato Co.*, 42 Agric. Dec. 408, 409-10 (1983); *In re Richard "Dick" Robinson*, 42 Agric. Dec. 7 (1983), *aff'd*, 718 F.2d 336 (10th Cir. 1983); *In re Daniel M. Winger*, 38 Agric. Dec. 182, 187 (1979), *appeal dismissed*, No. 79-C-126 (W.D. Wis. June 1979); *In re Lamers Dairy, Inc.*, 36 Agric. Dec. 265, 289 (1977), *aff'd sub nom. Lamers Dairy, Inc. v. Bergland*, No. 77-C-173 (E.D. Wis. Sept. 28, 1977), *printed in* 36 Agric. Dec. 1642, *aff'd*, 607 F.2d 1007 (7th Cir. 1979), *cert. denied*, 444 U.S. 1077 (1980).

contend. Complainant raised the issue of Respondents' failure to file a timely answer in Complainant's Motion for Default Decision. Therefore, I reject Respondents' contention that Complainant raises new issues in Complainant's Appeal Petition.

Fourth, Respondents contend Complainant's argument concerning the timing of the death of Respondents' counsel's father, Mr. Herman Rogovin, is inappropriate, and, while in most circumstances Complainant's zeal would be admirable, Complainant's argument seems only vengeful in this instance (Respondents' Memo Contra Complainant's Appeal Pet. at 3-5).

Complainant argues Mr. Herman Rogovin's death on November 10, 2004, the last day Respondents' Answer could be filed, could not have caused Respondents' failure to file an answer during the previous 19 days. Complainant failed to consider Mr. Herman Rogovin's final illness, which occurred over several months just prior to his death (Respondents' Memo Contra Complainant's Appeal Pet. at 3).

Even if I were to find Complainant's argument inappropriate and vengeful, I would not affirm the Chief ALJ's denial of Complainant's Motion for Default Decision. The death of a parent is generally a very sad event, and I know from first-hand experience that the final illness of a parent can cause one to neglect duties other than those owed to the parent. Nonetheless, Respondents failed to file a timely motion for extension of time and failed to file a timely answer. Thus, Respondents are deemed, for purposes of this proceeding, to have admitted the allegations of the Complaint and waived opportunity for hearing. The final illness and subsequent death of Respondents' counsel's father, tragic though it is, does not constitute a meritorious basis for the Chief ALJ's denial of Complainant's Motion for Default Decision.[18]

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

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[18]Complainant states he sympathizes with Respondents' counsel and derives no pleasure from his appeal of the Chief ALJ's Ruling Denying Motion for Adoption of Decision and Order (Complainant's Appeal Pet. at 8). I trust Complainant is aware that, while section 1.139 of the Rules of Practice (7 C.F.R. § 1.139) provides that a denial of a motion for a default decision may be appealed to the Judicial Officer, parties are not obliged by the Rules of Practice to appeal every denial of a motion for a default decision.

ORDER

1. Respondents, their agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations.

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

2. Respondent Diana R. McCourt is assessed an $18,070 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the Treasurer of the United States and sent to:

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

Payment of the civil penalty shall be sent to, and received by, Colleen A. Carroll within 60 days after service of this Order on Respondent Diana R. McCourt. Respondent Diana R. McCourt shall state on the certified check or money order that payment is in reference to AWA Docket No. 05-0003.

3. Respondent Siberian Tiger Conservation Association is assessed a $16,420 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the Treasurer of the United States and sent to:

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

Payment of the civil penalty shall be sent to, and received by, Colleen A. Carroll within 60 days after service of this Order on Respondent Siberian Tiger Conservation Association. Respondent Siberian Tiger Conservation Association shall state on the certified check or money order that payment is in reference to AWA Docket No. 05-0003.

RIGHT TO JUDICIAL REVIEW

Respondents have the right to seek judicial review of this Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341, 2343-2350. Such court has exclusive jurisdiction to enjoin, to set aside, to suspend (in whole or in part), or to determine the validity of this Order. Respondents must seek judicial review within 60 days after entry of this Order.[19] The date of entry of this Order is March 29, 2005.

_____

[19]7 U.S.C. § 2149(c).

In re: BODIE S. KNAPP, AN INDIVIDUAL, d/b/a WAYNE'S WORLD SAFARI.
AWA Docket No. 04-0029.
Decision and Order.
Filed May 31, 2005.

AWA – Animal Welfare Act – Failure to file timely answer – Default decision – Pro se – Estoppel – Effective date of filing – Mailbox rule – Due process – Cease and desist order – License revocation.

The Judicial Officer affirmed the Default Decision by Chief Administrative Law Judge Marc R. Hillson (Chief ALJ) concluding Respondent committed 84 violations of the regulations and standards issued under the Animal Welfare Act during the period March 13, 2002, through March 13, 2004. The Judicial Officer stated Respondent is deemed, by his failure to file a timely answer, to have admitted the allegations of the Complaint (7 C.F.R. § 1.136(c)). The Judicial Officer held Respondent's appearance pro se, Respondent's belief that filing was effective on the date of mailing, Respondent's unsuccessful attempts to contact Complainant's counsel and a United States Department of Agriculture inspector, and Respondent's purported receipt of erroneous information did not constitute good cause to set aside the Chief ALJ's Default Decision. The Judicial Officer issued a cease and desist order and revoked Respondent's Animal Welfare Act license.

Colleen A. Carroll, for Complainant.
Phillip Westergren, Corpus Christi, Texas, for Respondent.
Initial Decision by Chief Administrative Law Judge Marc R. Hillson.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on August 31, 2004. Complainant instituted the proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations and Standards]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary

Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges that on March 13, 2002, September 5, 2002, January 9, 2003, April 11, 2003, September 5, 2003, December 18, 2003, March 11, 2004, March 13, 2004, and March 11, 2005, Bodie S. Knapp, d/b/a Wayne's World Safari [hereinafter Respondent], willfully violated the Regulations and Standards (Compl. ¶¶ 3-9).

The Hearing Clerk served Respondent with the Complaint, the Rules of Practice, and a service letter on September 4, 2004.[1] Respondent failed to file an answer to the Complaint within 20 days after service, as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)), and on October 6, 2004, the Hearing Clerk sent Respondent a letter informing him that he had not filed an answer to the Complaint in accordance with section 1.136 of the Rules of Practice (7 C.F.R. § 1.136).

On October 19, 2004, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for Adoption of Proposed Decision and Order [hereinafter Motion for Default Decision] and a proposed Decision and Order By Reason of Admission of Facts [hereinafter Proposed Default Decision]. The Hearing Clerk served Respondent with Complainant's Motion for Default Decision, Complainant's Proposed Default Decision, and a service letter on October 25, 2004.[2] Respondent was required by section 1.139 of the Rules of Practice (7 C.F.R. § 1.139) to file objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision within 20 days after service. On November 8, 2004, Respondent requested an extension of time within which to file objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision. On November 9, 2004, Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] extended the time for Respondent's filing objections to

[1]United States Postal Service Domestic Return Receipt for Article Number 7003 2260 0005 5721 4592.

[2]United States Postal Service Domestic Return Receipt for Article Number 7099 3400 0014 4584 7342.

Complainant's Motion for Default Decision and Complainant's Proposed Default Decision to November 19, 2004.[3] Respondent filed objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision on November 22, 2004.

On January 4, 2005, the Chief ALJ issued a Decision and Order By Reason of Admission of Facts [hereinafter Initial Decision]: (1) concluding Respondent willfully violated the Regulations and Standards as alleged in the Complaint; (2) directing Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; and (3) revoking Respondent's Animal Welfare Act license (Initial Decision at 21-23).

On March 11, 2005, Respondent filed a motion for leave to file an affidavit and appealed to, and requested oral argument before, the Judicial Officer. On March 30, 2005, Complainant filed Complainant's Response to Respondent's Appeal Petition, Request for Oral Argument, and Motion for Leave to File Affidavit. On May 18, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful review of the record, I agree with the Chief ALJ's January 4, 2005, Initial Decision. 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 Chief ALJ's Initial Decision as the final Decision and Order. Additional conclusions and rulings by the Judicial Officer follow the Chief ALJ's conclusions of law, as restated.

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

[3]Order Extending Time to File Objections to Proposed Decision and Order.

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

§ 2131. Congressional statement of policy

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

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

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

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

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

§ 2132. Definitions

When used in this chapter—

. . . .

(f) The term "dealer" means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of, (1) any dog or other animal whether alive or

dead for research, teaching, exhibition, or use as a pet, or (2) any dog for hunting, security, or breeding purposes, except that this term does not include—

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

(ii) any person who does not sell, or negotiate the purchase or sale of any wild animal, dog, or cat, and who derives no more than $500 gross income from the sale of other animals during any calendar year[.]

. . . .

(h) The term "exhibitor" means any person (public or private) exhibiting any animals, which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary, and such term includes carnivals, circuses, and zoos exhibiting such animals whether operated for profit or not; but such term excludes retail pet stores, organizations sponsoring and all persons participating in State and country fairs, livestock shows, rodeos, purebred dog and cat shows, and any other fairs or exhibitions intended to advance agricultural arts and sciences, as may be determined by the Secretary[.]

§ 2149. Violations by licensees

(a) Temporary license suspension; notice and hearing; revocation

If the Secretary has reason to believe that any person licensed as a dealer, exhibitor, or operator of an auction sale subject to section 2142 of this title, has violated or is violating any provision of this chapter, or any of the rules or regulations or standards promulgated by the Secretary hereunder, he may suspend such person's license temporarily, but not to exceed 21 days, and after notice and opportunity for hearing, may suspend for such additional period as he may specify, or revoke such license, if such violation is determined to have occurred.

(b) Civil penalties for violation of any section, etc.; separate offenses; notice and hearing; appeal; considerations in assessing penalty; compromise of penalty; civil action by Attorney General for failure to pay penalty; district court jurisdiction; failure to obey cease and desist order

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, that violates any provision of this chapter, or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than $2,500 for each such violation, and the Secretary may also make an order that such person shall cease and desist from continuing such violation. Each violation and each day during which a violation continues shall be a separate offense. No penalty shall be assessed or cease and desist order issued unless such person is given notice and opportunity for a hearing with respect to the alleged violation, and the order of the Secretary assessing a penalty and making a cease and desist order shall be final and conclusive unless the affected person files an appeal from the Secretary's order with the appropriate United States Court of Appeals. The Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations. Any such civil penalty may be compromised by the Secretary. Upon any failure to pay the penalty assessed by a final order under this section, the Secretary shall request the Attorney General to institute a civil action in a district court of the United States or other United States court for any district in which such person is found or resides or transacts business, to collect the penalty, and such court shall have jurisdiction to hear and decide any such action. Any person who knowingly fails to obey a cease and desist order made by the Secretary under this section shall be subject to a civil penalty of $1,500 for each offense, and each day during which such failure continues shall be deemed a separate

offense.

(c) Appeal of final order by aggrieved person; limitations; exclusive jurisdiction of United States Courts of Appeals

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, aggrieved by a final order of the Secretary issued pursuant to this section may, within 60 days after entry of such an order, seek review of such order in the appropriate United States Court of Appeals in accordance with the provisions of sections 2341, 2343 through 2350 of title 28, and such court shall have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of the Secretary's order.

§ 2151. Rules and regulations

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

7 U.S.C. §§ 2131, 2132(f), (h), 2149(a)-(c), 2151.

28 U.S.C.:

TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE

. . . .

PART VI—PARTICULAR PROCEEDINGS

. . . .

CHAPTER 163—FINES, PENALTIES AND FORFEITURES

§ 2461. Mode of recovery

. . . .

FEDERAL CIVIL PENALTIES INFLATION ADJUSTMENT

SHORT TITLE

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

FINDINGS AND PURPOSE

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

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

(2) the impact of many civil monetary penalties has been and is diminished due to the effect of inflation;

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

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

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

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

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

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

DEFINITIONS

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

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

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

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

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

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

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

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

CIVIL MONETARY PENALTY INFLATION ADJUSTMENT REPORTS

SEC. 4. The head of each agency shall, not later than 180 days after the date of enactment of the Debt Collection Improvement Act of 1996 [Apr. 26, 1996], and at least once every 4 years thereafter–

(1) by regulation adjust each civil monetary penalty provided by law within the jurisdiction of the Federal agency, except for any penalty (including any addition to tax and additional amount) under the Internal Revenue Code of 1986 [26 U.S.C. 1 *et seq*.], the Tariff Act of 1930 [19 U.S.C. 1202 *et seq*.], the Occupational Safety and Health Act of 1970 [29 U.S.C. 651 *et seq*.], or the Social Security Act [42 U.S.C. 301 *et seq*.], by the inflation adjustment described under section 5 of this Act; and

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

COST-OF-LIVING ADJUSTMENTS OF CIVIL MONETARY PENALTIES

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

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

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

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

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

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

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

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

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

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

ANNUAL REPORT

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

LIMITATION ON INITIAL ADJUSTMENT.–The first adjustment of

a civil monetary penalty . . . may not exceed 10 percent of such penalty.

28 U.S.C. § 2461 (note).

7 C.F.R.:

TITLE 7—AGRICULTURE

SUBTITLE A—OFFICE OF THE SECRETARY OF AGRICULTURE

. . . .

PART 3—DEBT MANAGEMENT

. . . .

SUBPART E—ADJUSTED CIVIL MONETARY PENALTIES

§ 3.91 Adjusted civil monetary penalties.

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

(b) *Penalties—*. . . .

. . . .

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

. . . .

(v) Civil penalty for a violation of Animal Welfare Act, codified at 7 U.S.C. 2149(b), has a maximum of $2,750; and knowing failure to obey a cease and desist order has a civil penalty of $1,650.

7 C.F.R. § 3.91(a), (b)(2)(v).

9 C.F.R.:

TITLE 9—ANIMALS AND ANIMAL PRODUCTS

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

SUBCHAPTER A—ANIMAL WELFARE

PART 1—DEFINITION OF TERMS

§ 1.1 Definitions.

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

. . . .

Dealer means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of: Any dog or other animal whether alive or dead (including unborn animals, organs, limbs, blood, serum, or other parts) for research, teaching, testing, experimentation, exhibition, or for use as a pet; or any dog at the wholesale level for hunting, security, or breeding purposes. This term does not include: A retail pet store, as defined in this section, unless such store sells any animal to a research facility, an exhibitor, or a dealer (wholesale); any retail outlet where dogs are sold for hunting, breeding, or security purposes; or any person who does not sell or negotiate the

purchase or sale of any wild or exotic animal, dog, or cat and who derives no more than $500 gross income from the sale of animals other than wild or exotic animals, dogs, or cats during any calendar year.

. . . .

Exhibitor means any person (public or private) exhibiting any animals, which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary. This term includes carnivals, circuses, animal acts, zoos, and educational exhibits, exhibiting such animals whether operated for profit or not. This term excludes retail pet stores, horse and dog races, organizations sponsoring and all persons participating in State and county fairs, livestock shows, rodeos, field trials, coursing events, purebred dog and cat shows and any other fairs or exhibitions intended to advance agricultural arts and sciences as may be determined by the Secretary.

PART 2—REGULATIONS

SUBPART D–ATTENDING VETERINARIAN AND ADEQUATE VETERINARY CARE

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

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

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

(2) Each dealer and exhibitor shall assure that the attending

veterinarian has appropriate authority to ensure the provision of adequate veterinary care and to oversee the adequacy of other aspects of animal care and use.

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

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

. . . .

SUBPART H–COMPLIANCE WITH STANDARDS AND HOLDING PERIOD

§ 2.100 Compliance with standards.

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

. . . .

SUBPART I–MISCELLANEOUS

. . . .

§ 2.131 Handling of animals.

. . . .

(b)(1) During public exhibition, any animal must be handled so there is minimal risk of harm to the animal and to the public, with sufficient distance and/or barriers between the animal and the general viewing public so as to assure the safety of animals and the public.

. . . .

(c) . . . .

(2) A responsible, knowledgeable, and readily identifiable employee or attendant must be present at all times during periods of public contact.

. . . .

PART 3—STANDARDS

. . . .

SUBPART D—SPECIFICATIONS FOR THE HUMANE HANDLING, CARE, TREATMENT, AND TRANSPORTATION OF NONHUMAN PRIMATES

FACILITIES AND OPERATING STANDARDS

§ 3.75 Housing facilities, general.

. . . .

(c) *Surfaces*–(1) *General requirements*. The surfaces of housing facilities–including perches, shelves, swings, boxes, houses, dens, and other furniture-type fixtures or objects within the facility–must be constructed in a manner and made of materials that allow them to be readily cleaned and sanitized, or removed or replaced when worn or soiled. Furniture-type fixtures or objects must be sturdily constructed and must be strong enough to provide for the safe activity and welfare of nonhuman primates. Floors may be made of dirt, absorbent bedding, sand, gravel, grass, or other similar material that can be readily cleaned, or can be removed or replaced whenever cleaning does not eliminate odors, diseases, pests, insects, or vermin. Any surfaces that come in contact with nonhuman primates must:

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

. . . .

ANIMAL HEALTH AND HUSBANDRY STANDARDS

. . . .

§ 3.83 Watering.

Potable water must be provided in sufficient quantity to every nonhuman primate housed at the facility. If potable water is not continually available to the nonhuman primates, it must be offered to them as often as necessary to ensure their health and well-being, but no less than twice daily for at least l hour each time, unless otherwise required by the attending veterinarian, or as required by the research proposal approved by the Committee at research facilities. Water receptacles must be kept clean and sanitized in accordance with methods provided in § 3.84(b)(3) of this subpart at least once every 2 weeks or as often as necessary to keep them clean and free from contamination. Used water receptacles must be sanitized before they can be used to provide water to a different nonhuman primate or social grouping of nonhuman primates.

§ 3.84 Cleaning, sanitization, housekeeping, and pest control.

(a) *Cleaning of primary enclosures*. Excreta and food waste must be removed from inside each indoor primary enclosure daily and from underneath them as often as necessary to prevent an excessive accumulation of feces and food waste, to prevent the nonhuman primates from becoming soiled, and to reduce disease hazards, insects, pests, and odors. Dirt floors, floors with absorbent bedding, and planted areas in primary enclosures must be spot-cleaned with sufficient frequency to ensure all animals the freedom to avoid contact with excreta, or as often as necessary to reduce disease hazards, insects, pests, and odors. When steam or water is used to clean the primary enclosure, whether by hosing, flushing, or other methods, nonhuman primates must be removed, unless the enclosure is large enough to ensure the animals will not

be harmed, wetted, or distressed in the process. Perches, bars, and shelves must be kept clean and replaced when worn. If the species of the nonhuman primates housed in the primary enclosure engages in scent marking, hard surfaces in the primary enclosure must be spot-cleaned daily.

. . . .

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

FACILITIES AND OPERATING STANDARDS

§ 3.125 Facilities, general.

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

. . . .

(c) *Storage*. Supplies of food and bedding shall be stored in facilities which adequately protect such supplies against deterioration, molding, or contamination by vermin. Refrigeration shall be provided for supplies of perishable food.

. . . .

§ 3.127 Facilities, outdoor.

(a) *Shelter from sunlight*. When sunlight is likely to cause overheating or discomfort of the animals, sufficient shade by natural or artificial means shall be provided to allow all animals kept outdoors to protect themselves from direct sunlight.

(b) *Shelter from inclement weather*. Natural or artificial

shelter appropriate to the local climatic conditions for the species concerned shall be provided for all animals kept outdoors to afford them protection and to prevent discomfort to such animals. Individual animals shall be acclimated before they are exposed to the extremes of the individual climate.

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

. . . .

ANIMAL HEALTH AND HUSBANDRY STANDARDS

§ 3.129 Feeding.

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

. . . .

§ 3.131 Sanitation.

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

9 C.F.R. §§ 1.1; 2.40(a), (b)(1), .100(a), .131(b)(1), (c)(2); 3.75(c)(1)(i),

.83, .84(a), .125(a), (c), .127(a)-(c), .129(a), .131(a) (2004).

THE CHIEF ALJ'S INITIAL DECISION (AS RESTATED)

Statement of the Case

Respondent failed to file an answer to the Complaint 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 the failure to file an answer within the time provided in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) shall be deemed, for purposes of the proceeding, an admission of the allegations in the complaint. Further, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the failure to file an answer or the admission by the answer of all the material allegations of fact contained in the complaint, constitutes a waiver of hearing. Accordingly, the material allegations in the Complaint are adopted as findings of fact. This Decision and Order is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent is an individual doing business as "Wayne's World Safari" and whose address is 11212 Highway 359, Mathis, Texas 78368. At all times material to this proceeding, Respondent operated as a dealer and as an exhibitor, as those terms are defined in the Regulations and Standards, and held Animal Welfare Act license number 74-C-0533.

2. Respondent exhibits approximately 200 wild and exotic animals to the public. Respondent's exhibition business is significant. Respondent has many customers each year and also solicits and accepts donations from the public. The gravity of Respondent's violations is great and the violations involve willful, deliberate violations of the handling and veterinary care regulations and repeated failures to comply with the facilities standards. The violations themselves demonstrate a lack of good faith on the part of Respondent. Respondent has also

exhibited bad faith by lying to Animal and Plant Health Inspection Service officials about the circumstances surrounding the death of two adult tigers in December 2003. Specifically, Respondent informed Animal and Plant Health Inspection Service officials that the animals died in a fight, when in fact both animals had died at the hand of Respondent. Respondent is a respondent in another enforcement proceeding under the Animal Welfare Act: *In re Corpus Christi Zoological Association*, AWA Docket No. 04-0015.

3. On or about the following dates, Respondent willfully violated the veterinary care regulations (9 C.F.R. § 2.40), as follows:

a. On March 13, 2002, Respondent failed to have an attending veterinarian provide adequate veterinary care to animals as required. Specifically, Respondent failed to have an attending veterinarian provide care to a porcupine (Scarface) that needed veterinary medical attention for her left eye. (9 C.F.R. § 2.40(a).)

b. On September 5, 2003, Respondent failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate facilities and equipment to comply with the provisions of the Regulations and Standards. Specifically, Respondent lacked facilities to prevent the escape of the brown bears. (9 C.F.R. § 2.40(b)(1).)

4. On or about the following dates, Respondent willfully violated section 2.131 of the Regulations and Standards (9 C.F.R. § 2.131), as follows:

a. On March 13, 2002, Respondent failed to handle a rhinoceros during public exhibition so there was minimal risk of harm to the animal and to the public, with sufficient distance and/or barriers between the rhinoceros and the general viewing public so as to assure the safety of the animal and the public. Specifically, there was no barrier between the rhinoceros and the public. (9 C.F.R. § 2.131(b)(1).)

b. On March 13, 2002, Respondent failed to have a responsible, knowledgeable, and readily-identifiable employee or attendant present during periods of public contact with animals. Specifically, Respondent had no employee or attendant present at Respondent's petting zoo, when customers were allowed to be in contact with

animals. (9 C.F.R. § 2.131(c)(2).)

c. On January 9, 2003, Respondent failed to handle a rhinoceros during public exhibition so there was minimal risk of harm to the animal and to the public, with sufficient distance and/or barriers between the rhinoceros and the general viewing public so as to assure the safety of the animal and the public. Specifically, the barrier at the gate at the front of Respondent's rhinoceros exhibit was only 18 inches high and was constructed of cattle paneling. (9 C.F.R. § 2.131(b)(1).)

d. On April 11, 2003, Respondent failed to handle a giraffe during public exhibition so there was minimal risk of harm to the animal and to the public, with sufficient distance and/or barriers between the giraffe and the general viewing public so as to assure the safety of the animal and the public. Specifically, the public barrier was bowed, broken, sagging, and generally structurally compromised. (9 C.F.R. § 2.131(b)(1).)

e. On April 11, 2003, Respondent failed to have a responsible, knowledgeable, and readily-identifiable employee or attendant present during periods of public contact with animals. Specifically, Respondent had no employee or attendant present at Respondent's petting zoo, when customers were allowed to be in contact with animals. (9 C.F.R. § 2.131(c)(2).)

f. On September 5, 2003, Respondent failed to handle a giraffe during public exhibition so there was minimal risk of harm to the animal and to the public, with sufficient distance and/or barriers between the giraffe and the general viewing public so as to assure the safety of the animals and the public. Specifically, the public barrier was bowed, broken, sagging, and generally structurally compromised. (9 C.F.R. § 2.131(b)(1).)

g. On September 5, 2003, Respondent failed to have a responsible, knowledgeable, and readily-identifiable employee or attendant present during periods of public contact with animals. Specifically, Respondent had no employee or attendant present at Respondent's petting zoo, when customers were allowed to be in contact with animals. (9 C.F.R. § 2.131(c)(2).)

h. On March 11, 2004, Respondent failed to have a responsible,

knowledgeable, and readily-identifiable employee or attendant present during periods of public contact with animals. Specifically, Respondent had no employee or attendant present at Respondent's petting zoo, when customers were allowed to be in contact with animals. (9 C.F.R. § 2.131(c)(2).)

i. On March 11, 2004, Respondent failed to handle a giraffe during public exhibition so there was minimal risk of harm to the animal and to the public, with sufficient distance and/or barriers between the giraffe and the general viewing public so as to assure the safety of the animals and the public. Specifically, the public barrier was bowed, broken, sagging, and generally structurally compromised. (9 C.F.R. § 2.131(b)(1).)

5. On or about the following dates, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum standards for nonhuman primates (9 C.F.R. §§ 3.75-.92), as follows:

a. On March 13, 2002, Respondent failed to provide sufficient water to nonhuman primates continually or as often as necessary for the health and comfort of the animals. Specifically, Respondent provided no drinking water to the spider monkeys. (9 C.F.R. § 3.83.)

b. On September 5, 2002, Respondent failed to remove excreta from primary enclosures daily. Specifically, there was a build-up of excreta in the muntjac and spot-nosed monkey enclosure. (9 C.F.R. § 3.84(a).)

c. On January 9, 2003, Respondent failed to remove excreta from primary enclosures daily. Specifically, there was a build-up of excreta in the muntjac and spot-nosed monkey enclosure. (9 C.F.R. § 3.84(a).)

d. On April 11, 2003, Respondent failed to ensure that surfaces of housing facilities that come into contact with nonhuman primates are free of excessive rust that prevents the required cleaning and sanitization or affects the structural strength of the surface. Specifically, Respondent's primate barn contained numerous rusty surfaces that prevented cleaning and sanitization. (9 C.F.R. § 3.75(c)(1)(i).)

e. On April 11, 2003, Respondent failed to ensure that surfaces

of housing facilities that come into contact with nonhuman primates are free of excessive rust that prevents the required cleaning and sanitization or affects the structural strength of the surface. Specifically, the supports and framework of the doors and lock-out area of Respondent's baboon enclosure were excessively rusted and structurally compromised. (9 C.F.R. § 3.75(c)(1)(i).)

f. On September 5, 2003, Respondent failed to ensure that surfaces of housing facilities that come into contact with nonhuman primates are free of excessive rust that prevents the required cleaning and sanitization or affects the structural strength of the surface. Specifically, Respondent's primate barn contained numerous rusty surfaces that prevented cleaning and sanitization. (9 C.F.R. § 3.75(c)(1)(i).)

g. On September 5, 2003, Respondent failed to ensure that surfaces of housing facilities that come into contact with nonhuman primates are free of excessive rust that prevents the required cleaning and sanitization or affects the structural strength of the surface. Specifically, the supports and framework of the doors and lock-out area of Respondent's baboon enclosure were excessively rusted and structurally compromised. (9 C.F.R. § 3.75(c)(1)(i).)

h. On December 18, 2003, Respondent failed to ensure that surfaces of housing facilities that come into contact with nonhuman primates are free of excessive rust that prevents the required cleaning and sanitization or affects the structural strength of the surface. Specifically, Respondent's primate barn contained numerous rusty surfaces that prevented cleaning and sanitization. (9 C.F.R. § 3.75(c)(1)(i).)

i. On December 18, 2003, Respondent failed to ensure that surfaces of housing facilities that come into contact with nonhuman primates are free of excessive rust that prevents the required cleaning and sanitization or affects the structural strength of the surface. Specifically, the supports and framework of the doors and lock-out area of Respondent's baboon enclosure were excessively rusted and structurally compromised. (9 C.F.R. § 3.75(c)(1)(i).)

j. On March 11, 2004, Respondent failed to ensure that surfaces of housing facilities that come into contact with nonhuman primates

are free of excessive rust that prevents the required cleaning and sanitization or affects the structural strength of the surface. Specifically, Respondent's primate barn contained numerous rusty surfaces that prevented cleaning and sanitization. (9 C.F.R. § 3.75(c)(1)(i).)

k. On March 11, 2004, Respondent failed to ensure that surfaces of housing facilities that come into contact with nonhuman primates are free of excessive rust that prevents the required cleaning and sanitization or affects the structural strength of the surface. Specifically, Respondent's primate barn contained numerous rusty surfaces that prevented cleaning and sanitization. (9 C.F.R. § 3.75(c)(1)(i).)

6. On or about the following dates, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum requirements for facilities in section 3.125 of the Regulations and Standards (9 C.F.R. § 3.125), as follows:

a. On March 13, 2002, Respondent failed to store supplies of food in facilities that adequately protect the food supplies against deterioration, molding, or contamination by vermin. Specifically, Respondent stored meat in a freezer without any wrapping, leaving it susceptible to freezer burn. (9 C.F.R. § 3.125(c).)

b. On September 5, 2002, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury. Specifically, Respondent's coatimundi enclosure had wires protruding from the concrete base, which wires posed a danger to the animals housed inside. (9 C.F.R. § 3.125(a).)

c. On January 9, 2003, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, the doors of Respondent's bear enclosure were rusted and structurally compromised. (9 C.F.R. § 3.125(a).)

d. On January 9, 2003, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, the doors of Respondent's shelter box for lions were

rusted and structurally compromised. (9 C.F.R. § 3.125(a).)

e. On January 9, 2003, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, the doors of Respondent's shelter box for tigers were rusted and structurally compromised. (9 C.F.R. § 3.125(a).)

f. On January 9, 2003, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, the doors of Respondent's shelter box for lions were rusted and structurally compromised. (9 C.F.R. § 3.125(a).)

g. On January 9, 2003, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, one side of the giraffe barn had been kicked loose and its metal portions structurally compromised. (9 C.F.R. § 3.125(a).)

h. On April 11, 2003, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, one side of the caracal enclosure was badly rusted, had holes, and was structurally compromised. (9 C.F.R. § 3.125(a).)

i. On April 11, 2003, Respondent failed to store supplies of food in facilities that adequately protect the food supplies against deterioration, molding, or contamination by vermin. Specifically, Respondent stored animal food with chemicals, gasoline, oil, and pesticides. (9 C.F.R. § 3.125(c).)

j. On September 5, 2003, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, the front fence of the brown bear enclosure was not secure and was structurally compromised to the extent that the male bear could lift up the fence and could easily escape. (9 C.F.R. § 3.125(a).)

k. On September 5, 2003, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them.

Specifically, the doors and door frame of the lion enclosure were badly rusted and their structural strength compromised to the extent that the animals could escape or be injured. (9 C.F.R. § 3.125(a).)

l. On September 5, 2003, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, the doors and door frame of the tiger enclosure were badly rusted and their structural strength compromised to the extent that the animals could escape or be injured. (9 C.F.R. § 3.125(a).)

m. On September 5, 2003, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, the doors and door frame of the white tiger enclosure were badly rusted and their structural strength compromised to the extent that the animals could escape or be injured. (9 C.F.R. § 3.125(a).)

n. On September 5, 2003, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, the doors and door frame of the other tiger enclosure were badly rusted and their structural strength compromised to the extent that the animals could escape or be injured. (9 C.F.R. § 3.125(a).)

o. On September 5, 2003, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, the doors and door frame of the leopard enclosure were badly rusted and their structural strength compromised to the extent that the animals could escape or be injured. (9 C.F.R. § 3.125(a).)

p. On September 5, 2003, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, the doors and door frame of the jaguar enclosure were badly rusted and their structural strength compromised to the extent that the animals could escape or be injured. (9 C.F.R. § 3.125(a).)

q. On September 5, 2003, Respondent failed to ensure that his

housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, the wood of the back wall of the bobcat enclosure was badly rotted and had fallen off the wall. (9 C.F.R. § 3.125(a).)

r. On September 5, 2003, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, there was a hole in the fence that divides the leopard enclosure from the jaguar enclosure, which could allow the animals to be injured or to escape. (9 C.F.R. § 3.125(a).)

s. On September 5, 2003, Respondent failed to store supplies of food in facilities that adequately protect the food supplies against deterioration, molding, or contamination by vermin. Specifically, Respondent stored food in a filthy freezer that had blood and food residue on the walls and floor. (9 C.F.R. § 3.125(c).)

t. On September 5, 2003, Respondent failed to store supplies of food in facilities that adequately protect the food supplies against deterioration, molding, or contamination by vermin. Specifically, Respondent stored food in a chest freezer with a door that was broken and allowed warm air to enter. (9 C.F.R. § 3.125(c).)

u. On December 18, 2003, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, the doors and door frame of the lion enclosure were badly rusted and their structural strength compromised to the extent that the animals could escape or be injured. (9 C.F.R. § 3.125(a).)

v. On December 18, 2003, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, the doors and door frame of the tiger enclosure were badly rusted and their structural strength compromised to the extent that the animals could escape or be injured. (9 C.F.R. § 3.125(a).)

w. On December 18, 2003, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, the doors and door frame of the white tiger enclosure

were badly rusted and their structural strength compromised to the extent that the animals could escape or be injured. (9 C.F.R. § 3.125(a).)

x. On December 18, 2003, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, the doors and door frame of the other tiger enclosure were badly rusted and their structural strength compromised to the extent that the animals could escape or be injured. (9 C.F.R. § 3.125(a).)

y. On December 18, 2003, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, the doors and door frame of the leopard enclosure were badly rusted and their structural strength compromised to the extent that the animals could escape or be injured. (9 C.F.R. § 3.125(a).)

z. On December 18, 2003, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, the doors and door frame of the jaguar enclosure were badly rusted and their structural strength compromised to the extent that the animals could escape or be injured. (9 C.F.R. § 3.125(a).)

aa. On December 18, 2003, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, the back wall of the serval enclosure was badly rusted and its structural strength compromised to the extent that the animals could escape or be injured. (9 C.F.R. § 3.125(a).)

bb. On March 11, 2004, Respondent failed to store supplies of food in facilities that adequately protect the food supplies against deterioration, molding, or contamination by vermin. Specifically, Respondent stored animal food with chemicals, gasoline, oil, and pesticides. (9 C.F.R. § 3.125(c).)

cc. On March 11, 2004, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them.

Specifically, the back wall of the caracal enclosure was badly rusted and its structural strength compromised to the extent that the animals could escape or be injured. (9 C.F.R. § 3.125(a).)

dd. On March 11, 2004, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, the front fence of the brown bear enclosure was not secure and its structural strength compromised to the extent that the male bear could lift up the fence and could easily escape. (9 C.F.R. § 3.125(a).)

ee. On March 11, 2004, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, the doors and door frame of the lion enclosure were badly rusted and their structural strength compromised to the extent that the animals could escape or be injured. (9 C.F.R. § 3.125(a).)

ff. On March 11, 2004, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, the wood of the back wall of the bobcat enclosure was badly rotted and had fallen off the wall. (9 C.F.R. § 3.125(a).)

gg. On March 11, 2004, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, there was a hole in the fence that divides the leopard enclosure from the jaguar enclosure, which could allow the animals to be injured or to escape. (9 C.F.R. § 3.125(a).)

hh. On March 13, 2004, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, the doors and door frame of the lion enclosure were badly rusted and their structural strength compromised to the extent that the animals could escape or be injured. (9 C.F.R. § 3.125(a).)

ii. On March 13, 2004, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them.

Specifically, the back wall of the serval enclosure was badly rusted and its structural strength compromised to the extent that the animals could escape or be injured. (9 C.F.R. § 3.125(a).)

jj. On March 13, 2004, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, the doors and door frame of the leopard enclosure were badly rusted and their structural strength compromised to the extent that the animals could escape or be injured. (9 C.F.R. § 3.125(a).)

kk. On March 13, 2004, Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them. Specifically, the doors and door frame of the jaguar enclosure were badly rusted and their structural strength compromised to the extent that the animals could escape or be injured. (9 C.F.R. § 3.125(a).)

7. On or about the following dates, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum requirements for outdoor facilities in section 3.127 of the Regulations and Standards (9 C.F.R. § 3.127), as follows:

a. On March 13, 2002, Respondent failed to provide animals housed outdoors with sufficient shade by natural or artificial means to allow the animals protection from direct sunlight. Specifically, Respondent housed Patagonian cavies in an enclosure that did not allow the animals to protect themselves from direct sunlight. (9 C.F.R. § 3.127(a).)

b. On March 13, 2002, Respondent failed to provide animals housed outdoors with sufficient shade by natural or artificial means to allow the animals protection from direct sunlight. Specifically, Respondent housed reindeer in an enclosure that did not allow the animals to protect themselves from direct sunlight. (9 C.F.R. § 3.127(a).)

c. On September 5, 2002, Respondent failed to provide animals housed outdoors with sufficient shade by natural or artificial means to allow the animals protection from direct sunlight. Specifically, Respondent housed bears in an enclosure that did not allow the

animals to protect themselves from direct sunlight. (9 C.F.R. § 3.127(a).)

d. On April 11, 2003, Respondent failed to provide animals housed outdoors with natural or artificial shelter to afford them protection and to prevent discomfort. Specifically, Respondent housed an adult male caracal in an enclosure with a single shelter that could not accommodate him and had no floor. (9 C.F.R. § 3.127(b).)

e. On September 5, 2003, Respondent failed to provide animals housed outdoors with natural or artificial shelter to afford them protection and to prevent discomfort. Specifically, Respondent housed five African crested porcupines in an enclosure with two doghouse shelters that could not accommodate all of the animals. (9 C.F.R. § 3.127(b).)

f. On September 5, 2003, Respondent failed to provide animals housed outdoors with sufficient shade by natural or artificial means to allow the animals protection from direct sunlight. Specifically, Respondent housed five African crested porcupines in an enclosure that did not allow the animals to protect themselves from direct sunlight. (9 C.F.R. § 3.127(a).)

g. On September 5, 2003, Respondent failed to provide animals housed outdoors with natural or artificial shelter to afford them protection and to prevent discomfort. Specifically, Respondent housed a sable, an eland, a fallow deer, and a bongo in an enclosure with a single shelter that did not protect all of the animals from mud. (9 C.F.R. § 3.127(b).)

h. On September 5, 2003, Respondent failed to provide a suitable method to rapidly eliminate excess water for animals housed outdoors. Specifically, Respondent housed a sable, an eland, a fallow deer, and a bongo in an enclosure where the animals were required to stand in mud up to their knees. (9 C.F.R. § 3.127(c).)

i. On March 11, 2004, Respondent failed to provide animals housed outdoors with sufficient shade by natural or artificial means to allow the animals protection from direct sunlight. Specifically, Respondent housed five African crested porcupines in an enclosure that did not allow the animals to protect themselves from direct sunlight. (9 C.F.R. § 3.127(a).)

8. On or about the following dates, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum requirements for feeding in section 3.129 of the Regulations and Standards (9 C.F.R. § 3.129), as follows:

a. On March 13, 2002, Respondent failed to provide food to animals that was wholesome, palatable, and free from contamination. Specifically, Respondent offered animals meat that had been stored in a freezer without any wrapping, leaving it susceptible to freezer burn. (9 C.F.R. § 3.129(a).)

b. On April 11, 2003, Respondent failed to provide food to animals that was wholesome, palatable, and free from contamination. Specifically, Respondent offered animals food that had been stored with, and susceptible to contamination by, chemicals, gasoline, oil, and pesticides. (9 C.F.R. § 3.129(a).)

c. On September 5, 2003, Respondent failed to provide food to animals that was wholesome, palatable, and free from contamination. Specifically, fruit intended to be offered to animals had been thawed and re-frozen into a large block. (9 C.F.R. § 3.129(a).)

d. On March 11, 2004, Respondent failed to provide food to animals that was wholesome, palatable, and free from contamination. Specifically, Respondent offered animals food that had been stored with, and susceptible to contamination by, chemicals, gasoline, oil, and pesticides. (9 C.F.R. § 3.129(a).)

9. On or about the following dates, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum requirements for sanitation in section 3.131 of the Regulations and Standards (9 C.F.R. § 3.131), as follows:

a. On September 5, 2002, Respondent failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals in the primary enclosures, to minimize disease hazards, and to reduce odors. Specifically, there was a build-up of excreta in the Patagonian cavy enclosure. (9 C.F.R. § 3.131(a).)

b. On September 5, 2002, Respondent failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals in the primary enclosures, to minimize

disease hazards, and to reduce odors. Specifically, there was a build-up of excreta in the civit enclosure. (9 C.F.R. § 3.131(a).)

c. On September 5, 2002, Respondent failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals in the primary enclosures, to minimize disease hazards, and to reduce odors. Specifically, there was a build-up of excreta in the rhinoceros enclosure. (9 C.F.R. § 3.131(a).)

d. On January 9, 2003, Respondent failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals in the primary enclosures, to minimize disease hazards, and to reduce odors. Specifically, there was a build-up of excreta in the capybara enclosure. (9 C.F.R. § 3.131(a).)

e. On January 9, 2003, Respondent failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals in the primary enclosures, to minimize disease hazards, and to reduce odors. Specifically, there was a build-up of excreta in the Patagonian cavy enclosure. (9 C.F.R. § 3.131(a).)

f. On April 11, 2003, Respondent failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals in the primary enclosures, to minimize disease hazards, and to reduce odors. Specifically, there was a build-up of excreta in the rhinoceros enclosure. (9 C.F.R. § 3.131(a).)

g. On September 5, 2003, Respondent failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals in the primary enclosures, to minimize disease hazards, and to reduce odors. Specifically, there was a build-up of excreta in the rhinoceros enclosure. (9 C.F.R. § 3.131(a).)

h. On September 5, 2003, Respondent failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals in the primary enclosures, to minimize disease hazards, and to reduce odors. Specifically, there was a build-up of excreta in the civit enclosure. (9 C.F.R. § 3.131(a).)

i. On December 18, 2003, Respondent failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals in the primary enclosures, to minimize

disease hazards, and to reduce odors. Specifically, there was a build-up of excreta in the civit enclosure. (9 C.F.R. § 3.131(a).)

j. On March 11, 2004, Respondent failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals in the primary enclosures, to minimize disease hazards, and to reduce odors. Specifically, there was a build-up of excreta in the rhinoceros enclosure. (9 C.F.R. § 3.131(a).)

k. On March 11, 2004, Respondent failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals in the primary enclosures, to minimize disease hazards, and to reduce odors. Specifically, there was a build-up of excreta in the civit enclosure. (9 C.F.R. § 3.131(a).)

l. On March 13, 2004, Respondent failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals in the primary enclosures, to minimize disease hazards, and to reduce odors. Specifically, there was a build-up of excreta in the civit enclosure. (9 C.F.R. § 3.131(a).)

Conclusions of Law

1. By reason of the Findings of Fact, Respondent has willfully violated the Animal Welfare Act and the Regulations and Standards as set forth in paragraphs 2 through 15 of these Conclusions of Law.

2. On March 13, 2002, Respondent willfully violated section 2.40(a) of the Regulations and Standards (9 C.F.R. § 2.40(a)).

3. On September 5, 2003, Respondent willfully violated section 2.40(b)(1) of the Regulations and Standards (9 C.F.R. § 2.40(b)(1)).

4. On March 13, 2002, January 9, 2003, April 11, 2003, September 5, 2003, and March 11, 2004, Respondent willfully violated section 2.131(b)(1) of the Regulations and Standards (9 C.F.R. § 2.131(b)(1) (2004) [now 9 C.F.R. § 2.131(c)(1) (2005)]).

5. On March 13, 2002, April 11, 2003, September 5, 2003, and March 11, 2004, Respondent willfully violated section 2.131(c)(2) of the Regulations and Standards. (9 C.F.R. § 2.131(c)(2) (2004) [now 9 C.F.R. § 2.131(d)(2) (2005)]).

6. On March 13, 2002, Respondent willfully violated section

2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum standards for nonhuman primates in section 3.83 of the Regulations and Standards (9 C.F.R. § 3.83).

7. On September 5, 2002, and January 9, 2003, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum standards for nonhuman primates in section 3.84(a) of the Regulations and Standards (9 C.F.R. § 3.84(a)).

8. On April 11, 2003 (two instances), September 5, 2003 (two instances), December 18, 2003 (two instances), and March 11, 2004 (two instances), Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum standards for nonhuman primates in section 3.75(c)(1)(i) of the Regulations and Standards (9 C.F.R. § 3.75(c)(1)(i)).

9. On September 5, 2002, January 9, 2003 (five instances), April 11, 2003, September 5, 2003 (nine instances), December 18, 2003, (seven instances), March 11, 2004 (five instances), and March 13, 2004 (four instances), Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum requirements for facilities in section 3.125(a) of the Regulations and Standards (9 C.F.R. § 3.125(a)).

10. On March 13, 2002, April 11, 2003, September 5, 2003 (two instances), and March 11, 2004, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum requirements for facilities in section 3.125(c) of the Regulations and Standards (9 C.F.R. § 3.125(c)).

11. On March 13, 2002 (two instances), September 5, 2002, September 5, 2003, and March 11, 2004, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum requirements for outdoor facilities in section 3.127(a) of the Regulations and Standards (9 C.F.R. § 3.127(a)).

12. On April 11, 2003, and September 5, 2003 (two instances), Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum requirements for outdoor facilities in section 3.127(b) of the Regulations and Standards (9 C.F.R. § 3.127(b)).

13. On September 5, 2003, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum requirements for outdoor facilities in section 3.127(c) of the Regulations and Standards (9 C.F.R. § 3.127(c)).

14. On March 13, 2002, April 11, 2003, September 5, 2003, and March 11, 2004, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum requirements for feeding in section 3.129(a) of the Regulations and Standards (9 C.F.R. § 3.129(a)).

15. On September 5, 2002 (three instances), January 9, 2003 (two instances), April 11, 2003, September 5, 2003 (two instances), December 18, 2003, March 11, 2004 (two instances), and March 13, 2004, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum requirements for sanitation in section 3.131(a) of the Regulations and Standards (9 C.F.R. § 3.131(a)).

ADDITIONAL CONCLUSIONS AND RULINGS BY THE JUDICIAL OFFICER

Ruling on Respondent's Request for Oral Argument

Respondent requests oral argument before the Judicial Officer (Appeal to the Judicial Officer at 1). Complainant opposes Respondent's request for oral argument on the ground that oral argument is not necessary because the parties have thoroughly addressed the issues and the issues are not complex (Complainant's Response to Respondent's Appeal Pet. at 13).

I agree with Complainant. Respondent's request for oral argument before the Judicial Officer, which, pursuant to section 1.145(d) of the Rules of Practice (7 C.F.R. § 1.145(d)), the Judicial Officer may grant, refuse, or limit, is refused because Complainant and Respondent have thoroughly addressed the issues and the issues are not complex. Thus, oral argument would appear to serve no useful purpose.

Ruling on Respondent's Motion for Leave to File Affidavit

Respondent attaches Jennifer Knapp's March 9, 2005, affidavit, to Respondent's Appeal to the Judicial Officer and requests leave to file the affidavit (Appeal to the Judicial Officer at 8). Complainant contends Respondent's motion for leave to file Jennifer Knapp's March 9, 2005, affidavit should be denied because the time for filing objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision has passed and the affidavit raises new arguments on appeal (Complainant's Response to Respondent's Appeal Pet. at 13-14).

Jennifer Knapp's March 9, 2005, affidavit is filed in support of Respondent's Appeal to the Judicial Officer, not in support of Respondent's objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision, as Complainant suggests. Moreover, while it is well settled that new arguments cannot be raised for the first time on appeal to the Judicial Officer,[4] Jennifer

[4]*In re William J. Reinhart*, 60 Agric. Dec. 241, 257 (2001) (Order Denying William J. Reinhart's Pet. for Recons.); *In re Marysville Enterprises, Inc.* (Decision as to Marysville Enterprises, Inc., d/b/a Marysville Hog Buying Co., and James L. Breeding), 59 Agric. Dec. 299, 329 (2000); *In re Mary Meyers*, 58 Agric. Dec. 861, 866 (1999) (Order Denying Pet. for Recons.); *In re Anna Mae Noell*, 58 Agric. Dec. 855, 859-60 (1999) (Order Denying the Chimp Farm, Inc.'s Motion to Vacate); *In re Kreider Dairy Farms, Inc.*, 57 Agric. Dec. 413, 423-24 (1998) (Order Denying Pet. for Recons.); *In re Michael Norinsberg*, 57 Agric. Dec. 791, 795 (1998) (Order Denying Pet. for Recons.); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1911 (1997), *aff'd*, 178 F.3d 743 (5th Cir. 1999), *cert. denied*, 528 U.S. 1021 (1999); *In re David M. Zimmerman*, 56 Agric. Dec. 433, 473-74 (1997), *aff'd*, 156 F.3d 1227 (3d Cir. 1998) (Table), printed in 57 Agric. Dec. 46 (1998); *In re Barry Glick*, 55 Agric. Dec. 275, 282 (1996); *In re Jeremy Byrd*, 55 Agric. Dec. 443, 448 (1996); *In re Bama Tomato Co.*, 54 Agric. Dec. 1334, 1342 (1995), *aff'd*, 112 F.3d 1542 (11th Cir. 1997); *In re Stimson Lumber Co.*, 54 Agric. Dec. 155, 166 n.5 (1995); *In re Johnny E. Lewis*, 53 Agric. Dec. 1327, 1354-55 (1994), *aff'd in part, rev'd & remanded in part*, 73 F.3d 312 (11th Cir. 1996), *decision on remand*, 55 Agric. Dec. 246 (1996), *aff'd per curiam sub nom. Morrison v. Secretary of Agric.*, 111 F.3d 897 (11th Cir. 1997) (Table); *In re Craig Lesser*, 52 Agric. Dec. 155, 167 (1993), *aff'd*, 34 F.3d 1301 (7th Cir. 1994); *In re Rudolph J. Luscher*, 51 Agric. Dec. 1026, 1026 (1992); *In re Lloyd Myers Co.*, 51 Agric. Dec. 782, 783 (1992) (Order Denying Pet. for Recons.), *aff'd*, 15 F.3d 1086 (9th Cir. 1994), 1994 WL 20019 (9th Cir. 1994) (not to be cited as precedent under 9th Circuit Rule 36–3), *printed in* 53 Agric. Dec. 686 (1994); *In re Van Buren County Fruit Exchange, Inc.*, 51 Agric. Dec. 733, 740 (continued...)

Knapp's March 9, 2005, affidavit appears to be merely a declaration of facts rather than argument. Therefore, I reject Complainant's arguments for denying Respondent's motion for leave to file Jennifer Knapp's March 9, 2005, affidavit, and I grant Respondent's motion for leave to file Jennifer Knapp's March 9, 2005, affidavit.

Respondent's Appeal Petition

Respondent raises three issues in the Appeal to the Judicial Officer. First, Respondent contends he made no admissions of fact (Appeal to the Judicial Officer at 1-7).

Respondent is deemed, for purposes of this proceeding, to have admitted the allegations in the Complaint because he failed to file an answer to the Complaint within 20 days after the Hearing Clerk served him with the Complaint. The Hearing Clerk served Respondent with the Complaint, the Rules of Practice, and the Hearing Clerk's service letter on September 4, 2004.[5] Sections 1.136(a), 1.136(c), 1.139, and 1.141(a) of the Rules of Practice state the time within which an answer must be filed and the consequences of failing to file a timely answer, as follows:

> **§ 1.136 Answer.**
>
> (a) *Filing and service*. Within 20 days after the service of the complaint . . ., the respondent shall file with the Hearing Clerk an

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[4](...continued)
(1992); *In re Conesus Milk Producers*, 48 Agric. Dec. 871, 880 (1989); *In re James W. Hickey*, 47 Agric. Dec. 840, 851 (1988), *aff'd*, 878 F.2d 385, 1989 WL 71462 (9th Cir. 1989) (not to be cited as precedent under 9th Circuit Rule 36–3), *printed in* 48 Agric. Dec. 107 (1989); *In re Dean Daul*, 45 Agric. Dec. 556, 565 (1986); *In re E. Digby Palmer*, 44 Agric. Dec. 248, 253 (1985); *In re Evans Potato Co.*, 42 Agric. Dec. 408, 409-10 (1983); *In re Richard "Dick" Robinson*, 42 Agric. Dec. 7 (1983), *aff'd*, 718 F.2d 336 (10th Cir. 1983); *In re Daniel M. Winger*, 38 Agric. Dec. 182, 187 (1979), *appeal dismissed*, No. 79-C-126 (W.D. Wis. June 1979); *In re Lamers Dairy, Inc.*, 36 Agric. Dec. 265, 289 (1977), *aff'd sub nom. Lamers Dairy, Inc. v. Bergland*, No. 77-C-173 (E.D. Wis. Sept. 28, 1977), *printed in* 36 Agric. Dec. 1642, *aff'd*, 607 F.2d 1007 (7th Cir. 1979), *cert. denied*, 444 U.S. 1077 (1980).

[5]See note 1.

answer signed by the respondent or the attorney of record in the proceeding . . . .

. . . .

(c) *Default.* Failure to file an answer within the time provided under paragraph (a) of this section shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.

§ 1.139 Procedure upon failure to file an answer or admission of facts.

The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk. Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.

§ 1.141 Procedure for hearing.

(a) *Request for hearing.* Any party may request a hearing on the facts by including such request in the complaint or answer, or by a separate request, in writing, filed with the Hearing Clerk within the time in which an answer may be filed . . . . Failure to request a hearing within the time allowed for the filing of the answer shall constitute a waiver of such hearing.

7 C.F.R. §§ 1.136(a), (c), .139, .141(a).

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

> [T]his complaint shall be served upon the respondent. The respondent shall file an answer with the Hearing Clerk, United States Department of Agriculture, Washington, D.C. 20250-9200, in accordance with the Rules of Practice governing proceedings under the Act (7 C.F.R. § 1.130 *et seq*.). Failure to file an answer shall constitute an admission of all the material allegations of this complaint.

Compl. at 20-21.

Similarly, the Hearing Clerk informed Respondent in the August 31, 2004, service letter that a timely answer must be filed pursuant to the Rules of Practice and that failure to file a timely answer to any allegation in the Complaint would constitute an admission of that allegation, as follows:

> CERTIFIED RECEIPT REQUESTED
>
> August 31, 2004
>
> Mr. Bodie S. Knapp d/b/a
> Wayne's World Safari
> 11212 Highway 359
> Mathis, Texas 78368
>
> Dear Mr. Knapp:
>
> Subject: In re: Bodie S. Knapp d/b/a Wayne's World Safari Respondent
> AWA Docket No. 04-0029

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

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

The rules specify that you may represent yourself personally or by an attorney of record. Unless an attorney files an appearance in your behalf, it shall be presumed that you have elected to represent yourself personally. Most importantly, you have 20 days from the receipt of this letter to file with the Hearing Clerk an original and four copies of your written and signed answer to the complaint. It is necessary that your answer set forth any defense you wish to assert, and to specifically admit, deny or explain each allegation of the complaint.

Your answer may include a request for an oral hearing. Failure to file an answer or filing an answer which does not deny the material allegations of the complaint, shall constitute an admission of those allegations and a waiver of your right to an oral hearing.

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

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

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

Respondent's answer was due no later than September 24, 2004. Respondent's first filing in this proceeding is dated and was filed November 8, 2004, 1 month 15 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)).

On October 19, 2004, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed Complainant's Motion for Default Decision and Complainant's Proposed Default Decision. The Hearing Clerk served Respondent with Complainant's Motion for Default Decision and Complainant's Proposed Default Decision on October 25, 2004.[6] Respondent was required by section 1.139 of the Rules of Practice (7 C.F.R. § 1.139) to file objections to Complainant's Motion for Default Decision and Complainant' Proposed Default Decision within 20 days after service. On November 8, 2004, Respondent requested an extension of time within which to file objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision. On November 9, 2004, the Chief ALJ extended the time for Respondent's filing objections to Complainant's Motion for Default Decision and Complainant's

[6]See note 2.

Proposed Default Decision to November 19, 2004.[7] Respondent filed objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision on November 22, 2004.

On January 4, 2005, the Chief ALJ issued an Initial Decision: (1) concluding Respondent willfully violated the Regulations and Standards as alleged in the Complaint; (2) directing Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; and (3) revoking Respondent's Animal Welfare Act license (Initial Decision at 21-23).

Although, on rare occasions, default decisions have been set aside for good cause shown or where the complainant states the complainant does not object to setting aside the default decision,[8] generally there is no

[7]See note 3.

[8]*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 Perishable Agricultural Commodities Act 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 (continued...)

basis for setting aside a default decision that is based upon a respondent's failure to file a timely answer.[9]

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[8](...continued)
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).

[9]*See generally In re Wanda McQuary* (Decision as to Wanda McQuary and Randall Jones), 62 Agric. Dec. 452 (2003) (holding the default decision was properly issued where respondent Wanda McQuary filed her answer 6 months 20 days after she was served with the complaint and respondent Randall Jones filed his answer 6 months 5 days after he was served with the complaint and holding the respondents are deemed, by their failures to file timely answers, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re David Finch*, 61 Agric. Dec. 567 (2002) (holding the default decision was properly issued where the respondent filed his answer 3 months 18 days after he was served with the complaint and holding the respondent is deemed, by his failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re Heartland Kennels, Inc.*, 61 Agric. Dec. 492 (2002) (holding the default decision was properly issued where the respondents filed their answer 3 months 9 days after they were served with the complaint and holding the respondents are deemed, by their failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re Steven Bourk* (Decision as to Steven Bourk and Carmella Bourk), 61 Agric. Dec. 25 (2002) (holding the default decision was properly issued where respondent Steven Bourk's first and only filing was 10 months 9 days after he was served with the complaint and respondent Carmella Bourk's first filing was 5 months 5 days after she was served with the complaint; stating both respondents are deemed, by their failures to file timely answers, to have admitted the violations of the Animal Welfare Act and the Regulations alleged in the complaint); *In re J. Wayne Shaffer*, 60 Agric. Dec. 444 (2001) (holding the default decision was properly issued where the respondents' first filing was 5 months 13 days after they were served with the complaint and 4 months 24 days after the respondents' answer was due and holding the respondents are deemed, by their failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations alleged in the complaint); *In re Beth Lutz*, 60 Agric. Dec. 53 (2001) (holding the default decision was properly issued where the respondent filed her answer 23 days after she was served with the complaint and 3 days after the respondent's answer was due and holding the respondent is deemed, by her failure to file a timely answer, to have admitted the violations of the Regulations alleged in the complaint); *In re Curtis G. Foley*, 59 Agric. Dec. 581 (2000) (holding the (continued...)

[9](...continued)
default decision was properly issued where the respondents filed their answer 6 months 5 days after they were served with the complaint and 5 months 16 days after the respondents' answer was due and holding the respondents are deemed, by their failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re Nancy M. Kutz* (Decision as to Nancy M. Kutz), 58 Agric. Dec. 744 (1999) (holding the default decision was properly issued where the respondent's first filing in the proceeding was 28 days after service of the complaint on the respondent and the filing did not respond to the allegations of the complaint and holding the respondent is deemed, by her failure to file a timely answer and by her failure to deny the allegations of the complaint, to have admitted the violations of the Animal Welfare Act and the Regulations alleged in the complaint); *In re Anna Mae Noell*, 58 Agric. Dec. 130 (1999) (holding the default decision was properly issued where the respondents filed an answer 49 days after service of the complaint on the respondents and holding the respondents are deemed, by their failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint), *appeal dismissed sub nom. The Chimp Farm, Inc. v. United States Dep't of Agric.*, No. 00-10608-A (11th Cir. July 20, 2000); *In re Jack D. Stowers*, 57 Agric. Dec. 944 (1998) (holding the default decision was properly issued where the respondent filed his answer 1 year 12 days after service of the complaint on the respondent and holding the respondent is deemed, by his failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re James J. Everhart*, 56 Agric. Dec. 1400 (1997) (holding the default decision was properly issued where the respondent's first filing was more than 8 months after service of the complaint on the respondent and holding the respondent is deemed, by his failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations alleged in the complaint); *In re John Walker*, 56 Agric. Dec. 350 (1997) (holding the default decision was properly issued where the respondent's first filing was 126 days after service of the complaint on the respondent and holding the respondent is deemed, by his failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re Mary Meyers*, 56 Agric. Dec. 322 (1997) (holding the default decision was properly issued where the respondent's first filing was 117 days after the respondent's answer was due and holding the respondent is deemed, by her failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re Dora Hampton*, 56 Agric. Dec. 301 (1997) (holding the default decision was properly issued where the respondent's first filing was 135 days after the respondent's answer was due and holding the respondent is deemed, by her failure to file a timely answer, to have admitted the violations of the Regulations and Standards alleged in the complaint); *In re City of Orange*, 55 Agric. Dec. 1081 (1996) (holding the default decision was properly issued where the respondent's first filing was
(continued...)

Respondent contends the Chief ALJ's Initial Decision should be set aside for good cause. In support of this contention, Respondent states: (1) at the time the answer was due, he appeared pro se; (2) Sonny Kelm, a United States Department of Agriculture investigator, influenced

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[9](...continued)
70 days after the respondent's answer was due and holding the respondent is deemed, by its failure to file a timely answer, to have admitted the violations of the Regulations and Standards alleged in the complaint); *In re Ronald DeBruin*, 54 Agric. Dec. 876 (1995) (holding the default decision was properly issued where the respondent failed to file an answer and holding the respondent is deemed, by his failure to file an answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re James Joseph Hickey, Jr.*, 53 Agric. Dec. 1087 (1994) (holding the default decision was properly issued where the respondent failed to file an answer and holding the respondent is deemed, by his failure to file an answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged the complaint); *In re Ron Morrow*, 53 Agric. Dec. 144 (1994) (holding the default decision was properly issued where the respondent was given an extension of time until March 22, 1994, to file an answer, but the answer was not received until March 25, 1994, and holding the respondent is deemed, by his failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint), *aff'd per curiam*, 65 F.3d 168 (Table), 1995 WL 523336 (6th Cir. 1995), *printed in* 54 Agric. Dec. 870 (1995); *In re Dean Daul*, 45 Agric. Dec. 556 (1986) (holding the default decision was properly issued where the respondent failed to file a timely answer and, in his late answer, did not deny the material allegations of the complaint and holding the respondent is deemed, by his failure to file a timely answer and by his failure to deny the allegations in the complaint in his late answer, to have admitted the violations of the Animal Welfare Act and the Regulations alleged in the complaint); *In re Ronald Jacobson*, 43 Agric. Dec. 780 (1984) (holding the default decision was properly issued where the respondents failed to file a timely answer and holding the respondents are deemed, by their failure to file a timely answer, to have admitted the violations of the Standards alleged in the complaint); *In re Willard Lambert*, 43 Agric. Dec. 46 (1984) (holding the default decision was properly issued where the respondent failed to file an answer and holding the respondent is deemed, by his failure to file an answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re Randy & Mary Berhow*, 42 Agric. Dec. 764 (1983) (holding the default decision was properly issued where the respondents failed to file an answer and holding the respondents are deemed, by their failure to file an answer, to have admitted the violations of the Standards alleged in the complaint).

Respondent not to file a timely answer by stating that Respondent would only be assessed a civil monetary penalty; (3) Respondent tried to contact Complainant's counsel, Colleen Carroll, and a United States Department of Agriculture inspector, Charlie Currer; and (4) Respondent believed filing was effective on the date of mailing.

I do not find Respondent's appearance pro se constitutes good cause for setting aside the Chief ALJ's Initial Decision. The Rules of Practice makes no distinction between persons who appear pro se and persons represented by counsel.[10] The Rules of Practice requires that a respondent, whether appearing pro se or through counsel, file a response to a complaint within 20 days after service of the complaint and provides that failure to file a timely answer shall be deemed an admission of the allegations of the complaint and a waiver of hearing.[11] Respondent's decision to proceed pro se does not operate as an excuse for his failure to file a timely answer to the Complaint.[12]

I do not find the United States Department of Agriculture investigator's purported statement regarding the sanction constitutes good cause for setting aside the Chief ALJ's Initial Decision. I infer Respondent contends I am estopped from adopting the Chief ALJ's Initial Decision because, allegedly, Sonny Kelm, a United States Department of Agriculture investigator, stated that Respondent would only be assessed a civil monetary penalty. The doctrine of equitable estoppel is not, in itself, either a claim or a defense; rather, it is a means

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[10]*In re Chad Way*, 64 Agric. Dec. 401, 419 (2005) (stating the Rules of Practice makes no distinction between persons who appear pro se and persons represented by counsel); *In re Mary Meyers*, 58 Agric. Dec. 861, 865 (1999) (Order Denying Pet. for Recons.) (stating the respondent is not exempt from the Rules of Practice merely because the respondent was pro se at the time her answer was due).

[11]7 C.F.R. §§ 1.136(a), (c), .139.

[12]*In re Chad Way*, 64 Agric. Dec. 401, 419 (2005) (stating the respondents' decision to proceed pro se does not operate as an excuse for their failure to file a timely answer to the amended complaint); *In re Dean Byard* (Decision as to Dean Byard), 56 Agric. Dec. 1543, 1559 (1997) (stating the respondent's decision to proceed pro se prior to May 1997 does not operate as an excuse for the respondent's failure to file an answer).

of precluding a litigant from asserting an otherwise available claim or defense against a party who has detrimentally relied on that litigant's conduct.[13] Even if Respondent acted to his detriment based on Sonny Kelm's statement, it is well settled that the government may not be estopped on the same terms as any other litigant.[14] It is only with great reluctance that the doctrine of estoppel is applied against the government, and its application against the government is especially disfavored when it thwarts enforcement of public laws.[15] Equitable estoppel does not generally apply to the government acting in its sovereign capacity,[16] as it is doing in this case,[17] and estoppel is only

[13]*Kennedy v. United States*, 965 F.2d 413, 417 (7th Cir. 1992); *Olsen v. United States*, 952 F.2d 236, 241 (8th Cir. 1991); *ATC Petroleum, Inc. v. Sanders*, 860 F.2d 1104, 1111 (D.C. Cir. 1988); *FDIC v. Roldan Fonseca*, 795 F.2d 1102, 1108 (1st Cir. 1986).

[14]*Heckler v. Community Health Servs.*, 467 U.S. 51, 60 (1984); *United States Immigration & Naturalization Serv. v. Hibi*, 414 U.S. 5, 8 (1973) (per curiam); *FCIC v. Merrill*, 332 U.S. 380, 383 (1947).

[15]*Muck v. United States*, 3 F.3d 1378, 1382 (10th Cir. 1993); *Trapper Mining, Inc. v. Lujan*, 923 F.2d 774, 781 (10th Cir.), *cert. denied*, 502 U.S. 821 (1991); *Emery Mining Corp. v. Secretary of Labor*, 744 F.2d 1411, 1416 (10th Cir. 1984); *United States v. Browning*, 630 F.2d 694, 702 (10th Cir. 1980), *cert. denied*, 451 U.S. 988 (1981).

[16]*United States v. Killough*, 848 F.2d 1523, 1526 (11th Cir. 1988); *Johnson v. Williford*, 682 F.2d 868, 871 (9th Cir. 1982).

[17]*See In re Reginald Dwight Parr*, 59 Agric. Dec. 629, 646 (2000) (holding the government acts in its sovereign capacity in disciplinary proceedings under the Animal Welfare Act) (Order Denying Pet. for Recons.); *In re Mary Meyers*, 58 Agric. Dec. 861, 868 (1999) (holding the government acts in its sovereign capacity in disciplinary proceedings under the Animal Welfare Act) (Order Denying Pet. for Recons.); *In re David M. Zimmerman*, 57 Agric. Dec. 1038, 1059 (1998) (holding the government acts in its sovereign capacity in disciplinary proceedings under the Animal Welfare Act); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 130 (1996) (holding the government acts in its sovereign capacity in disciplinary proceedings under the Animal Welfare Act). *Cf. In re Sunland Packing House Co.*, 58 Agric. Dec. 543, 601 (1999) (holding the government acts in its sovereign capacity in disciplinary proceedings under the Perishable Agricultural Commodities Act, as amended); *In re Dean Byard* (Decision as to Dean Byard), 56 Agric. Dec. 1543, 1561 (1997) (holding the government acts in its (continued...)

available if the government's wrongful conduct threatens to work a serious injustice, if the public's interest would not be unduly damaged by the imposition of estoppel, and, generally, only if there is proof of affirmative misconduct by the government.[18] Respondent bears a heavy burden when asserting estoppel against the government, and Respondent has fallen far short of demonstrating that the traditional elements of estoppel are present in this case.

Therefore, even if I were to find that Sonny Kelm erroneously stated that Respondent would only be assessed a civil monetary penalty, I would reject Respondent's contention that the erroneous statement constitutes good cause for setting aside the Chief ALJ's Initial Decision.

I do not find Respondent's attempts to contact Colleen Carroll and Charlie Currer constitute good cause for setting aside the Chief ALJ's Initial Decision. Section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) provides that a respondent shall file an answer with the Hearing Clerk within 20 days after service of the complaint. As an initial matter, based on Jennifer Knapp's March 9, 2005, affidavit, Respondent's unsuccessful attempts to contact Colleen Carroll and Charlie Currer appear to have been initiated long after Respondent's answer was due. Moreover, even if I were to find Respondent's unsuccessful attempts to contact Colleen Carroll and Charlie Currer occurred within 20 days after service of the Complaint, I would not

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[17](...continued)
sovereign capacity in disciplinary proceedings under the Horse Protection Act of 1970, as amended); *In re Norwich Beef Co.*, 38 Agric. Dec. 380, 396-98 (1979) (holding the government acts in its sovereign capacity in disciplinary proceedings under the Federal Meat Inspection Act), *aff'd*, No. H-79-210 (D. Conn. Feb. 6, 1981), *appeal dismissed*, No. 81-6080 (2d Cir. Jan. 22, 1982); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 760-61 (1975) (holding the government acts in its sovereign capacity in disciplinary proceedings under the Perishable Agricultural Commodities Act, as amended), *aff'd*, 549 F.2d 830 (D.C. Cir.) (unpublished), *cert. denied*, 434 U.S. 920 (1977).

[18]*Lehman v. United* States, 154 F.3d 1010, 1016-17 (9th Cir. 1998), *cert. denied*, 526 U.S. 1040 (1999); *United States v. Omdahl*, 104 F.3d 1143, 1146 (9th Cir. 1997); *City of New York v. Shalala*, 34 F.3d 1161, 1168 (2d Cir. 1994); *United States v. Vanhorn*, 20 F.3d 104, 112 n.19 (4th Cir. 1994); *United States v. Guy*, 978 F.2d 934, 937 (6th Cir. 1992); *Gestuvo v. District Director of INS*, 337 F. Supp. 1093, 1099 (C.D. Cal. 1971)
.

conclude Respondent's unsuccessful attempts to contact Colleen Carroll and Charlie Currer constituted filing an answer with the Hearing Clerk.[19]

I do not find Respondent's belief that filing is effective on the date of mailing constitutes good cause for setting aside the Chief ALJ's Initial Decision. As an initial matter, Respondent's first filing is dated November 8, 2004, and the filing establishes that Respondent faxed it to the Hearing Clerk on November 8, 2004, 1 month 15 days after Respondent's answer was due. Therefore, even if I were to find the mailbox rule applies to this proceeding (which I do not so find)[20] and Respondent's November 8, 2004, filing is an answer (which it is not), I would not find good cause for setting aside the Chief ALJ's Initial Decision. Moreover, Respondent's belief that the mailbox rule applies in this proceeding is not reasonable. Section 1.147(g) of the Rules of Practice clearly provides the effective date of filing a document is the time when the document reaches the Hearing Clerk, as follows:

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

7 C.F.R. § 1.147(g).

Respondent's first filing in this proceeding was filed with the

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[19]*See In re Gerald Funches*, 56 Agric. Dec. 517, 528 (1997) (stating attempts to reach the Hearing Clerk do not constitute filing an answer with the Hearing Clerk).

[20]*See In re William J. Reinhart*, 59 Agric. Dec. 721, 742 (2000) (rejecting the respondents' contention that the Secretary of Agriculture must adopt the mailbox rule to determine the effective date of filing in proceedings conducted in accordance with the Rules of Practice), *aff'd per curiam*, 39 Fed. Appx. 954, 2002 WL 1492097 (6th Cir. 2002), *cert. denied*, 538 U.S. 979 (2003).

Hearing Clerk 1 month 15 days after Respondent's answer was due. Respondent's failure to file a timely answer is deemed, for 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.

Second, Respondent contends the Chief ALJ's revocation of Respondent's Animal Welfare Act license is far too harsh a sanction under the circumstances (Appeal to the Judicial Officer at 7).

I conclude Respondent committed 84 willful violations of the Regulations and Standards over a 2-year period. Many of these violations are serious violations which jeopardized the health and well-being of Respondent's animals. In light of the number and gravity of the violations and the period of time during which the violations occurred, I find revocation of Respondent's Animal Welfare Act license appropriate and necessary to ensure Respondent's compliance with the Animal Welfare Act and the Regulations and Standards in the future, to deter others from violating the Animal Welfare Act and the Regulations and Standards, and to fulfill the remedial purposes of the Animal Welfare Act.

Third, Respondent contends the revocation of his Animal Welfare Act license based upon his failure to file a timely answer deprives him of property without due process of law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States (Appeal to the Judicial Officer at 7-8).

As an initial matter, the due process clause of the Fourteenth Amendment to the Constitution of the United States, by its terms, is applicable to the states and is not applicable to the federal government. The United States Department of Agriculture is an executive department of the government of the United States;[21] it is not a state. Therefore, as a matter of law, the United States Department of Agriculture could not have violated the due process clause of the Fourteenth Amendment to

[21]See 5 U.S.C. §§ 101, 551(1).

the Constitution of the United States, as Respondent contends.

Moreover, 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.[22] Therefore, I reject Respondent's contention that revocation of his Animal Welfare Act license, based upon his failure to file an answer to the Complaint, deprives him of property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

Paragraphs 7i and 7k of the Complaint

Complainant alleges, and Respondent is deemed to have admitted, that on March 11, 2005, he failed to provide animals housed outdoors with natural or artificial shelter to afford them protection and to prevent discomfort, in violation of section 3.127(b) of the Regulations and Standards (9 C.F.R. § 3.127(b)) (Compl. ¶¶ 7i, 7k). Complainant filed the Complaint on August 31, 2004, well before the alleged March 11, 2005, violations. As it was impossible for Respondent to have committed the March 11, 2005, violations at the time Complainant filed the Complaint, I decline to include these violations in the findings of fact and conclusions of law, even though Respondent is deemed to have

[22]*See United States v. Hulings*, 484 F. Supp. 562, 567-68 (D. Kan. 1980) (concluding a hearing was not required under the Fifth Amendment to the Constitution of the United States where the respondent was notified that failure to deny the allegations of the complaint would constitute an admission of those allegations under the Rules of Practice and the respondent failed to specifically deny the allegations). *See also Father & Sons Lumber and Building Supplies, Inc. v. NLRB*, 931 F.2d 1093, 1096 (6th Cir. 1991) (stating 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).

admitted the violations.[23]

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

ORDER

1. Respondent, his agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards.

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

2. Respondent's Animal Welfare Act license (Animal Welfare Act license number 74-C-0533) is revoked.

The license revocation provisions of this Order shall become effective 60 days after service of this Order on Respondent.

RIGHT TO JUDICIAL REVIEW

Respondent has the right to seek judicial review of this Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341, 2343-2350. Such court has exclusive jurisdiction to enjoin, to set aside, to suspend (in whole or in part), or to determine the validity of this Order. Respondent must seek judicial review within 60 days after entry of this Order.[24] The date of entry of this Order is May 31, 2005.

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[23] *See In re Cynthia Twum Boafo*, 60 Agric. Dec. 191, 197 (2001) (concluding the respondent, by her failure to file an answer, is deemed to have admitted the violations alleged in the complaint, even though the complainant and the respondent agreed the date of the violations alleged in the complaint was in error).

[24] 7 U.S.C. § 2149(c).

In re: FOR THE BIRDS, INC., AN IDAHO CORPORATION; AND JERRY L. KORN, AN INDIVIDUAL, AND SUSAN F. KORN, AN INDIVIDUAL, d/b/a FOR THE BIRDS; AND BEN KORN, AN INDIVIDUAL.
AWA Docket No. 04-0033.
Decision and Order as to For The Birds, Inc., and Jerry L. Korn.
Filed June 22, 2005.

AWA – Animal Welfare Act – Failure to file timely answer – Default decision – Cease and desist order – License revocation – Civil penalty.

The Judicial Officer concluded that For The Birds, Inc., committed at least 1,545 violations of the regulations and standards issued under the Animal Welfare Act and Jerry L. Korn committed at least 749 violations of the regulations and standards issued under the Animal Welfare Act during the period March 2001 through August 2003. The Judicial Officer stated For The Birds, Inc., and Jerry L. Korn are deemed, by their failures to file timely answers, to have admitted the allegations of the Complaint (7 C.F.R. § 1.136(c)). The Judicial Officer issued a cease and desist order, revoked Jerry L. Korn's Animal Welfare Act license, assessed For The Birds, Inc., a $28,050 civil penalty, and assessed Jerry L. Korn a $20,597 civil penalty.

Colleen A. Carroll, for Complainant.
Respondents For The Birds, Inc., and Jerry L. Korn, Pro se.
Initial Decision issued by Administrative Law Judge Peter M. Davenport.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on September 8, 2004. Complainant instituted the proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142 (2004)) [hereinafter the Regulations and Standards]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges that during the period March 2001 through

August 2003, For The Birds, Inc., Jerry L. Korn, Susan F. Korn, and Ben Korn willfully violated the Regulations and Standards (Compl. ¶¶ 8-52).

The Hearing Clerk served For The Birds, Inc., and Jerry L. Korn with the Complaint, the Rules of Practice, and a service letter on September 14, 2004.[1] The Hearing Clerk served Susan F. Korn with the Complaint, the Rules of Practice, and a service letter on September 29, 2004.[2] For The Birds, Inc., Jerry L. Korn, and Susan F. Korn failed to file answers to the Complaint within 20 days after service, as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)).

On January 19, 2005, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed: (1) a Motion for Adoption of Decision and Order as to Respondent Jerry L. Korn [hereinafter Motion for Default Decision as to Jerry L. Korn] and a proposed Decision and Order as to Respondent Jerry L. Korn [hereinafter Proposed Default Decision as to Jerry L. Korn]; (2) a Motion for Adoption of Decision and Order as to Respondent Susan F. Korn [hereinafter Motion for Default Decision as to Susan F. Korn] and a proposed Decision and Order as to Respondent Susan F. Korn [hereinafter Proposed Default Decision as to Susan F. Korn]; and (3) a Motion for Adoption of Decision and Order as to For The Birds, Inc. [hereinafter Motion for Default Decision as to For The Birds, Inc.], and a proposed Decision and Order as to Respondent For The Birds, Inc. [hereinafter Proposed Default Decision as to For The Birds, Inc.]. On January 27, 2005, the Hearing Clerk served: (1) Jerry L. Korn with Complainant's Motion for Default Decision as to Jerry L. Korn, Complainant's Proposed Default Decision as to Jerry L. Korn, and a service letter; and (2) For The Birds, Inc., with Complainant's Motion for Default Decision as to For The Birds, Inc., Complainant's Proposed

[1]United States Postal Service Domestic Return Receipts for Article Number 7003 2260 0005 5721 4356 and Article Number 7003 2260 0005 5721 4349.

[2]United States Postal Service Domestic Return Receipt for Article Number 7003 2260 0005 5721 4431.

Default Decision as to For The Birds, Inc., and a service letter.[3] On February 16, 2005, Jerry L. Korn and For The Birds, Inc., filed objections to Complainant's Motion for Default Decision as to Jerry L. Korn, Complainant's Proposed Default Decision as to Jerry L. Korn, Complainant's Motion for Default Decision as to For The Birds, Inc., and Complainant's Proposed Default Decision as to For The Birds, Inc.[4] On February 25, 2005, the Hearing Clerk served Susan F. Korn with Complainant's Motion for Default Decision as to Susan F. Korn, Complainant's Proposed Default Decision as to Susan F. Korn, and a service letter.[5]

On February 25, 2005, Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] issued a Decision and Order [hereinafter Initial Decision]: (1) concluding For The Birds, Inc., Jerry L. Korn, and Susan F. Korn willfully violated the Regulations and Standards; (2) directing For The Birds, Inc., Jerry L. Korn, and Susan F. Korn to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; and (3) assessing For The Birds, Inc., Jerry L. Korn, and Susan F. Korn, jointly and severally, a $28,050 civil penalty (Initial Decision at 21-30).

On March 11, 2005, Complainant filed Complainant's Appeal Petition. For The Birds, Inc., and Jerry L. Korn failed to file responses to Complainant's Appeal Petition. On May 26, 2005, Susan F. Korn filed a late-filed response to Complainant's Appeal Petition. On May 27, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision as to For The Birds, Inc., Jerry L. Korn, and Susan F. Korn.

Based upon a careful review of the record, I disagree with the ALJ's

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[3]United States Postal Service Domestic Return Receipts for Article Number 7003 2260 0005 5721 3786 and Article Number 7003 2260 0005 5721 3779.

[4]Objection to Motion for Adoption of Decision and Order as to Respondents Jerry L. Korn, For the Birds, Inc., and Ben Korn; and Request for Telephonic Hearing.

[5]Memorandum to File from Tonya Fisher dated February 25, 2005.

Initial Decision as it relates to Susan F. Korn,[6] the sanction imposed by the ALJ on For the Birds, Inc., and Jerry L. Korn, and a small number of the ALJ's findings of fact and conclusions of law. Therefore, I do not adopt the ALJ's Initial Decision as the final Decision and Order as to For The Birds, Inc., and Jerry L. Korn.

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

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

§ 2131. Congressional statement of policy

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

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[6]The record establishes the ALJ did not provide Susan F. Korn with 20 days within which to file objections to Complainant's Motion for Default Decision as to Susan F. Korn and Complainant's Proposed Default Decision as to Susan F. Korn, as required by section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). Therefore, simultaneous with my filing this Decision and Order as to For The Birds, Inc., and Jerry L. Korn, I file a Remand Order as to Susan F. Korn remanding this proceeding, as it relates to Susan F. Korn, to the ALJ to provide Susan F. Korn an opportunity to file objections to Complainant's Motion for Default Decision as to Susan F. Korn and Complainant's Proposed Default Decision as to Susan F. Korn.

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

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

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

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

§ 2132. Definitions

When used in this chapter—

. . . .

(f) The term "dealer" means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of, (1) any dog or other animal whether alive or dead for research, teaching, exhibition, or use as a pet, or (2) any dog for hunting, security, or breeding purposes, except that this term does not include—

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

(ii) any person who does not sell, or negotiate the purchase or sale of any wild animal, dog, or cat, and who derives no more than $500 gross income from the sale of other animals during any calendar year[.]

. . . .

(h) The term "exhibitor" means any person (public or private) exhibiting any animals, which were purchased in commerce or

the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary, and such term includes carnivals, circuses, and zoos exhibiting such animals whether operated for profit or not; but such term excludes retail pet stores, organizations sponsoring and all persons participating in State and country fairs, livestock shows, rodeos, purebred dog and cat shows, and any other fairs or exhibitions intended to advance agricultural arts and sciences, as may be determined by the Secretary[.]

§ 2146. Administration and enforcement by Secretary

(a) Investigations and inspections

The Secretary shall make such investigations or inspections as he deems necessary to determine whether any dealer, exhibitor, intermediate handler, carrier, research facility, or operator of an auction sale subject to section 2142 of this title, has violated or is violating any provision of this chapter or any regulation or standard issued thereunder, and for such purposes, the Secretary shall, at all reasonable times, have access to the places of business and the facilities, animals, and those records required to be kept pursuant to section 2140 of this title of any such dealer, exhibitor, intermediate handler, carrier, research facility, or operator of an auction sale.

§ 2149. Violations by licensees

(a) Temporary license suspension; notice and hearing; revocation

If the Secretary has reason to believe that any person licensed as a dealer, exhibitor, or operator of an auction sale subject to section 2142 of this title, has violated or is violating any provision of this chapter, or any of the rules or regulations or standards promulgated by the Secretary hereunder, he may suspend such

person's license temporarily, but not to exceed 21 days, and after notice and opportunity for hearing, may suspend for such additional period as he may specify, or revoke such license, if such violation is determined to have occurred.

(b) Civil penalties for violation of any section, etc.; separate offenses; notice and hearing; appeal; considerations in assessing penalty; compromise of penalty; civil action by Attorney General for failure to pay penalty; district court jurisdiction; failure to obey cease and desist order

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, that violates any provision of this chapter, or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than $2,500 for each such violation, and the Secretary may also make an order that such person shall cease and desist from continuing such violation. Each violation and each day during which a violation continues shall be a separate offense. No penalty shall be assessed or cease and desist order issued unless such person is given notice and opportunity for a hearing with respect to the alleged violation, and the order of the Secretary assessing a penalty and making a cease and desist order shall be final and conclusive unless the affected person files an appeal from the Secretary's order with the appropriate United States Court of Appeals. The Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations. Any such civil penalty may be compromised by the Secretary. Upon any failure to pay the penalty assessed by a final order under this section, the Secretary shall request the Attorney General to institute a civil action in a district court of the United States or other United States court for any district in which such person is found or resides or transacts business, to collect the penalty, and

such court shall have jurisdiction to hear and decide any such action. Any person who knowingly fails to obey a cease and desist order made by the Secretary under this section shall be subject to a civil penalty of $1,500 for each offense, and each day during which such failure continues shall be deemed a separate offense.

(c) Appeal of final order by aggrieved person; limitations; exclusive jurisdiction of United States Courts of Appeals

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, aggrieved by a final order of the Secretary issued pursuant to this section may, within 60 days after entry of such an order, seek review of such order in the appropriate United States Court of Appeals in accordance with the provisions of sections 2341, 2343 through 2350 of title 28, and such court shall have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of the Secretary's order.

. . . .

§ 2151. Rules and regulations

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

7 U.S.C. §§ 2131, 2132(f), (h), 2146, 2149(a)-(c), 2151.

28 U.S.C.:

TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE

. . . .

PART VI—PARTICULAR PROCEEDINGS

. . . .

CHAPTER 163—FINES, PENALTIES AND FORFEITURES

§ 2461. Mode of recovery

. . . .

FEDERAL CIVIL PENALTIES INFLATION ADJUSTMENT

SHORT TITLE

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

FINDINGS AND PURPOSE

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

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

(2) the impact of many civil monetary penalties has been and is diminished due to the effect of inflation;

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

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

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

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

(2) maintain the deterrent effect of civil monetary

penalties and promote compliance with the law; and

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

DEFINITIONS

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

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

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

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

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

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

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

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

CIVIL MONETARY PENALTY INFLATION ADJUSTMENT REPORTS

SEC. 4. The head of each agency shall, not later than 180 days after the date of enactment of the Debt Collection Improvement Act of 1996 [Apr. 26, 1996], and at least once every 4 years thereafter–

(1) by regulation adjust each civil monetary penalty provided by law within the jurisdiction of the Federal agency, except for any penalty (including any addition to tax and additional amount) under the Internal Revenue Code of 1986

[26 U.S.C. 1 *et seq*.], the Tariff Act of 1930 [19 U.S.C. 1202 *et seq*.], the Occupational Safety and Health Act of 1970 [29 U.S.C. 651 *et seq*.], or the Social Security Act [42 U.S.C. 301 *et seq*.], by the inflation adjustment described under section 5 of this Act; and

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

COST-OF-LIVING ADJUSTMENTS OF CIVIL MONETARY PENALTIES

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

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

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

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

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

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

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

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

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

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

ANNUAL REPORT

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

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

28 U.S.C. § 2461 (note).

7 C.F.R.:

TITLE 7—AGRICULTURE

SUBTITLE A—OFFICE OF THE SECRETARY OF AGRICULTURE

. . . .

PART 3—DEBT MANAGEMENT

. . . .

SUBPART E—ADJUSTED CIVIL MONETARY PENALTIES

§ 3.91 Adjusted civil monetary penalties.

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

(b) *Penalties*—. . . .

. . . .

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

. . . .

(v) Civil penalty for a violation of Animal Welfare Act, codified at 7 U.S.C. 2149(b), has a maximum of $2,750; and knowing failure to obey a cease and desist order has a civil penalty of $1,650.

7 C.F.R. § 3.91(a), (b)(2)(v).

9 C.F.R.:

TITLE 9—ANIMALS AND ANIMAL PRODUCTS

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

PART 1—DEFINITION OF TERMS

§ 1.1 Definitions.

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

. . . .

Dealer means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of: Any dog or other animal whether alive or dead (including unborn animals, organs, limbs, blood, serum, or other parts) for research, teaching, testing, experimentation, exhibition, or for use as a pet; or any dog at the wholesale level for hunting, security, or

breeding purposes. This term does not include: A retail pet store, as defined in this section, unless such store sells any animal to a research facility, an exhibitor, or a dealer (wholesale); any retail outlet where dogs are sold for hunting, breeding, or security purposes; or any person who does not sell or negotiate the purchase or sale of any wild or exotic animal, dog, or cat and who derives no more than $500 gross income from the sale of animals other than wild or exotic animals, dogs, or cats during any calendar year.

. . . .

Exhibitor means any person (public or private) exhibiting any animals, which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary. This term includes carnivals, circuses, animal acts, zoos, and educational exhibits, exhibiting such animals whether operated for profit or not. This term excludes retail pet stores, horse and dog races, organizations sponsoring and all persons participating in State and county fairs, livestock shows, rodeos, field trials, coursing events, purebred dog and cat shows and any other fairs or exhibitions intended to advance agricultural arts and sciences as may be determined by the Secretary.

PART 2—REGULATIONS

SUBPART A—LICENSING

§ 2.1 Requirements and application.

(a)(1) Any person operating or desiring to operate as a dealer, exhibitor, or operator of an auction sale, except persons who are exempted from the licensing requirements under paragraph (a)(3) of this section, must have a valid license. A person must be 18 years of age or older to obtain a license. A person seeking a license shall apply on a form which will be furnished by the AC Regional Director in the State in which that person operates or

intends to operate. The applicant shall provide the information requested on the application form, including a valid mailing address through which the licensee or applicant can be reached at all times, and a valid premises address where animals, animal facilities, equipment, and records may be inspected for compliance. The applicant shall file the completed application form with the AC Regional Director.

. . . .

§ 2.10 Licensees whose licenses have been suspended or revoked.

(a) Any person whose license has been suspended for any reason shall not be licensed in his or her own name or in any other manner within the period during which the order of suspension is in effect. No partnership, firm, corporation, or other legal entity in which any such person has a substantial interest, financial or otherwise, will be licensed during that period. Any person whose license has been suspended for any reason may apply to the AC Regional Director, in writing, for reinstatement of his or her license.

(b) Any person whose license has been revoked shall not be licensed in his or her own name or in any other manner; nor will any partnership, firm, corporation, or other legal entity in which any such person has a substantial interest, financial or otherwise, be licensed.

(c) Any person whose license has been suspended or revoked shall not buy, sell, transport, exhibit, or deliver for transportation, any animal during the period of suspension or revocation.

SUBPART D—ATTENDING VETERINARIAN AND ADEQUATE VETERINARY CARE

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

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

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

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

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

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

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

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

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

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

SUBPART G—RECORDS

§ 2.75 Records: Dealers and exhibitors.

. . . .

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

(i) The name and address of the person from whom the animals were purchased or otherwise acquired;

(ii) The USDA license or registration number of the person if he or she is licensed or registered under the Act;

(iii) The vehicle license number and state, and the driver's license number and state of the person, if he or she is not licensed or registered under the Act;

(iv) The name and address of the person to whom an animal was sold or given;

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

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

(vii) The number of animals in the shipment.

. . . .

SUBPART H—COMPLIANCE WITH STANDARDS AND HOLDING PERIOD

§ 2.100 Compliance with standards.

(a) Each dealer, exhibitor, operator of an auction sale, and intermediate handler shall comply in all respects with the

regulations set forth in part 2 and the standards set forth in part 3 of this subchapter for the humane handling, care, treatment, housing, and transportation of animals.

. . . .

SUBPART I—MISCELLANEOUS

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§ 2.126 Access and inspection of records and property.

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

. . . .

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

. . . .

§ 2.131 Handling of animals.

(a)(1) Handling of all animals shall be done as expeditiously and carefully as possible in a manner that does not cause trauma, overheating, excessive cooling, behavioral stress, physical harm, or unnecessary discomfort.

(2)(i) Physical abuse shall not be used to train, work, or otherwise handle animals.

. . . .

(b)(1) During public exhibition, any animal must be handled so there is minimal risk of harm to the animal and to the public, with sufficient distance and/or barriers between the animal and the general viewing public so as to assure the safety of animals and the public.

. . . .

(c)(1) Animals shall be exhibited only for periods of time and under conditions consistent with their good health and well-being.

(2) A responsible, knowledgeable, and readily identifiable

employee or attendant must be present at all times during periods of public contact.

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PART 3—STANDARDS

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SUBPART D—SPECIFICATIONS FOR THE HUMANE HANDLING, CARE, TREATMENT, AND TRANSPORTATION OF NONHUMAN PRIMATES

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ANIMAL HEALTH AND HUSBANDRY STANDARDS

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§ 3.83 Watering.

Potable water must be provided in sufficient quantity to every nonhuman primate housed at the facility. If potable water is not continually available to the nonhuman primates, it must be offered to them as often as necessary to ensure their health and well-being, but no less than twice daily for at least 1 hour each time, unless otherwise required by the attending veterinarian, or as required by the research proposal approved by the Committee at research facilities. Water receptacles must be kept clean and sanitized in accordance with methods provided in § 3.84(b)(3) of this subpart at least once every 2 weeks or as often as necessary to keep them clean and free from contamination. Used water receptacles must be sanitized before they can be used to provide water to a different nonhuman primate or social grouping of nonhuman primates.

§ 3.84 Cleaning, sanitization, housekeeping, and pest control.

. . . .

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

. . . .

§ 3.85 Employees.

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

. . . .

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

FACILITIES AND OPERATING STANDARDS

§ 3.125 Facilities, general.

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

. . . .

(c) *Storage*. Supplies of food and bedding shall be stored in facilities which adequately protect such supplies against deterioration, molding, or contamination by vermin. Refrigeration shall be provided for supplies of perishable food.

(d) *Waste disposal*. Provision shall be made for the removal and disposal of animal and food wastes, bedding, dead animals, trash and debris. Disposal facilities shall be so provided and operated as to minimize vermin infestation, odors, and disease hazards. The disposal facilities and any disposal of animal and food wastes, bedding, dead animals, trash, and debris shall comply with applicable Federal, State, and local laws and regulations relating to pollution control or the protection of the environment.

. . . .

§ 3.126 Facilities, indoor.

. . . .

(d) *Drainage*. A suitable sanitary method shall be provided to eliminate rapidly, excess water from indoor housing facilities. If drains are used, they shall be properly constructed and kept in good repair to avoid foul odors and installed so as to prevent any backup of sewage. The method of drainage shall comply with applicable Federal, State, and local laws and regulations relating to pollution control or the protection of the environment.

§ 3.127 Facilities, outdoor.

. . . .

(b) *Shelter from inclement weather*. Natural or artificial

shelter appropriate to the local climatic conditions for the species concerned shall be provided for all animals kept outdoors to afford them protection and to prevent discomfort to such animals. Individual animals shall be acclimated before they are exposed to the extremes of the individual climate.

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

(d) *Perimeter fence*. On or after May 17, 2000, all outdoor housing facilities (i.e., facilities not entirely indoors) must be enclosed by a perimeter fence that is of sufficient height to keep animals and unauthorized persons out. Fences less than 8 feet high for potentially dangerous animals, such as, but not limited to, large felines (e.g., lions, tigers, leopards, cougars, etc.), bears, wolves, rhinoceros, and elephants, or less than 6 feet high for other animals must be approved in writing by the Administrator. The fence must be constructed so that it protects the animals in the facility by restricting animals and unauthorized persons from going through it or under it and having contact with the animals in the facility, and so that it can function as a secondary containment system for the animals in the facility. It must be of sufficient distance from the outside of the primary enclosure to prevent physical contact between animals inside the enclosure and animals or persons outside the perimeter fence. Such fences less than 3 feet in distance from the primary enclosure must be approved in writing by the Administrator. A perimeter fence is not required:

(1) Where the outside walls of the primary enclosure are made of sturdy, durable material, which may include certain types of concrete, wood, plastic, metal, or glass, and are high enough and constructed in a manner that restricts entry by animals and unauthorized persons and the Administrator gives written approval; or

(2) Where the outdoor housing facility is protected by an effective natural barrier that restricts the animals to the facility

and restricts entry by animals and unauthorized persons and the Administrator gives written approval; or

(3) Where appropriate alternative security measures are employed and the Administrator gives written approval; or

(4) For traveling facilities where appropriate alternative security measures are employed; or

(5) Where the outdoor housing facility houses only farm animals, such as, but not limited to, cows, sheep, goats, pigs, horses (for regulated purposes), or donkeys, and the facility has in place effective and customary containment and security measures.

§ 3.128 Space requirements.

Enclosures shall be constructed and maintained so as to provide sufficient space to allow each animal to make normal postural and social adjustments with adequate freedom of movement. Inadequate space may be indicated by evidence of malnutrition, poor condition, debility, stress, or abnormal behavior patterns.

ANIMAL HEALTH AND HUSBANDRY STANDARDS

§ 3.129 Feeding.

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

(b) Food, and food receptacles, if used, shall be sufficient in quantity and located so as to be accessible to all animals in the enclosure and shall be placed so as to minimize contamination. Food receptacles shall be kept clean and sanitary at all times. If self-feeders are used, adequate measures shall be taken to prevent

molding, contamination, and deterioration or caking of food.

§ 3.130 Watering.

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

§ 3.131 Sanitation.

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

. . . .

§ 3.132 Employees.

A sufficient number of adequately trained employees shall be utilized to maintain the professionally acceptable level of husbandry practices set forth in this subpart. Such practices shall be under a supervisor who has a background in animal care.

§ 3.133 Separation.

Animals housed in the same primary enclosure must be compatible. Animals shall not be housed near animals that interfere with their health or cause them discomfort.

9 C.F.R. §§ 1.1; 2.1(a)(1), .10, .40, .75(b)(1), .100(a), .126(a)(2), .131(a)(1)-(2)(i), (b)(1), (c)(1)-(2); 3.83, .84(c), .85, .125(a), (c)-(d),

.126(d), .127(b)-(d), .128-.131(a), .132-.133 (2004).

DECISION

Statement of the Case

For The Birds, Inc., and Jerry L. Korn failed to file answers to the Complaint 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 the failure to file an answer within the time provided in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) shall be deemed, for purposes of the proceeding, an admission of the allegations in the complaint. Further, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the failure to file an answer or the admission by the answer of all the material allegations of fact contained in the complaint, constitutes a waiver of hearing. Accordingly, the material allegations in the Complaint are adopted as findings of fact. This Decision and Order as to For The Birds, Inc., and Jerry L. Korn is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. For the Birds, Inc., is an Idaho corporation whose agent for service of process is Jerry L. Korn, 1506 Happy Valley Road, Nampa, Idaho 83687. At all times material to the allegations in the Complaint, For The Birds, Inc., was an "exhibitor" as that word is defined in the Animal Welfare Act and the Regulations and Standards.

2. Jerry L. Korn is an individual doing business as For the Birds and whose mailing address is 1506 Happy Valley Road, Nampa, Idaho 83687. At all times material to the allegations in the Complaint, Jerry L. Korn was an "exhibitor" as that word is defined in the Animal Welfare Act and the Regulations and Standards. Between 2001 and May 23, 2003, Jerry L. Korn held Animal Welfare Act license number 82-C-0035 issued to "JERRY L. AND SUSAN F. KORN DBA FOR THE BIRDS," which Animal Welfare Act license was cancelled on May 23,

2003, and has not been reinstated.

3. For The Birds, Inc., and Jerry L. Korn have a moderate-sized business, with approximately 50 animals, including farm, wild, and exotic animals: goats, llamas, giraffe, a camel, a bear, tigers, a mountain lion, lemurs, eland, elk, prairie dogs, rabbits, cats, dogs, and a kangaroo. The gravity of For The Birds, Inc.'s and Jerry L. Korn's violations is great. The violations include repeated instances in which For The Birds, Inc., and Jerry L. Korn knowingly exhibited animals without having a valid Animal Welfare Act license and continuing instances of failures by For The Birds, Inc., and Jerry L. Korn to provide minimally-adequate veterinary care, food, water, and housing to animals and to handle animals carefully and in compliance with the Regulations and Standards (which failures have resulted in serious injuries and death to animals in For The Birds, Inc.'s and Jerry L. Korn's custody). For The Birds, Inc., and Jerry L. Korn have continually failed to comply with the Regulations and Standards after having been repeatedly advised of deficiencies.

4. For The Birds, Inc., and Jerry L. Korn have not shown good faith. Jerry L. Korn has not provided notice of his current mailing address. Jerry L. Korn falsely represented to Animal and Plant Health Inspection Service officials that he had not received certified or registered mail. Moreover, For The Birds, Inc., and Jerry L. Korn have demonstrated an unwillingness to comply with the prohibition in the Animal Welfare Act and the Regulations and Standards against exhibiting animals without having a valid Animal Welfare Act license.

5. For The Birds, Inc., and Jerry L. Korn do not have a history of previous violations.

6. Between March 15, 2001, and at least August 24, 2003, For The Birds, Inc., exhibited animals without having been licensed by the Secretary of Agriculture to do so. Specifically, For The Birds, Inc., continuously kept the animals at 1506 Happy Valley Road, Nampa, Idaho 83687, on display to the public. (9 C.F.R. §§ 2.1(a), .100(a).)

7. Between May 23, 2003, and at least August 24, 2003, Jerry L. Korn exhibited animals without having been licensed by the Secretary of Agriculture to do so. Specifically, Jerry L. Korn continuously kept the animals at 1506 Happy Valley Road, Nampa, Idaho 83687, on display to

the public. (9 C.F.R. §§ 2.1(a), .100(a).)

8. Between May 23, 2003, and at least August 16, 2003, Jerry L. Korn operated as a "dealer" as that word is defined in the Animal Welfare Act and the Regulations and Standards without having been licensed by the Secretary of Agriculture to do so. Specifically, Jerry L. Korn delivered for transportation or transported, sold or negotiated the sale of a zebra, multiple elk, and llamas. (9 C.F.R. §§ 2.1(a), .100(a).)

9. On or about the following dates, For The Birds, Inc., and Jerry L. Korn failed to have an attending veterinarian provide adequate veterinary care to their animals:

a. From October 2002 through June 2003, and on or about August 12, 2003, For The Birds, Inc., and Jerry L. Korn failed to obtain any veterinary care for a giraffe whose hooves were overgrown (9 C.F.R. § 2.40(a)).

b. From approximately May 2003 through August 2003, For The Birds, Inc., and Jerry L. Korn failed to obtain any veterinary care for a white Bengal tiger that was experiencing a rapid and extreme weight loss (9 C.F.R. § 2.40(a)).

c. From approximately August 1, 2003, through August 16, 2003, For The Birds, Inc., and Jerry L. Korn failed to employ an attending veterinarian to provide adequate veterinary care to their animals. Specifically, For The Birds, Inc., and Jerry L. Korn failed to obtain any veterinary care for a tiger that was limping and whose left front paw was severely swollen. (9 C.F.R. § 2.40(a).)

d. From approximately May 2003 through August 2003, For The Birds, Inc., and Jerry L. Korn failed to obtain any veterinary care for a camel with a golf-ball-sized abscess on the camel's lower left jaw (9 C.F.R. § 2.40(a)).

e. From approximately May 2003 through August 2003, For The Birds, Inc., and Jerry L. Korn failed to employ an attending veterinarian to provide adequate veterinary care to their animals. Specifically, For The Birds, Inc., and Jerry L. Korn failed to obtain any veterinary care for a camel, after Jerry L. Korn lanced a golf-ball-sized abscess on the camel's lower left jaw, causing it to become a seeping, open wound that attracted a large number of flies. (9 C.F.R. § 2.40(a).)

f. On or about July 7, 2003, through July 9, 2003, For The Birds, Inc., and Jerry L. Korn failed to employ an attending veterinarian to provide adequate veterinary care to their animals. Specifically, on July 7, 2003, For The Birds, Inc., and Jerry L. Korn failed to obtain any veterinary care for a female snow leopard in obvious severe distress and bleeding from her vaginal and rectal area and a giraffe whose condition was reported directly to Jerry L. Korn, who took no action, which inaction resulted in, or contributed to, the animal's death on or about July 9, 2003. (9 C.F.R. § 2.40(a).)

g. In the spring 2002, For The Birds, Inc., and Jerry L. Korn failed to employ an attending veterinarian to provide adequate veterinary care to their animals. Specifically, For The Birds, Inc., and Jerry L. Korn failed to obtain any veterinary care for a pregnant llama resulting in, or contributing to, the death of the animal and her baby. (9 C.F.R. § 2.40(a).)

h. On or about August 12, 2003, For The Birds, Inc., and Jerry L. Korn failed to employ an attending veterinarian to provide adequate veterinary care to their animals. Specifically, For The Birds, Inc., and Jerry L. Korn failed to obtain any veterinary care for an eland whose hooves were overgrown. (9 C.F.R. § 2.40(a).)

10. On or about March 7, 2001, April 3, 2002, May 22, 2002, July 2, 2002, August 27, 2002, and February 12, 2003, For The Birds, Inc., and Jerry L. Korn failed to employ a full-time attending veterinarian or a part-time attending veterinarian under formal arrangements that include a written program of veterinary care (9 C.F.R. § 2.40(a)(1)).

11. Between March 7, 2001, and August 24, 2003, For The Birds, Inc., and Jerry L. Korn failed to ensure that their attending veterinarian had appropriate authority to ensure the provision of adequate veterinary care and to oversee the adequacy of other aspects of animal care and use (9 C.F.R. § 2.40(a)(2)).

12. Between March 7, 2001, and August 24, 2003, For The Birds, Inc., and Jerry L. Korn failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate facilities, including adequate enclosures and secure perimeter fences (9 C.F.R. § 2.40(b)(1)).

13. Between March 7, 2001, and August 24, 2003, For The Birds,

Inc., and Jerry L. Korn failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate personnel, including an adequate number of employees trained in species-specific animal care and husbandry. Specifically, on or about August 2002, For The Birds, Inc., and Jerry L. Korn failed to have sufficient personnel to remove mud and excreta in the elk enclosure and allowed an aged elk to become trapped in the mud and excreta for several days, subjecting the elk to injury by a bull elk. (9 C.F.R. § 2.40(b)(1).)

14. Between March 7, 2001, and August 24, 2003, For The Birds, Inc., and Jerry L. Korn failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate equipment (9 C.F.R. § 2.40(b)(1)).

15. Between March 7, 2001, and August 24, 2003, For The Birds, Inc., and Jerry L. Korn failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate services, including veterinary services. Specifically, For The Birds, Inc., and Jerry L. Korn failed to have any veterinary services available for, *inter alia*, a snow leopard, a camel, two tigers, an elk, a giraffe, an eland, and a pregnant llama and her baby. (9 C.F.R. § 2.40(b)(1).)

16. Between March 7, 2001, and August 24, 2003, For The Birds, Inc., and Jerry L. Korn failed to establish and maintain a program of adequate veterinary care that included the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and the availability of emergency, weekend, and holiday care. Specifically, For The Birds, Inc., and Jerry L. Korn failed to use appropriate methods to treat, *inter alia*, a snow leopard, a camel, two tigers, an elk, a giraffe, an eland, and a pregnant llama and her baby. (9 C.F.R. § 2.40(b)(2).)

17. Between March 7, 2001, and August 24, 2003, For The Birds, Inc., and Jerry L. Korn failed to establish and maintain a program of adequate veterinary care that included a mechanism of direct and frequent communication with the attending veterinarian, so that timely and accurate information on problems of animal health, behavior, and well-being was conveyed to the attending veterinarian. Specifically, For The Birds, Inc., and Jerry L. Korn failed to communicate to their attending veterinarian animal heath information regarding, *inter alia*, a

snow leopard, a camel, two tigers, an elk, a giraffe, an eland, and a pregnant llama and her baby. (9 C.F.R. § 2.40(b)(3).)

18. Between March 7, 2001, and August 24, 2003, For The Birds, Inc., and Jerry L. Korn failed to establish and maintain a program of adequate veterinary care that included daily observation of all animals to assess their health and well-being. Specifically, For The Birds, Inc., and Jerry L. Korn failed to observe on a daily basis, *inter alia*, a snow leopard, a camel, two tigers, an elk, a giraffe, an eland, and a pregnant llama and her baby, to assess their health and well-being. (9 C.F.R. § 2.40(b)(3).)

19. Between March 7, 2001, and August 24, 2003, For The Birds, Inc., and Jerry L. Korn failed to establish and maintain a program of adequate veterinary care that included adequate guidance to personnel involved in the care and use of animals regarding handling, immobilization, anesthesia, and tranquilization. Specifically, For The Birds, Inc., and Jerry L. Korn failed to train personnel (including Jerry L. Korn) in the care and handling of animals. (9 C.F.R. § 2.40(b)(4).)

20. On or about March 7, 2001, August 27, 2002, February 11, 2003, and February 12, 2003, For The Birds, Inc., and Jerry L. Korn failed to make, keep, and maintain records that fully and correctly disclose information concerning animals in For The Birds, Inc.'s and Jerry L. Korn's possession or under For The Birds, Inc.'s and Jerry L. Korn's control, or disposed of by For The Birds, Inc., and Jerry L. Korn (9 C.F.R. § 2.75(b)(1)).

21. On April 3, 2002, For The Birds, Inc., and Jerry L. Korn failed to allow Animal and Plant Health Inspection Service officials, during business hours, to examine records required to be kept by the Animal Welfare Act and the Regulations and Standards (9 C.F.R. § 2.126(a)(2)).

22. On or about May 1, 2001 (tigers), May 10, 2001 (tiger - Raja), April 3, 2002 (giraffe), June 2002 (tiger - Raja), June 4, 2002 (tiger), June 25, 2002 (bear), August 2002 (elk), February 19, 2003 (tigers), May 6, 2003 (tigers, hoofstock, kangaroo), May 8, 2003 (tigers), May 13, 2003 (tigers), and July 23, 2003 (tiger), For The Birds, Inc., and Jerry L. Korn failed to handle animals as expeditiously and carefully as possible in a manner that would not cause trauma, unnecessary discomfort, behavioral stress, or physical harm (9 C.F.R. § 2.131(a)(1)

(2004) [9 C.F.R. § 2.131(b)(1) (2005)]).

23. On May 6, 2003, For The Birds, Inc., and Jerry L. Korn used physical abuse to handle a tiger during an exhibition to the public (9 C.F.R. § 2.131(a)(2)(i) (2004) [9 C.F.R. § 2.131(b)(2)(i) (2005)]).

24. On May 1, 2001, For The Birds, Inc., and Jerry L. Korn failed to handle animals during public exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public. Specifically, For The Birds, Inc., and Jerry L. Korn exhibited an adult tiger (Raja) to the public without sufficient barrier or distance. (9 C.F.R. § 2.131(b)(1) (2004) [9 C.F.R. § 2.131(c)(1) (2005)].)

25. On May 10, 2001, For The Birds, Inc., and Jerry L. Korn failed to handle animals during public exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public. Specifically, For The Birds, Inc., and Jerry L. Korn exhibited an adult tiger (Raja) to the public without sufficient barrier or distance. (9 C.F.R. § 2.131(b)(1) (2004) [9 C.F.R. § 2.131(c)(1) (2005)].)

26. In June 2002, For The Birds, Inc., and Jerry L. Korn failed to handle animals during public exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public. Specifically, For The Birds, Inc., and Jerry L. Korn exhibited an adult tiger (Raja) to a child without sufficient barrier or distance. (9 C.F.R. § 2.131(b)(1) (2004) [9 C.F.R. § 2.131(c)(1) (2005)].)

27. On June 4, 2002, For The Birds, Inc., and Jerry L. Korn failed to handle animals during public exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public. Specifically, For The Birds, Inc., and Jerry L. Korn exhibited adult tigers to children without any barrier or distance. (9 C.F.R. § 2.131(b)(1) (2004) [9 C.F.R. § 2.131(c)(1) (2005)].)

28. On February 19, 2003, For The Birds, Inc., and Jerry L. Korn failed to handle animals during public exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public. Specifically, For The Birds, Inc., and Jerry L. Korn exhibited adult tigers to the public without any barrier or distance. (9 C.F.R. § 2.131(b)(1) (2004) [9 C.F.R. § 2.131(c)(1) (2005)].)

29. On May 13, 2003, For The Birds, Inc., and Jerry L. Korn failed to handle animals during public exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public. Specifically, For The Birds, Inc., and Jerry L. Korn exhibited adult tigers to the public without any barrier or distance. (9 C.F.R. § 2.131(b)(1) (2004) [9 C.F.R. § 2.131(c)(1) (2005)].)

30. On May 6, 2003, For The Birds, Inc., and Jerry L. Korn failed to handle animals during public exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public. Specifically, For The Birds, Inc., and Jerry L. Korn exhibited two adult tigers to the public without any distance or barriers between the animals and the public (resulting in at least one injury to a member of the public). (9 C.F.R. § 2.131(b)(1) (2004) [9 C.F.R. § 2.131(c)(1) (2005)].)

31. On May 6, 2003, For The Birds, Inc., and Jerry L. Korn failed to handle animals during public exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public. Specifically, For The Birds, Inc., and Jerry L. Korn exhibited adult and juvenile goats, a juvenile kangaroo, an eland, a giraffe, and a camel to the public without sufficient distance or barriers to protect the animals from the public. (9 C.F.R. § 2.131(b)(1) (2004) [9 C.F.R. § 2.131(c)(1) (2005)].)

32. On May 8, 2003, For The Birds, Inc., and Jerry L. Korn failed to handle animals during public exhibition so there was minimal risk of

harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public (9 C.F.R. § 2.131(b)(1) (2004) [9 C.F.R. § 2.131(c)(1) (2005)]).

33. On July 23, 2003, For The Birds, Inc., and Jerry L. Korn failed to handle animals during public exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public. Specifically, For The Birds, Inc., and Jerry L. Korn exhibited adult tigers to approximately 40 children without any distance or barriers between the animals and the public. (9 C.F.R. § 2.131(b)(1) (2004) [9 C.F.R. § 2.131(c)(1) (2005)].)

34. On August 12, 2003, For The Birds, Inc., and Jerry L. Korn failed to handle animals during public exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public. Specifically, For The Birds, Inc., and Jerry L. Korn exhibited an adult giraffe and an adult eland to the public without any distance or barriers between the animals and the public. (9 C.F.R. § 2.131(b)(1) (2004) [9 C.F.R. § 2.131(c)(1) (2005)].)

35. Between approximately May 2003 and August 16, 2003, For The Birds, Inc., and Jerry L. Korn failed to handle animals during public exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public. Specifically, For The Birds, Inc., and Jerry L. Korn regularly allowed customers to enter the primary enclosure containing two tigers without any distance or barriers between the animals and the public. (9 C.F.R. § 2.131(b)(1) (2004) [9 C.F.R. § 2.131(c)(1) (2005)].)

36. On May 6, 2003, For The Birds, Inc., and Jerry L. Korn exhibited animals under conditions that were inconsistent with the animals' well-being. Specifically, For The Birds, Inc., and Jerry L. Korn exhibited tigers to the public outside of any enclosures and allowed personnel and the public to touch, tease, and harass animals, including an adult goat and her kids, an adult eland, a giraffe, and a juvenile kangaroo. (9 C.F.R. § 2.131(c)(1) (2004) [9 C.F.R. § 2.131(d)(1) (2005)].)

37. On or about the following dates, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum facilities and operating standards for nonhuman primates (9 C.F.R. §§ 3.75-.92), as follows:

a. On August 24, 2003, For The Birds, Inc., and Jerry L. Korn failed to provide any food to two lemurs (9 C.F.R. § 3.83).

b. On August 24, 2003, For The Birds, Inc., and Jerry L. Korn failed to provide potable water in sufficient quantity to nonhuman primates. Specifically, For The Birds, Inc., and Jerry L. Korn provided no water to two lemurs. (9 C.F.R. § 3.83.)

c. On August 27, 2002, For The Birds, Inc., and Jerry L. Korn failed to keep the premises clean and in good repair. Specifically, the building housing two lemurs needed cleaning, and the lemur enclosures had a large accumulation of cobwebs. (9 C.F.R. § 3.84(c).)

d. On February 12, 2003, For The Birds, Inc., and Jerry L. Korn failed to keep the premises clean and in good repair. Specifically, the building housing two lemurs needed cleaning, and the lemur enclosures had a large accumulation of cobwebs. (9 C.F.R. § 3.84(c).)

e. Between August 27, 2002, and August 24, 2003, For The Birds, Inc., and Jerry L. Korn failed to have enough employees to carry out the level of husbandry practices and care for nonhuman primates required by the Regulations and Standards (9 C.F.R. § 3.85).

38. On or about the following dates, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum general facilities standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates, and marine mammals regarding structural strength (9 C.F.R. § 3.125(a)), as follows:

a. On April 3, 2002, For The Birds, Inc., and Jerry L. Korn failed to maintain their housing facilities structurally sound and in good repair to protect the animals housed in the facilities from injury and to contain them. Specifically, For The Birds, Inc., and Jerry L. Korn

failed to repair torn metal in the eland enclosure.

b. On July 2, 2002, For The Birds, Inc., and Jerry L. Korn failed to maintain their housing facilities structurally sound and in good repair to protect the animals housed in the facilities from injury and to contain them. Specifically, For The Birds, Inc., and Jerry L. Korn failed to construct the bear enclosure so that it contained the bear securely.

c. On July 2, 2002, For The Birds, Inc., and Jerry L. Korn failed to maintain their housing facilities structurally sound and in good repair to protect the animals housed in the facilities from injury and to contain them. Specifically, For The Birds, Inc., and Jerry L. Korn failed to construct the tiger enclosure so that it contained the tigers securely.

d. On August 12, 2002, For The Birds, Inc., and Jerry L. Korn failed to maintain their housing facilities structurally sound and in good repair to protect the animals housed in the facilities from injury and to contain them. Specifically, For The Birds, Inc., and Jerry L. Korn failed to repair exposed nails in camel enclosure.

e. On August 27, 2002, For The Birds, Inc., and Jerry L. Korn failed to maintain their housing facilities structurally sound and in good repair to protect the animals housed in the facilities from injury and to contain them. Specifically, For The Birds, Inc., and Jerry L. Korn failed to repair jagged wire mesh in the tiger cub enclosure.

f. On August 27, 2002, For The Birds, Inc., and Jerry L. Korn failed to maintain their housing facilities structurally sound and in good repair to protect the animals housed in the facilities from injury and to contain them. Specifically, For The Birds, Inc., and Jerry L. Korn failed to repair the gap between the frame and wire in the tiger cub enclosure.

g. On May 6, 2003, For The Birds, Inc., and Jerry L. Korn failed to maintain their housing facilities structurally sound and in good repair to protect the animals housed in the facilities from injury and to contain them. Specifically, For The Birds, Inc., and Jerry L. Korn failed to repair broken wire in the enclosure housing a juvenile kangaroo.

h. On February 11, 2003, For The Birds, Inc., and Jerry L. Korn

failed to maintain their housing facilities structurally sound and in good repair to protect the animals housed in the facilities from injury and to contain them. Specifically, For The Birds, Inc., and Jerry L. Korn failed to repair the gate and handling chute in the enclosure housing a bull elk and a cow elk.

i. On February 12, 2003, For The Birds, Inc., and Jerry L. Korn failed to maintain their housing facilities structurally sound and in good repair to protect the animals housed in the facilities from injury and to contain them. Specifically, For The Birds, Inc., and Jerry L. Korn failed to repair the gate and handling chute in the enclosure housing a bull elk and a cow elk.

39. On or about the following dates, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum general facilities standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates, and marine mammals regarding storage (9 C.F.R. § 3.125(c)), as follows:

a. On August 27, 2002, For The Birds, Inc., and Jerry L. Korn failed to store supplies of food in facilities that adequately protected them from contamination.

b. In approximately June 2003, For The Birds, Inc., and Jerry L. Korn failed to store supplies of food and bedding in facilities that adequately protected them from contamination. Specifically, For The Birds, Inc., and Jerry L. Korn failed to protect food supplies from vermin, including the three to four rats found in the food preparation area.

c. In approximately June 2003, For The Birds, Inc., and Jerry L. Korn failed to store supplies of food and bedding in facilities that adequately protected them from contamination. Specifically, For The Birds, Inc., and Jerry L. Korn failed to dispose of rancid food in the food preparation area, leaving it out for days at a time.

d. In approximately June 2003, For The Birds, Inc., and Jerry L. Korn failed to store supplies of food and bedding in facilities that adequately protected them from deterioration and contamination. Specifically, For The Birds, Inc., and Jerry L. Korn failed to protect food supplies in the produce cooler, which contained countless live

maggots.

e. In approximately June 2003, For The Birds, Inc., and Jerry L. Korn failed to store supplies of food and bedding in facilities that adequately protected them from deterioration and contamination. Specifically, For The Birds, Inc., and Jerry L. Korn failed to protect animal bedding supplies, which contained countless live maggots.

40. On or about the following dates, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum general facilities standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates, and marine mammals regarding waste disposal (9 C.F.R. § 3.125(d)), as follows:

a. On April 3, 2002, For The Birds, Inc., and Jerry L. Korn failed to provide for the removal and disposal of animal and food wastes, bedding, dead animals, trash, and debris. Specifically, For The Birds, Inc., and Jerry L. Korn failed to remove food waste (bones) from the tiger enclosure.

b. On April 3, 2002, For The Birds, Inc., and Jerry L. Korn failed to provide for the removal and disposal of animal and food wastes, bedding, dead animals, trash, and debris. Specifically, For The Birds, Inc., and Jerry L. Korn failed to remove excreta from the giraffe enclosure.

c. On July 2, 2002, For The Birds, Inc., and Jerry L. Korn failed to provide for the removal and disposal of animal and food wastes, bedding, dead animals, trash, and debris. Specifically, For The Birds, Inc., and Jerry L. Korn failed to remove debris from the prairie dog enclosure.

d. On August 12, 2002, For The Birds, Inc., and Jerry L. Korn failed to provide for the removal and disposal of animal and food wastes, bedding, dead animals, trash, and debris. Specifically, For The Birds, Inc., and Jerry L. Korn failed to remove waste and debris from the moat adjacent to the bear enclosure.

e. On August 27, 2002, For The Birds, Inc., and Jerry L. Korn failed to provide for the removal and disposal of animal and food wastes, bedding, dead animals, trash, and debris. Specifically, For The Birds, Inc., and Jerry L. Korn failed to remove excreta and

debris from the giraffe enclosure.

f. On August 27, 2002, For The Birds, Inc., and Jerry L. Korn failed to provide for the removal and disposal of animal and food wastes, bedding, dead animals, trash, and debris. Specifically, For The Birds, Inc., and Jerry L. Korn failed to remove excreta and debris from the eland enclosure.

g. On August 27, 2002, For The Birds, Inc., and Jerry L. Korn failed to provide for the removal and disposal of animal and food wastes, bedding, dead animals, trash, and debris. Specifically, For The Birds, Inc., and Jerry L. Korn failed to remove excreta and debris from the elk enclosure.

h. On August 27, 2002, For The Birds, Inc., and Jerry L. Korn failed to provide for the removal and disposal of animal and food wastes, bedding, dead animals, trash, and debris. Specifically, For The Birds, Inc., and Jerry L. Korn failed to remove mouse droppings from the food preparation area.

i. On August 27, 2002, For The Birds, Inc., and Jerry L. Korn failed to provide for the removal and disposal of animal and food wastes, bedding, dead animals, trash, and debris. Specifically, For The Birds, Inc., and Jerry L. Korn failed to remove debris and old bones from the tiger enclosure.

j. On August 27, 2002, For The Birds, Inc., and Jerry L. Korn failed to provide for the removal and disposal of animal and food wastes, bedding, dead animals, trash, and debris. Specifically, For The Birds, Inc., and Jerry L. Korn failed to remove debris from the camel enclosure.

k. On February 12, 2003, For The Birds, Inc., and Jerry L. Korn failed to provide for the removal and disposal of animal and food wastes, bedding, dead animals, trash, and debris. Specifically, For The Birds, Inc., and Jerry L. Korn failed to remove debris and excreta from the giraffe enclosure.

l. On February 12, 2003, For The Birds, Inc., and Jerry L. Korn failed to provide for the removal and disposal of animal and food wastes, bedding, dead animals, trash, and debris. Specifically, For The Birds, Inc., and Jerry L. Korn failed to remove debris and excreta from the eland enclosure.

m. On February 12, 2003, For The Birds, Inc., and Jerry L. Korn failed to provide for the removal and disposal of animal and food wastes, bedding, dead animals, trash, and debris. Specifically, For The Birds, Inc., and Jerry L. Korn failed to remove debris from the food preparation area.

n. On May 6, 2003, For The Birds, Inc., and Jerry L. Korn failed to provide for the removal and disposal of animal and food wastes, bedding, dead animals, trash, and debris. Specifically, For The Birds, Inc., and Jerry L. Korn failed to remove debris from the goat enclosure.

o. On February 12, 2003, For The Birds, Inc., and Jerry L. Korn failed to provide for the removal and disposal of animal and food wastes, bedding, dead animals, trash, and debris. Specifically, For The Birds, Inc., and Jerry L. Korn failed to remove debris from the camel enclosure.

p. Between October 2002 and June 2003, For The Birds, Inc., and Jerry L. Korn failed to provide for the removal and disposal of animal and food wastes, bedding, dead animals, trash, and debris. Specifically, For The Birds, Inc., and Jerry L. Korn failed to remove excreta from the giraffe enclosure.

q. On August 12, 2003, For The Birds, Inc., and Jerry L. Korn failed to provide for the removal and disposal of animal and food wastes, bedding, dead animals, trash, and debris. Specifically, For The Birds, Inc., and Jerry L. Korn failed to remove debris and excreta from the camel enclosure.

r. On August 12, 2002, For The Birds, Inc., and Jerry L. Korn failed to provide for the removal and disposal of animal and food wastes, bedding, dead animals, trash, and debris. Specifically, For The Birds, Inc., and Jerry L. Korn failed to remove waste and debris from the moat adjacent to the cougar enclosure.

41.On August 27, 2003, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum facilities and operating standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates, and marine mammals (9 C.F.R. §§ 3.125-.142). Specifically, For The Birds, Inc., and Jerry L. Korn failed

to provide a suitable and sanitary method to eliminate rapidly excess water from indoor housing facilities for tigers. (9 C.F.R. § 3.126(d).)

42. On or about the following dates, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates, and marine mammals (9 C.F.R. §§ 3.125-.142), by failing to comply with (9 C.F.R. § 3.127), as follows:

a. On August 27, 2002, For The Birds, Inc., and Jerry L. Korn failed to provide a bear housed outdoors with appropriate natural or artificial shelter (9 C.F.R. § 3.127(b)).

b. On November 8, 2002, For The Birds, Inc., and Jerry L. Korn failed to provide a bear housed outdoors with appropriate natural or artificial shelter (9 C.F.R. § 3.127(b)).

c. On February 11, 2003, For The Birds, Inc., and Jerry L. Korn failed to provide a bear housed outdoors with appropriate natural or artificial shelter (9 C.F.R. § 3.127(b)).

d. On February 12, 2003, For The Birds, Inc., and Jerry L. Korn failed to provide a bear housed outdoors with appropriate natural or artificial shelter (9 C.F.R. § 3.127(b)).

e. On August 12, 2003, For The Birds, Inc., and Jerry L. Korn failed to provide a bear housed outdoors with appropriate natural or artificial shelter (9 C.F.R. § 3.127(b)).

f. On February 11, 2003, For The Birds, Inc., and Jerry L. Korn failed to provide a suitable method to eliminate rapidly excess water from the elk enclosure (9 C.F.R. § 3.127(c)).

g. On March 15, 2001, For The Birds, Inc., and Jerry L. Korn failed to construct a perimeter fence so that it protects the animals in the facility by restricting animals and unauthorized persons from going through it. Specifically, there was no perimeter fence around the tiger and bear enclosures. (9 C.F.R. § 3.127(d).)

h. On April 3, 2002, For The Birds, Inc., and Jerry L. Korn failed to construct a perimeter fence so that it protects the animals in the facility by restricting animals and unauthorized persons from going through it. Specifically, there was no perimeter fence around the mountain lion enclosure. (9 C.F.R. § 3.127(d).)

i. On April 3, 2002, For The Birds, Inc., and Jerry L. Korn failed to construct a perimeter fence so that it protects the animals in the facility by restricting animals and unauthorized persons from going through it. Specifically, there was no perimeter fence around the snow leopard enclosure. (9 C.F.R. § 3.127(d).)

j. On July 2, 2002, For The Birds, Inc., and Jerry L. Korn failed to construct a perimeter fence so that it protects the animals in the facility by restricting animals and unauthorized persons from going through it. Specifically, there was no perimeter fence around the tiger enclosure. (9 C.F.R. § 3.127(d).)

k. On July 2, 2002, For The Birds, Inc., and Jerry L. Korn failed to construct a perimeter fence so that it protects the animals in the facility by restricting animals and unauthorized persons from going through it. Specifically, there was no perimeter fence around the bear enclosure. (9 C.F.R. § 3.127(d).)

l. On May 22, 2002, For The Birds, Inc., and Jerry L. Korn failed to construct a perimeter fence so that it protects the animals in the facility by restricting animals and unauthorized persons from going through it. Specifically, there was no perimeter fence around the tiger enclosure. (9 C.F.R. § 3.127(d).)

m. On May 22, 2002, For The Birds, Inc., and Jerry L. Korn failed to construct a perimeter fence so that it protects the animals in the facility by restricting animals and unauthorized persons from going through it. Specifically, there was no perimeter fence around the bear enclosure. (9 C.F.R. § 3.127(d).)

n. On August 27, 2002, For The Birds, Inc., and Jerry L. Korn failed to construct a perimeter fence so that it protects the animals in the facility by restricting animals and unauthorized persons from going through it. Specifically, there was no perimeter fence around the bear enclosure. (9 C.F.R. § 3.127(d).)

o. On February 12, 2003, For The Birds, Inc., and Jerry L. Korn failed to provide a suitable method to eliminate rapidly excess water from the elk enclosure (9 C.F.R. § 3.127(c)).

43. On or about the following dates, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum facilities

and operating standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates, and marine mammals regarding space requirements (9 C.F.R. § 3.128), as follows:

a. Between October 2002 and May 30, 2003, For The Birds, Inc., and Jerry L. Korn failed to construct and maintain enclosures so as to provide sufficient space to allow each animal contained in the enclosures to make normal postural and social adjustments. Specifically, For The Birds, Inc., and Jerry L. Korn failed to construct the giraffe enclosure so as to provide sufficient space for the animal to make normal postural adjustments.

b. On August 12, 2003, For The Birds, Inc., and Jerry L. Korn failed to construct and maintain enclosures so as to provide sufficient space to allow each animal contained in the enclosures to make normal postural and social adjustments. Specifically, For The Birds, Inc., and Jerry L. Korn failed to construct the giraffe enclosure so as to provide sufficient space for the animal to make normal postural adjustments.

44. On or about the following dates, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum animal health and husbandry standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates, and marine mammals regarding feeding (9 C.F.R. § 3.129), as follows:

a. Between March 2002 and February 2003, For The Birds, Inc., and Jerry L. Korn repeatedly failed to provide tigers with a sufficient quantity of wholesome, palatable food and routinely failed to feed tigers any food for 4 days in a row.

b. On or about April 3, 2002, For The Birds, Inc., and Jerry L. Korn failed to minimize contamination of food. Specifically, For The Birds, Inc., and Jerry L. Korn provided spoiled meat to tigers.

c. On or about August 15, 2003, For The Birds, Inc., and Jerry L. Korn failed to minimize contamination of food. Specifically, food for tigers was putrified and contained maggots.

d. On or about August 24, 2003, For The Birds, Inc., and Jerry L. Korn failed to provide animals with a sufficient quantity of food that was wholesome, palatable, and free from contamination.

Specifically, For The Birds, Inc., and Jerry L. Korn failed to feed sufficient food to a giraffe, an eland, rabbits, a kangaroo, elk, tigers, and domestic cats, which animals were thin and hungry.

45. On or about the following dates, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum animal health and husbandry standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates, and marine mammals regarding watering (9 C.F.R. § 3.130), as follows:

a. On or about May 22, 2002, For The Birds, Inc., and Jerry L. Korn failed to maintain water receptacles for the eland clean and sanitary. Specifically, For The Birds, Inc., and Jerry L. Korn allowed large clumps of algae to grow in the eland's water trough.

b. On or about July 2, 2002, For The Birds, Inc., and Jerry L. Korn failed to maintain water receptacles for the eland clean and sanitary. Specifically, For The Birds, Inc., and Jerry L. Korn allowed large clumps of algae to grow in the eland's water trough and failed to remove a dead bird from the trough.

c. On or about April 3, 2002, For The Birds, Inc., and Jerry L. Korn failed to maintain water receptacles for the eland clean and sanitary. Specifically, For The Birds, Inc., and Jerry L. Korn allowed large clumps of algae to grow in the eland's water trough and failed to remove a dead bird from the trough.

d. On or about July 2, 2002, For The Birds, Inc., and Jerry L. Korn failed to maintain water receptacles for the snow leopards clean and sanitary.

e. On or about August 24, 2003, For The Birds, Inc., and Jerry L. Korn failed to provide animals with potable water as often as necessary. Specifically, For The Birds, Inc., and Jerry L. Korn failed to provide adequate water to rabbits.

46. On or about the following dates, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum animal health and husbandry standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates, and marine mammals regarding the cleaning of enclosures (9 C.F.R. § 3.131(a)), as

follows:

a. On February 12, 2003, For The Birds, Inc., and Jerry L. Korn failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals contained in the enclosures and to minimize disease hazards and reduce odors. Specifically, the giraffe enclosure contained excessive fecal material.

b. On August 24, 2003, For The Birds, Inc., and Jerry L. Korn failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals contained in the enclosures and to minimize disease hazards and reduce odors. Specifically, the giraffe enclosure contained excessive fecal material.

c. On February 12, 2003, For The Birds, Inc., and Jerry L. Korn failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals contained in the enclosures and to minimize disease hazards and reduce odors. Specifically, the eland enclosure contained excessive fecal material.

d. On February 12, 2003, For The Birds, Inc., and Jerry L. Korn failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals contained in the enclosures and to minimize disease hazards and reduce odors. Specifically, the enclosure housing the cow elk and bull elk contained excessive excreta.

e. On April 3, 2002, For The Birds, Inc., and Jerry L. Korn failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals contained in the enclosures and to minimize disease hazards and reduce odors. Specifically, the enclosure housing the giraffe contained excessive excreta.

f. On August 12, 2003, For The Birds, Inc., and Jerry L. Korn failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals contained in the enclosures and to minimize disease hazards and reduce odors. Specifically, the enclosure housing the camel contained excessive excreta.

g. On February 11, 2003, For The Birds, Inc., and Jerry L. Korn failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals contained in the

enclosures and to minimize disease hazards and reduce odors. Specifically, the enclosure housing the cow elk and bull elk contained excessive excreta.

47. During 2002 and 2003, and specifically on July 2, 2002, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to have a sufficient number of adequately-trained employees to carry out the level of husbandry practices and care required by the Regulations and Standards (9 C.F.R. § 3.132).

48. During the spring and summer 2002, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by housing incompatible animals in the same enclosure. Specifically, For The Birds, Inc., and Jerry L. Korn housed a cow elk, which became trapped in mud and excreta, in the same enclosure as a bull elk which harassed and attacked the trapped elk. (9 C.F.R. § 3.133.)

Conclusions of Law

1. By reason of the Findings of Fact, For The Birds, Inc., and Jerry L. Korn have willfully violated the Animal Welfare Act and the Regulations and Standards as set forth in paragraph 2 through paragraph 41 of these conclusions of law.

2. Between March 15, 2001, and at least August 24, 2003, For The Birds, Inc., willfully violated sections 2.1(a) and 2.100(a) of the Regulations and Standards (9 C.F.R. §§ 2.1(a), .100(a)) by exhibiting animals without an Animal Welfare Act license.

3. Between May 23, 2003, and at least August 24, 2003, Jerry L. Korn willfully violated sections 2.1(a) and 2.100(a) of the Regulations and Standards (9 C.F.R. §§ 2.1(a), .100(a)) by exhibiting animals without an Animal Welfare Act license.

4. Between May 23, 2003, and at least August 16, 2003, Jerry L. Korn willfully violated sections 2.1(a) and 2.100(a) of the Regulations and Standards (9 C.F.R. §§ 2.1(a), .100(a)) by operating as a dealer without an Animal Welfare Act license.

5. From October 2002 through June 2003, and on or about August

12, 2003, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.40(a) of the Regulations and Standards (9 C.F.R. § 2.40(a)) by failing to obtain any veterinary care for a giraffe whose hooves were overgrown.

6. From approximately May 2003 through August 2003, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.40(a) of the Regulations and Standards (9 C.F.R. § 2.40(a)) by failing to obtain any veterinary care for a white Bengal tiger that was experiencing a rapid and extreme weight loss.

7. From approximately August 1, 2003, through August 16, 2003, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.40(a) of the Regulations and Standards (9 C.F.R. § 2.40(a)) by failing to obtain any veterinary care for a tiger that was limping and whose left front paw was severely swollen.

8. From approximately May 2003 through August 2003, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.40(a) of the Regulations and Standards (9 C.F.R. § 2.40(a)) by failing to obtain any veterinary care for a camel with a golf-ball-sized abscess on the camel's lower left jaw.

9. From approximately May 2003 through August 2003, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.40(a) of the Regulations and Standards (9 C.F.R. § 2.40(a)) by failing to obtain any veterinary care for a camel, after Jerry L. Korn lanced a golf-ball-sized abscess on the camel's lower left jaw, causing it to become a seeping, open wound that attracted a large number of flies.

10. On or about July 7, 2003, through July 9, 2003, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.40(a) of the Regulations and Standards (9 C.F.R. § 2.40(a)) by failing to obtain any veterinary care for a female snow leopard in obvious severe distress and bleeding from her vaginal and rectal area and a giraffe whose condition was reported directly to Jerry L. Korn, who took no action, which inaction resulted in, or contributed to, the animal's death on or about July 9, 2003.

11. In the spring 2002, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.40(a) of the Regulations and Standards (9 C.F.R. § 2.40(a)) by failing to obtain any veterinary care for a pregnant

llama resulting in, or contributing to, the death of the animal and her baby.

12. On or about August 12, 2003, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.40(a) of the Regulations and Standards (9 C.F.R. § 2.40(a)) by failing to obtain any veterinary care for an eland whose hooves were overgrown.

13. On or about March 7, 2001, April 3, 2002, May 22, 2002, July 2, 2002, August 27, 2002, and February 12, 2003, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.40(a)(1) of the Regulations and Standards (9 C.F.R. § 2.40(a)(1)) by failing to employ a full-time attending veterinarian or a part-time attending veterinarian under formal arrangements that included a written program of veterinary care.

14. Between March 7, 2001, and August 24, 2003, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.40(a)(2) of the Regulations and Standards (9 C.F.R. § 2.40(a)(2)) by failing to ensure that their attending veterinarian had appropriate authority to ensure the provision of adequate veterinary care and to oversee the adequacy of other aspects of animal care and use.

15. Between March 7, 2001, and August 24, 2003, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.40(b)(1) of the Regulations and Standards (9 C.F.R. § 2.40(b)(1)) by failing to establish and maintain a program of adequate veterinary care that included the availability of appropriate facilities, including adequate enclosures and secure perimeter fences.

16. Between March 7, 2001, and August 24, 2003, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.40(b)(1) of the Regulations and Standards (9 C.F.R. § 2.40(b)(1)) by failing to establish and maintain a program of adequate veterinary care that included the availability of appropriate personnel, equipment, and services.

17. Between March 7, 2001, and August 24, 2003, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.40(b)(2) of the Regulations and Standards (9 C.F.R. § 2.40(b)(2)) by failing to establish and maintain a program of adequate veterinary care that included the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and the availability of emergency, weekend, and holiday care.

18. Between March 7, 2001, and August 24, 2003, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.40(b)(3) of the Regulations and Standards (9 C.F.R. § 2.40(b)(3)) by failing to establish and maintain a program of adequate veterinary care that included daily observation of all animals to assess their health and well-being and a mechanism of direct and frequent communication with the attending veterinarian, so that timely and accurate information on problems of animal health, behavior, and well-being was conveyed to the attending veterinarian.

19. Between March 7, 2001, and August 24, 2003, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.40(b)(4) of the Regulations and Standards (9 C.F.R. § 2.40(b)(4)) by failing to establish and maintain a program of adequate veterinary care that included adequate guidance to personnel involved in the care and use of animals regarding handling, immobilization, anesthesia, and tranquilization.

20. On or about March 7, 2001, August 27, 2002, February 11, 2003, and February 12, 2003, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.75(b)(1) of the Regulations and Standards (9 C.F.R. § 2.75(b)(1)) by failing to make, keep, and maintain records that fully and correctly disclose information concerning animals in For The Birds, Inc.'s and Jerry L. Korn's possession or under For The Birds, Inc.'s and Jerry L. Korn's control, or disposed of by For The Birds, Inc., and Jerry L. Korn.

21. On April 3, 2002, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.126(a)(2) of the Regulations and Standards (9 C.F.R. § 2.126(a)(2)) by failing to allow Animal and Plant Health Inspection Service officials, during business hours, to examine records required to be kept by the Animal Welfare Act and the Regulations and Standards.

22. On or about May 1, 2001 (tigers), May 10, 2001 (tiger - Raja), April 3, 2002 (giraffe), June 2002 (tiger - Raja), June 4, 2002 (tiger), June 25, 2002 (bear), August 2002 (elk), February 19, 2003 (tigers), May 6, 2003 (tigers, hoofstock, kangaroo), May 8, 2003 (tigers), May 13, 2003 (tigers), and July 23, 2003 (tiger), For The Birds, Inc., and Jerry L. Korn willfully violated section 2.131(a)(1) of the Regulations and Standards (9 C.F.R. § 2.131(a)(1) (2004) [9 C.F.R. § 2.131(b)(1) (2005)]) by failing to handle animals as expeditiously and carefully as

possible in a manner that would not cause trauma, unnecessary discomfort, behavioral stress, or physical harm.

23. On May 6, 2003, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.131(a)(2)(i) of the Regulations and Standards (9 C.F.R. § 2.131(a)(2)(i)) (2004) [9 C.F.R. § 2.131(b)(2)(i) (2005)]) by using physical abuse to handle a tiger during an exhibition to the public.

24. On May 1, 2001, on May 10, 2001, in June 2002 (one instance), on June 4, 2002, on February 19, 2003, on May 6, 2003 (two instances), on May 8, 2003, on May 13, 2003, on July 23, 2003, on August 12, 2003, and between May 2003 and August 16, 2003 (regularly), For The Birds, Inc., and Jerry L. Korn willfully violated section 2.131(b)(1) of the Regulations and Standards (9 C.F.R. § 2.131(b)(1) (2004) [9 C.F.R. § 2.131(c)(1) (2005)]) by failing to handle animals during public exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public.

25. On May 6, 2003, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.131(c)(1) of the Regulations and Standards (9 C.F.R. § 2.131(c)(1) (2004) [9 C.F.R. § 2.131(d)(1) (2005)]) by exhibiting animals under conditions that were inconsistent with the animals' well-being.

26. On August 24, 2003 (two instances), For The Birds, Inc., and Jerry L. Korn willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum standards for nonhuman primates in section 3.83 of the Regulations and Standards (9 C.F.R. § 3.83).

27. On August 27, 2002, and February 12, 2003, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum standards for nonhuman primates in section 3.84(c) of the Regulations and Standards (9 C.F.R. § 3.84(c)).

28. Between August 27, 2002, and August 24, 2003, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to have enough employees to carry out the level of husbandry practices and care

for nonhuman primates as required in section 3.85 of the Regulations and Standards (9 C.F.R. § 3.85).

29. On April 3, 2002, July 2, 2002 (two instances), August 12, 2002, August 27, 2002 (two instances), February 11, 2003, February 12, 2003, and May 6, 2003, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum facilities standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates, and marine mammals regarding structural strength of facilities in section 3.125(a) of the Regulations and Standards (9 C.F.R. § 3.125(a)).

30. On August 27, 2002, and in approximately June 2003 (four instances), For The Birds, Inc., and Jerry L. Korn willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum general facilities standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates, and marine mammals regarding storage in section 3.125(c) of the Regulations and Standards (9 C.F.R. § 3.125(c)).

31. On April 3, 2002 (two instances), July 2, 2002, August 12, 2002 (two instances), August 27, 2002 (six instances), February 12, 2003 (four instances), May 6, 2003, and August 12, 2003, and between October 2002 and June 2003, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum general facilities standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates, and marine mammals regarding waste disposal in section 3.125(d) of the Regulations and Standards (9 C.F.R. § 3.125(d)).

32. On August 27, 2003, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum facilities and operating standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates, and marine mammals regarding drainage in section 3.126(d) of the Regulations and Standards (9 C.F.R. § 3.126(d)).

33. On August 27, 2002, November 8, 2002, February 11, 2003, February 12, 2003, and August 12, 2003, For The Birds, Inc., and Jerry

L. Korn willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates, and marine mammals regarding shelter from inclement weather in section 3.127(b) of the Regulations and Standards (9 C.F.R. § 3.127(b)).

34. On February 11, 2003, and February 12, 2003, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates, and marine mammals regarding drainage of outdoor facilities in section 3.127(c) of the Regulations and Standards (9 C.F.R. § 3.127(c)).

35. On March 15, 2001, April 3, 2002 (two instances), May 22, 2002 (two instances), July 2, 2002 (two instances), and August 27, 2002, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates, and marine mammals regarding perimeter fencing in section 3.127(d) of the Regulations and Standards (9 C.F.R. § 3.127(d)).

36. Between October 2002 and May 30, 2003, and on August 12, 2003, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum facilities and operating standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates, and marine mammals regarding space requirements in section 3.128 of the Regulations and Standards (9 C.F.R. § 3.128).

37. Between March 2002 and February 2003 (routinely), and on or about April 3, 2002, August 15, 2003, and August 24, 2003, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum animal health and husbandry standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates, and marine mammals regarding feeding in section 3.129 of the Regulations and Standards (9 C.F.R. § 3.129).

38. On or about April 3, 2002, May 22, 2002, July 2, 2002 (two instances), and August 24, 2003, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum animal health and husbandry standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates, and marine mammals regarding watering in section 3.130 of the Regulations and Standards (9 C.F.R. § 3.130).

39. On April 3, 2002, February 11, 2003, February 12, 2003 (three instances), August 12, 2003, and August 24, 2003, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum animal health and husbandry standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates, and marine mammals regarding cleaning of enclosures in section 3.131(a) of the Regulations and Standards (9 C.F.R. § 3.131(a)).

40. During 2002 and 2003, and specifically on July 2, 2002, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to have a sufficient number of adequately-trained employees to carry out the level of husbandry practices and care as required by section 3.132 of the Regulations and Standards (9 C.F.R. § 3.132).

41. During spring and summer 2002, For The Birds, Inc., and Jerry L. Korn willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by housing incompatible animals in the same enclosure in violation of section 3.133 of the Regulations and Standards (9 C.F.R. § 3.133).

Complainant's Appeal Petition

Complainant raises three issues in Complainant's Appeal Petition. First, Complainant contends the ALJ erroneously failed to issue conclusions of law that conform to the findings of fact and erroneously

concluded For The Birds, Inc., Jerry L. Korn, and Susan F. Korn[7] committed violations of the Regulations and Standards that are not alleged in the Complaint. (Complainant's Appeal Pet. at 3-10.)

For The Birds, Inc., and Jerry L. Korn are deemed, by their failures to file timely answers, to have admitted the allegations of the Complaint.[8] There is no record that would support a conclusion that For The Birds, Inc., or Jerry L. Korn committed violations of the Regulations and Standards other than those alleged in the Complaint; therefore, I do not adopt the ALJ's Initial Decision.

Second, Complainant contends the ALJ erroneously failed to revoke Jerry L. Korn's and Susan F. Korn's[9] Animal Welfare Act license (Complainant's Appeal Pet. at 10).

Jerry L. Korn is deemed, by his failure to file a timely answer to the Complaint, to have admitted at least 749 willful violations of the Regulations and Standards over a 2-year 5-month period. Many of these violations are very serious violations which jeopardized the health and well-being of Jerry L. Korn's animals. In light of the number and gravity of the violations and the period of time during which the violations occurred, I find revocation of Jerry L. Korn's Animal Welfare Act license appropriate and necessary to ensure Jerry L. Korn's compliance with the Animal Welfare Act and the Regulations and Standards in the future, to deter others from violating the Animal Welfare Act and the Regulations and Standards, and to fulfill the remedial purposes of the Animal Welfare Act.

Third, Complainant contends the $28,050 civil penalty the ALJ assessed For The Birds, Inc., Jerry L. Korn, and Susan F. Korn,[10] jointly and severally, is inadequate. Complainant asserts For The Birds, Inc.,

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[7]See note 6.

[8]7 C.F.R. § 1.136(c).

[9]See note 6.

[10]See note 6.

Jerry L. Korn, and Susan F. Korn[11] should each be assessed a $28,050 civil penalty. (Complainant's Appeal Pet. at 10-11.)

With respect to the civil monetary penalty, the Secretary of Agriculture is required to give due consideration to the size of the business of the person involved, the gravity of the violations, the person's good faith, and the history of previous violations.[12]

For The Birds, Inc., and Jerry L. Korn are deemed to have admitted they have a moderate-sized business with approximately 50 animals.[13] Many of For The Birds, Inc.'s and Jerry L. Korn's violations are serious violations which directly jeopardized the health and well-being of For The Birds, Inc.'s and Jerry L. Korn's animals. Moreover, For The Birds, Inc., and Jerry L. Korn are deemed to have admitted the gravity of their violations is great.[14]

For The Birds, Inc.'s and Jerry L. Korn's willful violations during the period March 2001 through August 2003, reveals a consistent disregard for, and unwillingness to abide by, the requirements of the Animal Welfare Act and the Regulations and Standards. An ongoing pattern of violations establishes a "history of previous violations" for the purposes of section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) and a lack of good faith.

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

> [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,

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[11]See note 6.

[12]7 U.S.C. § 2149(b).

[13]Compl. ¶ 5.

[14]Compl. ¶ 5.

> always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

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

Complainant seeks assessment of a $28,050 civil penalty against For The Birds, Inc., and assessment of a $28,050 civil penalty against Jerry L. Korn or 1 percent of the maximum civil penalty that Complainant asserts the Secretary of Agriculture may assess against For The Birds, Inc., and Jerry L. Korn.

I find For The Birds, Inc., committed at least 1,545 violations of the Regulations and Standards and Jerry L. Korn committed at least 749 violations of the Regulations and Standards. For The Birds, Inc., and Jerry L. Korn could be assessed a maximum civil penalty of $2,750 for each of their violations of the Regulations and Standards.[15] After examining all the relevant circumstances, in light of the United States Department of Agriculture's sanction policy, and taking into account the requirements of section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)), the remedial purposes of the Animal Welfare Act, and the recommendations of the administrative officials, I conclude that a cease and desist order, assessment of a $28,050 civil penalty against For The Birds, Inc., and assessment of a $20,597 civil penalty against Jerry L.

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[15]Section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) provides that the Secretary of Agriculture may assess a civil penalty of not more than $2,500 for each violation of the Animal Welfare Act and the Regulations and Standards. Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), the Secretary of Agriculture adjusted the civil penalty that may be assessed under section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) for each violation of the Animal Welfare Act and the Regulations and Standards by increasing the maximum civil penalty from $2,500 to $2,750 (7 C.F.R. § 3.91(b)(2)(v)). Therefore, For The Birds, Inc., could be assessed a maximum civil penalty of $4,248,750, and Jerry L. Korn could be assessed a maximum civil penalty of $2,059,750.

Korn[16] are appropriate and necessary to ensure For The Birds, Inc.'s and Jerry L. Korn's compliance with the Animal Welfare Act and the Regulations and Standards in the future, to deter others from violating the Animal Welfare Act and the Regulations and Standards, and to fulfill the remedial purposes of the Animal Welfare Act.

Paragraph 12 of the Complaint

Complainant alleges that, on February 11, 2003, Jerry L. Korn failed and refused to accept delivery of notice of registered or certified mail from the Animal and Plant Health Inspection Service, in willful violation of section 1.5 of the Regulations and Standards (9 C.F.R. § 1.5) (Compl. ¶ 12). No such provision existed on February 11, 2003; therefore, I decline to conclude that Jerry L. Korn violated section 1.5 of the Regulations and Standards (9 C.F.R. § 1.5) on February 11, 2003.

Paragraphs 13f and 13j of the Complaint

Complainant alleges that, on or about August 12, 2003, For The Birds, Inc., and Jerry L. Korn failed to employ an attending veterinarian to care for their animals. Specifically, For The Birds, Inc., and Jerry L. Korn failed to obtain any veterinary care for a giraffe whose hooves were overgrown, in willful violation of section 2.40(a) of the Regulations and Standards (9 C.F.R. § 2.40(a)). (Compl. ¶¶ 13f, 13j.) Based on the limited record before me, it appears Complainant may have alleged the same violation twice. I give For The Birds, Inc., and Jerry L. Korn the benefit of my doubt and find only one violation of section 2.40(a) of the Regulations and Standards (9 C.F.R. § 2.40(a)) based upon For The Birds, Inc.'s and Jerry L. Korn's August 12, 2003, failure to obtain any veterinary care for a giraffe whose hooves were

[16]The $28,050 civil penalty which I assess For The Birds, Inc., represents the amount of the civil penalty that administrative officials recommended that I assess For The Birds, Inc., for its violations of the Regulations and Standards. The $20,597 civil penalty which I assess Jerry L. Korn represents 1 percent of the maximum civil penalty which I conclude could be assessed against Jerry L. Korn for his violations of the Regulations and Standards.

overgrown.

Paragraphs 50b and 50e of the Complaint

Complainant alleges that, on or about August 24, 2003, For The Birds, Inc., and Jerry L. Korn failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals contained in the enclosures and to minimize disease hazards and reduce odors. Specifically, the giraffe enclosure contained excessive fecal material,[17] in willful violation of section 3.131(a) of the Regulations and Standards (9 C.F.R. § 3.131(a)). (Compl. ¶¶ 50b, 50e.) Based on the limited record before me, it appears Complainant may have alleged the same violation twice. I give For The Birds, Inc., and Jerry L. Korn the benefit of my doubt and find only one violation of section 3.131(a) of the Regulations and Standards (9 C.F.R. § 3.131(a)) based upon For The Birds, Inc.'s and Jerry L. Korn's August 24, 2003, failure to remove excessive fecal material from the giraffe enclosure.

The Number of For The Birds, Inc.'s and Jerry L. Korn's Violations

A few of Complainant's allegations are framed so that I cannot determine the exact number of For The Bird, Inc.'s and Jerry L. Korn's violations. For example, Complainant alleges between May 2003 and August 16, 2003, For The Birds, Inc., and Jerry L. Korn *regularly* allowed customers to enter the primary enclosure containing two tigers without any distance or barriers between the animals and the public, in willful violation of section 2.131(b)(1) of the Regulations and Standards (9 C.F.R. § 2.131(b)(1) (2004) [9 C.F.R. § 2.131(c)(1) (2005)]) (Compl. ¶ 39); Complainant alleges between March 2002 and February 2003, For The Birds, Inc., and Jerry L. Korn *repeatedly* failed to provide tigers with a sufficient quantity of wholesome, palatable food and *routinely* failed to feed tigers for 4 days in a row, in willful violation of section 3.129 of the Regulations and Standards (9 C.F.R. § 3.129) (Compl. ¶

[17]Complainant uses the term "fecal material" in paragraph 50b of the Complaint and the word "excreta" in paragraph 50e of the Complaint.

48a); and, in some instances, Complainant's use of the words *approximately* and *between* makes the number of days during which a violation continued indeterminate (Compl. ¶¶ 13b, 13c, 13d, 13e, 44p).[18] In each instance, I have given For The Birds, Inc., and Jerry L. Korn the benefit of my doubt regarding the number of violations alleged and deemed to be admitted.

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

ORDER

1. For The Birds, Inc., and Jerry L. Korn, their agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards.

Paragraph 1 of this Order shall become effective on the day after service of this Order on For The Birds, Inc., and Jerry L. Korn.

2. Jerry L. Korn's Animal Welfare Act license (Animal Welfare Act license number 82-C-0035) is revoked.

Paragraph 2 of this Order shall become effective on the 60th day after service of this Order on Jerry L. Korn.

3. For The Birds, Inc., is assessed a $28,050 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the Treasurer of the United States and sent to:

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

Payment of the civil penalty shall be sent to, and received by,

[18]Each violation and each day during which a violation continues constitutes a separate offense (7 U.S.C. § 2149(b)).

Colleen A. Carroll within 60 days after service of this Order on For The Birds, Inc. For The Birds, Inc., shall state on the certified check or money order that payment is in reference to AWA Docket No. 04-0033.

4. Jerry L. Korn is assessed a $20,597 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the Treasurer of the United States and sent to:

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

Payment of the civil penalty shall be sent to, and received by, Colleen A. Carroll within 60 days after service of this Order on Jerry L. Korn. Jerry L. Korn shall state on the certified check or money order that payment is in reference to AWA Docket No. 04-0033.

RIGHT TO JUDICIAL REVIEW

For The Birds, Inc., and Jerry L. Korn have the right to seek judicial review of this Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341, 2343-2350. Such court has exclusive jurisdiction to enjoin, to set aside, to suspend (in whole or in part), or to determine the validity of this Order. For The Birds, Inc., and Jerry L. Korn must seek judicial review within 60 days after entry of this Order.[19] The date of entry of this Order is June 22, 2005.

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In re: MARY JEAN WILLIAMS, AN INDIVIDUAL; JOHN BRYAN WILLIAMS, AN INDIVIDUAL; AND DEBORAH ANN MILETTE, AN INDIVIDUAL.
AWA Docket No. 04-0023.

[19] 7 U.S.C. § 2149(c).

Decision and Order as to Deborah Ann Milette.
Filed June 29, 2005.

AWA – Animal Welfare Act – Failure to file timely answer – Default decision – Effect of license revocation on respondent personally – Effect of license revocation on educational programs – Interstate movement – Lacey Act Amendments of 1981 – Cease and desist order – Civil penalty – License revocation.

The Judicial Officer issued a decision in which he found Deborah Ann Milette (Respondent) violated regulations (9 C.F.R. §§ 2.40(a), (b)(1), .131(a)(1) (2004)) issued under the Animal Welfare Act. The Judicial Officer concluded Respondent failed to file a timely answer to the Complaint and, under the Rules of Practice (7 C.F.R. §§ 1.136(c), .139), was deemed to have admitted the allegations of the Complaint and waived opportunity for hearing. The Judicial Officer found Respondent's denial of the allegations of the Complaint in her appeal petition far too late to be considered. The Judicial Officer rejected Respondent's contention that interstate movement of an animal was a prerequisite to finding a violation of the Animal Welfare Act stating the Animal Welfare Act applies to activities that take place entirely in one state, as well as to those that involve traffic across state lines. The Judicial Officer also rejected Respondent's contention that a violation of the Lacey Act Amendments of 1981 is a prerequisite to finding a violation of the Animal Welfare Act. The Judicial Officer issued a cease and desist order against Respondent and assessed Respondent a $2,500 civil penalty.

Colleen A. Carroll, for Complainant.
Respondent Deborah Ann Milette, Pro se.
Initial Decision issued by Administrative Law Judge Peter M. Davenport.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on August 19, 2004. Complainant instituted the proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-2.133) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges Mary Jean Williams, John Bryan Williams, and Deborah Ann Milette willfully violated the Regulations (Compl. ¶¶ 5-11). The Hearing Clerk served Respondent Deborah Ann Milette with the Complaint, the Rules of Practice, and a service letter on February 18, 2005.[1] Respondent Deborah Ann Milette failed to file an answer to the Complaint within 20 days after service as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)).

On March 18, 2005, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for Adoption of Decision and Order as to Respondent Deborah Ann Milette [hereinafter Motion for Default Decision] and a proposed Decision and Order as to Respondent Deborah Ann Milette [hereinafter Proposed Default Decision]. On April 14, 2005, Respondent Deborah Ann Milette filed objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision.

On April 28, 2005, Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] issued a Decision and Order [hereinafter Initial Decision]: (1) concluding Respondent Deborah Ann Milette willfully violated sections 2.40(a) and 2.131(a)(1) of the Regulations (9 C.F.R. §§ 2.40(a), .131(a)(1)); (2) ordering Respondent Deborah Ann Milette to cease and desist from violating the Animal Welfare Act, the Regulations, and the standards issued under the Animal Welfare Act (9 C.F.R. §§ 3.1-.142) [hereinafter the Standards]; and (3) revoking Respondent Deborah Ann Milette's Animal Welfare Act license (Animal Welfare Act license number 21-C-0218) (Initial Decision at 4-6).

On May 17, 2005, Respondent Deborah Ann Milette appealed the ALJ's Initial Decision to the Judicial Officer. On June 6, 2005, Complainant filed "Complainant's Response to Respondent Deborah Ann Milette's Appeal Petition." On June 13, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision as to Respondent Deborah Ann Milette.

Based upon a careful review of the record, I agree with the ALJ's Initial Decision as it relates to Respondent Deborah Ann Milette, except that I disagree with the ALJ's failure to conclude Respondent Deborah

[1]United States Postal Service Track and Confirm for Article Number 7003 2260 0005 5721 3953.

Ann Milette willfully violated section 2.40(b)(1) of the Regulations (9 C.F.R. § 2.40(b)(1) (2004)), as alleged in the Complaint, and the ALJ's revocation of Respondent Deborah Ann Milette's Animal Welfare Act license. Therefore, I adopt the ALJ's Initial Decision as it relates to Respondent Deborah Ann Milette as the final Decision and Order as to Deborah Ann Milette, with exceptions. 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 54—TRANSPORTATION, SALE, AND HANDLING OF CERTAIN ANIMALS

§ 2131. Congressional statement of policy

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

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

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

(3) to protect the owners of animals from the theft of their

animals by preventing the sale or use of animals which have been stolen.

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

§ 2132. Definitions

When used in this chapter—

. . . .

(h) The term "exhibitor" means any person (public or private) exhibiting any animals, which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary, and such term includes carnivals, circuses, and zoos exhibiting such animals whether operated for profit or not; but such term excludes retail pet stores, organizations sponsoring and all persons participating in State and country fairs, livestock shows, rodeos, purebred dog and cat shows, and any other fairs or exhibitions intended to advance agricultural arts and sciences, as may be determined by the Secretary[.]

§ 2149. Violations by licensees

(a) Temporary license suspension; notice and hearing; revocation

If the Secretary has reason to believe that any person licensed as a dealer, exhibitor, or operator of an auction sale subject to section 2142 of this title, has violated or is violating any provision of this chapter, or any of the rules or regulations or standards promulgated by the Secretary hereunder, he may suspend such

person's license temporarily, but not to exceed 21 days, and after notice and opportunity for hearing, may suspend for such additional period as he may specify, or revoke such license, if such violation is determined to have occurred.

(b) Civil penalties for violation of any section, etc.; separate offenses; notice and hearing; appeal; considerations in assessing penalty; compromise of penalty; civil action by Attorney General for failure to pay penalty; district court jurisdiction; failure to obey cease and desist order

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, that violates any provision of this chapter, or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than $2,500 for each such violation, and the Secretary may also make an order that such person shall cease and desist from continuing such violation. Each violation and each day during which a violation continues shall be a separate offense. No penalty shall be assessed or cease and desist order issued unless such person is given notice and opportunity for a hearing with respect to the alleged violation, and the order of the Secretary assessing a penalty and making a cease and desist order shall be final and conclusive unless the affected person files an appeal from the Secretary's order with the appropriate United States Court of Appeals. The Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations. Any such civil penalty may be compromised by the Secretary. Upon any failure to pay the penalty assessed by a final order under this section, the Secretary shall request the Attorney General to institute a civil action in a district court of the United States or other United States court for any district in which such person is found or resides or transacts business, to collect the penalty, and

such court shall have jurisdiction to hear and decide any such action. Any person who knowingly fails to obey a cease and desist order made by the Secretary under this section shall be subject to a civil penalty of $1,500 for each offense, and each day during which such failure continues shall be deemed a separate offense.

(c) Appeal of final order by aggrieved person; limitations; exclusive jurisdiction of United States Courts of Appeals

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, aggrieved by a final order of the Secretary issued pursuant to this section may, within 60 days after entry of such an order, seek review of such order in the appropriate United States Court of Appeals in accordance with the provisions of sections 2341, 2343 through 2350 of title 28, and such court shall have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of the Secretary's order.

§ 2151. Rules and regulations

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

7 U.S.C. §§ 2131, 2132(h), 2149(a)-(c), 2151.

28 U.S.C.:

TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE

. . . .

PART VI—PARTICULAR PROCEEDINGS

. . . .

CHAPTER 163—FINES, PENALTIES AND FORFEITURES

§ 2461. Mode of recovery

. . . .

FEDERAL CIVIL PENALTIES INFLATION ADJUSTMENT

SHORT TITLE

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

FINDINGS AND PURPOSE

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

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

(2) the impact of many civil monetary penalties has been and is diminished due to the effect of inflation;

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

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

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

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

(2) maintain the deterrent effect of civil monetary

penalties and promote compliance with the law; and

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

DEFINITIONS

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

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

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

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

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

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

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

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

CIVIL MONETARY PENALTY INFLATION ADJUSTMENT REPORTS

SEC. 4. The head of each agency shall, not later than 180 days after the date of enactment of the Debt Collection Improvement Act of 1996 [Apr. 26, 1996], and at least once every 4 years thereafter–

(1) by regulation adjust each civil monetary penalty provided by law within the jurisdiction of the Federal agency, except for any penalty (including any addition to tax and additional amount) under the Internal Revenue Code of 1986

[26 U.S.C. 1 *et seq*.], the Tariff Act of 1930 [19 U.S.C. 1202 *et seq*.], the Occupational Safety and Health Act of 1970 [29 U.S.C. 651 *et seq*.], or the Social Security Act [42 U.S.C. 301 *et seq*.], by the inflation adjustment described under section 5 of this Act; and

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

COST-OF-LIVING ADJUSTMENTS OF CIVIL MONETARY PENALTIES

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

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

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

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

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

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

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

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

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

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

ANNUAL REPORT

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

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

28 U.S.C. § 2461 (note).

7 C.F.R.:

TITLE 7—AGRICULTURE

SUBTITLE A—OFFICE OF THE SECRETARY OF AGRICULTURE

. . . .

PART 3—DEBT MANAGEMENT

. . . .

SUBPART E—ADJUSTED CIVIL MONETARY PENALTIES

§ 3.91 Adjusted civil monetary penalties.

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

(b) *Penalties*—. . . .

. . . .

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

. . . .

(v) Civil penalty for a violation of Animal Welfare Act, codified at 7 U.S.C. 2149(b), has a maximum of $2,750; and knowing failure to obey a cease and desist order has a civil penalty of $1,650.

7 C.F.R. § 3.91(a), (b)(2)(v).

9 C.F.R.:

TITLE 9—ANIMALS AND ANIMAL PRODUCTS

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

SUBCHAPTER A—ANIMAL WELFARE

PART 1—DEFINITION OF TERMS

§ 1.1 Definitions.

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

. . . .

Exhibitor means any person (public or private) exhibiting any animals, which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary. This term includes carnivals, circuses, animal acts, zoos, and

educational exhibits, exhibiting such animals whether operated for profit or not. This term excludes retail pet stores, horse and dog races, organizations sponsoring and all persons participating in State and county fairs, livestock shows, rodeos, field trials, coursing events, purebred dog and cat shows and any other fairs or exhibitions intended to advance agricultural arts and sciences as may be determined by the Secretary.

PART 2—REGULATIONS

. . . .

SUBPART D—ATTENDING VETERINARIAN AND ADEQUATE VETERINARY CARE

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

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

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

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

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

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

SUBPART I—MISCELLANEOUS

. . . .

§ 2.131 Handling of animals.

(a)(1) Handling of all animals shall be done as expeditiously and carefully as possible in a manner that does not cause trauma, overheating, excessive cooling, behavioral stress, physical harm, or unnecessary discomfort.

9 C.F.R. §§ 1.1; 2.40(a), (b)(1), .131(a)(1) (2004).

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION (AS RESTATED)

Statement of the Case

Respondent Deborah Ann Milette failed to file an answer to the Complaint 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 the failure to file an answer within the time provided in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) shall be deemed, for purposes of the proceeding, an admission of the allegations in the complaint. Further, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the failure to file an answer or the admission by the answer of all the material allegations of fact contained in the complaint, constitutes a waiver of hearing. Accordingly, the material allegations in the Complaint that relate to Respondent Deborah Ann Milette are adopted as findings of fact. This Decision and Order as to Deborah Ann Milette is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent Deborah Ann Milette is an individual whose business mailing address is 30-8 Needle Park Circle, Queensbury, New York 12804. At all times material to this proceeding, Respondent Deborah Ann Milette was a licensed *exhibitor*, as that word is defined in the Animal Welfare Act and the Regulations, and held Animal Welfare Act license number 21-C-0218.

2. Respondent Deborah Ann Milette has a small business. The gravity of Respondent Deborah Ann Milette's violations of the Regulations is great. Respondent Deborah Ann Milette has no record of previous violations of the Animal Welfare Act, the Regulations, or the Standards.

3. On September 27, 2002, Respondent Deborah Ann Milette failed to have an attending veterinarian provide adequate veterinary care to animals. Specifically, Respondent Deborah Ann Milette, who is not a veterinarian, provided a sedative solution, which was administered to a young tiger. (9 C.F.R. § 2.40(a) (2004).)

4. On September 27, 2002, Respondent Deborah Ann Milette failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate personnel. Specifically, Respondent Deborah Ann Milette failed to provide personnel capable of handling a tiger safely. (9 C.F.R. § 2.40(b)(1) (2004).)

5. On September 27, 2002, Respondent Deborah Ann Milette failed to handle animals as expeditiously and carefully as possible in a manner that would not cause unnecessary discomfort, behavioral stress, or physical harm. Specifically, Respondent Deborah Ann Milette, who is not a veterinarian, administered or attempted to administer sedatives to a young tiger. (9 C.F.R. § 2.131(a)(1) (2004) [9 C.F.R. § 2.131(b)(1) (2005)].)

Conclusions of Law

1. On September 27, 2002, Respondent Deborah Ann Milette failed to have an attending veterinarian provide adequate veterinary care to animals. Specifically, Respondent Deborah Ann Milette, who is not a veterinarian, provided a sedative solution, which was administered to a young tiger, in willful violation of section 2.40(a) of the Regulations

(9 C.F.R. § 2.40(a) (2004)).

2. On September 27, 2002, Respondent Deborah Ann Milette failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate personnel. Specifically, Respondent Deborah Ann Milette failed to provide personnel capable of handling tigers safely, in willful violation of section 2.40(b)(1) of the Regulations (9 C.F.R. § 2.40(b)(1) (2004)).

3. On September 27, 2002, Respondent Deborah Ann Milette failed to handle animals as expeditiously and carefully as possible in a manner that would not cause unnecessary discomfort, behavioral stress, or physical harm. Specifically, Respondent Deborah Ann Milette, who is not a veterinarian, administered or attempted to administer sedatives to a young tiger, in willful violation of section 2.131(a)(1) of the Regulations (9 C.F.R. § 2.131(a)(1) (2004) [9 C.F.R. § 2.131(b)(1) (2005)])

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent Deborah Ann Milette raises four issues in her appeal petition. First, Respondent Deborah Ann Milette denies the material allegations of the Complaint.

Respondent Deborah Ann Milette's denial of the allegations in the Complaint comes far too late to be considered. Respondent Deborah Ann Milette is deemed, for purposes of this proceeding, to have admitted the allegations in the Complaint because she failed to file an answer to the Complaint within 20 days after the Hearing Clerk served her with the Complaint. The Hearing Clerk served Respondent Deborah Ann Milette with the Complaint, the Rules of Practice, and the Hearing Clerk's service letter on February 18, 2005.[2] Sections 1.136(a), 1.136(c), 1.139, and 1.141(a) of the Rules of Practice state the time within which an answer must be filed and the consequences of failing to file a timely answer, as follows:

§ 1.136 Answer.

[2]See note 1.

(a) *Filing and service.* Within 20 days after the service of the complaint . . ., the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding . . . .

. . . .

(c) *Default.* Failure to file an answer within the time provided under paragraph (a) of this section shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.

§ 1.139 Procedure upon failure to file an answer or admission of facts.

The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk. Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.

§ 1.141 Procedure for hearing.

(a) *Request for hearing.* Any party may request a hearing on the facts by including such request in the complaint or answer, or by a separate request, in writing, filed with the Hearing Clerk within the time in which an answer may be filed . . . . Failure to request a hearing within the time allowed for the filing of the

answer shall constitute a waiver of such hearing.

7 C.F.R. §§ 1.136(a), (c), .139, .141(a).

Moreover, the Complaint informs Respondent Deborah Ann Milette of the consequences of failing to file a timely answer, as follows:

> [T]his complaint shall be served upon the respondents, who 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 4.

Similarly, the Hearing Clerk informed Respondent Deborah Ann Milette in the August 20, 2004, service letter that a timely answer must be filed pursuant to the Rules of Practice and that failure to file a timely answer to any allegation in the Complaint would constitute an admission of that allegation, as follows:

> CERTIFIED RECEIPT REQUESTED
>
> August 20, 2004
>
> Ms. Mary Jean Williams
> Mr. John Bryan Williams
> Route 1, Box 67
> Ivanhoe, Texas 75447
>
> Ms. Deborah Ann Milette
> 30-8 Needle Park Circle
> Queensbury, New York 12804
>
> Dear Sir/Madame:
>
> Subject: In re: Mary Jean Williams, an individual; John B. Williams, an individual; and Deborah Ann Milette, an

individual, Respondents -
AWA Docket No. 04-0023

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

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

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

Respondent Deborah Ann Milette's answer was due no later than March 10, 2005. Respondent Deborah Ann Milette's first filing in this proceeding is dated April 9, 2005, and was filed April 14, 2005, 1 month 4 days after Respondent Deborah Ann Milette's answer was due. Respondent Deborah Ann Milette'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)).

On March 18, 2005, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed Complainant's Motion for Default Decision and Complainant's Proposed Default Decision. Respondent Deborah Ann Milette filed objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision on April 14, 2005.

On April 28, 2005, the ALJ issued an Initial Decision: (1) concluding Respondent Deborah Ann Milette willfully violated sections 2.40(a) and 2.131(a)(1) of the Regulations (9 C.F.R. §§ 2.40(a), .131(a)(1)); (2) ordering Respondent Deborah Ann Milette to cease and desist from violating the Animal Welfare Act, the Regulations, and the Standards; and (3) revoking Respondent Deborah Ann Milette's Animal Welfare Act license (Animal Welfare Act license number 21-C-0218) (Initial Decision at 4-6).

Although, on rare occasions, default decisions have been set aside for good cause shown or where the complainant states the complainant does not object to setting aside the default decision,[3] generally there is no basis for setting aside a default decision that is based upon a respondent's failure to file a timely answer.[4]

[3]*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 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 Perishable Agricultural Commodities Act 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).

[4]*See generally In re Bodie S. Knapp*, 64 Agric. Dec. 253 (2005) (holding the default decision was properly issued where the respondent filed his answer 1 month 15 days after his answer was due and holding the respondent is deemed, by his failure to file a timely answer, to have admitted the violations of the Regulations and Standards alleged in the complaint); *In re Wanda McQuary* (Decision as to Wanda McQuary and Randall Jones), 62 Agric. Dec. 452 (2003) (holding the default decision was properly issued

(continued...)

[4](...continued)
where respondent Wanda McQuary filed her answer 6 months 20 days after she was served with the complaint and respondent Randall Jones filed his answer 6 months 5 days after he was served with the complaint and holding the respondents are deemed, by their failures to file timely answers, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re David Finch*, 61 Agric. Dec. 567 (2002) (holding the default decision was properly issued where the respondent filed his answer 3 months 18 days after he was served with the complaint and holding the respondent is deemed, by his failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re Heartland Kennels, Inc.*, 61 Agric. Dec. 492 (2002) (holding the default decision was properly issued where the respondents filed their answer 3 months 9 days after they were served with the complaint and holding the respondents are deemed, by their failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re Steven Bourk* (Decision as to Steven Bourk and Carmella Bourk), 61 Agric. Dec. 25 (2002) (holding the default decision was properly issued where respondent Steven Bourk's first and only filing was 10 months 9 days after he was served with the complaint and respondent Carmella Bourk's first filing was 5 months 5 days after she was served with the complaint; stating both respondents are deemed, by their failures to file timely answers, to have admitted the violations of the Animal Welfare Act and the Regulations alleged in the complaint); *In re J. Wayne Shaffer*, 60 Agric. Dec. 444 (2001) (holding the default decision was properly issued where the respondents' first filing was 5 months 13 days after they were served with the complaint and 4 months 24 days after the respondents' answer was due and holding the respondents are deemed, by their failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations alleged in the complaint); *In re Beth Lutz*, 60 Agric. Dec. 53 (2001) (holding the default decision was properly issued where the respondent filed her answer 23 days after she was served with the complaint and 3 days after the respondent's answer was due and holding the respondent is deemed, by her failure to file a timely answer, to have admitted the violations of the Regulations alleged in the complaint); *In re Curtis G. Foley*, 59 Agric. Dec. 581 (2000) (holding the default decision was properly issued where the respondents filed their answer 6 months 5 days after they were served with the complaint and 5 months 16 days after the respondents' answer was due and holding the respondents are deemed, by their failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re Nancy M. Kutz* (Decision as to Nancy M. Kutz), 58 Agric. Dec. 744 (1999) (holding the default decision was properly issued where the respondent's first filing in the proceeding was 28 days after service of the complaint on the respondent and the filing did not respond to the allegations of the complaint and holding the respondent is deemed, by her failure to file a timely answer and by her failure to deny the allegations of the complaint, to have
(continued...)

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

Respondent Deborah Ann Milette's first filing in this proceeding was filed with the Hearing Clerk 1 month 4 days after Respondent Deborah Ann Milette's answer was due. Respondent Deborah Ann Milette's failure to file a timely answer is deemed, for 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 deemed Respondent Deborah Ann Milette to have admitted the allegations of the Complaint, except that the ALJ failed to conclude Respondent Deborah Ann Milette willfully violated section 2.40(b)(1) of the Regulations (9 C.F.R. § 2.40(b)(1) (2004)), as alleged in the Complaint.

Moreover, application of the default provisions of the Rules of

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[4](...continued)
(holding the default decision was properly issued where the respondent was given an extension of time until March 22, 1994, to file an answer, but the answer was not received until March 25, 1994, and holding the respondent is deemed, by his failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint), *aff'd per curiam*, 65 F.3d 168 (Table), 1995 WL 523336 (6th Cir. 1995), *printed in* 54 Agric. Dec. 870 (1995); *In re Dean Daul*, 45 Agric. Dec. 556 (1986) (holding the default decision was properly issued where the respondent failed to file a timely answer and, in his late answer, did not deny the material allegations of the complaint and holding the respondent is deemed, by his failure to file a timely answer and by his failure to deny the allegations in the complaint in his late answer, to have admitted the violations of the Animal Welfare Act and the Regulations alleged in the complaint); *In re Ronald Jacobson*, 43 Agric. Dec. 780 (1984) (holding the default decision was properly issued where the respondents failed to file a timely answer and holding the respondents are deemed, by their failure to file a timely answer, to have admitted the violations of the Standards alleged in the complaint); *In re Willard Lambert*, 43 Agric. Dec. 46 (1984) (holding the default decision was properly issued where the respondent failed to file an answer and holding the respondent is deemed, by his failure to file an answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re Randy & Mary Berhow*, 42 Agric. Dec. 764 (1983) (holding the default decision was properly issued where the respondents failed to file an answer and holding the respondents are deemed, by their failure to file an answer, to have admitted the violations of the Standards alleged in the complaint).

Practice does not deprive Respondent Deborah Ann Milette of her rights under the due process clause of the Fifth Amendment to the Constitution of the United States.[5]

Second, Respondent Deborah Ann Milette asserts her Animal Welfare Act license "keeps [her] going on a daily basis" and revocation of her Animal Welfare Act license is a "severe disservice" to her educational programs.

The effect of license revocation on Respondent Deborah Ann Milette's educational programs and on Respondent Deborah Ann Milette's ability to keep going on a daily basis are not relevant to my determination whether to revoke Respondent Deborah Ann Milette's Animal Welfare Act license. However, for the reasons discussed in this Decision and Order as to Deborah Ann Milette, *infra*, I do not revoke Respondent Deborah Ann Milette's Animal Welfare Act license.

A sanction by an administrative agency must be warranted in law and justified in fact.[6] The Secretary of Agriculture has authority to revoke

[5]*See United States v. Hulings*, 484 F. Supp. 562, 567-68 (D. Kan. 1980) (concluding a hearing was not required under the Fifth Amendment to the Constitution of the United States where the respondent was notified that failure to deny the allegations of the complaint would constitute an admission of those allegations under the Rules of Practice and the respondent failed to specifically deny the allegations). *See also Father & Sons Lumber and Building Supplies, Inc. v. NLRB*, 931 F.2d 1093, 1096 (6th Cir. 1991) (stating 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).

[6]*Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187-89 (1973); *Havana Potatoes of New York Corp. v. United States*, 136 F.3d 89, 92-93 (2d Cir. 1997); *County Produce, Inc. v. United States Dep't of Agric.*, 103 F.3d 263, 265 (2d Cir. 1997); *Potato Sales Co. v. Department of Agric.*, 92 F.3d 800, 804 (9th Cir. 1996); *Valkering, U.S.A., Inc. v. United States Dep't of Agric.*, 48 F.3d 305, 309 (8th Cir. 1995); *Farley & Calfee, Inc. v. United States Dep't of Agric.*, 941 F.2d 964, 966 (9th Cir. 1991); *Cox v. United States Dep't of Agric.*, 925 F.2d 1102, 1107 (8th Cir.), *cert. denied*, 502 U.S. 860 (1991); *Cobb v. Yeutter*, 889 F.2d 724, 730 (6th Cir. 1989); *Spencer Livestock Comm'n Co. v. Department of Agric.*, 841 F.2d 1451, 1456-57 (9th Cir. 1988); *Harry Klein Produce Corp. v. United States Dep't of Agric.*, 831 F.2d 403, 406 (2d Cir. 1987); (continued...)

the Animal Welfare Act license of any person who has violated the Animal Welfare Act, the Regulations, or the Standards.[7] Respondent Deborah Ann Milette violated sections 2.40(a), 2.40(b)(1), and 2.131(a)(1) of the Regulations (7 C.F.R. §§ 2.40(a), (b)(1), .131(a)(1) (2004)). Therefore, the ALJ's revocation of Respondent Deborah Ann Milette's Animal Welfare Act license is warranted in law. However, based on the limited record before me, I find revocation of Respondent Deborah Ann Milette's Animal Welfare Act license is not justified in fact; instead, I assess Respondent Deborah Ann Milette a civil penalty.

With respect to the civil monetary penalty, the Secretary of Agriculture is required to give due consideration to the size of the business of the person involved, the gravity of the violations, the person's good faith, and the history of previous violations.[8]

Respondent Deborah Ann Milette is deemed to have admitted she has a small business, the gravity of her violations of the Regulations is great, and she has no record of previous violations of the Animal

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[6](...continued)
Blackfoot Livestock Comm'n Co. v. Department of Agric., 810 F.2d 916, 922 (9th Cir. 1987); *Stamper v. Secretary of Agric.*, 722 F.2d 1483, 1489 (9th Cir. 1984); *Magic Valley Potato Shippers, Inc. v. Secretary of Agric.*, 702 F.2d 840, 842 (9th Cir. 1983) (per curiam); *J. Acevedo and Sons v. United States*, 524 F.2d 977, 979 (5th Cir. 1975) (per curiam); *Miller v. Butz*, 498 F.2d 1088, 1089 (5th Cir. 1974) (per curiam); *G.H. Miller & Co. v. United States*, 260 F.2d 286, 296-97 (7th Cir. 1958), *cert. denied*, 359 U.S. 907 (1959); *United States v. Hulings*, 484 F. Supp. 562, 566 (D. Kan. 1980); *In re La Fortuna Tienda*, 58 Agric. Dec. 833, 842 (1999); *In re James E. Stephens*, 58 Agric. Dec. 149, 186 (1999); *In re Nkiambi Jean Lema*, 58 Agric. Dec. 291, 297 (1999); *In re Limeco, Inc.*, 57 Agric. Dec. 1548, 1571 (1998), *appeal dismissed*, No. 98-5571 (11th Cir. Jan. 28, 1999); *In re Kanowitz Fruit & Produce Co.*, 56 Agric. Dec. 942, 951 (1997) (Order Denying Pet. for Recons.); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 269, 273 (1997) (Order Denying Pet. for Recons.); *In re Kanowitz Fruit & Produce Co.*, 56 Agric. Dec. 917, 932 (1997), *aff'd*, 166 F.3d 1200 (Table), 1998 WL 863340 (2d Cir. 1998), *cert. denied*, 526 U.S. 1098 (1999); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 97 (1997) (Order Denying Pet. for Recons.); *In re Volpe Vito, Inc.*, 56 Agric. Dec 166, 257 (1997), *aff'd*, 172 F.3d 51, 1999 WL 16562 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206).

[7]7 U.S.C. § 2149(a).

[8]7 U.S.C. § 2149(b).

Welfare Act, the Regulations, or the Standards.[9]

Respondent Deborah Ann Milette's three violations of the Regulations all occurred on the same date, September 27, 2002, and concern one animal. Based on the limited record before me, I find no ongoing pattern of violations establishing a "history of previous violations" for the purposes of section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)).

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

> [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. 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.[10]

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[9]Compl. ¶ 4.

[10]*In re Dennis Hill*, 63 Agric. Dec., slip op. at 74 (Oct. 8, 2004), *appeal docketed*, No. 05-1154 (7th Cir. Jan. 24, 2005); *In re Geo. A. Heimos Produce Co.*, 62 Agric. Dec. 763, 787 (2003), *appeal dismissed*, No. 03-4008 (8th Cir. Aug. 31, 2004); *In re Excel Corp.*, 62 Agric. Dec. 196, 234 (2003), *enforced as modified*, 397 F.3d 1285 (10th Cir.
(continued...)

Complainant seeks revocation of Respondent Deborah Ann Milette's Animal Welfare Act license and an order that Respondent Deborah Ann Milette cease and desist from violating the Animal Welfare Act and the Regulations (Complainant's Motion for Default Decision at 6). In support of his sanction recommendation, Complainant contends Respondent Deborah Ann Milette handled a tiger in a manner that allowed the tiger to escape in a restaurant parking lot, where the tiger represented a grave danger to the public (Complainant's Motion for Default at 6). While Complainant alleges an incident in which a tiger escaped in a restaurant parking lot, Complainant only alleges involvement by John Bryan Williams, Mary Jean Williams, and unnamed local authorities, as follows:

> 11. On September 28, 2002, respondents John Bryan Williams

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[10](...continued)
2005); *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), *aff'd*, 342 F.3d 584 (6th Cir. 2003); *In re Karl Mitchell*, 60 Agric. Dec. 91, 130 (2001), *aff'd*, 42 Fed. Appx. 991, 2002 WL 1941189 (9th Cir. 2002); *In re American Raisin Packers, Inc.*, 60 Agric. Dec. 165, 190 n.8 (2001), *aff'd*, 221 F. Supp.2d 1209 (E.D. Cal. 2002), *aff'd*, 66 Fed. Appx. 706, 2003 WL 21259771 (9th Cir. 2003); *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), *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).

> and Mary Jean Williams failed to handle animals as expeditiously and carefully as possible in a manner that would not cause trauma, unnecessary discomfort, behavioral stress, or physical harm, and specifically, said respondents allowed a young tiger to exit its transport enclosure and escape in the parking lot of a restaurant, whereupon local authorities eventually shot and killed the animal, in willful violation of the handling regulations. 9 C.F.R. § 2.131(a)(1).

Compl. ¶ 11.

Moreover, while Complainant alleges, and Respondent Deborah Ann Milette is deemed to have admitted, that the violations alleged in the Complaint resulted in the death of a young tiger (Compl. ¶ 4), only paragraph 11 of the Complaint, which does not implicate Respondent Deborah Ann Milette, specifically references the death of a young tiger. Therefore, I am uncertain whether Respondent Deborah Ann Milette is deemed to have admitted that *her* violations resulted in the death of a young tiger. I give Respondent Deborah Ann Milette the benefit of my doubt and decline to find that Respondent Deborah Ann Milette's violations resulted in the death of a young tiger.

I find Respondent Deborah Ann Milette committed three violations of the Regulations. Respondent Deborah Ann Milette could be assessed a maximum civil penalty of $2,750 for each of her violations of the Regulations.[11] After examining all the relevant circumstances, in light of the United States Department of Agriculture's sanction policy, and taking into account the requirements of section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)), the remedial purposes of the Animal

[11]Section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) provides that the Secretary of Agriculture may assess a civil penalty of not more than $2,500 for each violation of the Animal Welfare Act, the Regulations, or the Standards. Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), the Secretary of Agriculture adjusted the civil penalty that may be assessed under section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) for each violation of the Animal Welfare Act, the Regulations, or the Standards by increasing the maximum civil penalty from $2,500 to $2,750 (7 C.F.R. § 3.91(b)(2)(v)). Therefore, Respondent Deborah Ann Milette could be assessed a maximum civil penalty of $8,250.

Welfare Act, and the recommendations of the administrative officials, I conclude a cease and desist order and assessment of a $2,500 civil penalty against Respondent Deborah Ann Milette are appropriate and necessary to ensure Respondent Deborah Ann Milette's compliance with the Animal Welfare Act and the Regulations in the future, to deter others from violating the Animal Welfare Act and the Regulations, and to fulfill the remedial purposes of the Animal Welfare Act.

Third, Respondent Deborah Ann Milette contends she did not violate the Animal Welfare Act or the Regulations because the tiger, which is the subject of the allegations in the Complaint, was not moved interstate.

I do not agree with Respondent Deborah Ann Milette's position that interstate movement of an animal is a necessary prerequisite for my finding a violation of the Animal Welfare Act or the Regulations. The Animal Welfare Act and the Regulations apply to activities that take place entirely within one state, as well as to those that involve traffic across state lines.[12]

Fourth, Respondent Deborah Ann Milette contends she did not violate the Regulations because she did not violate the "Lacy Act."

Respondent Deborah Ann Milette does not provide a citation to the "Lacy Act," and I cannot locate any federal statute referred to as the "Lacy Act"; however, I surmise Respondent Deborah Ann Milette's reference to the "Lacy Act" is a typographical error and Respondent Deborah Ann Milette intends to reference the Lacey Act Amendments of 1981. In any event, a violation of the Lacey Act Amendments of 1981 is not a necessary prerequisite for my finding a violation of the Animal Welfare Act or the Regulations.

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

ORDER

1. Respondent Deborah Ann Milette, her agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations.

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[12] 3 Off. Legal Counsel 326 (1979).

Paragraph 1 of this Order shall become effective on the day after service of this Order on Respondent Deborah Ann Milette.

2. Respondent Deborah Ann Milette is assessed a $2,500 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the Treasurer of the United States and sent to:

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

Payment of the civil penalty shall be sent to, and received by, Colleen A. Carroll within 60 days after service of this Order on Respondent Deborah Ann Milette. Respondent Deborah Ann Milette shall state on the certified check or money order that payment is in reference to AWA Docket No. 04-0023.

RIGHT TO JUDICIAL REVIEW

Respondent Deborah Ann Milette has the right to seek judicial review of this Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341, 2343-2350. Such court has exclusive jurisdiction to enjoin, to set aside, to suspend (in whole or in part), or to determine the validity of this Order. Respondent Deborah Ann Milette must seek judicial review within 60 days after entry of this Order.[13] The date of entry of this Order is June 29, 2005.

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[13]7 U.S.C. § 2149(c).

HORSE PROTECTION ACT

DEPARTMENTAL DECISIONS

In re: TIM GRAY.
HPA Docket No. 01-D022 (formerly HPA Docket No. 01-A022, formerly HPA Docket No. 01-0022.
Decision and Order.
Filed March 1, 2005.

HPA – Soring.

Frank Martin, Jr., for Complainant.
Ted W. Daniel, for Respondent.
Decision and Order issued by Administrative Law Judge Jill S. Clifton

CONFIRMATION OF ORAL DECISION and ORDER

Complainant, the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture, is represented by Colleen A. Carroll, Esq. Respondent, Tim Gray, is representing himself.

This proceeding was instituted under the Horse Protection Act (15 U.S.C. § 1821 *et seq.*) (the "Act"), by a complaint filed on June 28, 2001, alleging, among other things, that on or about May 27, 2000, Respondent Tim Gray violated section 5(2)(B) of the Act by entering a horse named "JFK All Over" in a horse show while the horse was sore. Respondent Tim Gray timely filed an answer to the complaint, which, among other things, denied the horse was sore.

On March 7, 2005, I issued my Decision and Order as to Respondent Tim Gray **orally** at the close of the hearing, in accordance with 7 C.F.R. § 1.142(c)(1). The transcript may not be available to the Hearing Clerk or the parties for weeks, so I provide this documentation. This writing confirms my oral Decision and Order and instructs the Hearing Clerk to comply with 7 C.F.R. § 1.142 (c)(2): see attached Appendix 2.

Four witnesses testified and I now identify the exhibits that were

admitted into evidence. The four videotapes (CX10, CX11, CX12, and CX13) and CX2 are all located in Complainant's exhibit notebook marked HPA Docket No. 01-0022 and used for the first time in HPA Docket No. 01-B022. The remainer of the exhibits admitted in this case are located with this record file: CX3, CX4a, CX4b, CX4c, CX7 and CX20.

Abbreviated Summary of Findings of Fact Announced Orally

1. Respondent Tim Gray is an individual whose mailing address is 3125 Highway 231 North, Shelbyville, Tennessee 37160, and who is engaged in the business of training and showing Tennessee Walking Horses.

2. On or about May 27, 2000, Respondent Tim Gray entered "JFK All Over" in the 30th Annual Spring Fun Show in Shelbyville, Tennessee, (the "Fun Show"), as entry number 252 in class number 34 ("Three-Year-Old Walking Stallions") for the purpose of showing the horse in that class.

3. On or about May 27, 2000, Respondent Tim Gray entered "JFK All Over" in the Fun Show, as entry number 252 in class number 34, while the horse was "sore," as that term is defined in the Act, for the purpose of showing the horse in that class, in violation of section 5(2)(B) of the Act (15 U.S.C. § 1824(2)(B)).

Abbreviated Summary of Conclusions Announced Orally

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

2. Respondent Tim Gray has violated section 5(2)(B) of the Horse Protection Act. 15 U.S.C. § 1824(2)(B).

3. The following order is authorized by the Act and warranted under the circumstances.

Abbreviated Summary of Order Announced Orally

1. Respondent Tim Gray is assessed a civil penalty of $2,200, which

shall be paid by May 6, 2005, by a certified check or money order or cashier's check, made payable to the order of, the Treasurer of the United States.

2. Respondent Tim Gray is disqualified for two years 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, or horse sale or auction.[1]

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

My oral Decision and Order becomes final and effective without further proceedings on **Monday, April 11, 2005**, UNLESS an appeal to the Judicial Officer is filed with the Hearing Clerk by **Wednesday, April 6, 2005**, in accordance with 7 C.F.R. § 1.145 (see attached Appendix 1).

Copies of this Confirmation shall be served by the Hearing Clerk upon the parties; Respondent's copy shall be sent by ordinary mail, and also by FAX to 931-684-0379, in addition to being served by certified mail. Further, the Hearing Clerk shall use the same means to serve the transcript excerpt when it is available.

* * *

APPENDIX

7 C.F.R.:

TITLE 7—-AGRICULTURE

[1]"Participating" means engaging in any activity beyond that of a spectator, and includes, without limitation, transporting or arranging for the transportation of horses to or from equine events, personally giving instructions to exhibitors, being present in any area where spectators are not allowed, and financing the participation of others in equine events.

SUBTITLE A—-OFFICE OF THE SECRETARY OF AGRICULTURE

PART 1—-ADMINISTRATIVE REGULATIONS

. . . .

SUBPART H—-RULES OF PRACTICE GOVERNING FORMAL

ADJUDICATORY PROCEEDINGS INSTITUTED BY THE SECRETARY UNDER

VARIOUS STATUTES

. . .

§ 1.145 Appeal to Judicial Officer.

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

(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.

(c) *Transmittal of record*. Whenever an appeal of a Judge's

decision is filed and a response thereto has been filed or time for filing a response has expired, the Hearing Clerk shall transmit to the Judicial Officer the record of the proceeding. Such record shall include: the pleadings; motions and requests filed and rulings thereon; the transcript or recording of the testimony taken at the hearing, together with the exhibits filed in connection therewith; any documents or papers filed in connection with a pre-hearing conference; such proposed findings of fact, conclusions, and orders, and briefs in support thereof, as may have been filed in connection with the proceeding; the Judge's decision; such exceptions, statements of objections and briefs in support thereof as may have been filed in the proceeding; and the appeal petition, and such briefs in support thereof and responses thereto as may have been filed in the proceeding.

(d) *Oral argument.* A party bringing an appeal may request, within the prescribed time for filing such appeal, an opportunity for oral argument before the Judicial Officer. Within the time allowed for filing a response, appellee may file a request in writing for opportunity for such an oral argument. Failure to make such request in writing, within the prescribed time period, shall be deemed a waiver of oral argument. The Judicial Officer may grant, refuse, or limit any request for oral argument. Oral argument shall not be transcribed unless so ordered in advance by the Judicial Officer for good cause shown upon request of a party or upon the Judicial Officer's own motion.

(e) *Scope of argument.* Argument to be heard on appeal, whether oral or on brief, shall be limited to the issues raised in the appeal or in the response to the appeal, except that if the Judicial Officer determines that additional issues should be argued, the parties shall be given reasonable notice of such determination, so as to permit preparation of adequate arguments on all issues to be argued.

(f) *Notice of argument; postponement.* The Hearing Clerk shall advise all parties of the time and place at which oral argument will be heard. A request for postponement of the argument must be made by motion filed a reasonable amount of time in advance of the date fixed for argument.

(g) *Order of argument.* The appellant is entitled to open and conclude the argument.

(h) *Submission on briefs.* By agreement of the parties, an appeal may be submitted for decision on the briefs, but the Judicial Officer may direct that the appeal be argued orally.

(i) *Decision of the [J]udicial [O]fficer on appeal.* As soon as practicable after the receipt of the record from the Hearing Clerk, or, in case oral argument was had, as soon as practicable thereafter, the Judicial Officer, upon the basis of and after due consideration of the record and any matter of which official notice is taken, shall rule on the appeal. If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum. A final order issued by the Judicial Officer shall be filed with the Hearing Clerk. Such order may be regarded by the respondent as final for purposes of judicial review without filing a petition for rehearing, reargument, or reconsideration of the decision of the Judicial Officer.

[42 FR 743, Jan. 4, 1977, as amended at 60 FR 8456, Feb. 14, 1995; 68 FR 6341, Feb. 7, 2003]

7 C.F.R. § 1.145.

* * *

APPENDIX 2

7 C.F.R.:

TITLE 7—-AGRICULTURE

SUBTITLE A—-OFFICE OF THE SECRETARY OF AGRICULTURE

PART 1—-ADMINISTRATIVE REGULATIONS

. . . .

SUBPART H—-RULES OF PRACTICE GOVERNING FORMAL

ADJUDICATORY PROCEEDINGS INSTITUTED BY THE SECRETARY UNDER

VARIOUS STATUTES

. . .

§ 1.142(c) Judge's Decision

(1) The Judge may, upon motion of any party or in his or her own discretion, issue a

decision orally at the close of the hearing, or within a reasonable time after the closing of the hearing.

(2) If the decision is announced orally, a copy thereof, excerpted from the transcript or recording, shall be furnished to the parties by the Hearing Clerk. Irrespective of the date such copy is mailed, the issuance date of the decision shall be the date the oral decision was announced.

(3) If the decision is in writing, it shall be filed with the Hearing Clerk and served upon the parties as provided in §1.147.

(4) The Judge's decision shall become final and effective without further proceedings 35 days after the issuance of the decision, if announced orally at the hearing, or if the decision is in writing, 35 days after the date of service thereof upon the respondent, unless there is an appeal to the Judicial Officer by a party to the proceeding pursuant to §1.145; *Provided*, *however*, that no decision shall be final for purposes of judicial review except a final decision of the Judicial Officer upon appeal.

7 C.F.R. § 1.142 (c).

In re: CHAD WAY, AN INDIVIDUAL, AND CHAD WAY STABLES, INC., A TENNESSEE CORPORATION.
HPA Docket No. 03-0005.
Decision and Order.
Filed April 11, 2005.

HPA – Horse Protection Act – Default – Failure to file timely answer to amended complaint – Failure or refusal to permit inspection – Prohibited substances – Effective date of filing – Hearing Clerk's Office business hours – Civil penalty – Disqualification.

The Judicial Officer reversed Administrative Law Judge Peter M. Davenport's denial of Complainant's motion for default decision. The Judicial Officer issued a decision in which he found Respondents failed and refused to permit the Secretary of Agriculture to inspect a horse and entered a horse in a horse show while the horse was wearing a prohibited substance in violation of the Horse Protection Act (15 U.S.C. § 1824(7), (9)) and the regulations issued under the Horse Protection Act (9 C.F.R. §§ 11.2(c), .4(b)). The Judicial Officer concluded Respondents filed a late answer to the Amended Complaint and, under the Rules of Practice (7 C.F.R. §§ 1.136(c), .139), were deemed to have admitted the allegations in the Amended Complaint and waived opportunity for hearing. The Judicial Officer found Respondents' objections to Complainant's motion for default decision timely filed; however, the Judicial Officer did not find Respondents' objections meritorious. The Judicial Officer found Respondents' decision to proceed pro se did not excuse Respondents from failing to file a timely answer to the Amended Complaint and found no basis for Respondents' mistaken belief that a timely answer to the Complaint operated as an answer to the Amended Complaint. The Judicial Officer assessed Respondents, jointly and severally, a $4,400 civil penalty and disqualified Respondents from showing, exhibiting, or entering any horse and from judging, managing, or participating in any horse show, horse exhibition, horse sale, or horse auction for 2 years.

Bernadette R. Juarez, for Complainant.
Aubrey B. Harwell, III, Nashville, TN, for Respondents.
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 January 10, 2003. 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]. On May 9, 2003, Complainant filed an Amended Complaint.

Complainant alleges: (1) on August 25, 2001, Chad Way and Chad Way Stables, Inc. [hereinafter Respondents], failed and refused to permit the Secretary of Agriculture to inspect a horse known as "Jose Jose," in violation of section 5(9) of the Horse Protection Act (15 U.S.C. § 1824(9)) and section 11.4(b) of the Horse Protection Regulations (9 C.F.R. § 11.4(b)); and (2) on August 25, 2001, Respondents entered Jose Jose, as entry number 1499 in class number 70B, in the 63rd Annual Tennessee Walking Horse Celebration in Shelbyville, Tennessee, for the purpose of showing or exhibiting Jose Jose in the horse show while Jose Jose was wearing a substance prohibited by the Secretary of Agriculture under section 11.2(c) of the Horse Protection Regulations (9 C.F.R. § 11.2(c)), in violation of section 5(7) of the Horse Protection Act (15 U.S.C. § 1824(7)) (Amended Compl. ¶¶ II(1)-(2)).

The Hearing Clerk served Respondents with the Amended Complaint and a service letter by certified mail no later than May 28, 2003,[1] and also served Respondents with the Amended Complaint and the service letter by regular mail on July 29, 2003.[2] Respondents failed to file an answer to the Amended Complaint within 20 days after service, as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). On February 9, 2004, the Hearing Clerk sent a letter to Respondents informing them that their answer to the Amended Complaint had not been filed within the time required in the Rules of Practice.[3]

On May 21, 2004, in accordance with section 1.139 of the Rules of

[1]Domestic Return Receipt for Article Number 7001 2510 0002 0111 5095.

[2]Memorandum to the File by Lolita Ellis, Assistant Hearing Clerk, dated July 29, 2003.

[3]Letter dated February 9, 2004, from Joyce A. Dawson, Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture, to Respondents.

Practice (7 C.F.R. § 1.139), Complainant filed a "Motion for Adoption of Proposed Decision and Order as to Respondents Chad Way and Chad Way Stables, Inc." [hereinafter Motion for Default Decision] and a proposed "Decision and Order as to Respondents Chad Way and Chad Way Stables, Inc. Upon Admission of Facts by Reason of Default" [hereinafter Proposed Default Decision]. On June 8, 2004, the Hearing Clerk served Respondents with Complainant's Motion for Default Decision and Complainant's Proposed Default Decision.[4] On June 28, 2004, Respondents filed objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision, a motion to file an answer to the Amended Complaint,[5] and "Answer of Chad Way and Chad Way Stables, Inc. to Complainant's Amended Complaint" [hereinafter Answer to Amended Complaint].

On January 19, 2005, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] issued an Order: (1) denying Complainant's Motion for Default Decision; (2) finding good cause for the late filing of Respondents' Answer to Amended Complaint; and (3) deeming Respondents' Answer to Amended Complaint timely filed (January 19, 2005, Order at 2-3).

On January 28, 2005, Complainant appealed the ALJ's January 19, 2005, Order to the Judicial Officer. On March 1, 2005, Respondents filed Respondents' Response to Complainant's Appeal Petition. On March 18, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful review of the record, I disagree with the ALJ's denial of Complainant's Motion for Default Decision. Therefore, I: (1) reverse the ALJ's January 19, 2005, denial of Complainant's Motion for Default Decision; and (2) issue this Decision and Order based upon Respondents' failure to file a timely answer to the Amended Complaint.

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[4]Domestic Return Receipt for Article Number 7099 3400 0014 4581 6584.

[5]Respondents' Response and Objection to Complainant's Motion for Adoption of Proposed Decision and Order and Respondents' Motion to File Their Answer to Amended Complainant and Proceed on the Merits.

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

15 U.S.C.:

TITLE 15—COMMERCE AND TRADE

. . . .

CHAPTER 44—PROTECTION OF HORSES

§ 1821. Definitions

As used in this chapter unless the context otherwise requires:

. . . .

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

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

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

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

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

and, as a result of such application, infliction, injection, use, or practice, such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving, except that such term does not include such an application, infliction, injection,

use, or practice in connection with the therapeutic treatment of a horse by or under the supervision of a person licensed to practice veterinary medicine in the State in which such treatment was given.

§ 1823. Horse shows and exhibitions

. . . .

(e) Inspection by Secretary or duly appointed representative

For purposes of enforcement of this chapter (including any regulation promulgated under this chapter) the Secretary, or any representative of the Secretary duly designated by the Secretary, may inspect any horse show, horse exhibition, or horse sale or auction or any horse at any such show, exhibition, sale, or auction. Such an inspection may only be made upon presenting appropriate credentials. Each such inspection shall be commenced and completed with reasonable promptness and shall be conducted within reasonable limits and in a reasonable manner. An inspection under this subsection shall extend to all things (including records) bearing on whether the requirements of this chapter have been complied with.

§ 1824. Unlawful acts

The following conduct is prohibited:

. . . .

(7) The showing or exhibiting at a horse show or horse exhibition; the selling or auctioning at a horse sale or auction; the allowing to be shown, exhibited, or sold at a horse show, horse exhibition, or horse sale or auction; the entering for the purpose of showing or exhibiting in any horse show or horse exhibition; or offering for sale at a horse sale or auction, any

horse which is wearing or bearing any equipment, device, paraphernalia, or substance which the Secretary by regulation under section 1828 if this title prohibits to prevent the soring of horses.

. . . .

(9) The failure or refusal to permit access to or copying of records, or the failure or refusal to permit entry or inspection, as required by section 1823 of this title.

§ 1825. Violations and penalties

. . . .

(b) Civil penalties; review and enforcement

(1) Any person who violates section 1824 of this title shall be liable to the United States for a civil penalty of not more than $2,000 for each violation. No penalty shall be assessed unless such person is given notice and opportunity for a hearing before the Secretary with respect to such violation. The amount of such civil penalty shall be assessed by the Secretary by written order. In determining the amount of such penalty, the Secretary shall take into account all factors relevant to such determination, including the nature, circumstances, extent, and gravity of the prohibited conduct and, with respect to the person found to have engaged in such conduct, the degree of culpability, any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

(2) Any person against whom a violation is found and a civil penalty assessed under paragraph (1) of this subsection may obtain review in the court of appeals of the United States for the circuit in which such person resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit by filing a notice of appeal in such court within 30 days from the date of such order and by simultaneously sending a copy

of such notice by certified mail to the Secretary. The Secretary shall promptly file in such court a certified copy of the record upon which such violation was found and such penalty assessed, as provided in section 2112 of title 28. The findings of the Secretary shall be set aside if unsupported by substantial evidence.

. . . .

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

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

§ 1828. Rules and regulations

The Secretary is authorized to issue such rules and regulations as he deems necessary to carry out the provisions of this chapter.

15 U.S.C. §§ 1821(3), 1823(e), 1824(7), (9), 1825(b)(1)-(2), (c), 1828.

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

. . . .

§ 11.2 Prohibitions concerning exhibitors.

. . . .

(c) *Substances*. All substances are prohibited on the extremities above the hoof of any Tennessee Walking Horse or racking horse while being shown, exhibited, or offered for sale at any horse show, horse exhibition, or horse sale or auction, except lubricants such as glycerine, petrolatum, and mineral oil, or mixtures thereof: *Provided*, That:

(1) The horse show, horse exhibition, or horse sale or auction management agrees to furnish all such lubricants and to maintain control over them when used at the horse show, horse exhibition, or horse sale or auction.

(2) Any such lubricants shall be applied only after the horse has been inspected by management or by a DQP and shall only be applied under the supervision of the horse show, horse exhibition, or horse sale or auction management.

(3) Horse show, horse exhibition, or horse sale or auction management makes such lubricants available to Department personnel for inspection and sampling as they deem necessary.

§ 11.4 Inspection and detention of horses.

For the purpose of effective enforcement of the Act:

. . . .

(b) When any APHIS representative notifies the owner, exhibitor, trainer, or other person having custody of or responsibility for a horse at any horse show, horse exhibition, or horse sale or auction that APHIS desires to inspect such horse, it shall not be moved from the horse show, horse exhibition, or horse sale or auction until such inspection has been completed and the horse has been released by an APHIS representative.

9 C.F.R. §§ 11.2(c), .4(b).

DECISION

Statement of the Case

Respondents failed to file an answer to the Amended Complaint 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 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 Chad Way is an individual whose mailing address is 728 Sir Winston Place, Franklin, Tennessee 37064.

2. Respondent Chad Way Stables, Inc., is a corporation whose business mailing address is 2692 Midland Road, Shelbyville, Tennessee 37160.

3. On August 25, 2001, Respondents entered Jose Jose as entry number 1499 in class number 70B, in the 63rd Annual Tennessee Walking Horse Celebration in Shelbyville, Tennessee, for the purpose of showing or exhibiting the horse.

Conclusions of Law

1. On August 25, 2001, Respondents failed and refused to permit the Secretary of Agriculture to inspect Jose Jose, in violation of section 5(9) of the Horse Protection Act (15 U.S.C. § 1824(9)) and section 11.4(b) of the Horse Protection Regulations (9 C.F.R. § 11.4(b)).

2. On August 25, 2001, Respondents entered Jose Jose as entry number 1499 in class number 70B, in the 63rd Annual Tennessee Walking Horse Celebration in Shelbyville, Tennessee, for the purpose of

showing or exhibiting the horse in that show, while the horse was wearing a substance prohibited by the Secretary of Agriculture under section 11.2(c) of the Horse Protection Regulations (9 C.F.R. § 11.2(c)), in violation of section 5(7) of the Horse Protection Act (15 U.S.C. § 1824(7)).

COMPLAINANT'S APPEAL PETITION

Complainant raises two issues in Complainant's Appeal Petition. First, Complainant asserts Respondents' objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision were not timely filed; therefore, the ALJ erroneously considered Respondents' objections (Complainant's Appeal Pet. at 3-5).

On June 8, 2004, the Hearing Clerk served Respondents with Complainant's Motion for Default Decision and Complainant's Proposed Default Decision.[6] Respondents objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision were due no later than June 28, 2004. Complainant concedes the Hearing Clerk received one faxed copy of Respondents' objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision at 5:14 p.m., on June 28, 2004; however, Complainant argues the effective date of filing Respondents' objections is June 29, 2004, because the Hearing Clerk's Office is only open to receive documents until 4:30 p.m. and section 1.147(a) of the Rules of Practice (7 C.F.R. § 1.147(a)) requires that all documents required or authorized to be filed with the Hearing Clerk shall be filed in quadruplicate (Complainant's Appeal Pet. at 4).

Section 1.147(g) of the Rules of Practice provides that the effective date of filing a document is the date the document reaches the Hearing Clerk, as follows:

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

---

[6]See note 4.

. . . .

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

7 C.F.R. § 1.147(g).

The former Acting Chief Administrative Law Judge set the hours during which the Hearing Clerk's Office is open for the purpose of receiving documents, as follows:

January 28, 1999

TO: OALJ Staff

FROM: Edwin S. Bernstein
Acting Chief Administrative Law Judge

SUBJECT: New Hours of Operation

Effective February 1, 1999, the hours that the Hearing Clerk's Office will be open to receive documents will be 8:30 a.m. to 4:30 p.m., Monday through Friday, except for holidays.[7]

However, as Respondents correctly point out, the Rules of Practice do not set forth the hours during which the Hearing Clerk's Office is open to receive documents. Moreover, I find no indication in the record that the Hearing Clerk provided Respondents with the Acting Chief

[7] *See also In re Derwood Stewart* (Decision as to Derwood Stewart), 60 Agric. Dec. 570, 607 (2001), *aff'd*, 64 Fed. Appx. 941, 2003 WL 21147808 (6th Cir. May 15, 2003).

Administrative Law Judge's January 28, 1999, memorandum. Therefore, since Complainant concedes the Hearing Clerk received Respondents' objections on June 28, 2004,[8] and Respondents did not have notice of the hours during which the Hearing Clerk's Office was open to receive documents, I find the effective date of filing Respondents' objections is June 28, 2004, and I find Respondents' objections timely filed. Moreover, Respondents' failure to fax Respondents' objections in quadruplicate does not change the effective date of filing. Parties have long been allowed to establish the effective date of filing by faxing a single copy of a document to the Hearing Clerk's Office, which then must be followed by filing the original and appropriate number of copies of the document.

Second, Complainant contends the ALJ's denial of Complainant's Motion for Default Decision is error. Complainant requests that I reverse the ALJ's January 19, 2005, Order denying Complainant's Motion for Default Decision or vacate the ALJ's January 19, 2005, Order denying Complainant's Motion for Default Decision and remand the proceeding to the ALJ for issuance of a decision and order in accordance with the Rules of Practice. (Complainant's Appeal Pet. at 5-12.)

The ALJ denied Complainant's Motion for Default Decision on the ground that decisions on the merits have traditionally been preferred over default procedures particularly when, as in the instant proceeding, a pro se respondent files a timely answer to the complaint and mistakenly believes the answer to the complaint operates as an answer to an amended complaint (January 19, 2005, Order at 2).

The Rules of Practice makes no distinction between persons who appear pro se and persons represented by counsel. The Rules of Practice requires that a respondent, whether appearing pro se or through counsel, file a response to a complaint within 20 days after service of the

[8]Generally, the Hearing Clerk's time and date stamp establishes the time and date a document reaches the Hearing Clerk. Here, however, the parties agree that the Hearing Clerk received Respondents' objections at 5:14 p.m., on June 28, 2004, rather than at 9:04 a.m., June 29, 2004, as indicated by the Hearing Clerk's time and date stamp.

complaint and provides that failure to file a timely answer shall be deemed an admission of the allegations of the complaint and a waiver of hearing.[9] Respondents' decision to proceed pro se does not excuse them from failing to file a timely answer to the Amended Complaint and is not a meritorious basis for denying Complainant's Motion for Default Decision.[10] Moreover, I find no basis for Respondents' mistaken belief that a timely answer to the Complaint operates as an answer to the Amended Complaint. The Amended Complaint, served on Respondents no later than May 28, 2003, informs Respondents of the consequences of failing to file a timely answer to the Amended Complaint, 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.

Amended Compl. at second unnumbered page.

Similarly, the Hearing Clerk informed Respondents in the service letter, which accompanied the Amended Complaint, that they had 20 days in which to file a response to the Amended Complaint, as follows:

> **CERTIFIED RECEIPT REQUESTED**

[9] 7 C.F.R. §§ 1.136(a), (c), .139.

[10] *See In re Dean Byard* (Decision as to Dean Byard), 56 Agric. Dec. 1543, 1559 (1997) (stating the respondent's decision to proceed pro se prior to May 1997 does not operate as an excuse for the respondent's failure to file an answer).

May 13, 2003

Aubrey B. Harwell, Jr., Esq.
Neal & Harwell, PLC
2000 One Nashville Place
150 Fourth Avenue North
Nashville, Tennessee 37219

Chad Way
Chad Way Stables, Inc.
2692 Midland Road
Shelbyville,Tennessee 37160

Dear Gentlemen:

Subject: In re: Chad Way, Chad Way Stables, Inc., William B. Johnson and Sandra Johnson; Respondents - HPA Docket No. 03-0005

Amended Complaint was received and filed with this office on May 9, 2003 in the above-entitled proceeding.

In accordance with the applicable Rules of Practice, Respondents will have 20 days from receipt of this letter in which to file a response with this office.

Sincerely,
/s/
Joyce A. Dawson
Hearing Clerk

On February 9, 2004, the Hearing Clerk informed Respondents that their answer to the Amended Complaint had not been received within the allotted time, as follows:

February 9, 2004

Chad Way

Chad Way Stables
2692 Midland Road
Shelbyville, Tennessee 37160

Dear Mr. Way:

Subject: In re: Chad Way and Chad Way Stables; Respondents - HPA Docket No. 03-0005

A copy of the *Amended Complaint* was mailed to you via certified return receipt on May 13, 2003, which was signed for by Brooke Way, and resent through regular mail on July 29, 2003. You have failed to file an Answer to the *Amended Complaint* within the time prescribed in accordance with Section 1.136 of the Rules of Practice.

You will be informed of any future action taken in this matter.

Sincerely,
/s/
Joyce A. Dawson
Hearing Clerk

Respondents failed to respond to the Hearing Clerk's February 9, 2004, letter.

Respondents' answer to the Amended Complaint was due no later than June 17, 2003. Respondents filed a response to the Amended Complaint on June 28, 2004, 1 year 11 days after Respondents' answer was due. Respondents' failure to file a timely answer is deemed an admission of the allegations of the Amended Complaint (7 C.F.R. § 1.136(a), (c)) and constitutes a waiver of hearing (7 C.F.R. § 1.139). Therefore, Respondents are deemed, for purposes of this proceeding, to have admitted the allegations of the Amended Complaint. Respondents' mistaken belief that their timely answer to the Complaint operated as an answer to the Amended Complaint is not a meritorious basis upon which

to deny Complainant's Motion for Default Decision.[11]

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

ORDER

1. Respondents are jointly and severally assessed a $4,400 civil penalty. The civil penalty shall be paid by certified check or money order, made payable to the "Treasurer of the United States" and sent to:

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

Respondents' payment of the civil penalty shall be forwarded to, and received by, Ms. Juarez within 60 days after service of this Order on Respondents. Respondents shall indicate on the certified check or money order that payment is in reference to HPA Docket No. 03-0005.

2. Respondents are each disqualified for 2 years 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 instructions to exhibitors;

[11] *In re Dennis Hill*, 63 Agric. Dec. 91, 147 (2004) (finding the respondent's answer to the complaint is not an answer to the amended complaint); *In re Erica Nicole Mashburn*, 63 Agric. Dec. 254, 257-58 (2004) (Order Vacating the ALJ's Denial of Complainant's Motion for Default Decision and Remand Order as to James Mashburn) (stating the respondent's timely answer to the complaint does not operate as an answer to the amended complaint).

(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 Respondents shall become effective on the 60th day after service of this Order on Respondents.

RIGHT TO JUDICIAL REVIEW

Respondents have the right to obtain review of this Order in the court of appeals of the United States for the circuit in which they reside or have their place of business or in the United States Court of Appeals for the District of Columbia Circuit. Respondents 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.[12] The date of this Order is April 11, 2005.

In re: SAND CREEK FARMS, INC.
HPA Docket No. 01-C022 formerly HPA Docket No. 01-A022; formerly HPA Docket No. 01-0022.
Decision and Order Upon Admission of Facts.
Filed April 11, 2005.

HPA – Showing, included in bundle of activities of "Entering"is.

Colleen Carroll, for Complainant.
John Norton, III, for Respondent.
Decision and Order issued by Administrative Law Judge, Jill S. Clifton.

DECISION

[1] Complainant, the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture (APHIS), is

[12] 15 U.S.C. § 1825(b)(2), (c).

represented by Colleen A. Carroll, Esq. Respondent, Sand Creek Farms, Inc., is represented by John H. Norton, III, Esq.

[2] This proceeding was instituted under the Horse Protection Act (15 U.S.C. § 1821 *et seq.*) (the "Act"), by a complaint filed on June 28, 2001, alleging, among other things, that on or about May 27, 2000, Respondent Sand Creek Farms, Inc. violated section 5(2)(***B***) of the Act by ***entering*** a horse named "JFK All Over" in a horse show while the horse was sore.

[3] Respondent Sand Creek Farms, Inc. timely filed an answer to the complaint, and thereafter was permitted to file an amended answer to the complaint, on February 2 and 6, 2004 (First Amended Answer), which, among other things, denied ***showing*** the horse while he was sore, as prohibited by section 5(2)(***A***) of the Act.

[4] *See* HPA Docket No. 01-0022 and HPA Docket No. 01-A022, by which this case was formerly known, and which contain the majority of the case file.

[5] I have carefully considered APHIS's Motion filed March 3, 2005, requesting the issuance of a Decision and Order Upon Admission of Facts; Respondent's response filed March 23, 2005; and Complainant's Opposition to Respondent's Motion to File Second Amended Answer, filed April 4, 2005. Earlier, I ruled that it would be futile to allow Sand Creek Farms, Inc. to file its proposed Second Amended Answer. The proposed Second Amended Answer still failed to deny adequately the allegation that Sand Creek Farms, Inc. ***entered*** the horse while he was sore.

[6] I conclude that the First Amended Answer fails to deny the material allegations of the complaint, specifically, that Sand Creek Farms, Inc. entered the horse while he was sore. The First Amended Answer denies a statutory section that is not alleged, the section that prohibits "showing" rather than the section that prohibits "entering".

[7] Consequently, I issue this Decision and Order Upon Admission of Facts, in accordance with the Rules of Practice. *See* 7 C.F.R. § 1.130 *et seq.*; especially 7 C.F.R. § 1.136 and 7 C.F.R. § 1.139.

Findings of Fact

[8] Respondent Sand Creek Farms, Inc. is a Tennessee corporation with a mailing address of 3125 Highway 231 North, Shelbyville, Tennessee 37160, which was, at all times material to this Decision, engaged in the business of breeding, boarding, training and showing Tennessee Walking Horses.

[9] On or about May 27, 2000, Respondent Sand Creek Farms, Inc. entered "JFK All Over" in the 30th Annual Spring Fun Show in Shelbyville, Tennessee, (the "Fun Show"), as entry number 252 in class number 34 ("Three-Year-Old Walking Stallions") for the purpose of showing the horse in that class.

[10] On or about May 27, 2000, Respondent Sand Creek Farms, Inc. entered "JFK All Over" in the Fun Show, as entry number 252 in class number 34, while the horse was "sore," as that term is defined in the Act, for the purpose of showing the horse in that class, in violation of section 5(2)(B) of the Act (15 U.S.C. § 1824(2)(B)).

Conclusions

[11] The Secretary of Agriculture has jurisdiction in this matter.

[12] Respondent Sand Creek Farms, Inc. has violated section 5(2)(B) of the Horse Protection Act. 15 U.S.C. § 1824(2)(B).

[13] The following order is authorized by the Act and warranted under the circumstances.

Order

[14] Respondent Sand Creek Farms, Inc. is assessed a civil penalty of ***$2,200***, which shall be paid by a certified check or money order or cashier's check, made payable to the order of, the Treasurer of the United States.

[15] Such check shall be marked with HPA Docket No. 01-C022 and forwarded to counsel for APHIS as follows:

Colleen A. Carroll, Esq.
Office of the General Counsel
United States Department of Agriculture

South Building, Mail Stop 1417
1400 Independence Avenue SW
Washington DC 20250-1417

[16] Respondent Sand Creek Farms, Inc. is ***disqualified for two years*** 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, or horse sale or auction. [1]

[17] Respondent Sand Creek Farms, Inc., its agents and employees, successors and assigns, directly or indirectly or through any corporate or other device, shall cease and desist from violating the Act and the regulations issued thereunder.

[18] This Decision and Order shall have the same force and effect as if entered after a full hearing. The Decision shall be final thirty five (35) days after service, unless an appeal to the Judicial Officer is filed with the Hearing Clerk within thirty (30) days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145, see attached Appendix A). The Order shall be effective on the first day after the Decision becomes final.

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

* *

APPENDIX A

7 C.F.R.:

TITLE 7—-AGRICULTURE

[1] "Participating" means engaging in any activity beyond that of a spectator, and includes, without limitation, transporting or arranging for the transportation of horses to or from equine events, personally giving instructions to exhibitors, being present in any area where spectators are not allowed, and financing the participation of others in equine events.

SUBTITLE A—-OFFICE OF THE SECRETARY OF AGRICULTURE

PART 1—-ADMINISTRATIVE REGULATIONS

. . . .

SUBPART H—-RULES OF PRACTICE GOVERNING FORMAL

ADJUDICATORY PROCEEDINGS INSTITUTED BY THE SECRETARY UNDER

VARIOUS STATUTES

. . .

§ 1.145 Appeal to Judicial Officer.

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

(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.

(c) *Transmittal of record*. Whenever an appeal of a Judge's decision is filed and a response thereto has been filed or time for filing a response has expired, the Hearing Clerk shall transmit to the Judicial Officer the

record of the proceeding. Such record shall include: the pleadings; motions and requests filed and rulings thereon; the transcript or recording of the testimony taken at the hearing, together with the exhibits filed in connection therewith; any documents or papers filed in connection with a pre-hearing conference; such proposed findings of fact, conclusions, and orders, and briefs in support thereof, as may have been filed in connection with the proceeding; the Judge's decision; such exceptions, statements of objections and briefs in support thereof as may have been filed in the proceeding; and the appeal petition, and such briefs in support thereof and responses thereto as may have been filed in the proceeding.

(d) *Oral argument.* A party bringing an appeal may request, within the prescribed time for filing such appeal, an opportunity for oral argument before the Judicial Officer. Within the time allowed for filing a response, appellee may file a request in writing for opportunity for such an oral argument. Failure to make such request in writing, within the prescribed time period, shall be deemed a waiver of oral argument. The Judicial Officer may grant, refuse, or limit any request for oral argument. Oral argument shall not be transcribed unless so ordered in advance by the Judicial Officer for good cause shown upon request of a party or upon the Judicial Officer's own motion.

(e) *Scope of argument.* Argument to be heard on appeal, whether oral or on brief,

shall be limited to the issues raised in the appeal or in the response to the appeal, except that if the Judicial Officer determines that additional issues should be argued, the parties shall be given reasonable notice of such determination, so as to permit preparation of adequate arguments on all issues to be argued.

(f) *Notice of argument; postponement.* The Hearing Clerk shall advise all parties of the time and place at which oral argument will be heard. A request for postponement of the argument must be made by motion filed a reasonable amount of time in advance of the date fixed for argument.

(g) *Order of argument.* The appellant is entitled to open and conclude the argument.

(h) *Submission on briefs.* By agreement of the parties, an appeal may

be submitted for decision on the briefs, but the Judicial Officer may direct that the appeal be argued orally.

(i) *Decision of the [J]udicial [O]fficer on appeal.* As soon as practicable after the receipt of the record from the Hearing Clerk, or, in case oral argument was had, as soon as practicable thereafter, the Judicial Officer, upon the basis of and after due consideration of the record and any matter of which official notice is taken, shall rule on the appeal. If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum. A final order issued by the Judicial Officer shall be filed with the Hearing Clerk. Such order may be regarded by the respondent as final for purposes of judicial review without filing a petition for rehearing, reargument, or reconsideration of the decision of the Judicial Officer.

[42 FR 743, Jan. 4, 1977, as amended at 60 FR 8456, Feb. 14, 1995; 68 FR 6341, Feb. 7, 2003]

7 C.F.R. § 1.145.

In re: MIKE TURNER AND SUSIE HARMON.
HPA Docket No. 01-0023.
Decision and Order.
Filed June 2, 2005.

HPA – Evidence, No present recollection as – Evidence, affidavit as – Evidence, usual and customary practice as.

Brian Hill, for Complainant.
Brenda S. Bramlett, for Respondent.
Decision and Order issued by Administrative Law Judge Peter M. Davenport.

Preliminary Statement

This is a disciplinary proceeding under the Horse Protection Act of 1970, as amended, (15 U.S.C. § 1821, *et seq.)* (the "Act"). This action was instituted by a complaint filed by the Administrator of the Animal and Plant Inspection Service, United States Department of Agriculture ("APHIS") charging Respondent Mike Turner, the trainer, with entering a horse for the purpose of showing or exhibiting while it was sore at the May 26, 2000 Annual Spring Fun Show at Shelbyville, Tennessee. The complaint also charges Respondent Susie Harmon with entering and allowing the horse to be entered at the same show for the purpose of showing or exhibiting it while it was sore.

The Respondents filed answers denying the material allegations of the complaint. An oral hearing was held on March 29, 2005 in Shelbyville, Tennessee. The Complainant was represented by Robert A. Ertman, Esq., Office of General Counsel, United States Department of Agriculture, Washington, DC and the Respondents were represented by Brenda S. Bramlett, Esq., Bramlett & White, Shelbyville, Tennessee.

Upon consideration of the evidence of record and the proposed findings, conclusions and the brief filed by the Complainant,[1] I conclude that the Complainant failed to prove that either of the Respondents violated the Act and that the Complaint should therefore be dismissed.

Any proposed finding or conclusion not included as part of those that follow are rejected as not in accordance with the credible, relevant, and material evidence of record.

Findings of Fact

[1] The transcript was filed with the Hearing Clerk on April 21, 2005. As announced at the hearing, briefs were to be submitted within 30 days of the filing of the transcript. (TR p. 101-103) The Complainant's proposed findings, conclusions and brief were filed on May 23, 2005. On May 26, 2005, the Respondents' counsel sought a 30 day extension, indicating that she had just received her copy of the transcript on May 25, 2005. No explanation was given as to whether she had inquired as to whether the transcript had been filed prior to that time; however, given the separate extensions granted in filing answers for each of the Respondents, the continuance of the hearing set for September 28, 2004, her tardiness in appearing for the hearing (TR p. 4-5), further delay in issuing a decision appeared unwarranted.

1. Respondent Mike Turner is an individual whose mailing address is 2225 Liberty Valley Road, Lewisburg, Tennessee 37091.

2. Respondent Susie Harmon, whose full name is Molly Sue Harmon (TR p. 60),[2] is an individual whose mailing address is 42 Riverside, Fort Thompson, South Dakota 57339.

3. At all times relevant to this proceeding, Mike Turner was the trainer of the horse known as "The Ultra Doc". (TR p. 54). Mike Turner determined that "The Ultra Doc" would be entered in the Annual Spring Fun Show held at Shelbyville, Tennessee on May 26, 2000, and entered the horse by completing the entry form, paying the entry fee and transporting the horse to the show grounds. *Id.*

4. At all times relevant to these proceedings, Susie Harmon was the owner of "The Ultra Doc" and acquiesced in the decision to enter the horse in the May 26, 2000 show. (Answer of Susie Harmon, ¶D; TR p. 61, 69).

5. Respondent Mike Turner presented "The Ultra Doc" for pre-show inspection in Class No. 21 at the 30th Annual Spring Fun Show at Shelbyville, Tennessee on May 26, 2000 where the horse was inspected first by Charles Thomas, a "Designated Qualified Person" ("DQP") and then by two USDA Veterinary Medical Officers ("VMOs") John Michael Guedron, DVM and Clement A. Dussault, VMD. (TR p. 15-21, 22-24, 50-52, 94-96; Government Ex. 12, 14).

6. The DQP, Charles Thomas, first visually inspected, and then performed a physical examination of the horse by palpation, noting the horse's reaction to the procedure. Based upon the reactions to his palpation of the horse,[3] he excused the horse from competition, finding no problem with locomotion (evidenced by a rating of 1), but gave "The Ultra Doc" ratings of 2 (defined as "suspect, but meeting minimum standards") in the categories of physical examination and appearance.

[2] References to the Transcript will be abbreviated as TR.

[3] The video tapes reflect that after conducting his initial inspection, Mr. Thomas examined the horse a second time.

(Government Exhibit 6; TR p. 94-96[4]). Using his ratings, the total rating of 5 precluded competition for the day, but failed to rise to the level of an Act violation. (Government Ex. 5). [5]

7. John Michael Guedron, DVM and Clement A. Dussault, VMD, veterinarians employed by the USDA were assigned to the show for evaluating the performance of the DQP and examining horses to enforce the Act. Both veterinarians separately inspected "The Ultra Doc" after the inspection performed by the DQP and checked the box indicating that the horse was sore as defined by the Act.[6] As the "secondary" veterinarian, Dr. Dussault did not complete the government form designated as APHIS Form 7077 (Government Ex. 2), but merely added his signature to the form after it had been completed by others[7] and that evening at his motel executed an affidavit prepared by Michael Nottingham (Government Ex. 10)[8]. Although Dr. Dussault acknowledged signing the APHIS Form 7077 and his affidavit, at the time of the hearing, in response to repeated questions, he stated he had

[4] The ratings are found in the National Horse Show Commission Official Rule Book. (RX 2 at page 118).

[5] The ratings and the DQP Ticket and NHSC DQP Examination Form were discussed in some detail in Lonnie Messick's testimony. (TR. p. 73-78). Mr. Messick is the Executive Vice President of the National Show Horse Commission and has responsibility for the daily operation of the organization as well as the assignment and training of DQPs.

[6] Apparently this portion of the form was completed by Dr. Guedron as Dr. Dussault testified that he only signed his name to the form.(TR p.40).

[7] Dr. Dussault's testimony at the hearing was unequivocal on this point:
Q What portion of this form did you actually complete?
A. I did not complete, except for my signature....(TR. p.40)

[8] Dr. Dussault's affidavit, while more informative than his testimony at the hearing is problematic in that it characterizes the reaction to his palpation as being "mild" on the left foot. This is consistent with the examination of Charles Thomas, the DQP who while noting the reaction did not feel that it rose to the level of a Horse Protection Act violation.

no present recollection of the events on the date in question. [9]

8. The APHIS Form 7077 (Government Ex. 2) submitted in connection with this case has significant omissions and errors which are inconsistent with actual facts, including characterizing the horse as a gelding rather than a stallion and misstating the owner of the horse as being John Harmon rather than Susie Harmon, the individual against whom the complaint was brought.

Conclusion

Complainant failed to prove that "the Ultra Doc" was sore when entered at the May 26, 2000 Spring Fun Show in Shelbyville, Tennessee.

The evidence in this case against the Respondents is based upon two video tapes of the inspection of the horse at the show, the affidavit of one of the two USDA veterinarians attending the show and the APHIS violation form which was signed by, but not prepared by the veterinarian.[10] The veterinarian testified that he has no present recollection of the events that took place on the day of the show. The threshold question is thus whether this evidence supports a prima facie case under the Act and the Administrative Procedures Act, 5 U.S.C. §556(d).

The APHIS violation form as completed lacks probative force. The

[9] Dr. Dussault denied having any present recollection of his inspection of the horse in question on May 26, 2000 (TR. p.38), indicated that he did not complete any portion of the APHIS Form 7077 except to sign it (TR. p.40), did not remember when the form was completed (TR. p.41) and limited his testimony to what his affidavit stated as he didn't have any present day recollection of the show even after reviewing the tapes which were admitted as evidence. (TR. p. 44) He went on to state that it was his practice to destroy any notes that he had made once his affidavit was prepared. (TR. p. 45-47)

[10] In addition to Dr. Dussault's testimony, Government Exhibits 2, 5,6, 7, 10, 12 and 14 were admitted into evidence. Significantly, there was no testimony from the primary veterinarian who had left USDA employment and is now private veterinary practice or from the investigator who prepared the affidavits and presumably assembled the other exhibits which were not admitted.

veterinarian who testified at the hearing indicated that he did not complete the form, but merely added his signature to what had been prepared by others. Given the errors which appear in the preparation of the form, it is evidence more of sloppiness and inaccuracy than it is of any violation. Compounding the problems with the APHIS Form 7077 is the affidavit of Dr. Dussault which recounts only a "mild" response to palpation on the left side. 15 U.S.C. § 1825(d)(5) requires the manifestation of "abnormal sensitivity or inflammation in both of its forelimbs or both of its hindlimbs"[11] to trigger a presumption of soreness.

Charles Thomas, the DQP[12] who examined the horse not once, but twice, testified that he observed no difficulty with the horse's locomotion, an observation confirmed by the viewing of the two video tapes that were shown at the hearing, but noted reaction upon palpation, with the left side being "lighter" than on the right. (TR p. 94-96) The DQP's opinion that the horse was "suspect, but met minimum standards" excused the horse from showing, but did not result in the DQP's receiving a letter of warning for any deficiency in the performance of his duties despite the presence of USDA officials at the show whose duties included evaluating his performance[13]. The DQP's testimony was forthright and credible, his notes were more detailed than those of the USDA veterinarians and his findings were consistent with all but the conclusion found in Dr. Dussault's affidavit.

While Dr. Dussault's affidavit and the APHIS Form 7077 might establish a prima facie case of a violation, it is not conclusive or binding upon the trier of fact as to the ultimate issue of whether the horse was

[11] In his testimony, Dr. Dussault noted that the responses were mild on the left side and noted that his examination was the fourth time that the horse had been subjected to being palpated. (TR p.23)

[12] Mr. Thomas testified that he had been a DQP since 1983 and has been around horses all his life and has inspected over 100,000 horses. Significantly, in all of his tenure as a DQP, he has never received a letter of warning from USDA concerning his work as a DQP. (TR p.90-91)

[13] Dr. Dussault testified that his duties at the show were to monitor the performance of the DQPs as well as to examine horses. (TR. p.12)

"sore" and in violation of the Act. *Elliott v. Administrator,* 990 F.2d 140, 145-146 (4th Cir. 1993). While probative, such evidence is well recognized to be subjective and must be considered along with all of the other relevant and material evidence presented at the hearing. *Fleming v. USDA,* 713 F.2d 179, 186 (6th Cir. 1983) Given the serious nature of civil proceedings under the Horse Protection Act, due process precludes the presumption of section 1825(d)(5) from shifting the burden of persuasion to the Respondents. *Landrum v. Block,* 40 Agric. Dec. 922 (1981) The burden of persuasion that the horse was artificially sored remains with the Secretary throughout the administrative process. *Id.*

In order to accept the opinion of Dr. Dussault that the horse was "sore" within the meaning of the Act as is recited in his affidavit, I must totally discount the opinion and findings of a highly qualified and experienced DQP with a lengthy tenure, whose memory of his examination was far superior to that of the VMO testifying at the hearing, who has undergone the same USDA sponsored training relating to the Act and who was not called to task for failing to perform his duties satisfactorily at this particular show or any other show as of the date of the hearing in this case.

Complainant seeks to bolster the affidavit and violation form by introducing testimony of their usual examination and documentation practices. In this case, given lack of recollection of facts on the part of the USDA veterinarian, such general testimony about "usual procedures" is not a sufficient basis for making a determination as to what occurred in this case. As was suggested in *In re William Jackson, et al.,* 57 Agric. Dec. 1145 (1992), it would be fundamentally unfair to allow the complainant to create a case from the general testimony of one of the very individuals whose entries (or absence of them) cast doubt upon the reliability of the documents being used to seek sanctions in this case.

As I conclude that the complainant has failed to offer sufficient proof to support a violation of the Act, it is unnecessary to decide whether the Respondent Susie Harmon's oral and written instructions to her trainer together with the other precautionary actions taken by her, including the periodic unannounced visits by a number of different veterinarians would insulate her from liability consistent with the holding of *Baird v.*

USDA, 39 F. 3d 131 (6th Cir. 1994).

For the above reasons, the following Order is entered.

Order

The Complaint is dismissed as to all respondents with prejudice.

In re: JACKIE McCONNELL, AN INDIVIDUAL; CYNTHIA McCONNELL, AN INDIVIDUAL; AND WHITTER STABLES, A PARTNERSHIP OR UNINCORPORATED ASSOCIATION.
HPA Docket No. 99-0034.
Decision and Order.
Filed June 23, 2005.

HPA – Horse protection – Sore – Entry – Shipping – Selective prosecution – Malicious prosecution – Civil penalty – Disqualification.

The Judicial Officer concluded Cynthia McConnell shipped a horse to a horse show with reason to believe that the horse may be shown or exhibited while sore, in violation of 15 U.S.C. § 1824(1) and Jackie McConnell and Cynthia McConnell entered a horse in a horse show while the horse was sore, in violation 15 U.S.C. § 1824(2)(B). The Judicial Officer rejected Respondents' contentions that they were the subjects of selective prosecution and malicious prosecution. The Judicial Officer rejected Cynthia McConnell's contention that Complainant could not institute a Horse Protection Act proceeding against her for her violations because she previously paid a fine and completed a suspension imposed by a Horse Industry Organization for the same violations. The Judicial Officer rejected Jackie McConnell's contention that the Secretary of Agriculture's past practice has been to forgo enforcement of the Horse Protection Act against persons who are merely custodians of horses and merely present those horses for pre-show inspections. The Judicial Officer assessed Jackie McConnell a $2,200 civil penalty, disqualified Jackie McConnell for 5 years, assessed Cynthia McConnell a $4,400 civil penalty, and disqualified Cynthia McConnell for 2 years.

Colleen A. Carroll, for Complainant.
Mike R. Wall, Oxford, Mississippi, for Respondents.
Initial decision issued by Jill S. Clifton, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

Bobby R. Acord, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on September 7, 1999. Complainant instituted the proceeding under the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) [hereinafter the Horse Protection Act]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges that: (1) on or about August 26, 1998, Jackie McConnell, Cynthia McConnell, and Whitter Stables [hereinafter Respondents] shipped a horse known as "Regal By Generator" to the 1998 Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, for the purpose of showing or exhibiting the horse, while Regal By Generator was sore, in violation of section 5(1) of the Horse Protection Act (15 U.S.C. § 1824(1)); and (2) on or about September 3, 1998, Respondents entered Regal By Generator as entry number 685 in class number 110 at the 1998 Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, for the purpose of showing or exhibiting the horse, while Regal By Generator was sore, in violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) (Compl. ¶¶ 11-12).[1]

On October 4, 1999, Cynthia McConnell and Whitter Stables filed

[1]Complainant also alleged Raymond F. Akin, Lillie Akin, Camille C. Akin, Mark A. Akin, and Akin Equine Veterinary Services violated the Horse Protection Act (Compl. ¶ 13). Four of these respondents, Raymond F. Akin, Camille C. Akin, Mark A. Akin, and Akin Equine Veterinary Services, entered into consent decisions with Complainant. *In re Jackie McConnell* (Consent Decision as to Raymond F. Akin), 59 Agric. Dec. 831 (2000); *In re Jackie McConnell* (Consent Decision as to Mark A. Akin, Camille C. Akin, and Akin Equine Veterinary Services), 59 Agric. Dec. 832 (2000). Further, Lillie Akin was dismissed as a respondent. *In re Jackie McConnell* (Consent Decision as to Raymond F. Akin), 59 Agric. Dec. 831 (2000). On May 12, 2003, Administrative Law Judge Jill S. Clifton amended the case caption to omit references to the "Akin" respondents (Order Amending Case Caption).

"Motion to Stay and Answer of Cynthia McConnell" and Jackie McConnell filed "Motion to Stay and Answer of Jackie McConnell" in which Respondents denied the material allegations of the Complaint.

Administrative Law Judge Dorothea A. Baker presided at a hearing in Memphis, Tennessee, on August 8, 2000, through August 10, 2000, and March 12, 2002, through March 15, 2002. Colleen A. Carroll, Office of the General Counsel, United States Department of Agriculture, represented Complainant. Lee Ann Rickard of Steen, Reynolds & Dalehite, Jackson, Mississippi, represented Jackie McConnell. Mike R. Wall, Oxford, Mississippi, represented Cynthia McConnell and Whitter Stables.[2]

On July 22, 2002, Complainant filed three separate proposed findings of fact and proposed conclusions of law, one for each of the three Respondents.[3] On October 17, 2002, Jackie McConnell filed proposed findings of fact and conclusions of law. On October 25, 2002, Cynthia McConnell and Whitter Stables filed "Respondents Cynthia McConnell and Whitter Stables Proposed Findings and Conclusions of Law; and Memorandum of Points and Authorities in Support Thereof." On December 19, 2002, Jackie McConnell filed "Respondent Jackie McConnell's Response to Complainant's Proposed Findings of Fact and Conclusions of Law," and Complainant filed "Complainant's Reply to Proposed Findings of Fact and Conclusions of Law Filed by Respondent Jackie McConnell." On December 24, 2002, Cynthia McConnell and Whitter Stables filed "Respondent's [sic] Cynthia McConnell and Whitter Stables Reply Brief." On January 8, 2003,

[2]On February 10, 2004, Lee Ann Rickard withdrew as counsel for Jackie McConnell and Mike R. Wall was substituted as counsel for Jackie McConnell (Notice of Withdrawal and Substitution of Counsel for Respondent Jackie McConnell).

[3]"Complainant's Proposed Findings of Fact and Conclusions of Law; and Memorandum of Points and Authorities in Support Thereof as to Respondent Jackie McConnell"; "Complainant's Proposed Findings of Fact and Conclusions of Law; and Memorandum of Points and Authorities in Support Thereof as to Respondent Cynthia McConnell"; and "Complainant's Proposed Findings of Fact and Conclusions of Law; and Memorandum of Points and Authorities in Support Thereof as to Respondent Whitter Stables."

Complainant filed "Complainant's Reply to Proposed Findings of Fact and Conclusions of Law Filed by Respondent Cynthia McConnell" and "Complainant's Reply to Proposed Findings of Fact and Conclusions of Law Filed by Respondent Whitter Stables."

On November 25, 2003, Administrative Law Judge Jill S. Clifton[4] [hereinafter the ALJ] issued a "Decision" [hereinafter Initial Decision]: (1) concluding that, on September 3, 1998, Jackie McConnell entered Regal By Generator as entry number 685 in class number 110 at the 1998 Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, for the purpose of showing or exhibiting Regal By Generator, while Regal By Generator was sore, in violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)); (2) concluding that, on or about August 23, 1998, through August 26, 1998, Cynthia McConnell and Whitter Stables shipped, transported, moved, and delivered Regal By Generator to a horse show, with reason to believe that Regal By Generator may be shown or exhibited while Regal By Generator was sore, in violation of section 5(1) of the Horse Protection Act (15 U.S.C. § 1824(1)); (3) concluding that, on or about September 2, 1998, through September 3, 1998, Cynthia McConnell and Whitter Stables entered Regal By Generator as entry number 685 in class number 110 at the 1998 Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, for the purpose of showing or exhibiting Regal By Generator, while Regal By Generator was sore, in violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)); (4) assessing Jackie McConnell a $2,200 civil penalty; (5) assessing Cynthia McConnell and Whitter Stables a $2,200 civil penalty; (6) disqualifying Jackie McConnell from showing, exhibiting, or entering any horse and from participating in any horse show, horse exhibition, horse sale, or horse auction for 5 years; and (7) disqualifying Cynthia McConnell and Whitter Stables from showing, exhibiting, or entering any horse and from participating in any horse show, horse exhibition, horse sale, or horse auction for 1 year (Initial Decision at

[4]Administrative Law Judge Dorothea A. Baker retired from federal service, and former Chief Administrative Law Judge James W. Hunt assigned the proceeding to Administrative Law Judge Jill S. Clifton effective January 9, 2003, for a decision (Notice of Case Reassignment).

39-41).

On December 19, 2003, Complainant appealed to the Judicial Officer. On December 24, 2003, Respondents appealed to, and requested oral argument before, the Judicial Officer. On January 22, 2004, Complainant filed responses to Respondents' appeal petitions. On January 30, 2004, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Respondents' request for oral argument before the Judicial Officer, which, pursuant to section 1.145(d) of the Rules of Practice (7 C.F.R. § 1.145(d)), the Judicial Officer may grant, refuse, or limit, is refused, because Respondents and Complainant have thoroughly addressed the issues. Thus, oral argument would appear to serve no useful purpose.

Based upon a careful consideration of the record, I agree with the ALJ's Initial Decision, except that I find Whitter Stables is merely a name under which Cynthia McConnell does business and that I increase the sanction imposed against Cynthia McConnell. Therefore, except for the ALJ's findings, conclusions, and sanction regarding Whitter Stables, the sanction imposed on Cynthia McConnell, and minor modifications, I adopt the Initial Decision as the final Decision and Order. Additional conclusions by the Judicial Officer follow the ALJ's discussion, as restated.

Complainant's exhibits are designated by "CX." Respondents' exhibits are designated by "RX." Transcript references are designated by "Tr. I" for the August 2000 segment of the hearing and "Tr. II" for the March 2002 segment of the hearing.

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

15 U.S.C.:

TITLE 15—COMMERCE AND TRADE

. . . .

CHAPTER 44—PROTECTION OF HORSES

§ 1821. Definitions

As used in this chapter unless the context otherwise requires:

. . . .

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

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

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

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

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

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

§ 1822. Congressional statement of findings

The Congress finds and declares that–

(1) the soring of horses is cruel and inhumane;

(2) horses shown or exhibited which are sore, where such soreness improves the performance of such horse, compete unfairly with horses which are not sore;

(3) the movement, showing, exhibition, or sale of sore horses in intrastate commerce adversely affects and burdens interstate and foreign commerce;

(4) all horses which are subject to regulation under this chapter are either in interstate or foreign commerce or substantially affect such commerce; and

(5) regulation under this chapter by the Secretary is appropriate to prevent and eliminate burdens upon commerce and to effectively regulate commerce.

§ 1824. Unlawful acts

The following conduct is prohibited:

(1) The shipping, transporting, moving, delivering, or receiving of any horse which is sore with reason to believe that such horse while it is sore may be shown, exhibited, entered for the purpose of being shown or exhibited, sold, auctioned, or offered for sale, in any horse show, horse exhibition, horse sale, or auction; except that this paragraph does not apply to the shipping, transporting, moving, delivering, or receiving of any horse by a common or contract carrier or an employee thereof in the usual course of the carrier's business or the employee's employment unless the carrier or employee has reason to believe that such horse is sore.

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

§ 1825. Violations and penalties

. . . .

(b) Civil penalties; review and enforcement

(1) Any person who violates section 1824 of this title shall be liable to the United States for a civil penalty of not more than $2,000 for each violation. No penalty shall be assessed unless such person is given notice and opportunity for a hearing before the Secretary with respect to such violation. The amount of such civil penalty shall be assessed by the Secretary by written order. In determining the amount of such penalty, the Secretary shall take into account all factors relevant to such determination, including the nature, circumstances, extent, and gravity of the prohibited conduct and, with respect to the person found to have engaged in such conduct, the degree of culpability, any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

(2) Any person against whom a violation is found and a civil penalty assessed under paragraph (1) of this subsection may obtain review in the court of appeals of the United States for the circuit in which such person resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit by filing a notice of appeal in such court within 30 days from the date of such order and by simultaneously sending a copy of such notice by certified mail to the Secretary. The Secretary shall promptly file in such court a certified copy of the record upon which such violation was found and such penalty assessed, as provided in section 2112 of title 28. The findings of the Secretary shall be set aside if found to be unsupported by substantial evidence.

. . . .

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

In addition to any fine, imprisonment, or civil penalty

authorized under this section, any person who was convicted under subsection (a) of this section or who paid a civil penalty assessed under subsection (b) of this section or is subject to a final order under such subsection assessing a civil penalty for any violation of any provision of this chapter or any regulation issued under this chapter may be disqualified by order of the Secretary, after notice and an opportunity for a hearing before the Secretary, from showing or exhibiting any horse, judging or managing any horse show, horse exhibition, or horse sale or auction for a period of not less than one year for the first violation and not less than five years for any subsequent violation. Any person who knowingly fails to obey an order of disqualification shall be subject to a civil penalty of not more than $3,000 for each violation. Any horse show, horse exhibition, or horse sale or auction, or the management thereof, collectively and severally, which knowingly allows any person who is under an order of disqualification to show or exhibit any horse, to enter for the purpose of showing or exhibiting any horse, to take part in managing or judging, or otherwise to participate in any horse show, horse exhibition, or horse sale or auction in violation of an order shall be subject to a civil penalty of not more than $3,000 for each violation. The provisions of subsection (b) of this section respecting the assessment, review, collection, and compromise, modification, and remission of a civil penalty apply with respect to civil penalties under this subsection.

(d) Production of witnesses and books, papers, and documents; depositions; fees; presumptions; jurisdiction

. . . .

(5) In any civil or criminal action to enforce this chapter or any regulation under this chapter a horse shall be presumed to be a horse which is sore if it manifests abnormal sensitivity or inflammation in both of its forelimbs or both of its hindlimbs.

§ 1828. Rules and regulations

The Secretary is authorized to issue such rules and regulations as he deems necessary to carry out the provisions of this chapter.

15 U.S.C. §§ 1821(3), 1822, 1824(1)-(2), 1825(b)(1)-(2), (c), (d)(5), 1828.

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.

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 in a standard dictionary, such as "Webster's."

. . . .

Exhibitor means (1) any person who enters any horse, any person who allows his horse to be entered, or any person who directs or allows any horse in his custody or under his direction, control or supervision to be entered in any horse show or horse exhibition; (2) any person who shows or exhibits any horse, any person who allows his horse to be shown or exhibited, or any person who directs or allows any horse in his custody or under his direction, control, or supervision to be shown or exhibited in any horse show or horse exhibition; (3) any person who enters or presents any horse for sale or auction, any person who allows his horse to be entered or presented for sale or auction, or any person who allows any horse in his custody or under his direction, control, or supervision to be entered or presented for sale or auction in any horse sale or horse auction; or (4) any person who sells or auctions any horse, any person who allows his horse to be sold or auctioned, or any person who directs or allows any horse in his custody or under his direction, control, or supervision to be sold or auctioned.

. . . .

Horse Exhibition means a public display of any horses, singly or in groups, but not in competition, except events where speed is the prime factor, rodeo events, parades, or trail rides.

. . . .

Horse Industry Organization or Association means an organized group of people, having a formal structure, who are engaged in the promotion of horses through the showing, exhibiting, sale, auction, registry, or any activity which contributes to the advancement of the

horse.

. . . .

Horse Show means a public display of any horses, in competition, except events where speed is the prime factor, rodeo events, parades, or trail rides.

Inspection means the examination of any horse and any records pertaining to any horse by use of whatever means are deemed appropriate and necessary for the purpose of determining compliance with the Act and regulations. Such inspection may include, but is not limited to, visual examination of a horse and records, actual physical examination of a horse including touching, rubbing, palpating and observation of vital signs, and the use of any diagnostic device or instrument, and may require the removal of any shoe, pad, action device, or any other equipment, substance or paraphernalia from the horse when deemed necessary by the person conducting such inspection.

. . . .

Person means any individual, corporation, company, association, firm, partnership, society, organization, joint stock company, or other legal entity.

. . . .

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.

9 C.F.R. § 11.1.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION (AS RESTATED)

Statement of the Case

Jackie McConnell and Cynthia McConnell are husband and wife, whose mailing address is 125 Valleywood, Collierville, Tennessee 38017. During all times relevant to this proceeding, Jackie McConnell and Cynthia McConnell held valid horse trainers' licenses. Cynthia McConnell is the owner of an unincorporated business known as "Whitter Stables" which has a mailing address of P.O. Box 205, Collierville, Tennessee 38027. Whitter Stables is a horse training facility for the care and training of Tennessee Walking Horses. Jackie McConnell and his business, Jackie McConnell Stables, buy and sell horses (Tr. II at 728-29). At the time of the alleged violations, Jackie McConnell Stables and Whitter Stables were situated on the same real estate.

Sanctions have been imposed on Jackie McConnell under the Horse Protection Act on three occasions: as the result of two consent decisions, where Jackie McConnell did not admit to violating the Horse Protection Act, a civil monetary penalty twice and a 6-month period of disqualification twice; and, in a case heard on the merits, a $2,000 civil penalty and a 2-year period of disqualification (CX 17).[5]

[5] *In re Jackie McConnell*, 52 Agric. Dec. 1156 (1993), *aff'd*, 23 F.3d 407, 1994 WL 162761 (6th Cir. 1994), *printed in* 53 Agric. Dec. 174 (1994); *In re Rose Day* (Consent Decision as to Jackie McConnell), 47 Agric Dec. 1756 (1988); *In re Jackie McConnell*, 44 Agric. Dec. 712 (1985), *vacated in part*, Nos. 85-3259, 3267, 3276 (6th Cir. Dec. 5, 1985) (consent order substituted for original order), *printed in* 51 Agric. Dec. 313 (continued...)

Whitter Stables employed several professional trainers, including Jackie McConnell, to train horses under its care (Tr. II at 419-22). In 1998, Whitter Stables boarded and trained a horse known as "Regal By Generator." The horse is female and was 9 years old at the time of the alleged violations (CX 9). The owners of Regal By Generator wanted to have her entered in the 1998 Tennessee Walking Horse National Celebration in Shelbyville, Tennessee (CX 10).

Cynthia McConnell engaged an independent contractor on August 23, 1998, to transport horses, including Regal By Generator, to the 1998 Tennessee Walking Horse National Celebration, and on or about September 2, 1998, Cynthia McConnell entered Regal By Generator as entry number 685 in class number 110 in the 1998 Tennessee Walking Horse National Celebration (Tr. I at 284; Tr. II at 124-25, 130, 180; CX 4, CX 7). In addition to the evidence presented by Complainant, Cynthia McConnell testified that she personally participated in the act of entering Regal By Generator in the 1998 Tennessee Walking Horse National Celebration (Tr. II at 141-42).

Cynthia McConnell testified that her business, Whitter Stables, was a sole proprietorship and that her husband, Jackie McConnell, was merely a salaried employee of Whitter Stables and had no business interest in Whitter Stables (Tr. II at 113, 115-16, 125, 138-39). Cynthia McConnell testified about her interest in Whitter Stables and Jackie McConnell's relationship to Whitter Stables, as follows:

> BY MR. WALL:
>
> Q. Before we proceed on with any other documents, let me ask some questions about Whitter Stables.
>
> [BY MS. McCONNELL:]
>
> A. Yes, sir.

[5](...continued)
(1992).

Q. It was formed in 1994?

A. Yes, sir.

Q. Why did you form Whitter Stables at that time?

A. Jackie was going on suspension and I decided to go in and take over the business and run it myself.

Q. How long have you been in the walking horse business?

A. Probably 31 or 32 years.

Q. All right. So in 1994 it would have been 23 or 24 years you had been in the business in some form or fashion?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. When you opened up Whitter Stables, did you in fact take over the business?

A. Yes, sir.

Q. Have you maintained that business to this day?

A. Yes, sir.

. . . .

Q. What's entailed in running Whitter Stables? What are your job responsibilities just for running Whitter Stables?

A. Well, we take care of Tennessee walking horses for show, but when a horse is brought to me, I am solely responsible for the shoeing, the bedding, the feeding, the grooming, the employees. Anything that has to be done with them, I do it.

Q. You being Cyndi McConnell?

A. Cyndi McConnell.

Q. Do you have employees that work for you?

A. Yes, sir.

Q. Do you have trainers that work for you?

A. Yes, sir.

Q. There's been a document – I don't know that the deed was introduced into evidence where you and Jackie purchased some land in Fayette County.

A. Yes, sir.

Q. Who is paying that bill?

A. I am.

Q. And what account do you use to pay that bill?

A. Whitter Stables.

Q. And once again, does Jackie McConnell have any interest at all in Whitter Stables?

A. No, sir.

. . . .

Q. How is Jackie McConnell compensated by Whitter Stables?

A. I pay him.

Q. Do you pay him a commission, do you pay him a monthly salary, how do you pay him?

A. I pay him a monthly salary.

Q. All right. Are you all in any type of partnership?

A. It's Whitter Stables. I'm the sole proprietor.

Q. Other than Whitter Stables, are you and Jackie in a partnership?

A. No, sir.

Q. Okay. Did Jackie McConnell have anything to do with hauling Regal by Generator to the 1998 Celebration?

A. No, sir.

. . . .

Q. What activities did Jackie McConnell have to do with getting Regal by Generator from Fayette County, Tennessee to the celebration?

A. He didn't.

Q. What activities or responsibilities did Jackie McConnell

have in getting Regal by Generator eligible to show at the celebration?

A. He didn't.

Tr. II at 135-40.

Complainant offered evidence in an attempt to show that Whitter Stables was not a sole proprietorship but was, in fact, a general partnership between Cynthia McConnell and Jackie McConnell. Specifically, Complainant offered: (1) the affidavit of Camille C. Akin tending to show that people who do business with Whitter Stables had a belief that Jackie McConnell was part owner of Whitter Stables (CX 10); (2) a paid advertisement in a horse show magazine showing Sarah Akin riding Regal By Generator which also indicated that Jackie McConnell was a "manager" at Whitter Stables (CX 11); (3) a paid advertisement in a horse show magazine indicating that Jackie McConnell was getting the major credit for work done by Whitter Stables (CX 28); (4) an article from a horse show magazine which mentioned "Jackie McConnell's Whitter Stables" tending to show that Jackie McConnell was believed by the horse show industry to be more than just an employee (CX 29); (5) a recorded warranty deed from Fayette County, Tennessee, dated December 28, 1989, showing the land occupied by Whitter Stables was titled in joint ownership by Jackie McConnell and Cynthia McConnell; and (6) a copy of a Fayette County, Tennessee, real property tax receipt dated November 20, 1998, for the same property tending to show that the tax was paid by check by Jackie McConnell (CX 1).

Animal and Plant Health Inspection Service [hereinafter APHIS] investigator James Odle tried to recall at the hearing the basis for his opinion that Jackie McConnell "owned" Whitter Stables (Tr. I at 450-54, 560-61). Complainant contends, during the time of the alleged violations of the Horse Protection Act, Jackie McConnell had an ownership stake (a general partnership interest) in Whitter Stables because Whitter Stables occupied the same real estate, used the same physical facilities, had some of the same clients, and employed some of the same employees as Jackie McConnell Stables (Tr. II at 415-17,

437-39). James Odle stated he "knew" Whitter Stables was owned by both Jackie McConnell and Cynthia McConnell and he was "convinced" that Jackie McConnell was the trainer of Regal By Generator (Tr. I at 607-08, 684).

On September 3, 1998, Jackie McConnell led Regal By Generator to the pre-show inspection area at the 1998 Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, and presented her for inspection (Tr. I at 50-51, 82-86, 373; Tr. II at 150, 205; CX 9, CX 13). Additionally, Jackie McConnell stipulated he led the horse through the inspection station (Tr. I at 237).

At the pre-show inspection on September 3, 1998, John Michael Guedron, a doctor of veterinary medicine, an APHIS veterinary medical officer, and an experienced examiner of Tennessee Walking Horses, inspected Regal By Generator. Dr. Guedron observed Regal By Generator's movements and examined the horse's front legs and feet. Dr. Guedron testified that he prepared a report of his examination that same day (by completing portions of APHIS Form 7077) and prepared an affidavit the following day (Tr. I at 52-54; CX 9).

In their affidavits and on APHIS Form 7077, Dr. Guedron and Dr. Peter R. Kirsten, also an experienced doctor of veterinary medicine and an APHIS veterinary medical officer, described Regal By Generator's pain responses during their inspections (CX 9). Dr. Guedron stated in his affidavit:

> I began my physical exam on the left leg and foot and elicited strong, consistent and repeatable pain responses - as evidenced by the horse forcefully withdrawing its foot and rearing its head - to digital palpation of the anterior aspect of the pastern, approximately 1-2 inches above the coronary band, and the lateral aspect just above the coronary band. I also noted several thick, firm, abraded ridges of tissue on the posterior pastern that extended onto the medial and lateral aspects of the pastern. I continued with the right leg and foot and elicited the same consistent and repeatable pain responses to digital palpation of the medial, anterior, and lateral aspects of the pastern above the

> coronary band. In addition, there were several firm, raised red "button lesions" noted in the sulcus or "pocket" of the posterior pastern.

CX 9 at 2-3.

Dr. Guedron testified that the lesions and sensitivity to pain by Regal By Generator would have existed prior to the pre-show examination, as follows:

> [BY MS. CARROLL:]
>
> Q. Now, in paragraph 4 of page 2, it states: "As evidenced by the horse forcefully withdrawing its foot and rearing its head."
>
> What does rearing its head indicate, if anything, to you?
>
> [BY DR. GUEDRON:]
>
> A. The rearing of the head was in conjunction with withdrawal of the foot which would indicate that the horse was trying to remove its foot and leg from my grasp to avoid the painful sensations that I was eliciting through palpation.
>
> Q. At the end of that paragraph which continues on page 3 of Exhibit 9, it says:
>
> "I continued with the right leg and foot and elicited the same consistent and repeatable pain response to digital palpation of the medial, anterior, and lateral aspects of the pastern above the coronary band."
>
> Are those depicted anywhere else in this exhibit?
>
> A. Yes, they are depicted in the schematics under block 31 on the APHIS Form 7077.

Q. And what were those consistent and repeatable pain responses you are describing in here?

A. There was a forcible withdrawal of the leg in conjunction with the rearing of the head.

Q. And the last sentence of that paragraph says:

"There were several firm, raised, red 'button lesions' noted in the sulcus or 'pocket' of the posterior pastern."

Where, if anywhere, are those noted on the documentation?

A. Again, they are noted under block 31 on the APHIS Form 7077.

Q. What is the sulcus or pockets?

A. That is the posterior or back of the pastern, that area in the center is commonly referred to as the sulcus or the pocket pastern.

Q. Do you have an opinion whether this horse was in pain during your examination?

A. Yes, I do.

Q. What is that opinion?

A. My opinion is the horse was in pain.

Q. And what is the basis for that opinion?

A. The locomotion of the horse as well as the response to digital palpation.

Q. What did the locomotion tell you that led you to believe that the horse was in pain?

A. Locomotion indicates to me that the horse didn't want to place the normal amount of weight carried by the front feet on its front feet due to the painful condition.

Q. How was that indicated?

A. By the horse being back on its rear feet, having its weight back on its rear feet, its rear feet further up underneath the horse's body to support more of the weight.

Q. And in locomotion?

A. As it walked and as it stood, yes.

Q. And did you note that anywhere in your documentation?

A. I noted under block 31 on the APHIS Form 7077 a description to the right that the horse led and turned around the cone and that same description is in my affidavit, paragraph 4.

Q. What does that say?

A. That the horse led slowly and had difficulty turning around the cone.

Q. Do you have an opinion as to whether this horse would have been in pain if it had been exhibited after your examination?

A. Yes, I do.

Q. And what is that opinion?

A. I believe it would have been in pain.

Q. And what is the basis for that opinion?

A. Again, the basis for that opinion is the painful responses that I elicited upon my physical exam through digital palpation in conjunction with my observation of its locomotion and its stance would indicate to me that if this horse under saddle was forced to suffer concussive forces on its front feet that he would indeed experience pain.

Q. Do you have an opinion as to whether the conditions of this horse's posterior pasterns would have existed previously? That is before the date of your examination.

A. Yes, I believe these conditions would have taken, as I stated before, weeks to become that severe.

Tr. I at 70-73.

At the conclusion of his examination of Regal By Generator, Dr. Kirsten signed APHIS Form 7077 (CX 9; Tr. I at 302). In his affidavit, Dr. Kirsten described both his inspection and Dr. Guedron's inspection of Regal By Generator, as follows:

I then observed Dr. Guedron examine the horse. He elicited a painful response to palpation, evidenced by a strong leg withdrawal, when he palpated the lateral bulb of the left foot extending around the lateral aspect to the anterior of the pastern. There also was a response to palpation on the right foot from medial to lateral extending across the anterior of the pastern, evidenced by a strong leg withdrawal.

I then palpated the horse and got a strong leg withdrawal when I palpated the lateral and anterior aspect of the left pastern, and a mild leg withdrawal when I palpated the anterior and medial aspect of the right pastern. These responses were consistent and

> repeatable. I also observed that this horse had his rear legs tucked under. I also observed button lesions on the posterior of the right pastern and raised and thickened ridges on the posterior of the left pastern. . . .
>
> Dr. Guedron and I conferred and agreed on our findings. Dr. Guedron notified the custodian that we intended to write a government case on the horse.

CX 9 at 4-5.

Dr. Kirsten testified that the lesions and sensitivity to pain by Regal By Generator would have existed prior to the pre-show examination, as follows:

> [BY MS. CARROLL:]
>
> Q. What is your opinion, Dr. Kirsten, as to the length of time that it would take for a normal pastern to develop the abraded ridges and button lesions that you have just described?
>
> [BY DR. KIRSTEN:]
>
> A. My opinion is that it would occur chronically over a longer period of time. This is not, in my opinion, an acute suddenly onset lesion. It would be chronic and I would not give you a length of time. I don't have an opinion on that.
>
> Q. It would not have occurred overnight?
>
> A. It would not.
>
> . . . .
>
> Q. And what is the basis for your opinion?

A. The granulomatous lesion is, in my opinion, the response to chronic inflammation, chronic irritation.

Q. And is that the same for -- are you speaking of the button lesions or the ridges?

A. To both.

Q. And how does a granulomatous condition occur?

A. As a result of chronic, repeated inflammation or irritation.

Q. Do you have an opinion as to what the cause was of this condition on this horse?

. . . .

Q. Do you have an opinion?

A. That these lesions were caused by chemicals and/or mechanical devices.

Q. What is the basis for your opinion?

. . . .

THE WITNESS: This is my professional opinion as an inspector with the U. S. Department of Agriculture, Animal and Plant Health Inspection Service, Animal Care.

Q. Dr. Kirsten, do you have an opinion as to whether this horse would have been in pain?

. . . .

MS. CARROLL: If it had been exhibited following your examination?

. . . .

THE WITNESS: My opinion is that the horse would have been in pain if exhibited following my inspection, yes.

Q. What is the basis for your opinion?

A. The basis for my opinion is based upon my inspection of the horse, my observation of its movements and appearance and the results of my digital palpation.

Q. Dr. Kirsten, do you have an opinion as to a cause of the pain you elicited on the areas marked as X's in item 31?

. . . .

Q. Do you have an opinion?

A. Could you repeat the question, please?

Q. Do you have an opinion as to the cause of the responses of this horse that you elicited in the areas identified on item 31 in Exhibit 9, page 1?

A. My opinion is that a person applied chemicals and/or mechanical devices to the pasterns of this horse's feet in order to inflict pain and distress to this animal.

Q. What is the basis for your opinion?

A. The basis for my opinion is my professional experience as a veterinarian and my training and experience as an animal care VMO working the Horse Protection Act program for 11 years.

Nine years at the time of this inspection.

Tr. I at 316-19.

James Odle was present in the pre-show inspection area at the 1998 Tennessee Walking Horse National Celebration. He completed a portion of APHIS Form 7077. (Tr. I at 429.) Mr. Odle told Jackie McConnell that Regal By Generator was "excused" from the horse show and that further information would be required (Tr. I at 430). Mr. Odle testified about his recollection of his encounter with Jackie McConnell on September 3, 1998, as follows:

> [BY MR. ODLE:]
>
> A. Well, I remember on the evening that Mr. McConnell presented the horse for inspection and upon completion of the DQP examination and inspection by the USDA veterinarians, they alleged that the horse was sore in violation of the Horse Protection Act and we had this form prepared and I approached Mr. Jackie McConnell for the information to complete the form, explained the allegations and told him that he could excuse the horse and come back and give me the information at which time he told me that Cyndi would come, his wife, Mrs. McConnell would come and give me the information.

Tr. I at 430.

Cynthia McConnell was not present when Regal By Generator was inspected on September 3, 1998 (Tr. II at 150-51).

Respondents presented no evidence to refute the testimony and documentation of Drs. Guedron and Kirsten, except to show that Regal By Generator had successfully completed three pre-show inspections and at least one post-show inspection during the 1998 Tennessee Walking Horse National Celebration.

Discussion

I. Constitutional and Administrative Law Issues

A. Respondents Did Not Prove the Existence of an Agreement Between APHIS and the National Horse Show Commission

A significant portion of the testimony was devoted to an alleged agreement between APHIS and the National Horse Show Commission. Respondents contend there was an agreement, known throughout the Tennessee Walking Horse industry, that, if the National Horse Show Commission imposed an appropriate penalty for a Horse Protection Act violation, APHIS would not institute an administrative proceeding under the Horse Protection Act (Tr. II at 370).

Cynthia McConnell believed, if she accepted an 8-month suspension and paid a $500 fine to the National Horse Show Commission for her violations of the Horse Protection Act related to the entry of Regal By Generator in the 1998 Tennessee Walking Horse National Celebration, APHIS would not initiate a proceeding for the same violations. Cynthia McConnell testified she completed the National Horse Show Commission suspension on May 5, 1999, and paid the $500 fine. (Tr. II at 156-57, 166-71.)

Respondents provided evidence of the agreement between APHIS and the National Horse Show Commission through National Horse Show Commission executive vice president, Lonnie Messick (Tr. II at 362, 389, 395-96), and through National Horse Show Commission attorney, Craig Evans (Tr. II at 296-97).

Lonnie Messick testified he heard Dr. Ronald DeHaven, Acting Associate Administrator of APHIS, talk to horse owners and horse trainers about the agreement between APHIS and the National Horse Show Commission regarding a Horse Industry Organization penalty in lieu of the APHIS penalty (Tr. II at 403).

Respondents asserted the agreement between APHIS and the National Horse Show Commission was not in writing (Tr. II at 297). To demonstrate the parameters of the oral agreement, Respondents' witness, Craig Evans, described one occasion, where another horse trainer, Bill

Barnett, asked Dr. Dehaven if he could have the agreement in writing "that if he accepted [the National Horse Show Commission penalty] . . . there would be no Federal initiation of a complaint. And I carried that to Dr. DeHaven and he responded that what he said was enough. And it was." (Tr. II at 298.)

Complainant's witness, Dr. Ronald DeHaven, testified that "there was no specific agreement between APHIS, the agency, and any of the [Horse Industry Organizations]" (Tr. II at 962). Dr. DeHaven's version of APHIS' position was that "I made it known through discussions and meetings with industry, that included the National Horse Show Commission, but as well as others, that we would certainly consider penalties imposed by a [Horse Industry Organization] in exercising our prosecutorial [discretion]. There was no agreement per se." (Tr. II at 963.) Dr. DeHaven stated a proposed "Strategic Plan" did include terms concerning non-enforcement by APHIS if certain criteria were met; however, he also stated "[the proposed Strategic Plan] was rejected by all but one of the certified [Horse Industry Organizations]. So that constituted no agreement. So, again, to the best of my recollection, there was nothing official put out by [APHIS] . . . that would have made that kind of commitment." (Tr. II at 964.) Dr. DeHaven believed that he committed APHIS to the extent that "[APHIS] would in its exercising prosecutorial discretion, would certainly take such an industry penalty into consideration. And that would be a significant factor." (Tr. II at 966.) He stated "I had no specific agreement with Craig Evans." (Tr. II at 968.) In response to a hypothetical question, Dr. DeHaven described the various factors that would have been considered as to whether APHIS would have instituted an administrative proceeding instead of allowing a Horse Industry Organization to administer a penalty for a violation of the Horse Protection Act. Dr. DeHaven said the factors would be the timing of the penalty, the involvement of other persons in the violations, and the backdating of the suspension (Tr. II at 1028).

Proof of an agreement between APHIS and the National Horse Show Commission is lacking, even accepting all the testimony as credible, because there was no meeting of the minds. Even if I were to assume arguendo that there was an oral agreement, APHIS retained prosecutorial

discretion to institute administrative proceedings based on several factors, including, most relevant here – the involvement of parties other than the party who is subject to a Horse Industry Organization penalty.

Jackie McConnell is a party well known to APHIS and believed by the APHIS investigator to have been involved with the soring of horses on other occasions over a long period of time. When APHIS found evidence of the soring of Regal By Generator during the 1998 Tennessee Walking Horse National Celebration pre-show inspection, it is reasonable that APHIS would not be content to forgo instituting an administrative proceeding against Jackie McConnell as one of the alleged offenders, but would instead present a case against all alleged offenders.

During cross-examination, Dr. Guedron stated he told Jackie McConnell at the pre-show inspection area that "[a] federal case would be initiated." (Tr. I at 205.) There is no evidence that Cynthia McConnell or Jackie McConnell received assurances from APHIS that it would retract its stated intent to institute an administrative proceeding in this matter as a result of Cynthia McConnell taking an 8-month suspension and paying a $500 fine through the National Horse Show Commission. Respondents did not carry their burden of persuasion (preponderance of the evidence) for their affirmative defense that Complainant instituted this proceeding contrary to an agreement between APHIS and the National Horse Show Commission.

B. Respondents Did Not Prove Selective Enforcement of the Horse Protection Act Against Jackie McConnell

Jackie McConnell contends no other person who was merely a custodian of a horse has been found to have entered a sore horse in a horse show or horse exhibition in violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)). Jackie McConnell asserts he was merely the custodian of Regal By Generator, and, in light of the Secretary of Agriculture's past practice, a conclusion that he has violated section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) constitutes selective enforcement of the Horse Protection Act.

On September 3, 1998, Jackie McConnell led Regal By Generator to the pre-show inspection area at the 1998 Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, and presented her for inspection (Tr. I at 50-51, 82-86, 373; Tr. II at 150, 205; CX 9, CX 13). Additionally, Jackie McConnell stipulated he led the horse through the inspection station (Tr. I at 237).

It is well-settled that "entering," as that term is used in section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)), is a process, not an event, and includes all activities required to be completed before a horse can actually be shown or exhibited. The process generally begins with the payment of the fee to enter a horse in a horse show or horse exhibition and includes the presentation of a horse for pre-show inspection by designated qualified persons or APHIS veterinarians or both.[6] Therefore, even though Jackie McConnell was

[6]*Gray v. United States Dep't of Agric.*, 39 F.3d 670, 676 (6th Cir. 1994) (stating entry of a horse in a horse show, for purposes of liability under the Horse Protection Act includes paying the entry fee, registering the horse, and presenting the horse for inspection); *Elliott v. Administrator, Animal and Plant Health Inspection Service*, 990 F.2d 140, 143, 145 (4th Cir.) (stating entering a horse in a horse show is a process and includes all activities required to be completed before a horse can actually be shown or exhibited), *cert. denied*, 510 U.S. 867 (1993); *In re Bowtie Stables, LLC*, 62 Agric. Dec. 580, 611-12 (2003) (stating it is well settled that "entry," within the meaning of the Horse Protection Act, is a process, not an event; the process of entry includes all activities required to be completed before a horse can be shown or exhibited; the process generally begins with the payment of the fee to enter a horse in a horse show and includes the examination of the horse by designated qualified persons or United States Department of Agriculture veterinarians or both); *In re William J. Reinhart*, 60 Agric. Dec. 241, 253 (2001) (Order Denying William J. Reinhart's Pet. for Recons.) (stating it is well settled that "entry," within the meaning of the Horse Protection Act, is a process, not an event; the process of entry includes all activities required to be completed before a horse can be shown or exhibited; the process generally begins with the payment of the fee to enter a horse in a horse show and includes the examination of the horse by designated qualified persons or United States Department of Agriculture veterinarians or both); *In re Jack Stepp*, 57 Agric. Dec. 297, 309 (1998) (stating "entering," within the meaning of the Horse Protection Act, is a process that begins with the payment of the entry fee and includes pre-show examination by designated qualified persons or United States Department of Agriculture veterinarian or both), *aff'd*, 188 F.3d 508 (Table), 1999 WL 646138 (6th Cir. 1999) (not to be cited as precedent under 6th

(continued...)

merely the custodian of Regal By Generator, Jackie McConnell may be found to have violated section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)). Moreover, I find no basis for Jackie McConnell's contention that the Secretary of Agriculture's past practice has been to forgo enforcement of the Horse Protection Act against persons who are merely custodians of horses and who merely present those horses for pre-show inspections.[7] Therefore, I find no basis for Jackie McConnell's argument that the Secretary of Agriculture is selectively enforcing the Horse Protection Act against him.

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[6](...continued)
Circuit Rule 206); *In re Danny Burks*, 53 Agric. Dec. 322, 334 (1994) (rejecting the respondent's argument that the mere act of submitting a horse for pre-show inspection does not constitute "entering" as that term is used in the Horse Protection Act); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261, 280 (1994) (rejecting the respondent's argument that "entering," as used in the Horse Protection Act, is limited to doing whatever is specifically required by the management of any particular horse show to cause a horse to become listed on the class sheet for a specific class of that horse show), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994); *In re William Earl Bobo*, 53 Agric. Dec. 176, 206 (1994) (stating the United States Department of Agriculture has always construed entry to be a process), *aff'd*, 52 F.3d 1406 (6th Cir. 1995); *In re Billy Gray*, 52 Agric. Dec. 1044, 1055 (1993) (stating the United States Department of Agriculture has considered entry to be a process which includes pre-show inspection for at least 13 years), *aff'd*, 39 F.3d 670 (6th Cir. 1994); *In re John Allan Callaway*, 52 Agric. Dec. 272, 293 (1993) (stating "entering" a horse in a horse show is a continuing process, not an event, and includes all activities required to be completed before a horse can actually be shown or exhibited); *In re Paul A. Watlington*, 52 Agric. Dec. 1172, 1183 (1993) (stating entry is a process that gives a status of being entered to a horse and entry includes filling out forms and presenting the horse to the designated qualified person for inspection); *In re Glen O. Crowe*, 52 Agric. Dec. 1132, 1146-47 (1993) (stating "entering," within the meaning of the Horse Protection Act, is a process that begins with the payment of the entry fee).

[7]In *In re A.P "Sonny" Holt*, 49 Agric. Dec. 853, 861 (1990), the Judicial Officer dismissed Richard Wall, an assistant trainer, whose sole participation in the violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) was to lead the horse in question to the pre-show inspection area. However, the Judicial Officer based his dismissal of Richard Wall not only on Richard Wall's minimal involvement in the violation, but also, on the lack of any proposed findings, conclusion, or order in complainant's post-hearing brief relating to Richard Wall. I find *In re A.P. "Sonny" Holt* is not analogous to the situation presented in the instant proceeding.

C. Respondents Did Not Prove Malicious Prosecution by APHIS Against Cynthia McConnell

Respondents contend Cynthia McConnell is the only alleged violator of the Horse Protection Act in 1998 or 1999 who accepted a National Horse Show Commission suspension and fine against whom APHIS subsequently instituted a Horse Protection Act case. Respondents contend the institution of this proceeding against Cynthia McConnell constitutes malicious prosecution.

Respondents filed a Freedom of Information Act request with APHIS on or about October 5, 2000, requesting the disclosure of other Horse Protection Act cases with fact patterns similar to the instant proceeding. Respondents then proposed that instituting an administrative proceeding against Respondents was unique because no response was supplied by APHIS satisfying their Freedom of Information Act request. (Tr. II at 802-10.) Respondents' confidence in the inference to be drawn from APHIS' failure to respond to their Freedom of Information Act request is misplaced. The lack of a search result cannot be conclusive. Further, even if Cynthia McConnell is the only violator to face both a private National Horse Show Commission sanction and an administrative proceeding, it may be that this situation was the only situation that warranted an administrative action where a private National Horse Show Commission sanction had been imposed. The totality of the circumstances must be considered. Respondents have not shown that APHIS' discretion in choosing to institute the instant proceeding against Cynthia McConnell constitutes malicious prosecution.

D. Respondents Did Not Prove an APHIS Authorized Mechanism Shielding Respondents from Administrative Action

When Regal By Generator was found to have been sored at the pre-show inspection on September 3, 1998, Dr. Guerdon informed Jackie McConnell that an administrative proceeding would be initiated (Tr. I at 204-05). On or about September 4, 1998, Cynthia McConnell accepted an 8-month National Horse Show Commission suspension and $500

fine, believing she could avoid the institution of an administrative proceeding. Cynthia McConnell received the official National Horse Show Commission suspension notice on or about September 16, 1998 (RX 18). The APHIS investigator did not complete his work on this case until at or near the date he left employment at APHIS in May 1999. Cynthia McConnell paid her $500 fine in December 1998 (Tr. II at 307). Her 8-month National Horse Show Commission suspension period ended in May 1999, and APHIS could not have known until then, even if APHIS had been considering forbearance in instituting the instant proceeding, whether Cynthia McConnell satisfied all the National Horse Show Commission suspension criteria. (Such a suspension, by a private organization, is not the same as a disqualification under the Horse Protection Act. *See* the testimony of Craig Evans, who said, "And recognize that there was a difference in 1998 between the National Horse Show Commission suspension versus a USDA suspension." (Tr. II at 209-10.)) As the administrative case evolved, violations of the Horse Protection Act were alleged not only against Cynthia McConnell, but also against Jackie McConnell and Whitter Stables for "entering" a sore horse, against those responsible for shipping a sore horse, and against the owners for allowing a sore horse to be entered. Dr. DeHaven explained the lengthy process involved in the preparation of an administrative case, together with the multiple levels of review (Tr. II at 998-99). Complainant filed the Complaint on September 7, 1999. APHIS' case development process appears to have been rigorous and reasonable in nature and implemented with a view toward meeting APHIS' objectives. Respondents did not carry their burden of persuasion (preponderance of the evidence) for their affirmative defense that APHIS relinquished its prosecutorial discretion to institute an administrative proceeding against Respondents. Cynthia McConnell was mistaken in her belief that she was finished with the matter, when she complied with National Horse Show Commission requirements.

II. Substantive Law Issues

A. Whitter Stables Is Not a Legal Entity That Can Be Found to Have Violated the Horse Protection Act

The record supports a conclusion that Whitter Stables is merely a name under which Cynthia McConnell does business. Complainant, as the proponent of an order, has the burden of proof in this proceeding,[8] and the standard of proof by which this burden is met is the preponderance of the evidence standard.[9] While the record contains

[8] *See* 5 U.S.C. § 556(d).

[9] *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981). The standard of proof in administrative proceedings conducted under the Horse Protection Act is preponderance of the evidence. *In re Beverly Burgess* (Decision as to Winston T. Groover, Jr.), 63 Agric. Dec. 678, 712 (2004), *aff'd sub nom. Groover, Jr. v. United States Dep't of Agric.*, No. 04-4519 (6th Cir.October 31, 2005)(unpublished); *In re Robert B. McCloy*, 61 Agric. Dec. 173, 195 n.6 (2002), *aff'd*, 351 F.3d 447 (10th Cir. 2003), *cert. denied*, 125 S. Ct. 38 (2004); *In re William J. Reinhart*, 60 Agric. Dec. 241, 258 n.7 (2001) (Order Denying William J. Reinhart's Pet. for Recons.); *In re Carl Edwards & Sons Stables* (Decision as to Carl Edwards & Sons Stables, Gary R. Edwards, Larry E. Edwards, and Etta Edwards), 56 Agric. Dec. 529, 539 (1997), *aff'd per curiam*, 138 F.3d 958 (11th Cir. 1998) (Table), *printed in* 57 Agric. Dec. 296 (1998); *In re Gary R. Edwards* (Decision as to Gary R. Edwards, Larry E. Edwards, and Carl Edwards & Sons Stables), 55 Agric. Dec. 892, 903 (1996), *dismissed*, No. 96-9472 (11th Cir. Aug. 15, 1997); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 857 n.2 (1996); *In re Jim Singleton*, 55 Agric. Dec. 848, 850 n.2 (1996); *In re Keith Becknell*, 54 Agric. Dec. 335, 343-44 (1995); *In re C.M. Oppenheimer* (Decision as to C.M. Oppenheimer), 54 Agric. Dec. 221, 245-46 (1995); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261, 285 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994); *In re William Earl Bobo*, 53 Agric. Dec. 176, 197 (1994), *aff'd*, 52 F.3d 1406 (6th Cir. 1995); *In re Jack Kelly*, 52 Agric. Dec. 1278, 1286 (1993), *appeal dismissed*, 38 F.3d 999 (8th Cir. 1994); *In re Charles Sims* (Decision as to Charles Sims), 52 Agric. Dec. 1243, 1253-54 (1993); *In re Paul A. Watlington*, 52 Agric. Dec. 1172, 1186-87 (1993); *In re Jackie McConnell* (Decision as to Jackie McConnell), 52 Agric. Dec. 1156, 1167 (1993), *aff'd*, 23 F.3d 407, 1994 WL 162761 (6th Cir. 1994), *printed in* 53 Agric. Dec. 174 (1994); *In re A.P. Holt* (Decision as to Richard Polch and Merrie Polch), 52 Agric. Dec. 233, 242-43 (1993), *aff'd per curiam*, 32 F.3d 569, 1994 WL 390510 (6th Cir. 1994) (citation limited under 6th Circuit Rule 24); *In re Steve Brinkley*, 52 Agric. Dec. 252, 262 (1993); *In re John Allan Callaway*, 52 Agric. Dec. 272, 284 (1993); *In re Linda Wagner* (Decision as to Roy E. Wagner and Judith E. Rizio), 52 Agric. Dec. 298, 307 (1993), *aff'd*, 28 F.3d 279 (3d Cir. 1994), *reprinted in* 53 Agric. Dec. 169 (1994); *In re William Dwaine Elliott* (Decision as to William Dwaine Elliott), 51 Agric. Dec. 334, 341 (1992), *aff'd*, 990 F.2d 140 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993); *In re Pat*

(continued...)

some evidence that Whitter Stables is a legal entity which may be found to have violated the Horse Protection Act, I do not find Complainant's evidence is sufficiently strong to conclude that Whitter Stables is such a legal entity.

B. Cynthia McConnell Shipped a Sore Horse to a Horse Show in Violation of 15 U.S.C. § 1824(1)

Cynthia McConnell stated that on or about August 23, 1998, she contracted with an independent contractor to haul horses, including Regal By Generator, to the 1998 Tennessee Walking Horse National Celebration for $300 (Tr. II at 124-25, 130, 180-81; CX 4).

Dr. Guedron testified the condition of the posterior pasterns of Regal By Generator on September 3, 1998, would have taken weeks to develop (Tr. I at 72-73). Dr. Kirsten testified the button lesions (round, raised, granulomatous, hairless lesions) on the posterior of the right pastern and the raised and thickened ridges on the posterior of the left pastern would occur chronically over a long period of time, in response to chronic, repeated inflammation or irritation (Tr. I at 309-16). The period of time (August 23, 1998, through September 3, 1998) from the arrangements for transporting Regal By Generator until the pre-show inspection was only 11 days.

Respondents argue the evidence shows that Regal By Generator had already passed through the inspection process at the 1998 Tennessee Walking Horse National Celebration with three pre-show inspections and at least one post-show inspection without being found in violation of the Horse Protection Act (Tr. I at 123). Respondents argue the United States Department of Agriculture inspection process is inherently unreliable since the Complainant's evidence that the horse's condition would have developed "over weeks," conflicts with the evidence that Regal By Generator passed both pre-show and post-show inspections within a few days of September 3, 1998. Even so, evidence of prior

[9](...continued)
Sparkman (Decision as to Pat Sparkman and Bill McCook), 50 Agric. Dec. 602, 612 (1991); *In re Albert Lee Rowland*, 40 Agric. Dec. 1934, 1941 n.5 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983); *In re Steve Beech*, 37 Agric. Dec. 1181, 1183-85 (1978).

inspections is not worthy of great weight.[10]

C. Jackie McConnell Did Not Ship a Sore Horse to a Horse Show in Violation of 15 U.S.C. § 1824(1)

Complainant urges that I find Jackie McConnell to be a general partner with Cynthia McConnell in Whitter Stables and thus liable under the Horse Protection Act for acts of the partnership. Despite the firmly held conviction of APHIS investigator James Odle that Jackie McConnell was the trainer of Regal By Generator, Complainant's effort to prove Jackie McConnell was in partnership did not succeed in rising above suspicion (Tr. I at 684). The evidence presented by Complainant is relevant and material to the partnership question, but does not reach the level of a preponderance of the evidence to show Jackie McConnell was a partner of Whitter Stables or that he participated in any conduct prohibited by section 5(1) of the Horse Protection Act (15 U.S.C. § 1824(1)).

During her cross-examination, Cynthia McConnell maintained that she alone owned and controlled Whitter Stables. Her testimony is credible. Additionally, there is no evidence that Jackie McConnell acted individually or directed any person to ship Regal By Generator to the 1998 Tennessee Walking Horse National Celebration.

James Odle had left United States Department of Agriculture employment approximately 15 months prior to the hearing (Tr. I at 467). He had not seen the case file since May 1999 (Tr. I at 499). He did not have contemporaneous notes or tape recordings of his conversation with Jackie McConnell wherein Jackie McConnell was alleged to have acknowledged ownership of Whitter Stables (Tr. I at 478, 491, 493-95, 503, 521).

The affidavit of Whitter Stables customer Camille C. Akin (CX 10) is not dispositive as to the form of ownership of Whitter Stables in

[10]*See In re Richard L. Thornton*, 41 Agric. Dec. 870, 876 (1982), *aff'd*, 715 F.2d 1508 (11th Cir. 1983), *reprinted in* 51 Agric. Dec. 295 (1992); *In re Joe Fleming,* 41 Agric. Dec. 38, 44 (1982), *aff'd*, 713 F.2d 179 (6th Cir. 1983); *In re Albert Lee Rowland*, 40 Agric. Dec. 1934, 1939-40 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983).

August and September 1998. Ms. Akin's affidavit does not reveal the time period covered by the alleged partnership status. Ms. Akin's business relationship with Jackie McConnell and Cynthia McConnell spanned 8 years prior to the time of her affidavit and covers the time during which Jackie McConnell Stables was in operation training Tennessee Walking Horses (into 1994) and also the period during which Jackie McConnell Stables was conducting a horse buying and selling business (in 1996 and after) at the same location as Whitter Stables (Tr. II at 728-29). James Odle agreed that he may have been the one to have inserted "(Cyndi and Jackie Mconnell [sic])" for clarity during his preparation of the affidavit for Ms. Akin to sign (Tr. I at 567).

Complainant offered CX 11 through James Odle to show that Jackie McConnell was more than just an employee and was, in fact, a manager of Whitter Stables. But Mr. Odle did not know who paid for the advertisement, directed the placement of the advertisement, or who approved the advertisement (Tr. I at 703-04, 707-08). Mr. Odle also did not know how the advertisement became available to the United States Department of Agriculture (Tr. I at 705).

Complainant's CX 28, which was published before the 1998 Tennessee Walking Horse National Celebration, tends to prove that Jackie McConnell was a trainer in 1997 (Tr. II at 652-57). That Jackie McConnell was a trainer in 1997 was not a contested issue, but it is not probative regarding whether he was a partner in Whitter Stables in August and September 1998.

A "News & Stories" article written in May of 2000 by Tanya Hopper (CX 29) is not dispositive as to whether Jackie McConnell owned any part of Whitter Stables in August and September 1998.

The 1989 warranty deed and the 1998 property tax receipt for the property on which Whitter Stables is located (CX 1) shows joint ownership by "JACKIE McCONNELL and wife, CYNDI McCONNELL." Complainant argues CX 1 tends to prove that Whitter Stables, which began in 1994, was a partnership, but I do not find that joint ownership of the real estate indicates joint ownership of Whitter Stables. Additionally, Cynthia McConnell testified credibly that, after Jackie McConnell's disqualification in the spring of 1994, he re-opened Jackie McConnell Stables in 1996 in the business of buying and selling

horses (Tr. II at 728-29). Regarding CX 1 at 7, the 1998 property tax receipt, there was no evidence of how the bank account was titled on which check number 5860 was drawn to pay the 1998 taxes, whether from an account belonging to Jackie McConnell or otherwise. The most definitive evidence regarding payment of the real property tax bill was Cynthia McConnell's testimony that she paid it. The record contains no evidence whether Fayette County, Tennessee, listed ownership or tax records in the name of the male first in a husband-wife relationship and whether that might account for the entry "Rcv of: MC CONNELL JACKIE." See CX 1 at 7. Jackie McConnell and Cynthia McConnell being husband and wife provides sufficient explanation for their joint ownership of the real property where the entity of Whitter Stables was situated. Relationships between them do not include a partnership in Whitter Stables, which has been proven to be merely a name under which Cynthia McConnell does business.

James Odle did not request or obtain, for Jackie McConnell or Cynthia McConnell, copies of income tax returns (Tr. I at 526). Mr. Odle stated that he knew how to gather information about business entities from different sources, either from the state or from the Secretary of State if it is a corporation, or the Internal Revenue Service (Tr. I at 525). Complainant did not present any such evidence to prove the existence of a partnership during August 1998 or September 1998 between Cynthia McConnell and Jackie McConnell.

D. Cynthia McConnell Entered a Sore Horse in a Horse Show in Violation of 15 U.S.C. § 1824(2)(B)

Regal By Generator was entered as entry number 685 in class 110 in the 1998 Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, for competition in the horse show (CX 7). Cynthia McConnell stipulated she personally participated in completing the 1998 Tennessee Walking Horse National Celebration entry forms (Tr. I at 284; CX 7).

"Entry" or "entering" is a process that includes a variety of actions, including, but not limited to, completing the entry forms, paying the

entry fee, preparing the horse for exhibition, and presenting the horse for pre-show inspection to designated qualified persons or to United States Department of Agriculture's representatives.[11]

The result of a horse being "sore" or "sored" includes circumstances in which a horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving."[12] The testimony and affidavits of the veterinary medical officers, Drs. Guedron and Kirsten, were persuasive that Regal By Generator was sore at the time of the pre-show inspection and that she would suffer pain if exhibited in the show (CX 9). Respondents offered no evidence to refute the testimony and affidavits of Drs. Guedron and Kirsten, except to show that Regal By Generator had successfully completed three pre-show and at least one post-show inspection during the 1998 Tennessee Walking Horse National Celebration.

E. Jackie McConnell Entered a Sore Horse in a Horse Show in Violation of 15 U.S.C. § 1824(2)(B)

On September 3, 1998, Jackie McConnell led Regal By Generator to the pre-show inspection area at the 1998 Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, and presented her for inspection (Tr. I at 50-51, 82-86, 373; Tr. II at 150, 205; CX 9, CX 13). Additionally, Jackie McConnell stipulated he led the horse through the inspection station (Tr. I at 237).

Jackie McConnell urges that the Secretary of Agriculture's policy and practice is that custodians of a horse, who are not shown to have been otherwise connected with the sored horse, have not been included as persons charged with "entering" a sored horse. Jackie McConnell has narrowed the issue by stating that he understands "the position of the USDA [is] that the mere fact of presenting the horse constitutes 'entry'

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[11]See note 6.

[12]15 U.S.C. § 1821(3).

for the purposes of the HPA."[13]

A case in which the Complainant did not urge that the "custodian" be found in violation, and the Judicial Officer granted the custodian's motion to dismiss, is not persuasive here.[14]

If the remedial purpose of the Horse Protection Act is to be achieved, the Horse Protection Act must be construed liberally, so as to give effect to its provisions. "Entering," within the meaning of the Horse Protection Act, is a process that generally begins with the payment of an entry fee and includes presentation of a horse for pre-show examination by designated qualified persons or United States Department of Agriculture veterinarians. The entry of a horse within the meaning of the Horse Protection Act is also a status, such that once a person does any one or all of the steps in the process of entering a horse, it remains entered until it has finished showing or exhibiting.[15] "The Act was passed to end the practice of making horses sore and to quash the competitive advantage gained by cruelly making a horse 'sore.' Congress stated that its purpose was to 'make it impossible for persons to show sored horses in nearly all horse shows.' *See* H.R. Rep. No. 91-1597, 91st Cong., 2d Sess. 2, *reprinted in* 1970 U.S.C.C.A.N. 4870, 4871." *In re John Allan Callaway*, 52 Agric Dec. 272, 293 (1993), citing *Elliott*. In a case contemporary to *Callaway*, the Judicial Officer found "For the same reasons, I held in *In re Callaway*, . . . that the custodian who presents a horse to the DQP for the pre-show inspection 'enters' the horse, within the meaning of the Act. Accordingly, Complainant proved that Respondent Roy E. Wagner also entered 'Sir Shaker,' as alleged in the Complaint." *In re Linda Wagner* (Decision as to Roy E. Wagner and Judith E. Rizio), 52 Agric. Dec. 298, 316 (1993).

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

[13]See Jackie McConnell's proposed findings of fact and conclusions of law at 9.

[14]*See In re A.P. "Sonny" Holt*, 49 Agric. Dec. 853, 861 (1990).

[15]*In re William Dwaine Elliott*, 51 Agric. Dec. 334, 344 (1992), *aff'd*, 990 F.2d 140 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993).

Jackie McConnell's Appeal Petition

Jackie McConnell raises two issues in his Petition for Appeal. First, Jackie McConnell contends the ALJ erroneously determined that he (Jackie McConnell) participated in "entering" a sore horse in violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)). In support of this contention, Jackie McConnell cites his proposed findings of fact and conclusions of law, portions of the transcript, RX 17, RX 18, RX 33, RX 35, and *Elliott v. Administrator, Animal and Plant Health Inspection Service*, 990 F.2d 140 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993). (Pet. for Appeal at 1-2.)

I have carefully reviewed the portions of the record and the case cited by Jackie McConnell. I do not find the ALJ erred. Complainant established by a preponderance of the evidence that on September 3, 1998, Jackie McConnell led Regal By Generator to the pre-show inspection area at the 1998 Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, and presented her for inspection (Tr. I at 50-51, 82-86, 373; Tr. II at 150, 205; CX 9, CX 13). Additionally, Jackie McConnell stipulated he led the horse through the inspection station (Tr. I at 237).

It is well-settled that "entering," as that term is used in section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)), is a process, not an event, and includes all activities required to be completed before a horse can actually be shown or exhibited. The process generally begins with the payment of the fee to enter a horse in a horse show or horse exhibition and includes the presentation of a horse for pre-show inspection by designated qualified persons or APHIS veterinarians or both.[16]

Moreover, *Elliott*, cited by Jackie McConnell, does not support Jackie McConnell's position that his leading Regal By Generator to the pre-show inspection area does not constitute entering the horse in a horse show. To the contrary, the United States Court of Appeals for the Fourth Circuit expressly upheld the Secretary of Agriculture's position that "entering," as used in section 5(2)(B) of the Horse Protection Act

[16]See note 6.

(15 U.S.C. § 1824(2)(B)), is a process, which includes presenting a horse for pre-show inspection, as follows:

> Elliott asserts that "entering," as used in 15 U.S.C. § 1824(2)(B), constitutes only registration of the horse and payment of the entry fee. The time period between such time and the actual show, he asserts, is not included within the meaning of "entering." We cannot agree that "entering" means simply paying the fee and registering the horse for showing, which oftentimes is done by mail without the requirement for presenting the horse. Inspection of the horse is a prerequisite to the horse being eligible to show and the horse is not fully qualified to show until the inspection is passed. The plain meaning of "entering" a horse in a horse show would seem to encompass all the requirements–including inspection–and the time necessary to complete those requirements.
>
> Even if we were to agree, however, that the plain meaning of the Act is not clear, the USDA's interpretation is entirely reasonable and consistent with Congressional intent and thus must be upheld. We think it stretches credulity to argue that Congress intended only to prohibit a horse being "sore" at registration or when being shown and between that time the horse is permitted to be "sore." The Act was passed to end the practice of making horses sore and to quash the competitive advantage gained by cruelly making a horse "sore." Congress stated that its purpose was to "make it impossible for persons to show sore horses in nearly all horse shows." *See* H.R. Rep. No. 91-1597, 91st Cong., 2d Sess. 2, *reprinted in* 1970 U.S.C.C.A.N. 4870, 4871. Elliott's reading of the Act would defeat this purpose by effectively making meaningless pre-showing inspections which are not contemporaneous with the registration and payment of the entry fee. We conclude that the USDA's interpretation of "entering" is reasonable and not contrary to Congressional intent and thus we are not bound to give it effect.

Elliott v. Administrator, Animal and Plant Health Inspection Service, 990 F.2d 140, 145 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993).

I find Complainant proved by a preponderance of the evidence that, on September 3, 1998, Jackie McConnell entered Regal By Generator as entry number 685 in class number 110 at the 1998 Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, while Regal By Generator was sore, in violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)).

Second, Jackie McConnell contends the ALJ erroneously failed to find that Jackie McConnell was subjected to "selective prosecution" and "malicious prosecution" by Complainant. In support of this contention, Jackie McConnell cites his proposed findings of fact, portions of the transcript, RX 20, "Fed. Reg. 11.7(d)," and *United States v. Anderson*, 923 F.2d 450, 453 (6th Cir. 1991). (Pet. for Appeal at 2.)

I have carefully reviewed the portions of the record cited by Jackie McConnell. I do not find the cited portions of the record support Jackie McConnell's contention that ALJ erred by failing to find "selective prosecution" and "malicious prosecution."

Moreover, I am uncertain as to Jackie McConnell's reference to "Fed. Reg. 11.7(d)." Generally, "Fed. Reg." is an abbreviation used to reference the Federal Register, but a proper citation would include a volume number, page number, and date. Therefore, I am unable to locate the material in the Federal Register referenced by Jackie McConnell to determine what support, if any, the cited Federal Register material lends to Jackie McConnell's contention that the ALJ erroneously failed to find "selective prosecution" and "malicious prosecution."

Finally, *Anderson*, cited by Jackie McConnell, does not support Jackie McConnell's position that the ALJ erroneously failed to find "selective prosecution" and "malicious prosecution." The United States Court of Appeals for the Sixth Circuit expressly held that certain factors, not present in the instant proceeding, must be present to find "selective prosecution" or "vindictive prosecution," as follows:

> . . . A prosecutor selectively prosecutes someone when three

> things occur. First, he must single out a person belonging to an identifiable group, such as those of a particular race or religion, or a group exercising constitutional rights, for prosecution even though he has decided not to prosecute persons not belonging to that group in similar situations. . . . Second, he must initiate the prosecution with a discriminatory purpose. Finally, the prosecution must have a discriminatory effect on the *group* which the defendant belongs to. . . .
>
> A prosecutor vindictively prosecutes a person when he or she acts to deter the exercise of a protected right by the person prosecuted. . . . A person who claims he has been vindictively prosecuted must show that the prosecutor has some "stake" in deterring the petitioner's exercise of his rights, and that the prosecutor's conduct was somehow unreasonable.

United States v. Anderson, 923 F.2d 450, 453-54 (6th Cir. 1991) (citations omitted) (emphasis in original). Jackie McConnell has not established a prima facie case under either doctrine, and I find his contention that he was improperly prosecuted has no merit.

Cynthia McConnell's and Whitter Stable's Appeal Petition

Cynthia McConnell and Whitter Stables raise three issues in their Petition for Appeal.[17] First, Cynthia McConnell and Whitter Stables contend the ALJ erroneously determined they "shipped " a sore horse, in violation of section 5(1) of the Horse Protection Act (15 U.S.C. § 1824(1)). In support of this contention, Cynthia McConnell and Whitter Stables cite "Respondents Cynthia McConnell and Whitter Stables Proposed Findings and Conclusions of Law; and Memorandum of Points and Authorities in Support Thereof" and portions of the

[17]I do not address these issues as they relate to Whitter Stables because, as discussed in this Decision and Order, *supra*, I find Whitter Stables is merely a name under which Cynthia McConnell does business and not a legal entity which can be found to have violated the Horse Protection Act.

transcript. (Pet. for Appeal at 1.)

I have carefully reviewed "Respondents Cynthia McConnell and Whitter Stables Proposed Findings and Conclusions of Law; and Memorandum of Points and Authorities in Support Thereof" and the portions of the record cited by Cynthia McConnell and Whitter Stables. I do not find erroneous the ALJ's conclusion that Cynthia McConnell shipped, transported, moved, and delivered Regal By Generator to a horse show, with reason to believe that Regal By Generator may be shown or exhibited while Regal By Generator was sore, in violation of section 5(1) of the Horse Protection Act (15 U.S.C. § 1824(1)).

Cynthia McConnell stated that on or about August 23, 1998, she contracted with an independent contractor to haul horses, including Regal By Generator, to the 1998 Tennessee Walking Horse National Celebration for $300 (Tr. II at 124-25, 130, 180-81; CX 4). Dr. Guedron testified the condition of the posterior pasterns of Regal By Generator on September 3, 1998, would have taken weeks to develop (Tr. I at 72-73). Dr. Kirsten testified the button lesions (round, raised, granulomatous, hairless lesions) on the posterior of the right pastern and the raised and thickened ridges on the posterior of the left pastern would occur chronically over a long period of time, in response to chronic, repeated inflammation or irritation (Tr. I at 309-16). The period of time (August 23, 1998, through September 3, 1998) from the arrangements for transporting Regal By Generator until the pre-show inspection was only 11 days.

Second, Cynthia McConnell and Whitter Stables contend the ALJ erroneously determined they had not served an appropriate penalty for their violations of the Horse Protection Act and erroneously found there was no agreement between APHIS and the National Horse Show Commission. In support of these contentions, Cynthia McConnell and Whitter Stables cite portions of the transcript, the 1998 Strategic Plan, RX 17, RX 18, and RX 20. (Pet. for Appeal at 1-2.)

I agree with the ALJ's conclusion that Respondents did not carry their burden of persuasion (preponderance of the evidence) for their affirmative defense that APHIS relinquished its prosecutorial discretion to institute an administrative proceeding for a violation of the Horse Protection Act against a respondent who has previously been sanctioned

by a Horse Industry Organization for the same violation.

Third, Cynthia McConnell and Whitter Stables contend the ALJ erroneously failed to find that Cynthia McConnell and Whitter Stables were subjected to "selective prosecution" and "malicious prosecution" by Complainant. In support of this contention, Cynthia McConnell and Whitter Stables cite "Respondents Cynthia McConnell and Whitter Stables Proposed Findings and Conclusions of Law; and Memorandum of Points and Authorities in Support Thereof," portions of the transcript, CX 9, CX 13, RX 17, RX 18, and RX 20. (Pet. for Appeal at 2.)

I have carefully reviewed Cynthia McConnell and Whitter Stables Proposed Findings and Conclusions of Law; and Memorandum of Points and Authorities in Support Thereof and the portions of the record cited by Cynthia McConnell and Whitter Stables. I do not find the ALJ erred by failing to find "selective prosecution" and "malicious prosecution" of Cynthia McConnell.

Complainant's Appeal Petition

Complainant raises two issues in "Complainant's Petition for Appeal of Decision and Order" [hereinafter Complainant's Appeal Petition]. First, Complainant contends the ALJ erroneously assessed Cynthia McConnell and Whitter Stables a $2,200 civil penalty and disqualified Cynthia McConnell and Whitter Stables for 1 year for their violations of the Horse Protection Act. Complainant contends Cynthia McConnell and Whitter Stables should each have been assessed a $4,400 civil penalty and should each have been disqualified for a 2-year period. (Complainant's Appeal Pet. at 2-19.)

As discussed in this Decision and Order, *supra*, I find Whitter Stables is merely a name under which Cynthia McConnell does business and not a legal entity against which a sanction may be imposed under the Horse Protection Act.

As for Cynthia McConnell, I agree with Complainant that the ALJ should have assessed Cynthia McConnell a $4,400 civil penalty and should have disqualified Cynthia McConnell for a 2-year period for her two violations of the Horse Protection Act.

Section 6(b)(1) of the Horse Protection Act (15 U.S.C. § 1825(b)(1)) authorizes the assessment of a civil penalty of not more than $2,000 for each violation of section 5 of the Horse Protection Act (15 U.S.C. § 1824). However, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), the Secretary of Agriculture adjusted the civil monetary penalty that may be assessed under section 6(b)(1) of the Horse Protection Act (15 U.S.C. § 1825(b)(1)) for each violation of section 5 of the Horse Protection Act (15 U.S.C. § 1824) by increasing the maximum civil penalty from $2,000 to $2,200.[18] The Horse Protection Act also authorizes the disqualification of any person assessed a civil penalty, from showing or exhibiting any horse or judging or managing any horse show, horse exhibition, horse sale, or horse auction. The Horse Protection Act provides minimum periods of disqualification of not less than 1 year for a first violation and not less than 5 years for any subsequent violation.[19]

Congress has recognized the seriousness of soring horses. The legislative history of the Horse Protection Act Amendments of 1976 reveals the cruel and inhumane nature of soring horses, the unfair competitive aspects of soring, and the destructive effect of soring on the horse industry, as follows:

> NEED FOR LEGISLATION
>
> The inhumanity of the practice of "soring" horses and its destructive effect upon the horse industry led Congress to pass the Horse Protection Act of 1970 (Public Law 91-540, December 9, 1970). The 1970 law was intended to end the unnecessary, cruel and inhumane practice of soring horses by making unlawful the exhibiting and showing of sored horses and imposing significant penalties for violations of the Act. It was intended to prohibit the showing of sored horses and thereby destroy the incentive of owners and trainers to painfully mistreat their horses.

[18] 7 C.F.R. § 3.91(b)(2)(vii).

[19] 15 U.S.C. § 1825(c).

The practice of soring involved the alteration of the gait of a horse by the infliction of pain through the use of devices, substances, and other quick and artificial methods instead of through careful breeding and patient training. A horse may be made sore by applying a blistering agent, such as oil or mustard, to the postern area of a horse's limb, or by using various action or training devices such as heavy chains or "knocker boots" on the horse's limbs. When a horse's front limbs are deliberately made sore, the intense pain suffered by the animal when the forefeet touch the ground causes the animal to quickly lift its feet and thrust them forward. Also, the horse reaches further with its hindfeet in an effort to take weight off its front feet, thereby lessening the pain. The soring of a horse can produce the high-stepping gait of the well-known Tennessee Walking Horse as well as other popular gaited horse breeds. Since the passage of the 1970 act, the bleeding horse has almost disappeared but soring continues almost unabated. Devious soring methods have been developed that cleverly mask visible evidence of soring. In addition the sore area may not necessarily be visible to the naked eye.

The practice of soring is not only cruel and inhumane. The practice also results in unfair competition and can ultimately damage the integrity of the breed. A mediocre horse whose high-stepping gait is achieved artificially by soring suffers from pain and inflam[m]ation of its limbs and competes unfairly with a properly and patiently trained sound horse with championship natural ability. Horses that attain championship status are exceptionally valuable as breeding stock, particularly if the champion is a stallion. Consequently, if champions continue to be created by soring, the breed's natural gait abilities cannot be preserved. If the widespread soring of horses is allowed to continue, properly bred and trained "champion" horses would probably diminish significantly in value since it is difficult for them to compete on an equal basis with sored horses.

> Testimony given before the Subcommittee on Health and the Environment demonstrated conclusively that despite the enactment of the Horse Protection Act of 1970, the practice of soring has continued on a widespread basis. Several witnesses testified that the intended effect of the law was vitiated by a combination of factors, including statutory limitations on enforcement authority, lax enforcement methods, and limited resources available to the Department of Agriculture to carry out the law.

H.R. Rep. No. 94-1174, at 4-5 (1976), *reprinted in* 1976 U.S.C.C.A.N. 1696, 1698-99.

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

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

Section 6(b)(1) of the Horse Protection Act (15 U.S.C. § 1825(b)(1)) provides, in determining the amount of the civil penalty, the Secretary of Agriculture shall take into account all factors relevant to such determination, including the nature, circumstances, extent, and gravity of the prohibited conduct and, with respect to the person found to have engaged in such conduct, the degree of culpability, and any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

Complainant recommends that I assess Cynthia McConnell a $4,400 civil penalty. The extent and gravity of Cynthia McConnell's prohibited

conduct are great. Two United States Department of Agriculture veterinary medical officers found Regal By Generator sore. Dr. Guedron found that digital palpation of Regal By Generator's left and right leg and foot elicited strong, consistent, and repeatable pain responses and noted several thick, firm abraded ridges of tissue on the posterior pastern of the left leg and several firm, raised, red "button" lesions on the posterior pastern of the right leg. Dr. Kirsten stated that Regal By Generator exhibited strong leg withdrawal in response to digital palpation of the left leg and mild leg withdrawal to digital palpation of the right leg and observed lesions on Regal By Generator's right pastern and raised and thickened ridges on Regal By Generator's left pastern. (CX 9 at 2-4.) Dr. Guedron testified the condition of the posterior pasterns of Regal By Generator on September 3, 1998, would have taken weeks to develop (Tr. I at 72-73). Dr. Kirsten testified the button lesions (round, raised, granulomatous, hairless lesions) on the posterior of the right pastern and the raised and thickened ridges on the posterior of the left pastern would occur chronically over a long period of time, in response to chronic, repeated inflammation or irritation (Tr. I at 309-16).

Despite Regal By Generator's condition, Cynthia McConnell contracted with an independent contractor to haul Regal By Generator to the 1998 Tennessee Walking Horse National Celebration and personally participated in completing Regal By Generator's 1998 Tennessee Walking Horse National Celebration entry forms (Tr. I at 284; Tr. II at 124-25, 130, 180-81; CX 4, CX 7). Weighing all the circumstances, I find Cynthia McConnell is culpable for the violations of section 5(1) and (2)(B) of the Horse Protection Act (15 U.S.C. § 1824(1), (2)(B)).

Cynthia McConnell presented no argument that she is unable to pay a $4,400 civil penalty or that a $4,400 civil penalty would affect her ability to continue to do business.

In most Horse Protection Act cases, the maximum civil penalty per violation has been warranted.[20] Based on the factors that are required to

[20]*See, e.g.*, *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. 173, 208 (2002), *aff'd*, 351 F.3d 447 (10th Cir. 2003), *cert. denied*, 125 S. Ct. 38 (2004); *In re Jack Stepp*, (continued...)

be considered when determining the amount of the civil penalty to be assessed and the recommendation of administrative officials charged with responsibility for achieving the congressional purpose of the Horse Protection Act, I find no basis for an exception to the United States Department of Agriculture's policy of assessing the maximum civil penalty for each violation of the Horse Protection Act. Therefore, I assess Cynthia McConnell a $4,400 civil penalty.

Section 6(c) of the Horse Protection Act (15 U.S.C. § 1825(c)) provides that any person assessed a civil penalty under section 6(b) of the Horse Protection Act (15 U.S.C. § 1825(b)) may be disqualified from showing or exhibiting any horse, and from judging or managing any horse show, horse exhibition, horse sale, or horse auction for a period of not less than 1 year for the first violation of the Horse Protection Act and for a period of not less than 5 years for any subsequent violation of the Horse Protection Act.

The purpose of the Horse Protection Act is to prevent the cruel practice of soring horses. Congress amended the Horse Protection Act in 1976 to enhance the Secretary of Agriculture's ability to end soring of horses. Among the most notable devices to accomplish this end is the authorization for disqualification which Congress specifically added to

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[20](...continued)
57 Agric. Dec. 297 (1998), *aff'd*, 188 F.3d 508 (Table), 1999 WL 646138 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206); *In re Carl Edwards & Sons Stables* (Decision as to Carl Edwards & Sons Stables, Gary R. Edwards, Larry E. Edwards, and Etta Edwards), 56 Agric. Dec. 529 (1997), *aff'd per curiam*, 138 F.3d 958 (11th Cir. 1998) (Table), *printed in* 57 Agric. Dec. 296 (1998); *In re Gary R. Edwards* (Decision as to Gary R. Edwards, Larry E. Edwards, and Carl Edwards & Sons Stables), 55 Agric. Dec. 892 (1996), *dismissed*, No. 96-9472 (11th Cir. Aug. 15, 1997); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853 (1996); *In re Mike Thomas*, 55 Agric. Dec. 800 (1996); *In re C.M. Oppenheimer* (Decision as to C.M. Oppenheimer), 54 Agric. Dec. 221 (1995); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994); *In re Linda Wagner* (Decision as to Roy E. Wagner and Judith E. Rizio), 52 Agric. Dec. 298 (1993), *aff'd*, 28 F.3d 279 (3d Cir. 1994), *reprinted in* 53 Agric. Dec. 169 (1994); *In re William Dwaine Elliott* (Decision as to William Dwaine Elliott), 51 Agric. Dec. 334 (1992), *aff'd*, 990 F.2d 140 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993); *In re Eldon Stamper*, 42 Agric. Dec. 20 (1983), *aff'd*, 722 F.2d 1483 (9th Cir. 1984), *reprinted in* 51 Agric. Dec. 302 (1992).

provide a strong deterrent to violations of the Horse Protection Act by those persons who have the economic means to pay civil penalties as a cost of doing business.[21]

Section 6(c) of the Horse Protection Act (15 U.S.C. § 1825(c)) specifically provides that disqualification is in addition to any civil penalty assessed under section 6(b) of the Horse Protection Act (15 U.S.C. § 1825(b)). While section 6(b)(1) of the Horse Protection Act (15 U.S.C. § 1825(b)(1)) requires that the Secretary of Agriculture consider certain specified factors when determining the amount of the civil penalty to be assessed for a violation of the Horse Protection Act, the Horse Protection Act contains no such requirement with respect to the imposition of a disqualification period.

While disqualification is discretionary with the Secretary of Agriculture, the imposition of a disqualification period, in addition to the assessment of a civil penalty, has been recommended by administrative officials charged with responsibility for achieving the congressional purpose of the Horse Protection Act and the Judicial Officer has held that disqualification, in addition to the assessment of a civil penalty, is appropriate in almost every Horse Protection Act case, including those cases in which a respondent is found to have violated the Horse Protection Act for the first time.[22]

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[21]*See* H.R. Rep. No. 94-1174, at 11 (1976), *reprinted in* 1976 U.S.C.C.A.N. 1696, 1706.

[22]*In re Robert B. McCloy, Jr.*, 61 Agric. Dec. 173, 209 (2002), *aff'd*, 351 F.3d 447 (10th Cir. 2003), *cert. denied*, 125 S. Ct. 38 (2004); *In re Carl Edwards & Sons Stables* (Decision as to Carl Edwards & Sons Stables, Gary R. Edwards, Larry E. Edwards, and Etta Edwards), 56 Agric. Dec. 529, 591 (1997), *aff'd per curiam*, 138 F.3d 958 (11th Cir. 1998) (Table), *printed in*, 57 Agric. Dec. 296 (1998); *In re Gary R. Edwards* (Decision as to Gary R. Edwards, Larry E. Edwards, and Carl Edwards & Sons Stables), 55 Agric. 892, 982 (1996), *dismissed*, No. 96-9472 (11th Cir. Aug. 15, 1997); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 891 (1996); *In re Mike Thomas*, 55 Agric. Dec. 800, 846 (1996); *In re C.M. Oppenheimer* (Decision as to C.M. Oppenheimer), 54 Agric. Dec. 221, 321-22 (1995); *In re Danny Burks* (Decision as to Danny Burks), 53 Agric. Dec. 322, 347 (1994); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261, 318-19 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994); *In re Linda Wagner* (Decision as to Roy E. Wagner and Judith E. Rizio), 52 Agric. Dec. 298, 318 (1993), *aff'd*, 28 F.3d 279 (3d Cir. 1994), (continued...)

Congress has provided the United States Department of Agriculture with the tools needed to eliminate the practice of soring Tennessee Walking Horses, but those tools must be used to be effective. In order to achieve the congressional purpose of the Horse Protection Act, it would seem necessary to impose at least the minimum disqualification provisions of the 1976 amendments on any person who violates section 5 of the Horse Protection Act (15 U.S.C. § 1824).

Circumstances in a particular case might justify a departure from this policy. Since it is clear under the 1976 amendments that intent and knowledge are not elements of a violation, there are few circumstances warranting an exception from this policy, but the facts and circumstances of each case must be examined to determine whether an exception to this policy is warranted. An examination of the record before me does not lead me to believe that an exception from the usual practice of imposing the minimum disqualification period for Cynthia McConnell's first two violations of the Horse Protection Act, in addition to the assessment of a civil penalty, is warranted.

Second, Complainant contends the ALJ erred in Finding of Fact 7 (Complainant's Appeal Pet. at 19).

As an initial matter, the ALJ's Initial Decision does not contain Finding of Fact 7; however, the ALJ's Initial Decision contains a paragraph identified as "7" in the discussion of the procedural history in which the ALJ states:

> [7] On September 17, 1999, Respondents filed a claim sounding in tort against the United States Department of Agriculture (USDA) and certain of its employees in Federal District Court for the Western District of Tennessee - Civil Action No. 00-2434. On or about June 22, 2000, the Federal Court granted Defendant's (USDA's) motion to dismiss.

Initial Decision at 3-4.

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[22](...continued)
reprinted in 53 Agric. Dec. 169 (1994); *In re William Dwaine Elliott* (Decision as to William Dwaine Elliott), 51 Agric. Dec. 334, 352 (1992), *aff'd*, 990 F.2d 140 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993).

Complainant asserts Cynthia McConnell and Whitter Stables were not plaintiffs in the case referenced by the ALJ; Jackie McConnell was the sole plaintiff. Complainant attaches to Complainant's Appeal Petition the "Complaint and Motion For Stay, Or In The Alternative, For Injunctive Relief" filed September 17, 1999, and the "Order Granting Defendants' Motion To Dismiss Or, In The Alternative, For Summary Judgment" filed June 21, 2000, in *McConnell v. United States Dep't of Agric.*, Civil Action No. 00-2434 (W.D. Tenn. June 21, 2000), in support of Complainant's assertion.

Based on my review of the "Complaint and Motion For Stay, Or In The Alternative, For Injunctive Relief" and the "Order Granting Defendants' Motion To Dismiss Or, In The Alternative, For Summary Judgment" filed in *McConnell v. United States Dep't of Agric.*, Civil Action No. 00-2434 (W.D. Tenn. June 21, 2000), I agree with Complainant's assertion that the ALJ's erroneously stated that Cynthia McConnell and Whitter Stables were plaintiffs in *McConnell v. United States Dep't of Agric.*, Civil Action No. 00-2434 (W.D. Tenn. June 21, 2000); however, I find the ALJ's error harmless.

FINDINGS OF FACT

1. Regal By Generator was reasonably expected to suffer pain in the pastern areas of her front legs and feet if she were shown on September 3, 1998, as entry number 685 in class number 110 at the 1998 Tennessee Walking Horse National Celebration.

2. Regal By Generator exhibited abnormal sensitivity, lesions, and ridges on September 3, 1998, which were the response to chronic inflammation and irritation from chemicals and/or mechanical devices used on the pasterns of Regal By Generator's front legs and feet, according to two well-qualified, experienced APHIS veterinary medical officers who observed her in motion and examined her on September 3, 1998.

3. Regal By Generator's lesions and ridges would have occurred chronically over a long period of time, in response to chronic, repeated inflammation or irritation, according to one of the two well-qualified,

experienced APHIS veterinary medical officers.

4. Regal By Generator's abnormal sensitivity, lesions, and ridges would have taken weeks to develop, according to the other of those two well-qualified, experienced APHIS veterinary medical officers.

5. Regal By Generator was sore, within the meaning of the Horse Protection Act, during pre-show inspection on September 3, 1998.

6. Regal By Generator's sore condition was chronic and would have taken weeks to develop. Thus, Regal By Generator was sore on September 2, 1998, when the entry form was completed for her entry as number 685 in class number 110 at the 1998 Tennessee Walking Horse National Celebration; and Regal By Generator was sore on August 23, 1998, when arrangements were made to transport and deliver her to the 1998 Tennessee Walking Horse National Celebration.

7. Jackie McConnell is an individual whose business mailing address is P.O. Box 490, Collierville, Tennessee 38027. At all times material to this proceeding, Jackie McConnell was a licensed horse trainer. On September 3, 1998, by presenting Regal By Generator for inspection at the pre-show inspection area, Jackie McConnell entered Regal By Generator as entry number 685 in class number 110 at the 1998 Tennessee Walking Horse National Celebration in Shelbyville, Tennessee.

8. Cynthia McConnell is an individual whose business mailing address is P.O. Box 205, Collierville, Tennessee 38027. At all times material to this proceeding, Cynthia McConnell was a licensed horse trainer. On or about August 23, 1998, through August 26, 1998, Cynthia McConnell shipped, transported, moved, or delivered Regal By Generator to a horse show with reason to believe that the horse may be shown or exhibited in a horse show, by personally contracting with an independent contractor to transport and deliver horses, including Regal By Generator, to the 1998 Tennessee Walking Horse National Celebration in Shelbyville, Tennessee.

9. Whitter Stables is a sole proprietorship which has a mailing address of P.O. Box 205, Collierville, Tennessee 38027. At all times material to this proceeding, Whitter Stables was wholly owned and controlled by Cynthia McConnell.

10. On September 2, 1998, by personally completing an entry form,

Cynthia McConnell entered Regal By Generator as entry number 685 in class number 110 at the 1998 Tennessee Walking Horse National Celebration in Shelbyville, Tennessee.

11. This administrative proceeding is the first proceeding in which Cynthia McConnell has been found to have violated the Horse Protection Act.

12. Jackie McConnell has one prior violation, found in a hearing on the merits, of the Horse Protection Act.

13. Jackie McConnell has undergone three prior disqualification periods: two prior 6-month periods by consent with no culpability established; followed by a 2-year disqualification period that resulted from a prior violation of the Horse Protection Act.

CONCLUSIONS OF LAW

1. On September 3, 1998, Jackie McConnell entered Regal By Generator as entry number 685 in class number 110 at the 1998 Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, for the purpose of showing or exhibiting Regal By Generator, while Regal By Generator was sore, in violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)).

2. Jackie McConnell has one prior Horse Protection Act violation.

3. On or about August 23, 1998, through August 26, 1998, Cynthia McConnell shipped, transported, moved, or delivered Regal By Generator to a horse show, with reason to believe that Regal By Generator may be shown or exhibited while Regal By Generator was sore, in violation of section 5(1) of the Horse Protection Act (15 U.S.C. § 1824(1)).

4. On or about September 2, 1998, through September 3, 1998, Cynthia McConnell entered Regal By Generator as entry number 685 in class number 110 at the 1998 Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, for the purpose of showing or exhibiting Regal By Generator, while Regal By Generator was sore, in violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)).

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

ORDER

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

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

Jackie McConnell's payment of the civil penalty shall be forwarded to, and received by, Ms. Carroll within 60 days after service of this Order on Jackie McConnell. Jackie McConnell shall indicate on the certified check or money order that payment is in reference to HPA Docket No. 99-0034.

2. Jackie McConnell is disqualified for a period of 5 years from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or device, and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction. "Participating" means engaging in any activity beyond that of a spectator, and includes, without limitation: (a) transporting or arranging for the transportation of horses to or from any horse show, horse exhibition, horse sale, or horse auction; (b) personally giving instructions to exhibitors; (c) being present in the warm-up areas, inspection areas, or other areas where spectators are not allowed at any horse show, horse exhibition, horse sale, or horse auction; and (d) financing the participation of others in any horse show, horse exhibition, horse sale, or horse auction.

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

3. Cynthia McConnell is assessed a $4,400 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the "Treasurer of the United States" and sent to:

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

Cynthia McConnell's payment of the civil penalty shall be forwarded to, and received by, Ms. Carroll within 60 days after service of this Order on Cynthia McConnell. Cynthia McConnell shall indicate on the certified check or money order that payment is in reference to HPA Docket No. 99-0034.

4. Cynthia McConnell is disqualified for a period of 2 years from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or device, and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction. "Participating" means engaging in any activity beyond that of a spectator, and includes, without limitation: (a) transporting or arranging for the transportation of horses to or from any horse show, horse exhibition, horse sale, or horse auction; (b) personally giving instructions to exhibitors; (c) being present in the warm-up areas, inspection areas, or other areas where spectators are not allowed at any horse show, horse exhibition, horse sale, or horse auction; and (d) financing the participation of others in any horse show, horse exhibition, horse sale, or horse auction.

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

RIGHT TO JUDICIAL REVIEW

Jackie McConnell and Cynthia McConnell have the right to obtain review of this Order in the court of appeals of the United States for the circuit in which they reside or have their place of business or in the United States Court of Appeals for the District of Columbia Circuit. Jackie McConnell and Cynthia McConnell must file a notice of appeal in such court within 30 days from the date of this Order and must simultaneously send a copy of such notice by certified mail to the Secretary of Agriculture.[23] The date of this Order is June 23, 2005.

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[23] 15 U.S.C. § 1825(b)(2), (c).

ORGANIC FOODS PRODUCTION ACT

COURT DECISION

ARTHUR HARVEY v. USDA.
No. 04-1379.
Filed January 26, 2005.

OFPA – Synthetic, not-organic additives – Dairy herd conversion to Organic – 80% organic feed for nine months rule – *Chevron* deference – Standing – Zone of interests – Injury in fact.

Harvey (Producer, consumer, and accredited USDA organic food inspector) challenged certain final rules promulgated by USDA pursuant to Organic Food Production Act (OFPA) as being inconsistent with the Act. Appeal court granted *de-novo* review and agreed with Harvey in 2 of 7 counts that USDA rule "loopholes"; (a) (third count) allowing use of certain listed synthetic substances (the National List) as an "aid or adjunct" to processing of otherwise qualifying organic produce, and (b) (seventh count) the allowance of conversion of dairy herds to USDA accredited organic status in less than a year and with less than 100% organic feed were contrary to the Act.

United States Court of Appeals,
First Circuit.

Background: Producer and consumer of organic crops filed suit against the Secretary of Agriculture under the Administrative Procedure Act (APA), alleging that provisions of the National Organic Program Final Rule were inconsistent with the Organic Foods Production Act (OFPA) and diluted its organic standards. The United States District Court for the District of Maine, D. Brock Hornby, 297 F.Supp.2d 334, granted summary judgment in favor of defendant, and plaintiff appealed.

Holdings: The Court of Appeals, Schwarzer, Senior District Judge[1], sitting by designation, held that:

(1) regulation allowing use of private certifier's seal on products containing less than 95% organic ingredients, even though such products might not bear a USDA organic seal, was not contrary to purposes of

[1] Senior District Judge of the Northern District of California, sitting by designation.

OFPA;

(2) regulations providing that synthetic substances may be used in processed organic foods "as a processing aid or adjuvant" if they meet six criteria, and listing thirty-eight synthetic substances specifically allowed in or on processed products labeled as organic, are invalid; and

(3) regulation allowing dairy animals being converted to organic production to be fed 80% organic feed for the first nine months of the year prior to sale of their products as organic is invalid.

Affirmed in part; reversed in part and remanded.

Before BOUDIN, Chief Judge, SELYA, Circuit Judge, and SCHWARZER[2]

SCHWARZER, Senior District Judge.

Arthur Harvey appeals the District Court's grant of summary judgment to Secretary of Agriculture Ann Veneman on Harvey's claims alleging that multiple provisions of the National Organic Program Final Rule ("Final Rule" or "Rule"), 7 C.F.R. Pt. 205, are inconsistent with the Organic Foods Production Act of 1990, 7 U.S.C. §§ 6501-6523 ("OFPA" or "Act").

Harvey appeals on seven of the nine counts he originally brought. For the reasons set forth below, we affirm the judgment on the first, second, fifth, sixth, and eighth counts and reverse on the third and seventh counts, and we remand for entry of judgment in accordance with this opinion.

FACTUAL AND PROCEDURAL HISTORY

I. OVERVIEW OF OFPA AND IMPLEMENTING REGULATIONS

[2] Senior District Judge of the Northern District of California, sitting by designation.

Congress enacted OFPA in 1990 to "establish national standards governing the marketing" of organically produced agricultural products, to "assure consumers that organically produced products meet a consistent standard," and to "facilitate interstate commerce in" organically produced food. 7 U.S.C. § 6501. The Act furthers these purposes by establishing a national certification program for producers and handlers of organic products and by regulating the labeling of organic products. *Id.* §§ 6503(a), 6504, 6505(a)(1)(A). In order to be labeled or sold as organic, an agricultural product must be produced and handled without the use of synthetic substances, such as pesticides, and in accordance with an organic plan agreed to by an accredited certifying agent and the producer and handler of the product. *Id.* § 6504; *see also id.* § 6505 (listing OFPA requirements for certification). Products meeting these standards may be labeled as such and may bear the USDA seal. *Id.* § 6505(a)(2).

Exceptions to the Act's general prohibition on synthetic substances appear on a National List of approved substances for organic products. 7 U.S.C. § 6517. OFPA requires the Secretary to establish a National Organic Standards Board to develop the National List and to recommend exemptions for otherwise prohibited substances. *Id.* §§ 6518(a), (k); 6517(c)(1). The Act contains detailed guidelines for the inclusion of substances on the National List. *Id.* § 6517(c).

The Act also requires the Secretary to promulgate regulations "to carry out" OFPA. *Id.* § 6521. The Secretary published the Final Rule at issue in this case in December 2000 and it became effective on October 21, 2002. *See generally* 7 C.F.R. Pt. 205. Among other things, the Rule sets forth a four-tier labeling system for organic foods. *Id.* § 205.301. Under this system, the type of labeling permitted on a product varies according to the percentage of organic ingredients it contains. *Id.* The Rule also includes loopholes concerning nonorganic ingredients and synthetic substances, *id.* §§ 205.600(b), 205.605(b), 205.606; exemptions for wholesalers and distributors, *id.* § 205.101(b)(1), as well as livestock herds converting to organic dairy production, *id.* § 205.236(a)(2)(i); and restrictions on the activities of private certifiers,

id. §§ 205.303(a)(5), 205.303(b), 205.304(a)(3), 205.304(b)(2), 205.305(b)(2), 205.501(a)(11), 205.501(b). These are the provisions at issue in the present action and are outlined in more detail below.

II. HISTORY OF THE PRESENT ACTION

Plaintiff-appellant Harvey is a producer and handler of organic blueberries and other crops, an organic inspector employed by USDA-accredited certifiers, and a consumer of organic foods. In October 2003 Harvey filed a complaint for declaratory and injunctive relief under the Administrative Procedure Act, 5 U.S.C. §§ 555(b), 702, 706(1), and under OFPA, alleging that nine provisions of the Final Rule are inconsistent with the Act and dilute its organic standards.

On cross-motions for summary judgment, Magistrate Judge Margaret J. Kravchuk issued a recommended decision finding that Harvey lacked standing to bring his seventh claim, granting Harvey summary judgment on his ninth claim, and granting the Secretary summary judgment on the remaining claims. *Harvey v. Veneman,* No. 02-216-P-H, 2003 WL 22327171 (D.Me. Oct. 10, 2003). The District Court adopted the magistrate judge's recommended decision with respect to Harvey's first eight claims, but granted summary judgment to the Secretary, rather than Harvey, on his ninth claim. *Harvey v. Veneman,* 297 F.Supp.2d 334, 335 (D.Me.2004). Harvey timely appealed the District Court's judgment on the following seven of his nine original claims:

Count 1: Harvey contends that the Rule provides for the blanket exemption of nonorganic products "not commercially available in organic form" from the review and recommendation process OFPA requires for inclusion of substances on the National List, in contravention of the purposes of OFPA and the National List.

Count 2: Harvey contends that the Rule's provisions allowing use of a private certifier's seal on products containing less than 95% organic ingredients, even though such products may not, according to OFPA, bear a USDA organic seal, are contrary to the purposes of OFPA.

Count 3: Harvey contends that the Rule's provisions permitting the use of synthetic substances in processing contravene OFPA, which

prohibits the use of synthetic substances generally and specifically forbids the addition of synthetic ingredients in processing.

Count 5: Harvey contends that the Rule's exclusion of certain wholesalers and distributors from its coverage contravenes OFPA, which includes such entities among the "handlers" and "handling operations" to which it applies.

Count 6: Harvey contends that the Rule's prohibition on certifying agents' provision of uncompensated advice regarding certification standards contravenes OFPA, which prohibits only advice for compensation, and also violates the rights of such agents and their clients under the First Amendment to the United States Constitution.

Count 7: Harvey contends that the Rule's provisions allowing dairy animals being "converted" to organic production to be fed 80% organic feed for the first nine months of the year prior to sale of their products as organic contravenes OFPA, which requires dairy animals to be fed 100% organic feed for twelve full months prior to the sale of their products as organic.

Count 8: Harvey contends that the Rule's imposition of uniform standards on private certifiers contravenes the purposes of OFPA.

DISCUSSION

I. STANDARD OF REVIEW

We review a district court's grant of summary judgment de novo. *People to End Homelessness, Inc. v. Develco Singles Apts. Assocs.,* 339 F.3d 1, 8 (1st Cir.2003). In doing so, we draw all reasonable inferences from the facts in favor of the appellant. *Id.*

We also review de novo challenges to agency action under the APA (that is, we do not defer to a district court's conclusions). *Associated Fisheries v. Daley,* 127 F.3d 104, 109 (1st Cir.1997). Legal issues presented in such challenges are " 'for the courts to resolve, although even in considering such issues the courts are to give some deference to the agency's informed judgment' in applying statutory terms if the statute is silent or ambiguous on the issue." *Penobscot Air Servs., Ltd. v.*

FAA, 164 F.3d 713, 719 (1st Cir.1999) (quoting *FTC v. Indiana Fed'n of Dentists,* 476 U.S. 447, 454, 106 S.Ct. 2009, 90 L.Ed.2d 445 (1986)). "That deference is described in the familiar two-step test" of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842-44, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), according to which we first use traditional tools of statutory construction to determine congressional intent. *Penobscot Air Servs.,* 164 F.3d at 719. "[I]f the legislative intent is clear, we do not defer to the agency" and simply require that the regulations be consistent with the statute. *Id.* If, on the other hand, "the statute is silent or ambiguous with respect to the specific issue," the question "is whether the agency's answer is based on a permissible construction of the statute." *Id.* (citation and internal quotation marks omitted). We accord deference to the agency "as long as its interpretation is rational and consistent with the statute." *Id.* (citation omitted).

II. HARVEY'S STANDING

A plaintiff bringing legal claims in federal court must "establish standing to prosecute the action." *Elk Grove Unified Sch. Dist. v. Newdow,* 542 U.S. 1, 124 S.Ct. 2301, 2309, 159 L.Ed.2d 98 (2004). This is partly a constitutional requirement; to meet the requirements of Article III, a plaintiff must point to an "injury in fact" that a favorable judgment will redress. *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). It is also a prudential requirement. To establish prudential standing, Harvey must show that his complaint "fall[s] within the zone of interests protected by the law invoked." *Newdow,* 542 U.S. at ----, 124 S.Ct. at 2309 (citation and internal quotation marks omitted).

Harvey alleges that he has suffered an injury in fact because the challenged regulations weaken the integrity of the organic program and the standards it sets forth. This weakening harms Harvey as a consumer of organic foods because it degrades the quality of organically labeled foods. The magistrate judge properly held that this claimed harm represents concrete, redressable injury sufficient to confer Article III

standing with respect to most of the counts in Harvey's complaint. It is well established that consumers injured by impermissible regulations satisfy Article III's standing requirements. *See GMC v. Tracy,* 519 U.S. 278, 286, 117 S.Ct. 811, 136 L.Ed.2d 761 (1997) ("Consumers who suffer [higher costs] from regulation forbidden under the Commerce Clause satisfy the standing requirements of Article III."); *Baur v. Veneman,* 352 F.3d 625, 628, 641-42 (2d Cir.2003) (finding cognizable injury in fact where consumer alleged that USDA regulations permitting use of downed livestock for human consumption caused him increased risk of contracting food-borne illness); *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.,* 793 F.2d 1322, 1324 (D.C.Cir.1986) (finding that consumers suffered sufficient injury in fact to challenge regulations reducing fuel economy standards "because the vehicles available for purchase will likely be less fuel efficient than if the fuel economy standards were more demanding").

The magistrate judge concluded that Harvey lacked Article III standing with respect to his seventh count because Harvey failed to allege specifically that he was a consumer of organic milk or inspector of organic dairy operations. Recommended Decision on Cross-Motion for Summary Judgment, Civ. No. 02-216-P-H (Oct. 10, 2003), at 33. But Harvey has continuously alleged, as the magistrate judge acknowledged, that he purchases and consumes organic products. Moreover, the record clearly contains Harvey's specific allegations that he has regular commercial dealings with organic dairy farmers and has purchased products containing dairy ingredients identified as organic. The magistrate judge erred in requiring more. Harvey has established that this particular regulation threatens sufficient injury to him as a consumer.

Harvey also clearly satisfies the requirements of prudential standing. The zone of interests test excludes only those whose interests are "so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Clarke v. Sec. Indus. Ass'n,* 479 U.S. 388, 399, 107 S.Ct. 750, 93 L.Ed.2d 757 (1987). Congress enacted OFPA to establish

national standards governing the marketing of organic products, to assure consumers that organic products meet these standards, and to facilitate interstate commerce in organic products. *See* 7 U.S.C. § 6501. Harvey alleges that the Final Rule creates loopholes in the statutory standards, undermines consumer confidence, and fails to protect producers of true organic products. Harvey's alleged injuries fall precisely within the zone of interests that the statutes at issue were meant to protect.

III. THE MERITS

A. First Count: Alleged Exemption for Nonorganic Products Not Commercially Available

Harvey alleges that 7 C.F.R. § 205.606 permits the introduction of a wide variety of nonorganic ingredients into organic or made-with-organic products in contravention of OFPA's general prohibition of such ingredients. The portion of the Rule at issue provides:

> The following nonorganically produced agricultural products may be used as ingredients in or on processed products labeled as "organic" or "made with organic (specified ingredients or food group(s))" only in accordance with any restrictions specified in this section.
>
> *Any nonorganically produced agricultural product may be used in accordance with the restrictions specified in this section and when the product is not commercially available in organic form.*
>
> (a) Cornstarch (native)
>
> (b) Gums--water extracted only (arabic, guar, locust bean, carob bean)
>
> (c) Kelp--for use only as a thickener and dietary supplement
>
> (d) Lecithin--unbleached
>
> (e) Pectin (high-methoxy)

7 C.F.R. § 205.606 (emphasis added).

Harvey maintains that the emphasized portion of the Rule allows the introduction of any nonorganic ingredient into processed products whenever an individual certifier determines that the ingredient is not commercially available in organic form. Harvey correctly points out that §§ 6517 and 6518 of OFPA require all specific exemptions to the Act's ban on nonorganic substances to be placed on the National List following notice and comment and subject to periodic review. *See* 7 U.S.C. §§ 6517(a), (d), (e); 6518(k), (*l*), (m). Harvey argues that the challenged provision allows ad hoc decisions regarding the use of synthetic substances, in contravention of these statutory procedural requirements.

In the District Court and before this court, the Secretary has taken the position that § 205.606 does not create a blanket exemption, as Harvey contends, but rather permits use only of the ingredients specifically listed in that section. In other words, the Secretary maintains that the list of five products in § 205.606 is a part of the National List and that the provision emphasized above and challenged by Harvey should be interpreted simply as a further limitation on the addition of new nonorganic ingredients to the National List.

We agree with the District Court that the interpretation advanced by the Secretary is a plausible interpretation of the language of § 205.606 that eliminates any conflict with OFPA's requirements. The District Court was correct to conclude that, under the Secretary's interpretation, § 205.606 is not in contravention of OFPA.

However, the District Court did not clarify that it is necessary to interpret the Rule in this manner in order to find this portion of the Rule valid. Under other interpretations, § 205.606 might exceed the Secretary's authority under OFPA. In particular, the interpretation suggested by Harvey, although it is at odds with OFPA's evident requirements, is not an implausible construction of the language of § 205.606 considered alone. Indeed, the Secretary herself appears to have espoused exactly this interpretation in the past. *See* 65 Fed.Reg. 80,616 ("In the regulation, a nonsynthetic and nonorganic agricultural product

... used as a processing aid does not have to appear on the National List. Such products are included in the provision in § 205.606 that nonorganically produced agricultural products may be used in accordance with any applicable restrictions when the substance is not commercially available in organic form.").

In light of this possibility, it is insufficient for this court simply to affirm the District Court's judgment that § 205.606 is, as it stands, consistent with OFPA. Instead, to clarify that this portion of the Rule may not be interpreted in a way that contravenes the National List requirements of OFPA, we remand to the District Court for entry of a declaratory judgment that § 205.606 does not establish a blanket exemption to the National List requirements for nonorganic agricultural products that are not commercially available.

B. Second Count: Use of Private Certifiers' Seals on Products Containing Less Than 95% Organic Ingredients

Harvey also challenges a part of the Final Rule permitting use of private certification notices and private certifiers' seals on products containing between 70 and 94% organic ingredients. 7 C.F.R. §§ 205.304(a)(3), (b)(2). Harvey acknowledges that the Act allows such products to be labeled as containing "organic" ingredients but contends that OFPA implicitly prohibits the certification of such ingredients or the use of non-USDA seals on these products. In his view, such certification runs afoul of § 6505(a)(1)(B) of the Act, which forbids labeling that "implies, directly or indirectly, that [a] product is produced and handled using organic methods" when it was not produced or handled in such a way. *Id.* We conclude that the Act does not prohibit, either implicitly or explicitly, the certification of organic ingredients or the use of private certifiers' seals and that the challenged portion of the Rule was a permissible exercise of the Secretary's discretion in this area.

The provision to which Harvey objects is one aspect of a comprehensive labeling and certification scheme set forth in the Rule. *See* 7 C.F.R. §§ 205.301-205.305. This scheme provides for four

different types of product labels and for two different types of certification, all depending on the percentage of organic ingredients in the labeled product. The labeling scheme distinguishes (1) products containing 100% organic ingredients, which may be labeled "100 percent organic," *see id.* § 205.301(a); (2) products containing 94 to 100% organic ingredients, which may be labeled "organic," *see id.* § 205.301(b); (3) products containing 70 to 94% organic ingredients, which may be labeled "made with organic (specified ingredients or food group(s))," *see id.* § 205.301(c), and (4) products containing less than 70% percent organic ingredients, which may identify each such ingredient on the label or ingredient statement with the word "organic," *see id.* §§ 205.301(d), 205.305(a)(1). Harvey does not contest these portions of the Rule, which are plainly consistent with the Act's requirements. *See* 7 U.S.C. §§ 6505(a)-(c), 6510 (forbidding labeling of products as organically produced unless produced in accordance with the Act and providing that no more than 5% nonorganic ingredients may be added to processed foods handled in accordance with the Act, but also permitting labeling of *ingredients* as organic in processed foods containing less than 94% organic ingredients).

Harvey's challenge is to a portion of the Rule's parallel certification scheme. This scheme allows (1) products in the first two labeling categories, containing 95% or more organic ingredients, to bear both a USDA seal and the seal of a private certifying agent, *see* 7 C.F.R. §§ 205.303(b)(4)-(5), 205.311(a); (2) products containing 70 to 94% organic ingredients to bear a notice of private certification and the seal of a private certifying agent, *see id.* 205.304(a)(3), (b)(2); and (3) products containing less than 70% organic ingredients to bear neither a USDA seal nor that of a private certifier, *see id.* § 205.305(b). Harvey specifically objects to the second of these categories. He maintains that "the Act's limited exemption for identifying organic ingredients does not authorize the certification of products which do not meet the requirements of the Act" and that allowing certification of such products misleads consumers, in contravention of 7 U.S.C. § 6505(a)(1)(B).

We note again that Harvey does not challenge the third tier of the

Rule's labeling scheme, which allows products containing 70 to 94% organic ingredients to be labeled "made with organic (specified ingredients or food group(s))." 7 C.F.R. § 205.301(c). Rather, Harvey's challenge is to the use of private certification notices and seals on such products. His argument that use of private certifiers' seals to designate the presence of organic ingredients in a product contravenes OFPA depends on two related premises: (1) that the Act allows for only one kind or level of certification, namely, USDA certification, which cannot be uncoupled from private certification, and (2) that the Act does not contemplate the certification of ingredients or the use of private, non-USDA seals to indicate their certification.

Neither premise is supported by the Act itself. First, the Act does expressly restrict use of the USDA seal, *see* 7 U.S.C. § 6505(a)(2), and contemplates an extensive role for private certifying agents in implementing the Act's requirements.[3] However, it is silent on the use of private certifiers' seals and on the standards for inclusion of private certification information on product packaging. Since the Act does not address private certification at all, it necessarily cannot address whether private certification may be uncoupled from USDA certification.

Second, the Act does provide for the identification of ingredients as organic when a product contains less than 95% organic ingredients, *id*. § 6505(c)(1)- (2), but it is silent on whether such identification may or may not include certification of such ingredients as organic and/or a private certifier's mark. In other words, with respect to products containing less than 95% organic ingredients, the Act speaks only to the

[3]*See, e.g.,* 7 U.S.C. §§ 6502(3)-(5) (defining "certifying agent," "certified organic farm," and "certified organic handling operation"), 6503(d) (providing for certification of farms or handling operations by agents), 6506(a)(4)-(6) (providing for periodic review of organic programs by certifying agents), 6513(a) (providing for submission of organic plans to certifying agents), 6514(a)-(c) (addressing accreditation of certifying agents), 6515(a)-(j) (setting forth "[r]equirements of certifying agents"), 6516(a)-(b) (addressing peer review of certifying agents), 6518(b)(7) (setting aside seat on the National Organic Standards Board for a certifying agent), 6519(d)-(e) (addressing violations reported and committed by certifying agents).

labeling portion of the tiered scheme described above. With respect to *certification* of products in this category, the Act is silent.

Since the Act is silent on these issues, we must conclude that Congress committed the questions to the Secretary's discretion and assess the challenged portions of the Rule for their reasonableness in light of OFPA's overall scheme. *Penobscot Air Servs.,* 164 F.3d at 719; *see also United States v. Haggar Apparel Co.,* 526 U.S. 380, 392, 119 S.Ct. 1392, 143 L.Ed.2d 480 (1999) ("If ... the agency's statutory interpretation fills a gap or defines a term in a way that is reasonable in light of the legislature's revealed design, we give that judgment controlling weight." (citations and internal quotation marks omitted)).

The challenged regulations are reasonable in light of OFPA's overall scheme. The Act clearly authorizes the use of the word "organic" on the packaging of products made with 70 to 94% organic ingredients. 7 U.S.C. § 6505(c)(1). Under the Act, certifying agents play a crucial role in determining whether an ingredient derives from an organic operation. *Id.* § 6503(d). Given these statutory directives, the Secretary's requirement that labels on third-tier products (containing 70 to 94% organic ingredients) identify the agent responsible for certifying such ingredients is not unreasonable. This information allows the Secretary to identify and track certifiers on a product-by-product basis, creates consumer confidence that the specified ingredients are indeed organic, and provides the name of the certifier, which may be useful to some consumers. Far from contravening the Act, the certification requirement furthers its purpose of assuring consistency. *See id.* § 6501 (stating purposes of OFPA).

Nor is it unreasonable for the Secretary to permit inclusion of private certifiers' seals on such products. Such seals will tend to increase consumer confidence and to facilitate interstate commerce in organic products, furthering two of OFPA's three goals. *See id.* Harvey and the amici argue that the presence of a non-USDA seal on some products will confuse consumers. Consumers might be confused by the presence of *USDA* seals on products containing 70 to 94% organic ingredients. *See*

id. §§ 6505(a)(1)(B), 6505(a)(2), 6510(a)(4). But it is difficult to see how a *non-USDA* seal applied in compliance with the challenged provisions could create similar confusion, particularly since the seal will be accompanied by labeling stating not that the product is "100% organic" or "organic" but merely that it is "made with organic (ingredients)." Under these circumstances, a private certifier's seal appearing alone on a label serves simply to reiterate the identification of the agent certifying the ingredient. Harvey points to no support, statutory or otherwise, for his contention that the identification of an ingredient as "organic" is somehow less confusing to consumers than identification of a private certifier or use of such a certifier's seal, yet such a distinction is crucial to his argument. Because we can see no basis for the distinction, we reject the inference.

We conclude that the District Court did not err in upholding the challenged portions of the Final Rule as permissible exercises of the Secretary's authority. We therefore affirm the District Court's judgment on this count of Harvey's complaint.

C. Third Count: Use of Synthetic Substances in Processing

Harvey next challenges two parts of the Rule permitting synthetic substances to be used in processed organic foods. 7 C.F.R. §§ 205.600(b), 205.605(b). Section 205.600(b) provides that synthetic substances may be used "as a processing aid or adjuvant" if they meet six criteria; § 205.605(b) lists thirty-eight synthetic substances specifically allowed in or on processed products labeled as organic. These provisions, Harvey contends, contravene the plain language of OFPA, which provides that certified handling operations "shall not, with respect to any agricultural product covered by this title ... add any synthetic ingredient during the processing or any postharvest handling of this product." 7 U.S.C. § 6510(a)(1). [4] Harvey is correct; the challenged

[4]The ban on the addition of synthetic substances in handling applies only to those products labeled 'organic' or '100% organic.' The statute does not prohibit the addition of synthetic substances to foods labeled 'made with organic [ingredients],' provided the
(continued...)

regulations lie outside of the scope of authority granted the Secretary by OFPA.

The Secretary conceded before the District Court that § 6510(a)(1) constitutes a "general prohibition" against adding synthetic ingredients in handling operations. The Secretary argues, however, that § 6517 of the Act, which directs the establishment of the National List and governs the creation of exemptions from the Act's general prohibitions, allows the listing of synthetics for use in the handling of products labeled organic. We reject this argument. This section provides that

> The National List may provide for the use of substances in an organic farming or handling operation that are otherwise prohibited under this title *only if* ...
> (B) the substance--
> (i) is used in *production* and contains an active *synthetic* ingredient in the following categories ...
> (ii) is used in *production* and contains *synthetic* inert ingredients that are not classified by the Administrator of the Environmental Protection Agency as inerts of toxicological concern; or
> (iii)is used in *handling* and i[s] *non-synthetic* but is not organically produced....

7 U.S.C. § 6517 (emphases added). This section contemplates use of certain synthetic substances during the production, or growing, of organic products, but not during the handling or processing stages.[5] Section 6517(c)(1)(B)(iii) simply does not say what the Secretary needs it to say.

The Secretary notes that some subsections of § 6517 refer to "farming or handling" activities together, and the Secretary claims that this language renders the Act ambiguous or inconsistent, permitting the

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[4](...continued)
other requirements of the Act are met. *See* 7 U.S.C. § 6505(c).

[5]*See* 7 U.S.C. § 6502(8) (defining "handle" as "to sell, process, or package agricultural products"), (18) (defining "producer" as "a person who engages in the business of growing or producing food or feed").

Secretary to draft a reasonable reconciliation. We reject this characterization of the Act. Section 6517(c) clearly establishes a three-prong test for exemption of otherwise prohibited substances and their inclusion on the National List. Prong (A), not quoted above, sets forth requirements that any otherwise prohibited substance, whether used in production or handling, must meet to be exempted.[6] Prong (B), quoted above, specifically requires that the otherwise prohibited substances exempted for use in handling be nonsynthetic. Prong (B) is not inconsistent with prong (A); it merely sets forth more specific requirements with regard to the types of substances that may be exempted for use in production and handling, respectively.

The challenged regulations are contrary to the plain language of OFPA and therefore exceed the Secretary's statutory authority. *See Chevron,* 467 U.S. at 842-43, 104 S.Ct. 2778 ("If the intent of Congress is clear, that is the end of the matter...."). We therefore reverse the District Court's grant of summary judgment to the Secretary on this count.[7]

D. Fifth Count: Exemption of Wholesalers and Distributors from Certification Requirements

Harvey next challenges 7 C.F.R. § 205.101(b)(1), a portion of the Final Rule that excludes from the Act's coverage and requirements "handling operations" selling products that are "packaged or otherwise enclosed in a container prior to being received or acquired by the

[6]This subsection requires such substances to be "not ... harmful to human health or the environment"; necessary to production or handling of an agricultural product "because of the unavailability of wholly natural substitute products"; and "consistent with organic farming and handling." 7 U.S.C. § 6517(c)(1)(A)(i)-(iii).

[7]We note that in his brief, Harvey admits that he has withdrawn his challenge as to some of the thirty-eight substances listed in 7 C.F.R. § 205.605(b) because use of the substances is required by other statutes. Our reversal of the District Court's judgment is without prejudice to any such concessions made by Harvey or to the general principle of 7 U.S.C. § 6519(f), which provides that OFPA is not to be interpreted to alter the Secretary's authority under other statutes.

operation" and that "[r]emain in the same package or container and are not otherwise processed while in the control of the handling operation." *Id.* § 205.101(b)(1)(i)- (ii). According to Harvey, this provision impermissibly excludes wholesalers and distributors, a subset of those engaged in "handling operations," from certification and other OFPA requirements. But, Harvey argues, OFPA expressly exempts from its certification requirements only one subset of those engaged in "handling operations," namely, retailers who do not process the foods they sell. 7 U.S.C. §§ 6502(9), (10). According to Harvey, the Act cannot be read to permit the additional blanket exemption of wholesalers and distributors.

OFPA's exclusion of final retailers from its coverage shows that Congress knew how to exclude operations otherwise subject to the Act and must be presumed to have acted deliberately when it did not specifically exclude those that handle only packaged products. *See id.* That, however, is not the end of the story. Section 6510 of the Act specifies the requirements for certification of handling operations. *Id.* § 6510. Each of the seven subsections of § 6510 prohibits either the addition of contaminants or exposure to contaminating materials. *Id.* § 6510(a)(1)-(7). The evident purpose of this section is to ensure that operations handling organic products will not contaminate or expose to contamination those products. But operations handling only packaged products (as defined in the regulation) do not present the contamination hazards at which this section--and hence the certification process--is aimed. Thus, certification is irrelevant to those operations that handle only packaged products.

The statutory definition of handling operations in § 6502(10), on its face, appears to include operations handling only sealed packaged products. But the requirements for certification of handling operations in § 6510 appear to have no application to operations handling only sealed packaged products, which by their nature could not engage in any of the proscribed activities. This portion of the statute therefore lacks coherence and consistency, creating ambiguity concerning Congress' intent. *See, e.g., Barnhart v. Sigmon Coal Co.,* Inc., 534 U.S. 438, 450,

122 S.Ct. 941, 151 L.Ed.2d 908 (2002) (holding that inquiry as to statutory ambiguity ceases "if the statutory language is unambiguous and the statutory scheme is coherent and consistent") (internal quotation marks and citation omitted); *Salinas v. United States,* 522 U.S. 52, 60, 118 S.Ct. 469, 139 L.Ed.2d 352 (1997) (noting that in order for a statute to be considered unambiguous, "[i]t need only be plain to anyone reading the Act that the statute encompasses the conduct at issue") (internal quotation marks and citations omitted); *Brown v. Gardner,* 513 U.S. 115, 118, 115 S.Ct. 552, 130 L.Ed.2d 462 (1994) ("Ambiguity is a creature not of definitional possibilities but of statutory context.") (citation omitted). Because "the statute is silent or ambiguous with respect to the specific issue," the court must defer to the Secretary's reasonable interpretation of the statute. *Chevron,* 467 U.S. at 843-44, 104 S.Ct. 2778. We therefore affirm the District Court's grant of summary judgment to the Secretary on this count.

E. Sixth Count: Prohibition on Uncompensated Advice from Private Certifiers

Harvey also challenges 7 C.F.R. § 205.501(a)(11)(IV), which prohibits certifying agents from "giving advice or providing consultancy services, to certification applicants or certified operations, for overcoming identified barriers to certification." Harvey contends, first, that this regulation clearly conflicts with 7 U.S.C. § 6515(h), which bars certifying agents only from mixing advice with financial interest:

> Any certifying agent shall not--
> (1) carry out any inspections of any operation in which such certifying agent ... has, or has had, a commercial interest, including the provision of consultancy services;
> (2) accept payment, gifts, or favors of any kind from the business inspected other than prescribed fees; or
> (3) provide advice concerning organic practices or techniques for a fee, other than fees established under such program.

Id.

Harvey argues further that even if the relevant portion of OFPA is ambiguous, deference to the Secretary's interpretation as embodied in

the portion of the Rule at issue is not warranted, because this regulation raises serious constitutional questions in that it conditions receipt of a public benefit--USDA accreditation--on the relinquishment of free speech rights. *See Legal Servs. Corp. v. Velazquez,* 531 U.S. 533, 544, 121 S.Ct. 1043, 149 L.Ed.2d 63 (2001).

In connection with the first of these arguments, Harvey specifically contends that § 6515(h), titled "Conflicts of interest," constitutes the complete list of certifier activities banned by Congress and may not be interpreted to bar activities not involving financial benefit to the advice giver. But as the Secretary points out, the statute is not quite so narrowly focused; it also bars inspections when the certifier "has had" a commercial interest in an operation and prohibits inspectors from accepting "favors of any kind." 7 U.S.C. § 6515(h)(1), (2). As its title suggests, the subsection regulates conflicts of interest and certifier integrity generally. It neither addresses nor excludes the question of whether the provision of free advice may risk a conflict of interest.

Since the statute is ambiguous on this point, we reach step two of *Chevron* and must defer to the Secretary's interpretation if it is reasonable. *Chevron,* 467 U.S. at 843, 104 S.Ct. 2778. We conclude that this interpretation is reasonable. It is easy to imagine situations in which providing free advice might create a conflict of interest for a certifier; the Secretary outlines a scenario in which a certifier provides well-meaning but erroneous advice on compliance with the Act to a producer, then later is faced with a choice between reporting the producer's violation and recanting the erroneous advice, a step that could injure the certifier's own reputation and credibility. Section 6515(h) is concerned with ensuring certifiers' integrity and avoiding conflicts of interest. It does not preclude the Secretary from imposing additional requirements tending to achieve these ends. The challenged regulation is therefore neither inconsistent with the Act nor an unreasonable interpretation of the Secretary's authority.

Harvey argues that if we find the statute ambiguous on this point, any *Chevron* deference due the Secretary's interpretation is offset by the

requirement that we construe statutes, where possible, to avoid conflict with the Constitution. *See Rust v. Sullivan,* 500 U.S. 173, 190-91, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991); *see also U.S. West, Inc. v. FCC,* 182 F.3d 1224, 1231 (10th Cir.1999) ("[D]eference to an agency interpretation is inappropriate not only when it is conclusively unconstitutional, but also when it raises serious constitutional questions."). According to Harvey, the challenged regulation raises a substantial constitutional question, since it conditions receipt of a government benefit on speech restrictions.

In making this argument, Harvey relies primarily on *Legal Services Corp. v. Velazquez,* 531 U.S. 533, 121 S.Ct. 1043, 149 L.Ed.2d 63 (2001).[8] In *Legal Services Corp.,* the Supreme Court invalidated restrictions on the speech of attorneys representing welfare claimants in a government-funded legal services program. The Court noted that the challenged program "was designed to facilitate private speech, not to promote a governmental message," and contrasted it in this regard with the program in *Rust v. Sullivan,* 500 U.S. 173, 111 S.Ct. 1759, 114 L.Ed.2d 233, in which the government "used private speakers to transmit information pertaining to its own program," a program of federal funding for family planning clinics. *Legal Servs. Corp.,* 531 U.S. at 541-42 (citation and quotation omitted). The Court in *Legal Services Corp.* emphasized that "when the government disburses public funds to private entities to convey a governmental message[, as in *Rust*], it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee." *Id.* at 541, 121 S.Ct. 1043 (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.,* 515 U.S. 819, 833, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995)).

[8]The Secretary argues that the constitutionality of the regulation should instead be analyzed under *Pickering v. Board of Education,* 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), because certifiers are government employees. *Pickering* is not appropriate to analysis of this regulation, since certifiers are not by definition government employees or recipients of government funds. *See* 7 U.S.C. § 6514 (setting forth requirements for accreditation as applicable to both State officials and "private person[s]").

The present case is clearly more nearly analogous to *Rust,* in which the Court found that speech restrictions did not create a constitutional problem, than to *Legal Services Corp.,* in which the Court found that they did. In OFPA, the government has not created a program to facilitate private speech, as in *Legal Services Corp.* Instead it has created a scheme that uses private certifiers to transmit information regarding the national certification program, a clear example of a "governmental message." *Legal Servs. Corp.,* 531 U.S. at 541, 121 S.Ct. 1043; *see also Rosenberger,* 515 U.S. at 833, 115 S.Ct. 2510 ("we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message").

The limitation at issue, as discussed above, is a reasonable addition to OFPA's provisions for minimizing certifier conflicts of interest. We conclude that it is also an appropriate restriction on speech within OFPA's scheme and raises no serious constitutional difficulties. We therefore affirm the District Court's grant of summary judgment to the Secretary on this count.

F. Seventh Count: Conversion of Dairy Herds to Organic Production

Harvey also challenges a portion of the Rule creating an exception to the Act's requirements for dairy herds being converted to organic production. 7 C.F.R. § 205.236(a)(2)(i). OFPA provides that "[a] dairy animal from which milk or milk products will be sold or labeled as organically produced shall be raised and handled in accordance with this title for not less than the 12-month period immediately prior to the sale of such milk and milk products." 7 U.S.C. § 6509(e)(2). The challenged rule, in contrast, provides that

> when an entire, distinct herd is converted to organic production, the producer may:
> (i)For the first 9 months of the year, provide a minimum of 80-percent feed that is either organic or raised from land included in the organic system plan and managed in compliance with organic crop requirements; and

(ii)Provide feed in compliance with § 205.237 for the final 3 months.

7 C.F.R. § 205.236(a).

Section 205.237, referred to in the quoted portion of the Rule, provides that "[t]he producer of an organic livestock operation must provide livestock with a *total feed ration* composed of agricultural products, including pasture and forage, that are organically produced and, if applicable, organically handled." *Id.* § 205.237 (emphasis added). The reference to a "total feed ration" of organically produced feed products indicates that livestock must ordinarily be fed 100% organic feed to qualify as part of an "organic livestock operation." *Id.*[9] Under the challenged regulation, a converting dairy herd must be fed this way for only three months. In contrast, under § 6509(e)(2) of OFPA, dairy animals must be "handled organically" for a full twelve months before their products may be labeled organic. In other words, OFPA clearly requires a single type of organic handling for twelve months before sale of dairy products as organic, 7 U.S.C. § 6509(e)(2), whereas the Final Rule requires two different levels of organic feed during that twelve-month period, 7 C.F.R. § 205.236(a). The statutory and regulatory directives directly conflict on this point.

The Secretary admits that OFPA requires dairy livestock to be fed organically produced feed for the twelve months before their milk is sold as organic. *See* 7 U.S.C. § 6509(e)(2). The Secretary characterizes the challenged regulation, which provides for a phased conversion process, as an "exception" to this requirement. The Secretary justifies this exception through a twofold argument for the validity of § 205.236(a): (1) OFPA is silent on the question of dairy herd conversion, so the Secretary has freedom to promulgate reasonable regulations on this subject; and (2) even if § 6509(e)(2) of the Act is construed to govern the conversion of dairy herds, the Act does not specify the meaning of

[9]This interpretation of "total feed ration" is consistent with the legislative history of OFPA. *See* S.Rep. No. 101-357, 1990 U.S.C.C.A.N. 4656, 5222 ("Livestock must be fed 100 percent organically grown feed.... [Dairy] livestock [must] be raised according to all of the above standards for ... not less than one year.").

the term "handled organically," so the Secretary may fill this gap with a reasonable interpretation, such as that contained in § 205.236(a) of the Rule. We reject both arguments.

First, the twelve-month requirement of § 6509(e)(2) has little meaning if it does not govern situations in which a dairy animal is being "converted" to organic production, and nothing in the Act indicates that the standards for organic production are different for entire herds than for single animals. Reasonably construed, OFPA sets forth clear requirements for dairy herd conversion in § 6509(e)(2), and the Secretary may not promulgate a regulation directly at odds with those statutory requirements.

Second, while the Act itself does not define "handled organically," the Secretary appears to have filled that gap with respect to the feed provided dairy animals in § 205.237(a), which, fairly construed, requires 100% organic feed. This interpretation is consistent with Congress' intent as expressed in the legislative history of OFPA. *See* S.Rep. No. 101-357, 1990 U.S.C.C.A.N. 4656, 5222. Even if the meaning of "handled organically" remained unclear, it would be impossible to reconcile the phased conversion process set forth in the challenged rule with the one-step process that § 6509(e) of the Act sets forth. Nothing in the Act's plain language permits creation of an "exception" permitting a more lenient phased conversion process for entire dairy herds.

The Secretary's creation of such an exception in the challenged provision of the Rule is contrary to the plain language of the Act. *See Chevron,* 467 U.S. at 842-43, 104 S.Ct. 2778. The District Court was in error in concluding otherwise, and we therefore reverse its judgment on this count of Harvey's complaint.

G. Eighth Count: Prohibition on Distinct Private Certification Standards

Harvey's final challenge is to a provision of the Final Rule that prohibits a certifying agent from

> requir[ing] compliance with any ... practices other than those provided for in the Act and the regulations ... as a condition of use of [the agent's] identifying mark: Provided, That, certifying agents certifying production or handling operations within a State with more restrictive requirements, approved by the Secretary, shall require compliance with such requirements as a condition of use of their identifying mark....

7 C.F.R. § 205.501(b)(2).

Harvey argues not that this regulation contravenes any specific provision of the Act, but that its limitation on more stringent private standards is counter to the purposes of OFPA. Specifically, Harvey maintains that the limitation will suppress competition among users of organic production and handling methods, create consumer confusion, and limit consumer choice. Harvey also argues for the first time on appeal that the regulation impermissibly regulates commercial speech and is therefore unconstitutional.

In fact, the challenged regulation does not frustrate the purposes of the Act; it furthers them. Congress clearly set forth OFPA's purposes in the Act itself. The aim of the system established by the Act is, in part, to help "establish national standards governing the marketing" of organic products and to "assure consumers that organically produced products meet a consistent standard." 7 U.S.C. § 6501. The Act accordingly calls for the establishment of a national organic production program and national standards for organic production, *id.* §§ 6503, 6504, and provides that products may be labeled "organically produced only if such product is produced and handled in accordance with this title," *id.* § 6505(a)(1)(A). OFPA further provides that State certification programs may be more restrictive than the federal program. *Id.* § 6507(b)(1). This provision, incidentally, allows for the type of competition developing more stringent organic standards sought by Harvey.

The Act is silent, however, on the issue of more stringent private standards or certification requirements, just as it is silent on the use of private certifiers' seals. Since this is a matter on which Congress did not

speak, *Chevron* requires us to assess whether the challenged regulation is a reasonable interpretation of the Act. *Chevron,* 467 U.S. at 843, 104 S.Ct. 2778. We conclude that it is. As noted above, the Act's provision for more stringent State standards allows for the kind of competitive advancement of standards Harvey desires. Additionally, as the Secretary points out, nothing in the challenged regulation prevents private certifiers from making truthful claims about the products they certify; it only bars such certifiers from applying more stringent requirements as a condition of use of their USDA-accredited certifying mark. This ban is a reasonable means of furthering the Act's concern with consistency.

We decline to consider Harvey's constitutional argument. Harvey concedes that he did not raise the issue before the District Court but argues that our consideration of it is warranted under *National Ass'n of Social Workers v. Harwood,* 69 F.3d 622, 627-29 (1st Cir.1995). In *Harwood,* we noted that we countenance consideration of arguments not raised below when six factors "heavily preponderate in favor of" considering them. *Id.* at 628. It may be appropriate to consider an omitted argument when it (1) is "purely legal in nature and lends itself to satisfactory resolution on the existing record without further development of the facts," (2) "raises an issue of constitutional magnitude," (3) "is highly persuasive" or threatens a "miscarriage of justice" if not addressed, (4) does not threaten prejudice or inequity to the adverse party if addressed, (5) was omitted inadvertently, and (6) "implicates matters of great public moment." *Id.* The issue here is purely legal and constitutional, satisfying the first and second *Harwood* factors, and it may have been omitted inadvertently, satisfying the fourth, but Harvey does not argue convincingly that failing to reach the claim will threaten a miscarriage of justice or that the issue is one of great public moment. *See id.* (noting that the "great public moment" factor is "perhaps most salient"). On balance, the factors do not preponderate heavily in favor of considering the question.

The provision at issue is a reasonable interpretation of a matter on which the Act is silent, so it was a valid exercise of the authority delegated to the Secretary by the Act. We therefore affirm the District

Court's grant of summary judgment to the Secretary on this count.

CONCLUSION

We **REMAND** the first count of Harvey's complaint to the District Court for entry of declaratory judgment clarifying the permissible interpretation of the regulation at issue in accordance with this opinion.

On the second, fifth, sixth, and eighth of Harvey's counts, we **AFFIRM** the District Court's grant of summary judgment to the Secretary.

On the third and seventh of Harvey's counts, we **REVERSE** the District Court's grant of summary judgment to the Secretary and **REMAND** the counts to the District Court for entry of summary judgment in Harvey's favor.

The parties shall each bear their own costs.

PLANT QUARANTINE ACT

COURT DECISION

THE CALIFORNIA AVOCADO COMMISSION, ET AL. v. USDA.[1]
No. CVF016578RECSMS.
Decision and Order
Filed May 18, 2005.

(Cite as: 2005 WL 1344203 (E.D.Cal.))

P.Q. – N.E.P.A. – P.P.A. – Rule making – Avocados, Mexican Hass.

Avocado growers in California challenged a final rule which would have amended a long standing ban on importation of Mexican Hass Avocados into specified regions of the U.S. After the challenge to the original final rule, the USDA amended the rule based upon statistical findings (no pests found in 5 years & 10 million avocados inspected). The court found the growers's challenge to the original final rule moot.

United States District Court,
E.D. California.

ORDER DISMISSING CASE AS MOOT.

COYLE, J.

Plaintiffs, four California avocado growers and an agency created by the state of California that purports to represent the interests of California's approximately 6,000 commercial avocado growers and their 21,000 employees, challenge the promulgation of two final rules--the Original Avocado Rule and the Avocado Expansion Rule--by the Animal and Plant Health Inspection Service ("APHIS") of the United States Department of Agriculture ("USDA"). The challenged APHIS rules permitted the regulated importation of Hass avocados from the Mexican state of Michoacan into specified regions of the United States.

[1]Mike Johanns has been substituted for his predecessor Ann Veneman pursuant to Rule 25(d) of the Federal Rules of Civil Procedure.

On November 18, 2002, the Court heard the parties' cross motions for summary judgment or summary adjudication of Plaintiffs' claims. On January 14, 2004, the Court issued an order dismissing as moot Plaintiffs' challenge to the Original Avocado Rule. Upon further consideration, the Court dismisses as moot Plaintiffs' challenge to the Avocado Expansion Rule.

I. Undisputed Factual Background

The Mexican Hass avocado was subject to a ban on import to the contiguous United States from 1914 to 1997 under federal plant quarantine laws and regulations. On November 15, 1994, APHIS published an advance notice of a proposed rule-making in the Federal Register, announcing that it had received a request from the Government of Mexico to allow importation of Hass avocados from the Mexican state of Michoacan.

The Original Avocado Rule was promulgated under the authority of the Plant Quarantine Act of 1912. Following the solicitation of comments on the advanced notice, a proposed rule was published and APHIS prepared risk analysis documents and an Environmental Assessment. APHIS concluded that the likelihood of pest introduction into the United States would be reduced to a negligible level if the mitigation measures set forth in the Original Avocado Rule were applied. After a 180-day period for public comment, the submission of written comments, and public hearings, APHIS published a final rule on February 5, 1997 (the "Original Avocado Rule"). The Original Avocado Rule allowed, subject to certain conditions, the importation of Hass avocados from November through February into 19 central and northern states and the District of Columbia.

APHIS received another request from the Government of Mexico to expand the scope of avocado importation. A new authorizing statute, the Plant Protection Act, was in effect when the request was received and remains in effect today. APHIS, via the notice and comment rule-making procedures, amended the Original Avocado Rule on November 1, 2001. The amended regulation, the "Avocado Expansion

Rule," was published at 7 C.F.R. § 319.56-2ff. It expanded the area of distribution to include 12 more states and it lengthened the shipping season to October 15 through April 15.

II. Procedural Background

Plaintiffs' complaint challenges the legality of both the Original Avocado Rule and the Avocado Expansion Rule, arguing that both rules were promulgated in excess of the USDA's statutory authority, were arbitrary and capricious based on the administrative record and were contrary to the USDA's general quarantine. Plaintiffs also argue that the USDA violated the National Environmental Policy Act because it failed to prepare an environmental impact statement for either rule.

As mentioned, on January 14, 2004, the Court dismissed as moot Plaintiffs' challenge to the Original Avocado Rule. The Court found that the Avocado Expansion Rule superseded the Original Avocado Rule and that, accordingly, the Original Avocado Rule was incapable of harming Plaintiffs.

III. Recent Developments

On May 24, 2004, APHIS published an advance notice of a proposed rule-making in the Federal Register. 69 Fed.Reg. 69749, 69749 (Nov. 30, 2004). The proposal was to amend the regulations governing the importation of Hass avocados from Michoacan, Mexico to, *inter alia,* expand the number of states into which the avocados could be imported and to allow distribution all months of the year. *Id.* The action was proposed both in response to a request by the Government of Mexico and based on APHIS' determination that the phytosanitary measures provided by the rule would reduce the risk of introduction of plant pests associated with Mexican Hass avocados in the United States.

APHIS solicited comments for a 60 day period that ended on July 23, 2004, and the risk assessment was updated based on the comments received. *Id.* Ultimately, APHIS estimated with 95 percent confidence that fewer that 387 infested avocados would enter the United States

under the new rule. However, APHIS also noted that no pests have been discovered in 6 years of inspections that included the examination of over 10 million avocados. *Id.* Based in part on this data as well as on statistical models, APHIS concluded that "it is slightly more likely that zero infested avocados will enter the United States than one infested avocado." *Id.*

The final rule went into effect on January 31, 2005. As amended, it provides that fresh Hass avocados may be imported pursuant to restrictions from Michoacan, Mexico into all states except California, Florida and Hawaii. 7 C.F.R. § 319.56-2ff (2005). The regulation further provides that after January 31, 2007, fresh Hass avocados may be imported into all states. *Id.*

IV. Mootness

Under Article III of the Constitution, federal courts have jurisdiction only over cases and controversies. *Public Util. Comm'n v. F.E.R.C.,* 100 F.3d 1451, 1458 (9th Cir.1996). A case becomes moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Id.* (quoting *Murphy v. Hunt,* 455 U.S. 478, 481, 102 S.Ct. 1181, 71 L.Ed.2d 353 (1982)). A key inquiry is whether a court is "able to grant effective relief." *Id.* (citing *GTE California, Inc. v. FCC,* 39 F.3d 940, 945 (9th Cir.1994)); *McBride Cotton & Cattle Corp. v. Veneman,* 290 F.3d 973, 982 (9th Cir.2002).

Here, APHIS followed the notice and comment procedures for rule-making required by the Administrative Procedures Act. 5 U.S.C. §§ 551(5), 553. Under those procedures, an amended rule as promulgated is final and supersedes the earlier rule. Accordingly, the Avocado Expansion Rule ceased having legal effect on January 31, 2005, when the New Avocado Rule became effective. As was the case with respect to the Original Avocado Rule, the Court cannot grant relief from an inoperative rule. *See* Doc. 89 at 7. Consequently, Plaintiffs' challenge to the Avocado Expansion Rule is moot and the Court dismisses the remainder of the complaint on the grounds that the Court lacks subject matter jurisdiction. *See Sannon v. United States,* 631 F.2d 1247, 1250-51

(5th Cir.1980) (stating "[t]hat newly promulgated regulations immediately applicable to litigants in a given case can have the effect of mooting what once was a viable case is without doubt").

ACCORDINGLY, the remainder of Plaintiffs' complaint is DISMISSED AS MOOT.

IT IS SO ORDERED.

PLANT QUARANTINE ACT

DEPARTMENTAL DECISIONS

In re: MIGUEL A. HIDALGO.
P.Q. Docket No. 03-0008.
Decision and Order.
Filed January 24, 2005.

PQ – Plant quarantine – Default – Failure to file timely answer – Mangoes – Service.

The Judicial Officer affirmed the Default Decision by Administrative Law Judge Jill S. Clifton concluding Respondent imported six mangoes into the United States from Peru in violation of the Plant Protection Act (7 U.S.C. §§ 7701-7772) and regulations issued under the Plant Protection Act (7 C.F.R. § 319.56 *et seq*.) and assessing Respondent a $500 civil penalty. The Judicial Officer rejected Respondent's contention that he was not served with the complaint. The Judicial Officer stated the Hearing Clerk properly served Respondent with the complaint on November 12, 2002, in accordance with 7 C.F.R. § 1.147(c)(1), by mailing the complaint by certified mail to Respondent's last known residence where someone signed for the complaint. The Judicial Officer 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.

James A. Booth, 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

Kevin Shea, Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on November 7, 2002. Complainant instituted this proceeding under the Plant Protection Act (7 U.S.C. §§ 7701-7772); regulations issued under the Plant Protection Act (7 C.F.R. §§

319.56-.56-8); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges that, on or about March 4, 2001, Miguel A. Hidalgo [hereinafter Respondent] imported six mangoes from Peru into the United States at Houston, Texas, in violation of 7 C.F.R. §§ 319.56(c), .56-2(e), and .56-2i (Compl. ¶ II).

The Hearing Clerk served Respondent with the Complaint, the Rules of Practice, and a service letter on November 12, 2002.[1] Respondent failed to file an answer to the Complaint within 20 days after service, as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)).

On March 8, 2004, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for Adoption of Proposed Default Decision and Order and a Proposed Default Decision and Order. The Hearing Clerk served Respondent with Complainant's Motion for Adoption of Proposed Default Decision and Order, Complainant's Proposed Default Decision and Order, and a service letter on March 11, 2004.[2] Respondent failed to file objections to Complainant's Motion for Adoption of Proposed Default Decision and Order and Complainant's Proposed Default Decision and Order within 20 days after service, as required by section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

On April 12, 2004, 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 [hereinafter Initial Decision and Order]: (1) finding that on or about March 4, 2001, Respondent imported six mangoes from Peru into the United States at Houston, Texas; (2) concluding that Respondent violated the Plant Protection Act and 7 C.F.R. § 319.56 *et seq.*; and (3) assessing Respondent a $500 civil penalty (Initial Decision and Order at 2).

On May 4, 2004, Respondent appealed to the Judicial Officer. Complainant did not file a response to Respondent's appeal petition, and on January 11, 2005, the Hearing Clerk transmitted the record to the

[1]Domestic Return Receipt for Article Number 7001 0360 0000 0304 2912.

[2]Domestic Return Receipt for Article Number 7001 0360 0000 0304 7771.

Judicial Officer for consideration and decision.

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

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 104—PLANT PROTECTION

. . . .

SUBCHAPTER II—INSPECTION AND ENFORCEMENT

. . . .

§ 7734. Penalties for violation

. . . .

(b) Civil penalties

(1) In general

Any person that violates this chapter, or that forges, counterfeits, or, without authority from the Secretary, uses, alters, defaces, or destroys any certificate, permit, or other document provided for in this chapter may, after notice and

opportunity for a hearing on the record, be assessed a civil penalty by the Secretary that does not exceed the greater of—

(A) $50,000 in the case of any individual (except that the civil penalty may not exceed $1,000 in the case of an initial violation of this chapter by an individual moving regulated articles not for monetary gain), $250,000 in the case of any other person for each violation, and $500,000 for all violations adjudicated in a single proceeding; or

(B) twice the gross gain or gross loss for any violation, forgery, counterfeiting, unauthorized use, defacing, or destruction of a certificate, permit, or other document provided for in this chapter that results in the person deriving pecuniary gain or causing pecuniary loss to another.

(2) Factors in determining civil penalty

In determining the amount of a civil penalty, the Secretary shall take into account the nature, circumstance, extent, and gravity of the violation or violations and the Secretary may consider with respect to the violator—

(A) ability to pay;

(B) effect on ability to continue to do business;

(C) any history of prior violations;

(D) the degree of culpability; and

(E) any other factors the Secretary considers appropriate.

7 U.S.C. § 7734(b)(1)-(2).

7 C.F.R.:

TITLE 7—AGRICULTURE

. . . .

SUBTITLE B—REGULATIONS OF THE DEPARTMENT

OF AGRICULTURE

. . . .

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

. . . .

PART 319—FOREIGN QUARANTINE NOTICES

. . . .

SUBPART—FRUITS AND VEGETABLES

QUARANTINE

§ 319.56 Notice of quarantine.

. . . .

(c) On and after November 1, 1923, and until further notice, the importation from all foreign countries and localities into the United States of fruits and vegetables, and of plants or portions of plants used as packing material in connection with shipments of such fruits and vegetables, except as provided in the rules and regulations supplemental hereto, is prohibited: *Provided*, That whenever the Deputy Administrator for the Plant Protection and Quarantine Programs shall find that existing conditions as to pest risk involved in the importation of the articles to which the regulations supplemental hereto apply, make it safe to modify, by making less stringent, the restrictions contained in any of such regulations, he shall publish such findings in administrative instructions, specifying the manner in which the regulations shall be made less stringent, whereupon such modification shall become effective; or he may, when the public interests will permit, with respect to the importation of such articles into Guam,

upon request in specific cases, authorize such importation under conditions, specified in the permit to carry out the purposes of this subpart, that are less stringent than those contained in the regulations.

§ 319.56-2 Restrictions on entry of fruits and vegetables.

. . . .

(e) Any other fruit or vegetable, except those restricted to certain countries and districts by special quarantine [footnote omitted] and other orders now in force and by any restrictive order as may hereafter be promulgated, may be imported from any country under a permit issued in accordance with this subpart and upon compliance with the regulations in this subpart, at the ports as shall be authorized in the permit, if the U.S. Department of Agriculture, after reviewing evidence presented to it, is satisfied that the fruit or vegetable either:

(1) Is not attacked in the country of origin by injurious insects, including fruit and melon flies (Tephritidae);

(2) Has been treated or is to be treated for all injurious insects that attack it in the country of origin, in accordance with conditions and procedures that may be prescribed by the Administrator;

(3) Is imported from a definite area or district in the country of origin that is free from all injurious insects that attack the fruit or vegetable, its importation can be authorized without risk, and its importation is in compliance with the criteria of paragraph (f) of this section; or

(4) Is imported from a definite area or district of the country of origin that is free from certain injurious insects that attack the fruit or vegetable, its importation can be authorized without risk, and the criteria of paragraph (f) of this section are met with regard to those certain insects, provided that all other injurious insects that attack the fruit or vegetable in the area or district of the country of origin have been eliminated from the fruit or vegetable by treatment or any other procedures that may be prescribed by the Administrator.

§ 319.56-2i Administrative instructions prescribing treatments for mangoes from Central America, South America, and the West Indies.

(a) *Authorized treatments.* Treatment with an authorized treatment listed in the Plant Protection and Quarantine Treatment Manual will meet the treatment requirements imposed under § 319.56-2 as a condition for the importation into the United States of mangoes from Central America, South America, and the West Indies. The Plant Protection and Quarantine Treatment Manual is incorporated by reference. For the full identification of this standard, see § 300.1 of this chapter, "Materials incorporated by reference."

(b) *Department not responsible for damage.* The treatments for mangoes prescribed in the Plant Protection and Quarantine Treatment Manual are judged from experimental tests to be safe. However, the Department assumes no responsibility for any damage sustained through or in the course of such treatment.

7 C.F.R. §§ 319.56(c), .56-2(e), .56-2i (2001).

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

Findings of Fact

1. Respondent is an individual with a mailing address of 9608 Nonquitt Drive, Fairfax, Virginia 22031-1711.

2. On or about March 4, 2001, Respondent imported six mangoes from Peru into the United States at Houston, Texas, in violation of 7 C.F.R. §§ 319.56(c), .56-2(e), and .56-2i because importation of such mangoes from Peru into the United States is prohibited, except under specific conditions.

Conclusions

1. By reason of the Findings of Fact, Respondent has violated the Plant Protection Act and regulations issued under the Plant Protection Act (7 C.F.R. § 319.56 *et seq*.).

2. The $500 civil penalty assessed against Respondent in the Order is a reasonable, adequate, and appropriate civil penalty for Respondent's violations.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent states in his appeal petition that he moved from 9608 Nonquitt Drive, Fairfax, Virginia 22031, 5 years ago or more and that he did not receive any of the Hearing Clerk's "previous letters." I infer Respondent asserts the first filing Respondent received in this proceeding is the ALJ's Initial Decision and Order.

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 residence 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).

On November 7, 2002, the Hearing Clerk sent the Complaint, the Rules of Practice, and a service letter by certified mail to Respondent at 9608 Nonquitt Drive, Fairfax, Virginia 22031-1711. Someone signed the Domestic Return Receipt for Article Number 7001 0360 0000 0304 2912 attached to the envelope containing the Complaint, Rules of Practice, and service letter,[3] and the United States Postal Service stamped the Domestic Return Receipt for Article Number 7001 0360 0000 0304 2912 with the date of delivery, November 12, 2002.[4]

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

[3]The recipient of the Complaint, the Rules of Practice, and the service letter did not print his or her name in the space provided on the Domestic Return Receipt for Article Number 7001 0360 0000 0304 2912; however, the recipient signed the Domestic Return Receipt for Article Number 7001 0360 0000 0304 2912 "Shog."

[4]See note 1.

residence and someone signs for the document.[5] 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 November 12, 2002.

Sections 1.136(c) and 1.139 of the Rules of Practice 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 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.

[5] *In re Darrall S. McCulloch* (Decision as to Phillip Trimble), 62 Agric. Dec. 83, 95 2003), *aff'd sub nom. Trimble v. United States Dep't of Agric.*, 87 Fed. Appx. 456, 2003 WL 23095662 (6th Cir. 2003); *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).

7 C.F.R. §§ 1.136(c), .139.

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

> The respondent shall have twenty (20) days after service of this Complaint in which to file an Answer with the Hearing Clerk, United States Department of Agriculture, Room 1081 South Building, Washington, D.C. 20250-9200, in accordance with the applicable Rules of Practice (7 C.F.R. § 1.136). Failure to deny or otherwise respond to any allegation in this Complaint shall constitute an admission of the allegation. Failure to file an Answer within the prescribed time shall constitute an admission of the allegations in this Complaint and a waiver of hearing.

Compl. at 2.

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
>
> November 7, 2002
>
> Mr. Miguel A. Hidalgo
> 9608 Nonquitt Drive
> Fairfax, Virginia 22031-1711
>
> Dear Mr. Hidalgo:
>
> Subject: In re: Miguel A. Hidalgo, Respondent -
> P.Q. Docket No. 03-0008
>
> Enclosed is a copy of a Complaint which has been filed with this office under the Federal Plant Pest Act, as amended and the Plant Quarantine Act, as amended.

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

The rules specify that you may represent yourself personally or by an attorney of record. Unless an attorney files an appearance in your behalf, it shall be presumed that you have elected to represent yourself personally. Most importantly, you have 20 days from the receipt of this letter to file with the Hearing Clerk an original and 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 November 7, 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 December 2, 2002. Respondent's first filing in this proceeding is dated April 30, 2004, and was filed May 4, 2004, 1 year 5 months 2 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 purposes of this proceeding, to have admitted the allegations of the Complaint.

On December 13, 2002, the Hearing Clerk sent a letter to Respondent informing him that his answer to the Complaint had not been received within the time prescribed in section 1.136 of the Rules of Practice (7 C.F.R. § 1.136). Respondent failed to respond to the Hearing Clerk's December 13, 2002, letter.

On March 8, 2004, Complainant filed a Motion for Adoption of Proposed Default Decision and Order and a Proposed Default Decision and Order, and the Hearing Clerk sent Complainant's Motion for Adoption of Proposed Default Decision and Order, Complainant's Proposed Default Decision and Order, and a service letter by certified mail to Respondent at 9608 Nonquitt Drive, Fairfax, Virginia 22031-1711. "Ruth Nancy Hidalgo" signed the Domestic Return Receipt for Article Number 7001 0360 0000 0304 7771 attached to the envelope containing Complainant's Motion for Adoption of Proposed Default Decision and Order, Complainant's Proposed Default Decision and Order, and the service letter. The United States Postal Service stamped the Domestic Return Receipt for Article Number 7001 0360 0000 0304 7771 with the date of delivery, March 11, 2004. Therefore,

the Hearing Clerk properly served Respondent with Complainant's Motion for Adoption of Proposed Default Decision and Order and Complainant's Proposed Default Decision and Order in accordance with section 1.147(c)(1) of the Rules of Practice (7 C.F.R. § 1.147(c)(1)) on March 11, 2004.

Respondent failed to file objections to Complainant's Motion for Adoption of Proposed Default Decision and Order and Complainant's Proposed Default Decision and Order within 20 days after service, as provided in section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

On April 12, 2004, 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,[6] generally there is no

[6]*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 Perishable Agricultural Commodities Act 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*

(continued...)

basis for setting aside a default decision that is based upon a respondent's failure to file a timely answer.[7] The Rules of Practice provides 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 5 months 2 days after Respondent's answer was due. Respondent's failure to file a timely answer is deemed, for 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.

To meet the requirement of due process of law, it is only necessary that notice of a proceeding be sent in a manner "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).[8] The Rules of Practice, which provides for service by certified

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[6](...continued)
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).

[7]*See generally In re Bibi Uddin*, 55 Agric. Dec. 1010 (1996) (holding the default decision was properly issued where the respondent's response to the complaint was filed more than 9 months after service of the complaint on the respondent and the respondent is deemed, by her failure to file a timely answer, to have admitted the violation of 7 C.F.R. § 319.56 alleged in the complaint); *In re Sandra L. Reid*, 55 Agric. Dec. 996 (1996) (holding the default decision was properly issued where the respondent's response to the complaint was filed 43 days after service of the complaint on the respondent and the respondent is deemed, by her failure to file a timely answer, to have admitted the violation of 7 C.F.R. § 319.56(c) alleged in the complaint).

[8]*See also Trimble v. United States Dep't of Agric.*, 87 Fed. Appx. 456, 2003 WL 23095662 (6th Cir. 2003) (holding that sending a complaint to the respondent's last known business address by certified mail is a constitutionally adequate method of notice and lack of actual receipt of the certified mailing does not negate the constitutional adequacy of the attempt to accomplish actual notice); *DePiero v. City of Macedonia*, 180 F.3d 770, 788-89 (6th Cir. 1999) (holding service of a summons at the plaintiff's (continued...)

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

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[8](...continued)
last known address is sufficient where the plaintiff is not incarcerated and where the city had no information about the plaintiff's whereabouts that would give the city reason to suspect the plaintiff would not actually receive the notice mailed to his last know address), *cert. denied*, 528 U.S. 1105 (2000); *Weigner v. City of New York*, 852 F.2d 646, 649-51 (2d Cir. 1988) (stating 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), *cert. denied*, 488 U.S. 1005 (1989); *NLRB v. Clark*, 468 F.2d 459, 463-65 (5th Cir. 1972) (stating due process does not require receipt of actual notice in every case).

> 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.]

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.[9]

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

ORDER

Respondent is assessed a $500 civil penalty. The civil penalty shall be paid by certified check or money order, made payable to the Treasurer of the United States, and sent to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Payment of the civil penalty shall be sent to, and received by, the

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

United States Department of Agriculture, APHIS Field Servicing Office, Accounting Section, within 60 days after service of this Order on Respondent. Respondent shall state on the certified check or money order that payment is in reference to P.Q. Docket No. 03-0008.

RIGHT TO JUDICIAL REVIEW

The Order assessing Respondent a civil penalty is a final order reviewable under 28 U.S.C. §§ 2341-2351.[10] Respondent must seek judicial review within 60 days after entry of the Order.[11] The date of entry of the Order is January 24, 2005.

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[10]7 U.S.C. § 7734(b)(4).

[11]28 U.S.C. § 2344.

SUGAR MARKETING ALLOTMENT

DEPARTMENTAL DECISIONS

In re: AMALGAMATED SUGAR COMPANY, L.L.C.
SMA Docket No. 04-0003.
Decision and Order.
Filed February 7, 2005.

SMA – "Permanent Termination" of operations – "Sale of all assets" – Sugar Marketing allocation, transfer of – Pro-rata distribution of sugar marketing allocation – Processing capacity, lack of critical equipment for.

David Bunde, Kevin Brosch, Michael Greear, David Bieging, Steven Z. Kaplan, Steven Adducci, Ralph Linden for Complainant and Intervenors.
Jeffrey Kahn, for Respondent.
Decision and Order issued by Administrative Law Judge Victor W. Palmer

DECISION

Petitioner, Amalgamated Sugar Company ("Amalgamated"), is a sugar beet processor appealing a decision by the Commodity Credit Corporation ("CCC") that allowed a competitor, American Crystal Sugar Company ("American Crystal") to acquire all of the sugar beet marketing allocation formerly held by a different processor, Pacific Northwest Sugar Company ("Pacific Northwest", "PNW" or "PNSC"). Allocations for the marketing of beet sugar among beet sugar processors are applicable each crop year that allotments are in effect under the Agricultural Adjustment Act of 1938, as amended by the Farm Security and Rural Investment Act of 2002 (7 U.S.C.§§1359 aa-kk) ("Act" for the Act as amended and "2002 Farm Bill" for the 2002 amendatory provisions). The initial decision granting the transfer was made by CCC on September 16, 2003. In response to Petitioner's request for reconsideration, the CCC's Executive Vice President on November 14, 2003, issued a Reconsidered Determination denying the requested overturn of the decision. Petitioner's appeal from the Reconsidered Determination was filed pursuant to 7U.S.C.§1359 ii and the Rules of

Practice issued under 7 C.F.R.§1435.320 (b)[1]. The Act and the Rules of Practice provide for a hearing on the appeal by an Administrative Law Judge in accordance with 5 U.S.C.§§554 and 556 ("the Administrative Procedure Act", or "the APA"), and for intervention in the proceeding by affected persons. My decision as the assigned Administrative Law Judge, is based on the certified copy of the Administrative Record ("A.R.") upon which the Executive Vice President based his Reconsidered Determination, matters that have been officially noted, the transcribed testimony and exhibits received at the hearing and proposed findings of fact, conclusions, orders and briefs by the parties.[2] All proposed findings and conclusions were considered and are incorporated as part of this decision or, if not incorporated, rejected as not in accord with the material issues of fact, law or discretion presented on the record. This decision upon becoming effective, reverses the Reconsidered Determination by the Executive Vice President for the reasons set forth in the following findings, conclusions and discussion, and directs that the marketing allocation be distributed in future crop years to all beet sugar processors on a pro rata basis.

The Parties and the Issues

Petitioner, Amalgamated, has been joined in this appeal by two supporting Intervenors, Southern Minnesota Beet Sugar Cooperative L.L.C. ("SMBSC") and Wyoming Sugar Company ("Wyoming"). American Crystal has intervened in support of CCC. The Executive Vice President stated in his Reconsidered Determination that is the subject of this appeal, "...after careful reconsideration, I cannot find justification to overturn CCC's decision". (A.R. at 3). He based the decision on his interpretation of subparagraphs (E) and (F) of section 359d(b)(2) of the Act (7U.S.C.§1359dd(b)(2)(E) and(F) that read:

(E) PERMANENT TERMINATION OF OPERATIONS OF A PROCESSOR– If a processor of beet sugar has been dissolved, liquidated in a bankruptcy proceeding, or otherwise has permanently

[1] The Rules of Practice are attached as Addendum I. [Not included - Editor]

[2] *See* the Rules of Practice, Addendum I, particularly, Rule 1(b), Rule 2(a)(b)(c)(d)(e) and (g), Rule 5(a), Rule 6, Rule 9 and Rule 10.

terminated operations (other than in conjunction with a sale or other disposition of the processor or the assets of the processor), the Secretary shall –

(i) eliminate the allocation of the processor provided under this section; and

(ii) distribute the allocation to other beet sugar processors on a pro rata basis.

(F) SALE OF ALL ASSETS OF A PROCESSOR TO ANOTHER PROCESSOR – If a processor of beet sugar (or all of the assets of the processor) is sold to another processor of beet sugar, the Secretary shall transfer the allocation of the seller to the buyer unless the allocation has been distributed to other beet processors under subparagraph (E).

The Reconsidered Determination stated (A.R. at 3):

CCC determined that PNW was certainly not dissolved nor liquidated in a bankruptcy proceeding, but instead permanently terminated in conjunction with the sale of its assets. The act of permanent termination was simultaneous with the sale of its assets. The act of permanent termination was simultaneous with the act of closing the deal on the sale of PNW's assets. The former event did not precede the latter. If CCC had determined PNW was permanently terminated for reasons other than in conjunction with the sale of its assets, paragraph E would have dictated the outcome. While the statute does not define what it means to be 'permanently terminated', PNW was still recognized by CCC as a processor at the time of the sale, September 8, 2003.

As the beneficiary of CCC's decision, American Crystal has intervened to protect itself from losing the transferred Pacific Northwest marketing allocation. Petitioner and its two supporting Iintervenors seek the overturn of the CCC decision as beet sugar processors who shall share in the distribution of the marketing allocation under subparagraph E that controls when subparagraph F does not.

The Appeal Proceedings

Amalgamated filed its Petition on December 4, 2003. CCC filed an Answer, a Motion to Dismiss, and a Certified Copy of the Administrative Record on December 23, 2003. American Crystal filed a Notice of Intervention, Answer and Motion to Dismiss on January 14, 2204. Amalgamated filed a brief opposing the Motions to Dismiss on January 20, 2004. Both SMBSC and Wyoming filed Notices of Intervention on January 20, 2004. On March 2, 2004, Judge Jill S. Clifton who was then assigned to this case, held a telephone conference and set a schedule for the parties to follow in respect to a Motion for Summary Judgment American Crystal indicated it would file. On March 25, 2004, American Crystal filed a Memorandum in support of its Motion to Dismiss the Petition or in the Alternative for Summary Judgment. Also filed at that time, was an affidavit attesting to facts by American Crystal's Counsel, Steven Z. Kaplan. SMBSC filed its response to the Motions on May 3, 2004. American Crystal filed a reply to SMBSC's response on May 21, 2004. This proceeding was reassigned to me, and on June 23, 2004, I issued an Order denying the Motions to Dismiss and the Motion for Summary Judgment.[3] On August 10, 2004, I conducted a teleconference with the parties scheduling dates for identifying witnesses and exhibits, holding an oral hearing and the filing of pre-hearing briefs.

Pre-hearing briefs were filed and the oral hearing was held on September 21-23 and on October 4 and 5, 2004 in Washington, DC. An amended certified copy of the Administrative Record respecting the Executive Vice President's Reconsidered Determination was filed and made part of the record at the outset of the hearing. Post-hearing briefing was completed on November 24, 2004. References to the transcript of the oral hearing are shown as "Tr." plus the day of the hearing and the page of that day's transcript, e.g., "Tr. Sept. 21 at 25". Exhibits of Amalgamated and SMBSC are cited as "AMAL–SM - _____)". American Crystal's Exhibits are cited as "ASCS - ___". CCC's Administrative Record is cited as "A.R. _____." and CCC's amended Administrative Record is cited as A.R. add ____."

Findings of Fact

[3] Copy of my Order is attached as Addendum 2 [See Miscellaneous Orders this volume –Editor.].

1. The Columbia River Sugar Company (CRSC) was formed as a cooperative in 1991, to build and operate a sugar beet processing factory in Moses Lake, Washington. Sugar beets had been previously grown in the Columbia River Basin but the processing plant located these had gone out of business and was inoperable.
2. CRSC formed the Pacific Northwest Sugar Company in partnership with the Holly Sugar Company (Holly Sugar) to construct the factory, which took place in 1996 through the summer of 1998. (AMAL-SM 58 at 8).
3. In 1998, sugar beet processing was started at the Moses Lake factory under the direction of Holly Sugar whose personnel had experience gained from operating other factories. The Moses Lake operations did not go well. Equipment and system breakdowns caused frequent factory shutdowns for repairs and changes to the system. Approximately half of the sugar that went into its silos was unmarketable. The factory had a rate of recovery of sugar from the beets it processed of only 25% and two-thirds of the sugar beets delivered to the plant were not processed but instead rotted (AMAL-SM 58 at 8).
4. In 1999, Holly Sugar pulled out of the partnership conveying its interest in Pacific Northwest to CRSC. That year, Pacific Northwest operating the factory without assistance from Holly Sugar, hired a number of experienced employees to operate the factory. Plant equipment was improved through the investment of several million dollars.

The sugar recovery rate for the 1999 - 2000 processing season, increased from 25% to 65%. However, to be profitable, a sugar processing plant requires a recovery rate in excess of 80% with 90% being the optimum target (Tr. Sept. 22 at 52- 67; Tr. Oct 5 at 6-10).
5. In the 2000-2001 processing season Pacific Northwest made additional improvements to its plant's operations and claimed to have again increased its sugar recovery to 82%. However, to reach 82%, the plant's chief operating officer had directed that residual molasses be recycled through its equipment; a practice that cost more in energy costs than the value of the additional sugar obtained (Tr. Oct. 5 at 10-11).
6. Operating a sugar beet processing plant is very expensive requiring large sums of capital. In 1999, Pacific Northwest owed $159-160

million to its principal lender and various creditors (AMAL-SM-58 at 8). In August of 1999, with strong congressional support, Pacific Northwest obtained a loan guarantee from the U.S. Department of Agriculture's Rural Development Business Guarantee loan project that enable it to borrow $20 million to upgrade equipment, pay vendors and provide working capital. In December 2002, the U.S. Department of Agriculture, Office of the Inspector General Western Region, issued an audit report that reviewed the circumstances of the loan guarantee (AMAL-SM-58). The Department had guaranteed 70 percent or $14 million of the loan. In the spring of 2000, Pacific Northwest defaulted on the loan and the Rural Development was left with an unpaid balance of $12.1 million after the proceeds from liquidation were applied to the loan. When the $20 million guaranteed loan was made, Pacific Northwest pledged as collateral the land, plant and equipment of the company that was initially valued at $162 million. The lender discounted the appraised value to a range of $40 million to $70 million in recognition of the limited opportunities to dispose of company assets and the lack of a production history (AMAL-SM-58 at 9). The lender also obtained a liquidation appraisal that disclosed that the collateral pledged by Pacific Northwest had a scrap value of $2 million and a forced liquidation value of $10 million. The Inspector General's Audit Report concluded:

> "By the spring of 2000, the Company's second attempt to establish the viability of the processing plant had failed. The failure was attributable to the borrower's poor financial condition and its inability to maintain sufficient resources to survive equipment failure and added production costs. The plant closed and the lender was force to liquidate the company's assets. In May 2001, the collateral was sold for $2.1 million. After the company paid liquidation costs, $1.9 million was applied against the guaranteed loan amount, leaving Rural Development obligated to pay the lender $12.1 million.["] (AMAL-SM-58 at 9).

7. In August/September 2000, at the suggestion of Cobank which was Pacific Northwest's principal lender, Pacific Northwest retained Emmer Associates, Inc., an agricultural financing and debt restructuring firm to work on its debt problems (Tr. Sept. 22 at 46-47). The Chief Executive

Officer of Emmer Associates, Allan Lambrecht, personally worked on finding solutions for Pacific Northwest. In his opinion, Pacific Northwest had three principal needs: (1) the restructuring of its onerous debt; (2) a viable plant; and (3) a favorable price for the sugar the plant would produce (Tr. Sept. 22 at 61-62). At that time, the autumn of 2000, Pacific Northwest owed $159-160 million to four lenders with Cobank being the principal lender (Tr. Sept. 22 at 65-66). Efforts to restructure the debt did not go fast enough to maintain sugar beet planting commitments with growers and in March of 2001, Pacific Northwest released its growers from planting commitments. This decision was also based on the fact that the California energy crisis of 2000 – 2001 affected the Pacific Northwest and power companies paid both growers and the plant not to use power (Tr. Sept. 22 at 73). There was also a drought that year and since most of the sugar beets would have been grown on irrigated land, payments for water were avoided by not planting a sugar beet crop (Tr. Sept. 22 at 74-75). In June of 2001, a restructuring arrangement was completed under which the plant was sold to a third party, Central Leasing, for $2.1 million. Pacific Northwest then leased the plant for the 2001-2002 processing season with a purchase option to buy back the plant in the 12-month period following June 2001 for the $2.1 million (Tr. Sept. 22 at 75-76). The lease payment was set at the rate of interest Central Leasing was paying for having borrowed the $2.1 million it paid for the plant. (Tr. Sept. 22 at 80). Under the arrangement, the lenders allowed the plant to be sold free and clear of debts and liens by releasing their security so that title was transferred unencumbered to Central Leasing (Tr. Sept. 22 at 78). The $2.1 million was paid to Cobank and the lenders who were owed some $159-160 million (Tr. Sept 22 at 79). By these means the old debt no longer needed to be serviced but new capital was needed for the plant to operate (Tr. Sept. 22 at 85-86). Everyone understood, in June 2001, that the old debt of $159-160 million less the $2.1 million paid against it would not be paid (Tr. Sept.22 at 87). The debt would be carried on Pacific Northwest's balance sheet as unsecured debt but no payments on it would be made (Tr. Sept. 22 at 87). A principal problem in securing new capital for the plant to operate after June 2001, was that two very substantial agricultural lenders had been taken down, dramatically, wherein they released their collateral and lost $160 million that they

agreed they would not be able to recover. Normal commercial agricultural channels for borrowing money were therefore no longer available (Tr. Sept. 22 at 88).

8. On behalf of Pacific Northwest, Mr. Lambrecht attempted to secure capital for it to continue as a sugar beet processor from a variety of sources subsequent to the June 2001 arrangement with creditors and the sale and leaseback of the plant. Pacific Northwest and Mr. Lambrecht met or communicated with Global Ventures, General Mills, Cargill, American Federal Securities, Aegon Insurance Company, Oxbow Financial, Selby Financial, British Sugar, American Crystal, Michigan Sugar, Minn Daks, Southern Minnesota, and Amalgamated Sugar in an effort to find funding and, if possible, a partner to operate the Moses Lake plant (Tr. Sept. 22 at 90-106). None of these potential sources of capital resulted in necessary capital being obtained prior to the March 2002 deadline for obtaining sugar beet growing commitments for the 2002-2003 processing season (Tr. Sept. 22 at 108-109).

9. Sugar beet processing operations at the Moses Lake plant ceased in February 2001 and never resumed (Tr. Oct 5 at 11). No sugar beet crop was planted by CRSC growers in 2002 or 2003 (Tr. Sept. 21 at 188).

10. On July 23, 2001, Pacific Northwest was administratively dissolved by the Secretary of State of the State of Washington for failure to file an annual license renewal application as required by Washington State law (ASCS-70). Pacific Northwest was not reinstated until September 8, 2003 when it filed necessary documents (ASCS-71).

11. After Pacific Northwest announced it would not have beets planted for the 2001 crop year, it laid off employees at the Moses Lake plant and reduced its workforce to less than 40 people (Tr. Oct. 5 at 12). The plant when fully operational on October 19, 2000, had employed 290 people (AMAL-SM-22 at 3).

12. In December 2001, Pacific Northwest forfeited 91 million pounds of sugar to the CCC and the sugar was then sold on the market to Amalgamated and another bidder. When Amalgamated finally obtained access to the plant site in April 2002 to take the sugar, there were no people working there. Indemnity agreements and arrangements for cutting open the expensive tanks where the sugar was stored were made exclusively with Central Leasing with no participation by Pacific Northwest (Tr. Oct. 5 at 42-58). Central Leasing accepted a monetary

payment in lieu of actual repairs to the tanks and the tanks were not repaired (Tr. Oct. 5 at 59-60).

13. At the end of March 2002, Pacific Northwest's lease arrangement for the Moses Lake plant ended after having failed to pay the agreed rent, and the lease was not renewed (Tr. Sept. 22 at 115).

14. In May of 2002, the 2002 Farm Bill was signed and Pacific Northwest subsequently received a sugar beet marketing allocation of 2.7% of the future allotments under the Act, on the basis of its production record for 1998, 1999 and 2000.

15. In July of 2002, a daylong meeting was held in Spokane, Washington at the law offices of Pacific Northwest's attorneys that included Mr. Lambrecht, representatives of Central Leasing, all five of Pacific Northwest's Board of Directors, a Cargill representative who attended by telephone and a representative for Oxbow Capital and Selby Financial (Tr. Sept.22 at 119-121). Pacific Northwest's Board of Directors made it clear "they were really done spending money, and would pay no further bills from financial consultants or attorneys (Tr. Sept. 22 at 123). In fact, Mr. Lambrecht had not been paid by Pacific Northwest since January 2002 (Tr. Sept 20 at 123).

16. It was decided at the July 2002 meeting that a new entity, Washington Sugar Company, LLC ("Washington Sugar") would replace Pacific Northwest so that Pacific Northwest would not incur any more debts or obligations in respect to any activity to revive sugar beet processing operations at the Moses Lake plant (Tr. Sept. 22 at 125). Washington Sugar was a different company in terms of its ownership base from Pacific Northwest. The only owner of Washington Sugar was Scott Lybbert who was but one of the five directors of Pacific Northwest that was a wholly owned subsidiary of CRSC (Tr. Sept. 22 at 129). CRSC had no interest in Washington Sugar (Tr. Sept. 22 at 130).

17. A year after its June 2001 purchase of the Moses Lake plant, Central Leasing's leaseback/purchase option agreement with Pacific Northwest ended, and Central Leasing started to dispose of the plant's equipment and sought other ways to recover its investment. In July 2002, it leased two beet pilers to Amalgamated and in December 2002, Amalgamated brought the pilers from Central Leasing for $215,000 (Tr. Oct. 5 at 63; AMAL-SM-57). On June 10, 2003, Central Leasing sold the three remaining pilers of the Moses Lake plant to Amalgamated for

$700,000 (Tr. Oct. 5 at 63; AMAL-SM-59). To avoid frost damage to beets during the short harvest opportunity window in Moses Lake, beet pilers are required for beets to be received, cleaned and piled for long-term storage so the factory can operate for a longer period of time (Tr. Oct. 5 at 64-65). On April 16, 2004, Central Leasing sold to Crab Creek Sugar Company centrifuges, conveyors, filters, pumps and other sugar beet processing equipment identified in a Bill of Sale of that date (ASCS-94). By early 2002, the computer system that allowed the Moses Lake plant to be operated as an automated factory was no longer available. (Tr. Oct. 5 at 14-16).

18. In July 2002, Pacific Northwest lost its short-term lease on the Moses Lake facility for failure to pay rent and no longer had a purchase option for the plant in place (Tr. Sept. 23 at 6). Pacific Northwest owned no sugar beet processing equipment and had been unable to attract any new financing. At that point, the Board of Directors of Pacific Northwest informed their lawyers and consultants that they "were really done spending money" and that "they were not ready to stand on the line and incur any more debt or obligations for the people pursuing" further efforts to revive the Moses Lake plant (Tr. Sept. 22 at 122 and 125).

19. The former vice-president of Pacific Northwest and a CRSC member, Scott Lybbert, formed a new company, Washington Sugar, to pursue the revival of sugar beet processing at the Moses Lake plant. On December 3, 2002, the CRSC Board passed a resolution to transfer its marketing allocation to Washington Sugar and in support of Washington Sugar's efforts to reopen the Moses Lake plant (ASCS - 66 at 2). The resolution made it clear that Pacific Northwest had permanently terminated its operations at the Moses Lake plant:

> CRSC is the sole member of Pacific Northwest Sugar Company, LLC ("PNSC"); and…CRSC has no desire, interest or ability to move forward and operate PNSC processing facility (A.R. add at 95)

20. On September 24, 2002, Scott Lybbert, as President of Washington Sugar Company, wrote to CCC asking that Pacific Northwest's beet sugar marketing allocation be transferred to Washington Sugar (A.R. add at 2). On October 3, 2002, he wrote a

second letter making the same request (A.R. add at 3).

21. On October 11, 2002, CCC advised Mr. Lybert, pursuant to 7C.F.R.§1435.308(d) that covers purchasing processors who are new entrants, CCC would transfer Pacific Northwest's allocation to Washington Sugar Company "upon receipt of a copy of the bill of sale showing that virtually all of the assets or Pacific Northwest, including the factory, have been acquired by the Washington Sugar Company (A.R. add at 4).

22. At approximately the same time, Amalgamated, by its President, Ralph Burton, also asked CCC about acquiring Pacific Northwest's allocation. Amalgamated was told that it would be entitled to the allocation "(i)f Amalgamated purchased virtually all of the assets of Pacific Northwest Washington, including the factory" (A.R. add at 6, Tr. Oct. 4 at 134-137).

23. CCC redistributed virtually all of Pacific Norwest's marketing allocation to other processors in crop year 2002. Although CCC provided Pacific Northwest with an initial marketing allocation for crop year 2002, CCC was legally empowered to redistribute any allocation that wasn't being used. On October 1, 2002, when CCC announced initial allocations under the provisions of the 2002 Farm Bill, it immediately and simultaneously redistributed 87% (97,639 of 112,639 short tons) of Pacific Northwest's allocation to other processors (AMAL-SM-78). During the remainder of that same crop year, CCC subsequently redistributed an additional 24,023 short tons – nearly all the rest of Pacific Northwest's initial allocation, as well as any additional allocation that Pacific Northwest might have received because of increases in the beet sugar total allotment – to other sugar beet processors. As of September 25, 2003, Pacific Northwest's remaining balance was only 381 short tons or .008% of the overall beet sugar allotment (Tr. Oct 4 at 149-154; AMAL-SM-78).

24. Even though Pacific Northwest never used any of its sugar beet marketing allocation, it sought to have the allocation increased for crop year 2003. A hearing on the application was held on June 16, 2003, at which CCC's Executive Vice President presided. CCC was informed at the hearing through the testimony of various witnesses that Pacific Northwest had apparently terminated operations and was unlikely to operate in the future. Ralph Burton, President and CEO of

Amalgamated, testified (AMAL-SM-61 at 2; Tri. Oct. 4 at 146-147):

> "…a crop has not been grown and the factory has not processed sugar beets for at least two years…."

Perry Meuleman, President of the Idaho Sugarbeet Growers Association, testified (AMAL-SM-61 at 3):

> It is my understanding that Pacific Northwest has not planted sugar beets for at least two years – and 2004 is suspect. They do not control the factory assets. In fact, the owner of the factory assets has recently agreed to sell three of their beet pilers to the Amalgamated Sugar Company. Pilers are a critical component of a successful beet operation...

James Horvath, President and CEO of American Crystal testified (AMAL-SM-61 at 5):

> Pacific Northwest has not processed sugarbeets of the 2001 and 2002 crops, and it is our understanding that no sugar beets have been planted for the 2003 crop. Therefore, it is a real question as to whether it will be able to continue in operation in 2003…

The Sugarbeet Processors group, which included virtually every sugar beet processor other than Pacific Northwest, submitted virtually identical testimony (AMAL-SM-61 at 7). Finally, the Sugar Beet Growers group informed the CCC that based on Pacific Northwest's unsuccessful history, that fact that it was saddled with old mismatched equipment, its failure to process sugar beets during the 2001 and 2002 crop years, and that all but a minimal amount of PNSC's allocation had to be reallocated to other processors (AMAL-SM-61-at 23-24).

> …there has to be a real question in any reasonable person's mind as to whether this company can ever rise from the ashes to become an operational processor again….

25. The all day meeting held in Spokane, Washington in July 2002 marked the end of any meaningful involvement by Pacific Northwest with the sugar beet processing plant it had sold to Central Leasing.

From that point on, all arrangements, deals and overtures respecting the beet sugar marketing allocation CCC had conferred upon Pacific Northwest were undertaken by Scott Lybbert for his company Washington Sugar, with some assistance from Central Leasing. Neither entity had ever been recognized by CCC as having any independent right or entitlement to the allocation. Although various industry members were interested in acquiring the allocation, they appear to have been either misled or kept in the dark about the status of those who would sell it. There were also different objectives being pursued by Lybbert/Washington Sugar and Central Leasing. When Joseph Talley, Vice-President of Finance and Chief Financial Officer of American Crystal met with Scott Lybert, and Allan Lambrecht on January 30, 2003, Mr. Talley prepared notes on their conversation (Tr. Sept. 21 at 170; ASCS-26). Mr. Talley's notes and his confirming testimony show that he was advised that Washington Sugar was 100 per cent owned by Scott Lybbert and that others was an agreement with USDA that Washington Sugar had the rights to whatever marketing allocation Pacific Northwest had (Tr. Sept. 21 at 219-220, ASCS-26 at 4). There were stumbling blocks to reviving operations at the Moses Lake plant that Mr. Talley duly noted. Growers were still owed $8 million and their lawsuit against USDA (CCC Sugar) and Pacific Northwest was on appeal. USDA had hinted that if no crop was planted by May, the 15,000 tons of 2003 allocation would go away, and for the future it seemed like Pacific Northwest's allocation would go away permanently (Tr. Sept 32 at 220, ASCS-26 at 4). As for participation by Central Leasing:

> "Pacific Rim Ethanol is working with Central Leasing to convert the plant to an ethanol facility. Central Leasing would contribute the plant assets as equity to the ethanol company. Project would process barley and wheat into ethanol, and also to vital wheat gluten.
>
> ... Central Leasing does not appear to be willing to part with the plant today. Scott L. doesn't know how long this idea will live on.
>
> … Does Central Leasing understand that if the marketing allocation goes away the plant has no value as a sugar processing plant?["] (ASCS-26 at 4-5).

Mr. Talley's notes and testimony also disclosed that Central Leasing offered to lease the plant to Washington Sugar but it would not include the assets that Pacific Rim might want (boilers, gas system, etc…value of $10 million) (Tr. Sept. 21 at 220-2, ASCS-26 at 5).

26. Central Leasing brought Pacific Northwest's plant and equipment but never sought to acquire the allocation and was unwilling to directly use the plant for sugar processing. Scott Lybbert was a former director of Pacific Northwest who was interested in reviving the plant's operations through his company, Washington Sugar, but CCC so conditioned the transfer of the allocation to Washington Sugar that he was unable to go forward. There then came a time when Mr. Lybbert and Central Leasing decided to recoup financial losses. Both would share in the payment American Crystal was offering for a successful transfer of the allocation to cover American Crystal's processing operations at plants located outside the State of Washington and not at Moses Lake.

27. American Crystal's proposal was described in a July 3, 2003, fax by Joseph Talley of American Crystal to Barbara Fesco, a CCC sugar program official (A.R.add at 89-90):

> "First, our understanding is that Pacific Northwest Sugar Company (PSNC) currently holds an allocation to sell sugar. The allocation was initially established as a result of the Farm Security and Rural Investment Act of 2002 (Farm Bill). Since that time Pacific Northwest Sugar Company's allocation has not been permanently transferred from them nor terminated, but it has been reassigned (with such reassignment being valid only through the current fiscal year).["]
>
> American Crystal Sugar Company (ACSC) is currently contemplating a transaction, which would effectively result in the allocation, currently owned by PNSC, being transferred to ACSC. As currently contemplated, substantially all of the assets of PNSC would be transferred to an intermediary company (Washington Sugar Company (WSC)). Since PNSC has already transferred ownership of its former processing facility to another party (Central Leasing LLC), substantially all of the assets of PNSC consist mainly of the marketing allocation and some other

> generally immaterial assets. The next step in the transaction would be the immediate transfer of substantially all of the assets of WSC to ACSC (or perhaps a 100% owned subsidiary of ACSC). The effect of the transaction would be to move the sugar marketing allocation from PNSC, through WSC to ACSC.

ACSC does not intend to process sugar beets in Moses Lake, WA after the completion of the transaction (emphasis added).

28. On July 30, 2003, American Crystal's President James J. Horvath, and Scott Lybbert for Washington Sugar; sent CCC a fax that formally notified CCC of American Crystal's intent to "acquire ownership or control of the assets (including the rights to the production history and marketing allocations) associated with the Moses Lake Washington sugar beet process factory." They requested, "USDA's preliminary approval of these transactions as they related to the transfer of marketing allocation currently held by the Pacific Northwest Sugar Company, LLC to ACSC." CCC was again told that American Crystal had no intention of ever operating the Moses Lake facility (A.R. add at 92-93)

29. CCC replied on August 28, 2003 (A.R. add at 234-235):

We understand that American Crystal is purchasing all of the assets of Pacific Northwest, securing the rights to make sugar at the Pacific Northwest/Central Leasing factory site, and purchasing some of the sugar marking equipment used by Pacific Northwest (Emphasis added).

In contrast to previous responses to Washington Sugar and Amalgamated that CCC would require the purchase of virtually all of Pacific Northwest's assets, including the factory, American Crystal was advised that the transfer of Pacific Northwest's allocations would be effectuated upon receipt of documentation showing "that American Crystal has purchased some equipment (including the diffuser and the molasses desugaring equipment) from Central Leasing that Pacific Northwest used to make sugar" (emphasis added). (AMAL-SM-67; A.R. add at 234-235).

30. The letter from CCC of August 28, 2003 (A.R. add at 234-235), advised Mr. Lybbert of Washington Sugar and Mr. Horvath of American Crystal, that CCC would transfer Pacific Northwest's marketing allocation to American Crystal if provided with

documentation showing:

> *…all of the assets of Pacific Northwest have been purchased by American Crystal, that American Crystal has secured the rights to make sugar at the Pacific Northwest/Central Leasing facility, and that American Crystal has purchased some equipment (including the diffuser and the molasses desugaring equipment from Central Leasing that Pacific Northwest used to make sugar.
>
> * Certification from Pacific Northwest that it has not marketed any sugar under its 2002 – crop sugar marketing allocation, if American Crystal wishes CCC to transfer the Pacific Northwest's 2002 – croup allocation to American Crystal.
>
> * American Crystal and Pacific Northwest must each agree in writing to waive their respective rights, if any, to bring an action against the Secretary of Agriculture, USDA and any agency thereof including CCC, and any official of the Department, in the event USDA is required by a Court to reverse the transfer of the allocation to American Crystal as a result of legal action by a third party challenging the original transfer from Pacific Northwest to American Crystal.
>
> * American Crystal must agree in writing to drop Pacific Northwest's appeal of CCC's adverse decision regarding its request for an increased allocation because Pacific Northwest suffered a quality loss on stored beets and built a desugaring facility.

31. On September 8, 2003, American Crystal advised CCC that through its wholly-owned subsidiary, Crab Creek Sugar Company, it acquired that day, "…ownership or control of all of the assets (including the rights to the production history and the marketing allocations) associated with the production of sugar at the Moses Lake, Washington sugarbeet processing factory…" (AMAL-SM-70 at 1). The letter went on to positively address the requirements for the transfer CCC specified in its August 28th letter"(A.R. add at 243-244). A bill of Sale was attached (A.R. add at 245-247). However, an "Appendix A" referred to in the Bill of Sale from Central Leasing was not part of the materials produced in evidence and there is nothing indicating that the diffuser and molasses desugaring equipment was actually acquired by American Crystal (A.R. add at 248-249, ASCS 67 at 64-65).

32. On September 16, 2003, CCC, wrote to Scott Lybbert as Vice-President Finance and Marketing, Pacific Northwest Sugar Company, to inform that effective immediately, it was transferring Pacific Northwest's marketing allocation to American Crystal (A.R. add at 250).

33. American paid $6.8 million to acquire Pacific Northwest's marketing allocation. The following payments were made from an escrow account (ASCS 67 at 31-36, Tr. Sept. 21 at 137-139):

Central Leasing	$2,125,000.00
Scott Lybbert	$ 300,000.00
Pacific Northwest	$3,025,000.00

The $300,000.00 paid from the escrow account to Scott Lybbert was designed to be an initial payment on a "non-complete" agreement with the balance to be paid him over a so-called "earn out" period of time, for $1.65 million total going to him (Tr. Sept. 21 at 138-139).

34. After acquiring the allocation, American Crystal realized it could not fully use all of it (Tr. Sept. 21 at 155-156). American Crystal contacted other beet sugar processors and leased them portions of American Crystal's allocation for undisclosed sums (Tr. Sept. 21 at 159-166; ASCS 85-94). The other processors who leased portions of American Crystal's marketing allocation were Michigan Sugar and Minn-Dak and because of confidentiality agreements American Crystal has with each of them, I did not compel American Crystal to reveal the amounts it has received under the lease arrangements (Tr. Oct. 5 at 121-124).

35. On July 1, 2004, CCC added a regulatory provision dealing with permanently terminated sugar processors operations (7C.F.R.§1435.308(b)):

> ...CCC will permanently eliminate the processor's remaining allocation and distribute it to all the other processors on a pro-rata basis when the processor:
>
> (1) Has been dissolved,
> (2) Has been liquidated in a bankruptcy proceeding, or
> (3) Has permanently terminated operations by:

(i) Not processing sugarcane or sugar beets for 2 consecutive years, or
(ii) Notifying CCC that processor has permanently terminated operations.

Conclusions of Law

The Act has conferred subject matter jurisdiction upon Administrative Law Judges to hear and decide appeals of this kind.

Petitioner has stated a legally cognizable claim.

The doctrine of judicial estoppel is unwarranted and inappropriate in this case.

The Reconsidered Determination by the Executive Vice President of the Commodity Credit Corporation that implemented the permanent transfer of Pacific Northwest's marketing allocation exclusively to American Crystal instead of distributing it pro-
rata to all beet sugar processors, is unsupported by the evidence of record and is inconsistent with the Act's requirements.

Discussion

The first three conclusions deal with procedural issues that are discussed in the Order of June 23, 2004, attached as Addendum 2. The discussion that follows is concerned with the merits of the appeal that is the subject of the fourth conclusion.
Chief Judge Marc R. Hillson recently reviewed the history underlying the 2002 Farm Bill:

The federal government regulated sugar beets, along with other commodities, for many years. The degree of regulation has varied widely over time, based on a variety of circumstances. Thus, in 1996, Congress enacted the Agricultural Marketing Transition Act, P.L. 104-127, also known as the "Freedom to Farm Act"; which removed the previous sugar marketing allotments that had limited the sale of beet sugar, and other commodities. Then, in 2002, Congress largely reversed

itself by passing the Farm Security and Rural Investment Act, 7U.S.C.§ 1359 *et seq*. This Act required the Secretary to once again establish allotments for the processing of beet sugar, based on the average weighted quantity of beet sugar produced by a given processor during 1998 to 2000 crop years …. *In re: Southern Minnesota Beet Sugar Cooperative*, SMA Docket No. 03-0001, slip opinion, July 21, 2004, at 3.

The Act as amended in 2002, requires the Secretary of Agriculture to estimate the amount of sugar to be consumed in the United States each crop year from 2002 through 2007, and after estimating the amount of permissible imports and desirable carryover stocks of sugar, to establish allotments for the crop year that divides the marketable balance between domestic processors of sugar beets and sugarcane (7U.S.C.§1359bb). Sugar beet processors receive allocations of their crop year allotment based on their production histories during the 1998 to 2000 crop years (7U.S.C.§1359(dd (b)(2)). Any increase in a given processor's allocation requires an offsetting decrease in the allocations of other processors so that the overall allotment remains unchanged for what industry members call "a zero sum game."

The pertinent legislative history of the 2002 amendatory provisions that restored beet sugar allotments, consists of short, introductory remarks by their cosponsor, Senator Conrad of North Dakota (AMAL-SM-83; Vol.148, No. 10 of the Congressional Record, Feb. 8, 2002 at S 513-S 514). Senator Conrad stated that the provisions reflected producers' efforts to forge a consensus on a method for establishing allotments that is fair and open and provides some certainty and predictability to the industry. After reviewing the methodology for establishing future allotments, Senator Conrad stated that:

> ...the formula allows for adjustments in the reallocation of beet sugar allotments to account for such industry events as the permanent termination of operations by a processor, the sale of a processor's assets to another processor, the entry of a new processor, and so on.
>
> Taken together, these provisions offer the predictability, fairness, and transparency we all agree is much needed in the sugar beet industry.

These stated intentions that reallocations be event driven and that actions by the Secretary should be predictable, fair and transparent were not adequately met by CCC's actions in this case. Moreover, CCC's actions conflict with the plain and straightforward language of the Act. CCC, acting for the Secretary, is to transfer the allocation of allotment held by a sugar beet processor to another processor when the buying processor has either bought the selling processor itself or "all of the assets of the processor."

Other than when such a sale has taken place, the allocation of a processor whose operations have permanently terminated is to be eliminated by CCC and an equivalent allocation is to be made to the other beet sugar processors on pro rata basis *See* 7 U.S.C.§1359dd (b)(2)(E) and (F).

When a processor requests the transfer of another processor's allocation of allotments, CCC is required to make three determinations before granting the transfer request.

1. Both parties to the transfer must be processors.

Unquestionably, American Crystal is a sugar beet processor. But Pacific Northwest did not fit the regulatory definition at the time of the transfer request. The following definition was published on August 26, 2002 (67 FR 54928; 7 C.F.R.§1435.2):

> *Sugar beet processor* means a person who commercially produces sugar, directly or indirectly, from sugar beets (including sugar produced from sugar beet molasses), has a viable processing facility, and a supply of sugar beets for the applicable allotment year.

Earlier, 7C.F.R.§1435.2 states:

> The definitions, set forth in this section are applicable for all purposes of program administration.

Despite this admonition of the regulation, a failing processor needs time to wind down operations before selling its company or all of its assets. Strict application of the definition in those circumstances would thwart the Act's objective that CCC is to transfer the marketing

allocation of a processor that may be failing but has not as yet been dissolved, liquidated in bankruptcy, or has not otherwise permanently terminated its operations. This conflict between an objective of the Act and an implementing regulation requires an exception to the regulation to allow the transfer of a marketing allocation held by a failing but not totally failed, processor as the Act intends. Therefore, even though Pacific Northwest no longer had either a viable processing facility or a supply of current beets, it still was entitled to be treated as a "processor" for the purposes of administering subparagraph (F) of section 359d(b)(2) of the Act.

2. **The seller of the allocation has not been dissolved, liquidated in a bankruptcy proceeding, or otherwise has not permanently terminated operations (other than in conjunction with a sale or other disposition of the processor or the assets of the processor).**

CCC and American Crystal both argue that Pacific Northwest had not permanently terminated operations before selling its allocation to American Crystal.

American Crystal urges that even though Pacific Northwest previously sold its plant and equipment to Central Leasing, had lost the lease and its option to buy back the plant for failure to pay rent, and had not contracted for a supply of sugar beets for three years, it still had not permanently terminated operations at the time of sale. American Crystal asserts three bases for its argument. First, it argues that the attempts by other industry members to acquire the allocation indicates the industry did not believe a transfer was foreclosed because Pacific Northwest 's operation had permanently terminated. Second, a temporary shut-down of operations is not the same thing as a permanent termination and nothing about Pacific Northwest's conduct was consistent with a company that had given up (American Crystal's brief, at 23). Third, it joins with CCC in arguing that a determination of whether a permanent termination of operations has taken place is a wholly discretionary matter left to CCC's judgment.

The fact that others sought the transfer of Pacific Northwest's marketing allocation is of no legal consequence. They made incorrect assumptions based on misleading and incomplete information (*See*

Finding of Fact 24).

The argument that the plant's shut-down was only temporary and Pacific Northwest had not given up hope is completely refuted by the evidence of record. Hope was definitely gone. American Crystal's own witness, Allan Lambrecht, testified that Pacific Northwest's Board of Directors in a July 2 "summit meeting," instructed all in attendance that "they were really done spending money" and would incur no financial obligations to revive sugar beet processing at the Moses Lake plant (*See* Findings of Fact 15 and 16).

The record evidence makes it abundantly clear that at the time American Crystal undertook to buy the marketing allocation, Pacific Northwest had long ceased to have the ability to process sugar beets. Its factory and equipment had been sold more than two years earlier to Central Leasing. Although when it sold the plant and equipment, it obtained a lease with a purchase option, Pacific Northwest failed to pay the agreed rent and any right to process sugar beets at the plant ended in March 2002. Sugar beet processing operations ceased in Febraury 2001 and never resumed. No sugar beet crop was planted for processing by Pacific Northwest in 2001, 2002, or 2003. On July 23, 2001, the State of Washington administratively dissolved Pacific Northwest for failure to file its requisite annual license renewal application. At the day-long "summit meeting", held in July 2002, the Directors of Pacific Northwest told their lawyers their financial advisors and everyone else in attendance, they would no longer pay anyone for advice and assistance on how to revive the plant's operations. In no uncertain terms, the Board of Directors told everyone that Pacific Northwest would never again attempt to operate the plant to process sugarbeets (Tr. Sept 22, at 119-132).

American Crystal's third and final argument, and CCC's only one, is that even in light of these facts, a beet sugar processor cannot be said to have permanently terminated its operations until CCC says so. However, the Act requires CCC to make the determination when the facts are such that there has been a permanent termination of operations other than in conjunction with a sale of the processor or all of the processor's assets. Senator Conrad's statement of Feb 8, 2002, explained that the reallocation of all allotments are to be based on industry events. When such events occur, action by CCC is mandated

by the plain language of the Act and CCC's discretion in making reallocations is circumscribed.

On July 1, 2004, subsequent to granting this transfer, CCC amended its regulations to add a provision respecting permanent termination of operations 7 C.F.R.§1435.308(b) was amended to read (69 Fed. Reg. 39811, 39813 (July 1, 2004)):

> ... CCC will permanently eliminate the processor's remaining allocation and distribute it to all other processors on a pro-rate basis when the processor:
> (1) Has been dissolved,
> (2) Has been liquidated in a bankruptcy proceeding, or
> (3) Has permanently terminated operations by:
> (i) Not processing sugarcane or sugarbeets for 2 consecutive years, or
> (ii) Notify CCC that processor has permanently terminated operations.

But even if this regulation had been in effect, the parties do not agree on the meaning of "2 consecutive years". American Crystal and CCC argue that the regulation means two consecutive crop years and Pacific Northwest cannot be said to have ceased operations for that long in that the 2002-2003 crop year didn't end on September 30, 2003. Conversely, Petitioner argues that since "crop year" was not the term used in this provision while it was plainly stated elsewhere in the Act and the regulations, the word "year" should be given its ordinary meaning denoting a twelve-month time period. Under this interpretation, because Pacific Northwest ceased operations in February of 2001, two consecutive years had indeed passed by the time the transfer was approved on September 16, 2003. I agree with Petitioner that the specific use of "crop year" in other sections of the sugar regulations as well as within subsection 1435.308 itself while not used in subsection 1435.308(b)(i), is subject to the rule of construction that the disparity is intentional and purposeful. *See Barnhardt v. Sigmon Coal, Co., Inc., et al*, 534 U.S.C. 438, 452 (2002); and R*ussello v. U.S*., 464 U.S.16, 23 (1983). Petitioner next urges that we look to the new regulation for guidance. My problem with this approach is that the new regulation fails to clarify why two years of inactivity results in a presumption that a termination of operations is permanent. The

amended regulation was issued as a final rule without notice and comment. It may well be that CCC issued the regulation for purposes of administrative convenience rather than as a reflection of industry practices. But there really is no need to apply the regulation retroactively.

Pacific Northwest's decision to stay completely shut down and no longer be a processor seeking to reopen, was clearly established by the pronouncement of its Board of Directors at the 'summit meeting" in July 2002.

The evidence of record in the proceeding clearly demonstrates that Pacific Northwest permanently terminated operations prior to and not due to selling its rights to its marketing allocation.

3. There must be a sale of a processor of beet sugar or all of the assets of the processor.

The Act is very specific. There must be a sale of the processor, or all of the assets of the processor for its allocation to be transferred.

Pacific Northwest itself was not sold. The assets that it still owned at the time of the sale, consisted of its right to the allocation and what a spokesman for American Crystal described to CCC as "immaterial assets". These immaterial assets were "goodwill", production rights, production history and books and records listing growers and customers. Without a plant, equipment or sugar beets, Pacific Northwest's production rights had become inoperative. The production history that had been used to obtain Pacific Northwest's marketing allocation had no further value. No purchasing processor needed a list of growers who hadn't planted sugar beets for over three years. Nor was there any real value in learning who had once bought sugar from Pacific Northwest. The obvious concern of a processor acquiring additional marketing allocation is the ability to meet its own customer demands and not how it might increase them.

American Crystal points out in its brief (American Crystal brief at 16) that it also bought equipment from Central Leasing to meet conditions imposed by CCC for approving the transfer. Inasmuch as the equipment was once owned by Pacific Northwest, American Crystal seems to suggest that this secondhand acquisition helped it meet the

Act's requirement that a qualifying sale include "all of the assets of the processor". However, CCC in its brief (CCC brief at 11), clarifies that it required American Crystal to acquire these other assets because of its concern that if others acquired control of them they might in the future request allocation as a new entrant or because they had acquired and reopened the factory for sugar beet production. Such a claim for allocation could be made under 7 U.S.C.§1359dd(b)(2)(H), and CCC feared there could be a double counting of Pacific Northwest's former allocation.

In sum, the only assets American Crystal bought that were still owned by Pacific Northwest were its rights to the marketing allocation and what its spokesman aptly described to CCC as "some other generally immaterial assets".

The Act does not treat a marketing allocation as an asset that a processor can simply buy and sell. CCC can change a processor's allocation if it sells a factory or if a new sugar beet processor enters into the industry, reopens a factory, or acquires an operating factory with a production history. *See* 7 U.S.C.§§1359dd(b)(2)(G), (H) and (I). Allocations can be changed during a crop year (AMAL-SM-78). CCC is empowered by the Act to transfer or temporarily reassign part of a processor's allocation when there is a shortfall in the processor's production that another processor can make up 7 U.S.C.§1359 ee. A sugar beet processor's allocation is further subject to the requirement that allocations "be shared among producers served by the processors in a fair and equitable manner" 7 U.S.C.§1359 ff. When a sugar beet processor closes a factory, the growers who were delivering beets to the closed factory can elect to deliver their crops to another processor and request CCC to transfer allocation commensurate with the growers' production history to their new processor 7 U.S.C.§1435.308(a). The Secretary of Agriculture is not required to compensate a processor who loses allocation in any of these circumstances or first seek the processor's permission. A marketing allocation is not, therefore, an asset that can be transferred without the concurrence of USDA. For there to be a "sale of all assets", more than the marketing allocation itself needs to be conveyed.

CCC apparently recognized this fact when prior applications to transfer Pacific Northwest's allocation were received from others. Scott

Lybbert, the sole owner of Washington Sugar, the would-be successor to Pacific Northwest, sought to obtain it and was advised he would have to provide a "…bill of sale showing that virtually all of the assets of Pacific Northwest including the factory, have been acquired by the Washington Sugar Company" (Finding of Fact 20 and A.R. add at 4). CCC explains that as a new entrant the requirements for Washington Sugar were different. But they were also set differently for petitioner, Amalgamated, an established processor, when it too was advised that the transfer would only be authorized "…if Amalgamated purchases virtually all of the assets of PNW including the factory… (Finding of Fact 21; A.R. add at 6; Tr. Oct.4 at 134-137). These communications took place in the fall of 2002. What transpired in the year that followed that altered CCC's interpretation of the controlling provisions is unexplained.

In any event, CCC did impose different requirements for its approval of the allocation's transfer to American Crystal.

The fact that it imposed any conditions at all for its approval of the transfer is inconsistent with the argument that the language of the Act left it no choice but to give its approval.

Both CCC and American Crystal assert that subparagraph (F) required the allocation's transfer just because it had not been previously distributed to other sugar beet processors under subparagraph (E). If subparagraph (F) is read this simplistically, things of no real worth, such as pencils and paper clips could be the only assets sold with a marketing allocation, and CCC would have to approve the transfer. This would be an absurd result. CCC must evaluate the transfer and place such conditions on its approval as may be needed to effectuate the objectives of the Act. CCC did find it necessary to condition its approval of the transfer.

Inasmuch as the plant and processing equipment was owned by Central Leasing and not by Pacific Northwest, "...CCC wanted to insure that if it transferred the Pacific Northwest allocation to American Crystal, another entity would not come along and, on the basis of other assets relating to the beet sugar processing operation of Pacific Northwest, apply for an allocation" (CCC's brief, at 11). CCC did so by requiring American Crystal to acquire equipment no longer owned by Pacific Northwest. CCC, therefore, did condition its approval even

though it now argues that subparagraph (F) left it without discretion to withhold approval.

The Reconsidered Determination by the Executive Vice President of CCC, that is the subject of this appeal, also recognized that for a transfer to be approved under subparagraph (F) the sale of the processor's assets must be the cause of the processor's permanent termination of operations. For an act to be the proximate cause of a consequence, as is so often stated in Tort law, the consequence would not have occurred but for the act.

Here, it cannot be said but for the sale of the assets still owned by Pacific Northwest when its allocation was transferred to American Crystal, Pacific Northwest would still have been able to process sugar beets. "Good will", production history, inoperative production rights, and books and record of past dealings would not have been enough. Pacific Northwest needed ownership or control of a factory and equipment to once again process sugar beets into sugar. It sold or lost those assets long before this transaction. The permanent termination of its operations was not proximately caused by its sale of these immaterial assets and they were not sufficient to meet the statutory requirements for a transfer to be approved.

Additional Comments, Findings and Conclusions

The language of the Act, as supported by underlying legislative history, places restrictions on the sale of sugar beet marketing allocations by one processor to another.

CCC is to transfer the allocations of allotments by a processor of beet sugar to another processor when the buying processor has either bought the selling processor itself or "all of the assets of the processor".
Other than when such a sale has taken place, the allocation of a processor whose operations have permanently terminated is to be eliminated by CCC, and a pro rata distribution of an equivalent allocation is to be made by CCC to the other beet sugar processors.
See 7 U.S.C.§1359dd(b)(2)(E) and (F.

The record in this case makes it abundantly clear that when the sale to American Crystal took place, Pacific Northwest was no longer able to ever again process beets into sugar. It had neither the physical assets or

the will. Actually, under the laws of the State of Washington it was dissolved as an entity although it was later reactivated for the sole purpose of signing the transfer papers.

Setting aside for a moment its sale of its plant and the subsequent loss of its lease and the fact it had no sugar beets under contract for processing, the Board of Directors of Pacific Northwest made it clear that it would never again attempt to operate the plant to process sugar beets (Tr Sept 22, at 119-132).

That was a signal event. Despite the fact that others may still have had hopes to restart operations, Pacific Northwest did not. Central Leasing, the plant's owner, was actively attempting to convert the plant for ethanol production (Tr. Sept. 22, at 133) and sold off equipment needed to operate it for sugar beet processing (Tr. Oct 5, at 63-65).

One man, Scott Lybbert, a director of Pacific Northwest, did want to resume operations at the plant, but for his own company, Washington Sugar, and not for Pacific Northwest. To do so, Washington Sugar had to obtain needed financing, the use of the plant and Pacific Northwest's marketing allocation. It was unable to obtain any of them. Its overtures to CCC seeking the transfer of the marketing allocation were thwarted by CCC's requirement that Washington Sugar had to first acquire the factory. By then, Central Leasing had other potential uses for the plant and Washington Sugar could not meet this requirement. The financing source Mr. Lybbert had turned to for needed capital to start the plant, was American Crystal. But American Crystal, upon investigation of the situation at Moses Lake decided that financing the revival of beet sugar processing operation at the plant would be a bad investment. Instead, American Crystal, as was the case with many other industry members, coveted Pacific Northwest's marketing allocation to support processing operations at plants outside of Washington State. When the deal with American Crystal was made, two parties besides Pacific Northwest asserted claims to the sale proceeds. Central Leasing owned the Moses Lake plant and any remaining equipment that it had not by then sold to others. The equipment may still have included the diffuser and molasses desugaring equipment that CCC required American Crystal to acquire as a condition for its approval. But they were not listed on the Bill of Sale. Scott Lybbert, the alter ego and sole owner of Washington Sugar, also claimed a share of the proceeds. He had the energy and drive to put the

deal through, but owned none of the assets to be conveyed. He never acquired the marketing allocation, the use of the plant, or the needed capital to reopen it.

Pacific Northwest the essential "processor of beet sugar" owned what American Crystal's spokesman described to CCC as "immaterial assets." Its possession of rights to a marketing allocation existed only because CCC had failed to take action under 7 U.S.C.§1359dd(b)(2)(E), to eliminate it even though Pacific Northwest had by then permanently terminated operations.

I have been unable to discern any essential purpose of the Act that was served by CCC's approval of the transfer. The approval was not given to assure that local growers would still have a processing outlet for their sugar beets. It was not given in order that a new processor would have entry to this industry that largely forecloses newcomers under government regulations. It was given to increase the marketing allocation of American Crystal, that already had the distinction of being the largest holder of sugar beet marketing allocation in America (AMAL-SM-73 at 2).

Moreover, the conditions CCC set for the transfer primarily show concern for administrative convenience. The parties waived rights to bring an action against USDA, CCC, and any Departmental Official in the event a third party successfully challenged the transfer in court; agreed to drop Pacific Northwest's appeal of CCC's earlier adverse decision against it; and furnished settlement documents showing that American Crystal took actions to preclude the need for CCC to entertain any future applications by new entrants or others who might acquire or reopen the factory as a sugar beet processor, by securing the rights to make sugar at the facility and purchasing some equipment (including the diffuser and the molasses desugaring equipment) from Central Leasing that Pacific Northwest has used to make sugar (A.R. at 234-235).

The Act, as amended, intended that CCC take actions responsive to events. CCC through its day-to-day operations, knew that Pacific Northwest had ceased all operations, had sold its plant, and had not had a beet crop planted for processing in 2001, 2002, or 2003. In a public hearing held on June 16, 2003, the Executive Vice President of CCC, whose Reconsidered Determination is the subject of this appeal, was informed by virtually every beet sugar organization in the industry,

including American Crystal, that Pacific Northwest had terminated operations and was unlikely to operate in the future (AMAL-SM-61 at 1-27).

Moreover, when American Crystal described the proposed transfer to CCC in July 2003, it stated (A.R. add. At 89-90):

> American Crystal's Sugar Company (ACSC) is currently contemplating a transaction, which would effectively result in the allocation, currently owned by PNSC, being transferred to ACSC. As currently contemplated, substantially all of the assets of PNSC would be transferred to an intermediary company (Washington Sugar Company (WSC)). Since PNSC has already transferred ownership of its former processing facility to another party (Central Leasing, LLC), substantially all of the assets of PNSC consist mainly of the marketing allocation and some other generally immaterial assets. The next step in the transaction would be the immediate transfer of substantially all of the assets of WSC to ACSC or perhaps a 100% owned subsidiary of ACSC). The effect of the transaction would be to move the sugar marketing allocation from PNSC, through WSC, to ACSC.
>
> ASCS does not intend to process sugar beets in Moses Lake, WA after the completion of the transaction.

For CCC to say in light of all this information, as it did in the Reconsidered Determination that Pacific Northwest was "terminated in conjunction with the sale of its assets" is untenable.

Moreover, CCC had duties as a fact finder. The facts before it appear sufficient for it to have declared Pacific Northwest to have permanently terminated operations. At very least, those facts were sufficient to require CCC to resolve gaps in its knowledge by conducting fact finding. By not taking the steps necessary to make the determination, CCC has encouraged what appears to be a sham transaction contrary to objectives of the Act. This omission taken together with inconsistent treatment of applicants who had earlier sought the allocation's transfer, is conduct of the type the APA instructs reviewers to set aside for being "arbitrary, capricious, an abuse of discretion…" (5 U.S.C.§706(2)(A)).

CCC employed inconsistent standards for the transfer of the allocation

that it has not fully explained. American Crystal was only required to acquire some of Pacific Northwest's assets. But previously, both Washington Sugar and Amalgamated had been advised they would need to acquire virtually all of Pacific Northwest's assets including the factory.

CCC points out that Washington Sugar would have been a new entrant to the industry and for that reason different rules would apply. But Amalgamated's status was the same as American Crystal's and yet Amalgamated was required to meet a more stringent standard.

CCC also argues that the applicable statutory provisions are ambiguous and deference should be given to its interpretation. It is our policy to give some deference to interpretations by agency officials, who administer a statute's provisions. *See In re: Southern Minnesota Beet Sugar Cooperative, supra*, slip opinion, at 17. But since my function is take the evidence to determine whether CCC's actions were in accord with the law, the deference that may be accorded its actions is necessarily limited. Here, the way the provisions were interpreted and applied was in conflict with the language and objectives of the Act.

For these reasons, the Reconsidered Determination by the Executive Vice President of CCC that is the subject of the appeal is hereby reversed. Upon this decision becoming final and effective, CCC shall distribute, in future crop years, the amount of marketing allocation that was transferred to American Crystal from Pacific Northwest to all beet sugar processors on a pro rata basis in accordance with 7U.S.C.§1359dd(b)(2)(E) of the Act.

Copies of this Decision and Order shall be served by the Hearing Clerk upon each of the parties and each of the Intervenors, and shall become final and effective 25 days after the Hearing Clerk has served the decision upon the Executive Vice President, unless a party or an Intervenor files an appeal petition within 20 days after service of this decision.

* *

ADDENDUM I

[*]The Rules of Practice

[*]Rules of Practice not included – Editor

* *

ADDENDUM 2

Order Denying Motion to Dismiss and
[**]Motion for Summary Judgment

In re: SOUTHERN MINNESOTA BEET SUGAR COOPERATIVE.
SMA Docket No. 03-0001.
Decision and Order.
Filed May 9, 2005.

SMA – Sugar beets – Adjustment to allocation – Opened sugar beet processing factory – Substantial quality losses on stored sugar beets – Credibility determinations – Statutory construction – Ordinary meaning of words – Opened defined – Judicial officer's authority to rule statute unconstitutional – Due process – Regulatory taking.

The Judicial Officer affirmed Chief Administrative Law Judge (Chief ALJ) Marc R. Hillson's decision denying Petitioner's request for an increase in its beet sugar marketing allotment allocation. The Judicial Officer rejected Petitioner's contention that its modification of a sugar beet processing factory constituted opening a sugar beet processing factory, thereby entitling Petitioner to an allocation adjustment under the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359dd(b)(2)(D)(i)(I), (b)(2)(D)(ii)(I)). The Judicial Officer held the common meaning of the verb *to open* is *to begin, initiate, or commence* and the word *opened* would not be commonly understood to include the mere modification of an existing sugar beet processing factory. The Judicial Officer also rejected Petitioner's contention that a beet sugar processor that suffers substantial quality losses in two separate crop years is entitled to two adjustments to its beet sugar marketing allotment allocation under the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359dd(b)(2)(D)(i)(IV), (b)(2)(D)(ii)(IV)). The Judicial Officer, stating that he gives great weight to administrative law judge credibility determinations, rejected Petitioner's contention that the Chief ALJ erroneously found credible Intervenors' claims that, if Petitioner were entitled to an allocation adjustment for opening a new sugar beet processing factory, some of the Intervenors would likewise be entitled to the same adjustment. Finally, the Judicial Officer rejected Petitioner's claims that it was denied due process and that the failure to adjust Petitioner's allocation constitutes a regulatory taking.

[**]Order found in Miscellaneous Orders this volume – Editor

Jeffrey Kahn, for the Executive Vice President.
Steven A. Adduci, Gina L. Allery, David A. Bieging, and Peter D. LeJeune, Washington, DC, for Petitioner.
Phillip L. Fraas and Karen M. Johnson, Washington, DC, for Intervenors.
Initial decision issued by Marc R. Hillson, Chief Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

On October 1, 2002, the Commodity Credit Corporation, United States Department of Agriculture [hereinafter the CCC], announced the 2002-crop sugar allotments and allocations. On October 9, 2002, Southern Minnesota Beet Sugar Cooperative [hereinafter Petitioner] requested that the Executive Vice President, CCC [hereinafter the Executive Vice President], reconsider the October 1, 2002, beet sugar marketing allotment allocation for Petitioner. On December 10, 2002, the Executive Vice President denied Petitioner's request for reconsideration of the October 1, 2002, beet sugar marketing allotment allocation. On January 23, 2003, Petitioner filed a Petition for Review of the Executive Vice President's December 10, 2002, denial of Petitioner's request for reconsideration of the October 1, 2002, beet sugar marketing allotment allocation. Petitioner filed the Petition for Review pursuant to the Agricultural Adjustment Act of 1938, as amended by section 1403 of the Farm Security and Rural Investment Act of 2002 [hereinafter the Agricultural Adjustment Act of 1938]; the Sugar Program regulations (7 C.F.R. pt. 1435); and the Rules of Practice Applicable to Appeals of Reconsidered Determinations Issued by the Executive Vice President, Commodity Credit Corporation, Under 7 U.S.C. §§ 1359dd and 1359ff [hereinafter the Rules of Practice].

On February 13, 2003, the Executive Vice President filed an Answer, a certified copy of the record upon which the Executive Vice President based the December 10, 2002, reconsidered determination, and a list of "affected persons."[1] The Hearing Clerk served the Petition for Review

[1]Beet sugar allocations are a "zero-sum" situation, in that any increase in allocation to any beet sugar processor means a corresponding reduction in allocations of all other beet sugar processors. Rule 2(c) of the Rules of Practice defines an "affected person" as a beet sugar processor, other than the petitioner, affected by the Executive Vice (continued...)

and Answer upon each affected person. Seven affected persons, American Crystal Sugar Company, Imperial Sugars Corporation, Michigan Sugar Company, Minn-Dak Farmers Cooperative, Monitor Sugar Company, Western Sugar Cooperative, and The Amalgamated Sugar Company [hereinafter Intervenors], intervened. On May 21, 2003, Intervenors filed Intervenors' Response to the Petition.

On November 10, 12, and 13, 2003, Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] conducted a hearing in Washington, DC. Steven A. Adducci and Peter D. LeJeune, Dorsey & Whitney, LLP, Washington, DC, represented Petitioner. Jeffrey Kahn, Office of the General Counsel, United States Department of Agriculture, represented the Executive Vice President. Phillip L. Fraas and Karen M. Johnson, Washington, DC, represented Intervenors.

On January 21, 2004, the Executive Vice President filed Post-Hearing Brief of Commodity Credit Corporation and Petitioner filed Initial Post-Hearing Brief of Southern Minnesota Beet Sugar Cooperative. On January 22, 2004, Intervenors filed Joint Brief of the Intervenors in Opposition to the Petition for Review. On February 18, 2004, the Executive Vice President filed Post-Hearing Reply Brief of Commodity Credit Corporation. On February 23, 2004, Petitioner filed Post Hearing Reply Brief of Southern Minnesota Beet Sugar Cooperative and Intervenors filed Joint Brief of the Intervenors in Response to the Initial Briefs Filed by the Petitioner and the Government. On February 27, 2004, Intervenors filed Corrected Joint Brief of the Intervenors in Opposition to the Petition for Review.

On July 21, 2004, the Chief ALJ filed a Decision [hereinafter Initial Decision]: (1) affirming the Executive Vice President's December 10, 2002, denial of Petitioner's request for reconsideration of the October 1, 2002, beet sugar marketing allotment allocation; and (2) denying Petitioner's January 23, 2003, Petition for Review.

On August 18, 2004, Petitioner appeal to, and requested oral argument before, the Judicial Officer. On September 9, 2004, the Executive Vice President filed a response to Petitioner's appeal petition,

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[1](...continued)
President's reconsidered determination and identified by the Executive Vice President as an affected person. Rule 5(a) of the Rules of Practice requires that any answer filed by the Executive Vice President shall be accompanied by the names and addresses of affected persons.

and, on September 15, 2004, Intervenors filed a response to Petitioner's appeal petition. On September 20, 2004, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Petitioner's request for oral argument before the Judicial Officer, which, pursuant to Rule 11(d) of the Rules of Practice, the Judicial Officer may grant, refuse, or limit, is refused, because Petitioner, the Executive Vice President, and Intervenors have thoroughly addressed the issues. Thus, oral argument would appear to serve no useful purpose.

Based upon a careful consideration of the record, I agree with the Chief ALJ's July 21, 2004, Initial Decision. Therefore, except for the Chief ALJ's discussion of the deference he gave to the CCC's interpretation of the Agricultural Adjustment Act of 1938 and minor modifications, I adopt the Chief ALJ's Initial Decision as the final Decision and Order. Additional conclusions by the Judicial Officer follow the Chief ALJ's findings and conclusions as restated.

Petitioner's exhibits are designated by "CX." Intervenors exhibits are designated by "IX." Exhibits from the certified copy of the record upon which the Executive Vice President based the December 10, 2002, reconsidered determination are designated by "CR." The transcript is divided into three volumes, one volume for each day of the 3-day hearing. Each volume begins with page 1 and is sequentially numbered. References to "Tr. I" are to the volume of the transcript that relates to the November 10, 2003, segment of the hearing. References to "Tr. II" are to the volume of the transcript that relates to the November 12, 2003, segment of the hearing. I make no reference to the volume of the transcript that relates to the November 13, 2003, segment of the hearing.

APPLICABLE STATUTORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 35—AGRICULTURAL ADJUSTMENT ACT OF 1938

. . . .

SUBPART VII—FLEXIBLE MARKETING ALLOTMENTS FOR SUGAR

. . . .

§ 1359dd. Allocation of marketing allotments

(a) Allocation to processors

Whenever marketing allotments are established for a crop year under section 1359cc of this title, in order to afford all interested persons an equitable opportunity to market sugar under an allotment, the Secretary shall allocate each such allotment among the processors covered by the allotment.

(b) Hearing and notice

. . . .

(2) Beet sugar

(A) In general

Except as otherwise provided in this paragraph and sections 1359cc(g), 1359ee(b), and 1359ff(b) of this title, the Secretary shall make allocations for beet sugar among beet sugar processors for each crop year that allotments are in effect on the basis of the adjusted weighted average quantity of beet sugar produced by the processors for each of the 1998 through 2000 crop years, as determined under this paragraph.

. . . .

(D) Adjustments

####### (i) In general

The Secretary shall adjust the weighted average quantity of beet sugar produced by a beet sugar processor during the 1998 through 2000 crop years under subparagraph (C) if the Secretary determines that the processor—

(I) during the 1996 through 2000 crop years, opened a sugar beet processing factory;

(II) during the 1998 through 2000 crop years, closed a sugar beet processing factory;

(III) during the 1998 through 2000 crop years, constructed a molasses desugarization facility; or

(IV) during the 1998 through 2000 crop years, suffered substantial quality losses on sugar beets stored during any such crop year.

(ii) Quantity

The quantity of beet sugar produced by a beet sugar processor under subparagraph (C) shall be—

(I) in the case of a processor that opened a sugar beet processing factory, increased by 1.25 percent of the total of the adjusted weighted average quantities of beet sugar produced by all processors during the 1998 through 2000 crop years (without consideration of any adjustment under this subparagraph) for each sugar beet processing factory that is opened by the processor;

(II) in the case of a processor that closed a sugar beet processing factory, decreased by 1.25 percent of the total of the adjusted weighted average quantities of beet sugar produced by all processors during the 1998 through 2000 crop years (without consideration of any adjustment under this subparagraph) for each sugar beet processing factory that is closed by the processor;

(III) in the case of a processor that constructed a

> molasses desugarization facility, increased by 0.25 percent of the total of the adjusted weighted average quantities of beet sugar produced by all processors during the 1998 through 2000 crop years (without consideration of any adjustment under this subparagraph) for each molasses desugarization facility that is constructed by the processor; and
>
> (IV) in the case of a processor that suffered substantial quality losses on stored sugar beets, increased by 1.25 percent of the total of the adjusted weighted average quantities of beet sugar produced by all processors during the 1998 through 2000 crop years (without consideration of any adjustment under this subparagraph).

7 U.S.C. § 1359dd(a), (b)(2)(A), (D) (Supp. II 2002).

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

Decision Summary

I deny Petitioner's January 23, 2003, petition to overturn the decision of the Executive Vice President. I find the Executive Vice President's December 10, 2002, denial of Petitioner's request for reconsideration of the October 1, 2002, beet sugar marketing allotment allocation is in accord with the express language of the Agricultural Adjustment Act of 1938. I thus find Petitioner is not entitled to an increase in its beet sugar marketing allotment allocation either for opening a sugar beet processing factory or for sustaining substantial quality losses on stored sugar beets during the 1999 crop year.

Statutory and Regulatory Background

The United States has regulated sugar beets, along with other commodities, for many years. The degree of regulation has varied

widely over time, based on a variety of circumstances. Thus, in 1996, Congress enacted the Agricultural Market Transition Act, also known as the "Freedom to Farm Act," which removed the previous sugar marketing allotments that had limited the sale of beet sugar and other commodities. Then, Congress passed the Farm Security and Rural Investment Act of 2002, which requires the Secretary of Agriculture to establish allotments for the marketing by processors of sugar processed from sugar beets and from domestically-produced sugarcane and to allocate those allotments among the processors covered by the allotment. The allocations for beet sugar among beet sugar processors for each crop year that allotments are in effect are based on the weighted average quantity of beet sugar produced by each beet sugar processor during the 1998 through 2000 crop years. At issue in this proceeding are the provisions allowing for adjustments to these weighted averages for opening a sugar beet processing factory, closing a sugar beet processing factory, and suffering substantial quality losses on stored sugar beets (7 U.S.C. § 1359dd(b)(2)(D)(i)(I)-(II), (IV)).

Neither the Agricultural Adjustment Act of 1938 nor the Sugar Program regulations define what is meant by "opened" or "closed" with respect to a sugar beet processing factory, nor is there any specific guidance on the implementation of the "substantial quality losses on sugar beets stored during any crop year" provision.

While I base my decision primarily on the unambiguous language of the Agricultural Adjustment Act of 1938, I also discuss below, in the alternative, the legislative history, in the form of a statement by Senator Conrad, which is the sole discussion by Congress respecting the beet sugar allocation adjustment provisions. Senator Conrad, who cosponsored this provision, stated:

> The purpose of this amendment is to provide a predictable, transparent, and equitable formula for the Department of Agriculture to use in establishing beet sugar marketing allotments in the future. This is an amendment that enjoys widespread support within the sugar beet industry. Producers in that industry recall, as I do, the very difficult and contentious period just a few years ago when the Department of Agriculture last attempted to establish beet sugar allotments with very little direction in the

> law.
>
> That experience left us all believing that there must be a better way, that we should seek a method for establishing allotments that is fair and open and provides some certainty and predictability to the industry. On that basis, I urged members of the industry to work together to see if they could agree on a reasonable formula.
>
> I am pleased to say the amendment I am offering today with the Senator from Idaho reflects producers' efforts to forge that consensus. It provides that any future allotments will be based on each processor's weighted-average production during the years 1998 through 2000, with authority for the Secretary of Agriculture to make adjustments in the formula if an individual processor experienced disaster-related losses during that period or opened or closed a processing facility or increased processing capacity through improved technology to extract more sugar from beets.

148 Cong. Rec. S514 (daily ed. Feb. 8, 2002) (statement of Sen. Conrad).

Facts

Petitioner is a beet sugar processing cooperative that was formed in 1972. Petitioner currently consists of 585 farmer/shareholders in Minnesota. The cooperative is located in Renville, Minnesota, and currently employs approximately 275 year-round workers and 450 seasonal workers. (Tr. I at 219-20.)

In 1999, Petitioner borrowed approximately $100,000,000 and engaged in extensive renovations of its sugar beet processing factory (Tr. I at 193-95). At the hearing, Petitioner detailed the scope and magnitude of the construction project, which it termed "Vision 2002" (Tr. I at 32-86; CX 1, 5, 8-10, 12-22, 25, 41). Petitioner states substantial portions of the old sugar beet processing factory were demolished, and, in effect, the extensive nature of renovations is equivalent to the opening of a new sugar beet processing factory, as referred to in the Agricultural Adjustment Act of 1938. As a result of all

this construction, Petitioner states its design capacity for processing sugar beets into sugar is more than double the capacity of the sugar beet processing factory as it previously existed on the same site (Post Hearing Reply Brief of Southern Minnesota Beet Sugar Cooperative at 22).

Petitioner significantly modernized and increased the capacity of its Renville, Minnesota, sugar beet processing factory. Likewise, the record contains considerable testimony that some Intervenors also undertook significant and highly costly—though not as costly over as short a period as Petitioner—modifications and improvements to their sugar beet processing factories. Thus, Kevin Price, director of governmental affairs, American Crystal Company, the largest beet sugar processor, testified to two major expansions totaling approximately $134,000,000 during the period from 1996 through 2000 (Tr. II at 32-46). Inder Mathur, president and chief executive officer, Western Sugar Cooperative, testified to a $22.5 million expansion project (Tr. II at 120-23). Victor Krabbenhoft, chairman of the board, Minn-Dak Farmers Cooperative, testified to a $93,000,000 expansion (Tr. II at 170-71, 179).

The process of extracting sugar from the sugar beet is complicated, time-consuming, and expensive. The extraction process presents difficult material handling problems in a harsh climate. It is complicated by a perishable raw material that is delivered in the fall of the year (usually after a frost to enhance sugar content) to begin what is called the "beet slicing campaign." The raw as-received sugar beets degrade if not processed by the time the springtime warm weather arrives. Once the sugar beets are converted to an intermediate product of thick, syrupy liquid ("thick juice" or "in-process sugar"), the time constraints on further processing are less intense, other than to finish the process before the next year's crop of sugar beets starts arriving. The beet end of the sugar beet processing factory is normally shut down for lack of raw product between beet slicing campaigns. The sugar end of the overall process consists of a year-round concentration and crystallization process. With the aid of intermediate product storage tanks, processing of the thick juice may proceed at a slower daily rate than operations at the beet end of the factory.

Shortly after regulations were issued implementing the 2002

amendments to the Agricultural Adjustment Act of 1938, the CCC sent out a survey to all beet sugar processors. This Beet Processor Allotment Production History Adjustment Survey (CR 004-005) contained four questions concerning the four bases for adjustments available under the Agricultural Adjustment Act of 1938. While Petitioner did state it had suffered a loss more than 20 percent above normal on stored sugar beets during the 1999 and 2000 crop years, it answered "No" to the question:

> 1. Did your company start processing sugar beets at a new processing facility in the period, October 1, 1996, through September 30, 2001?

Petitioner elicited testimony that it did not realize that this survey was official, since the survey was not on a printed form or on letterhead and that Petitioner simply made a mistake in filling out this form. John Richmond, president and chief executive officer of Petitioner, testified that, since the survey's wording did not exactly track the regulations, Petitioner was "unsure of what to do." (Tr. I at 135.)

Mr. Richmond also testified that the sugar beet processing portion of the factory was rebuilt in essentially one off-season, between March and September of 1999. By reconstructing a plant "so that it was now two or three times bigger than it was before, I believe means that we reopened the plant and we constructed a new plant simultaneously." (Tr. I at 140.) "[W]hat we did was demolish the beet end of a factory, and rebuild that factory and add another factory at the same time. We did not permanently terminate the operation at that factory. We essentially rebuilt that factory and right with it, built another factory at the same time." (Tr. I at 142.) Shortly after this statement that Petitioner essentially had two factories on the same site where it previously had one, apparently as a result of the degree of expansion in processing capacity, Mr. Richmond engaged in this short colloquy with the Executive Vice President's counsel:

> Q. MR. KAHN: . . . And you have never had more than one factory, have you, on that site?
>
> A. MR. RICHMOND: There has only ever been one sugar

factory.

Tr. I at 143.

Petitioner also introduced evidence, for comparison purposes, of the reopening of a sugar beet processing factory that had been idle for two decades in Moses Lake, Washington (Tr. I at 95-99). Pacific Northwest Sugar Company, the owner of the Moses Lake, Washington, factory, received an adjustment for opening a sugar beet processing factory. While there was some testimony indicating that portions of the infrastructure from the Moses Lake factory that had sat idle for 20 years still existed in a usable condition, other testimony showed that a significant portion of the factory's equipment had been cannibalized (Tr. II at 236-37).

There was no dispute that the CCC found Petitioner had incurred substantial quality losses on stored sugar beets in crop year 2000 entitling Petitioner to a favorable adjustment in its allocation. At the hearing, a good deal of evidence was presented as to whether Petitioner was entitled to a second such adjustment for substantial losses on stored sugar beets allegedly suffered during crop year 1999. Petitioner testified that it suffered substantial quality losses on stored sugar beets because of a major boiler failure, which resulted in the work at the factory slowing down. The boiler failure, combined with abnormally warm weather, caused the quality of the sugar beets, and the resulting output of sugar, to significantly deteriorate. (Tr. I at 144-45.) The record contains considerable testimony as to whether losses triggered by an equipment failure even qualify as "substantial quality losses" under the Agricultural Adjustment Act of 1938. The term has not been defined by the CCC through either regulation or other guidance.

Mr. Richmond testified the "straight house" recovery method was an appropriate way to determine the relative performance of sugar beet processing factories and a 20 percent loss in sugar production calculated according to this method was an appropriate measure of substantiality (Tr. I at 117-18). He further testified, in order to establish a baseline to determine the extent of the loss, it was appropriate to use a standard of recovering a minimum of 75 percent of the sugar in the harvested sugar beets. He stated that, applying this methodology, the recovery average

for 1999 was well below the 10-year average recovery percentage.

Intervenors strongly contested Petitioner's methodology and results. Intervenors argued that the 75 percent standard for evaluating straight house recovery was inappropriate and unsubstantiated and testified, if it was the appropriate standard, then a number of other companies would have been similarly entitled to an allocation adjustment. (Tr. II at 22-26, 124, 157-58, 204-05, 237; IX 29.) Intervenors also contended the statutory term "quality losses" was not meant to cover every type of loss that could occur in the processing of sugar beets and equipment problems, such as boiler failure, constitute a "non-quality" loss not intended to be covered by the statutory adjustment of allocation.

All parties acknowledge that the beet sugar allotment allocation program is a "zero-sum" situation—that is, any increase in one beet sugar processor's allocation results in a decrease in the amount of the allocations of the other beet sugar processors. Every year the Secretary of Agriculture estimates the amount of sugar that will be consumed in the United States, along with projected domestic production and imports, and establishes an overall allotment quantity, which is allotted according to a statutory formula between sugar derived from sugar beets and sugar derived from sugarcane. Thus, the total amount of sugar to be processed by the beet sugar industry is a fixed amount, subject to some periodic interim adjustments. Thus, an allocation increase of 1.25 percent for one beet sugar processor would result in a reduction of a total of 1.25 percent in the cumulative allocations of the other beet sugar processors, resulting in zero net gain or loss to all the beet sugar processors combined.

Discussion

Petitioner is Not Entitled to an Adjustment for Opening a Sugar Beet Processing Factory

I affirm the Executive Vice President's denial of Petitioner's request for an adjustment in its beet sugar marketing allotment allocation for opening a sugar beet processing factory. I find the language in the Agricultural Adjustment Act of 1938 is clear and unambiguous that substantial expansions, modifications, or modernizations of a sugar beet processing factory are not equivalent to the opening of a factory.

Further, the legislative history supports the CCC's interpretation of the Agricultural Adjustment Act of 1938. Moreover, I find the CCC's granting Pacific Northwest Sugar Company an adjustment for opening a sugar beet processing factory in Moses Lake, Washington, is not inconsistent with the Executive Vice President's denial of Petitioner's request for reconsideration of the October 1, 2002, beet sugar marketing allotment allocation.

In its request for reconsideration of beet sugar marketing allotment allocation by the Executive Vice President, dated October 9, 2002, Petitioner states:

> Beginning in crop year 1998, SMSBC substantially re-built and expanded its processing facility, resulting in what is essentially a new sugar beet processing factory on the same site and partially using existing buildings. Nearly every major unit operation in the facility was replaced or substantially modified.

CR 010. Petitioner then refers to this re-building and expansion as an "essentially new factory" (CR 010) and states Petitioner:

> reconstructed and reconfigured its Renville, Minnesota sugar beet processing factory thus creating a new sugar beet processing factory on the same site. The new factory increased production capacity and enhanced efficiency and productivity thereby driving down the costs of production.

Brief of Southern Minnesota Beet Sugar Cooperative Concerning Suggested Procedural Matters at 4. Petitioner is thus essentially arguing that by significantly improving efficiency and expanding its capacity, it has "opened" a new sugar beet processing factory.

Congress could have chosen to reward a beet sugar processor for expanding significantly in size. By limiting the allocation increase to beet sugar processors that "opened" a sugar beet processing factory, however, Congress did not make the choice urged by Petitioner. That choice being made, it is not the role of the CCC nor the undersigned to second-guess Congress. That Congress chose a different course after earlier passing the Freedom to Farm Act and that Petitioner might have

made business decisions in reliance on the Freedom to Farm Act does not give the CCC any ground to implement the current Agricultural Adjustment Act of 1938 in a manner contrary to its express terms. Moreover, the record indicates that farm bills have a limited life and that those regulated by these bills have learned to expect periodic changes of greater or lesser significance. As I read it, the Agricultural Adjustment Act of 1938 simply does not make any provision for adjusting a beet sugar processor's allocation simply because it has increased its processing capacity, even if the increase was substantial. Indeed, granting allocation adjustments for increasing capacity would, based on the evidence presented by several Intervenors, potentially result in a number of adjustments in allocation, which would all have to come out of the same total beet sugar allotment. Moreover, imposing a rule that arguably doubling capacity is the equivalent of opening a sugar beet processing factory, while any lesser number would not result in an adjustment, would likely be viewed as arbitrary, particularly given the clear meaning of "opened" in this context. Congress was certainly familiar with the potential for expanding the capacity of a sugar beet processing facility, and Congress appears to have decided to limit the allocation increase to beet sugar processors who "opened" a sugar beet processing factory rather than include those who expanded a presently existing factory.

Alternatively, Petitioner contended that it effectively demolished its old sugar beet processing factory—although Petitioner never ceased operating other than in the normal off-season for this industry—and built two new factories in its place (Tr. I at 139, 162). On the other hand, Petitioner seems to recognize, as Mr. Richmond testified, that just one sugar beet processing factory exits in Renville, Minnesota, albeit a significantly larger and probably more efficient factory than the pre-expansion factory. The legal argument that Petitioner effectively demolished its old sugar beet processing factory and opened two new factories on the same location is less than compelling. Petitioner argues "[t]he entire beet end of the facility was demolished and reconstructed . . ." (Initial Post-Hearing Brief of Southern Minnesota Beet Sugar Cooperative at 16-17) and the beet end of a facility is the "factory" (Initial Post-Hearing Brief of Southern Minnesota Beet Sugar Cooperative at 21). However, Petitioner also goes on to argue in its Post

Hearing Reply Brief of Southern Minnesota Beet Sugar Cooperative that it should not suffer the downward adjustment that the Agricultural Adjustment Act of 1938 mandates for a beet sugar processor which has "closed" a sugar beet processing factory. Yet, if a factory is demolished, I find it difficult to conceive of the factory not being closed. In fact, Petitioner's approach would logically mandate that the CCC deem a sugar beet processing factory "closed" if a beet sugar processor reduced factory capacity by 50 percent, since that would appear to be the converse of accepting Petitioner's argument that the doubling of capacity is "opening" an additional factory. Contending the "beet end" and the "sugar end" are two different factories and, therefore, now two factories exist where there once was one seems little more than a bootstrap approach to arguing that allegedly doubling the potential capacity to process sugar beets is the same as opening a new factory.

I also find significant, but not controlling, that in response to the Beet Processor Allotment Production History Adjustment Survey conducted by the CCC, Petitioner indicated that it had not opened a new sugar beet processing factory during the time period that would trigger the increased allocation. Although Petitioner, through testimony and argument, indicates that its answer to the survey was a mistake, that the survey form was confusing because the form did not track the language of the Agricultural Adjustment Act of 1938, and that the survey did not appear to be an official survey, I find apparent that, at the time of the survey, Petitioner considered its extensive renovation of its factory just that, a renovation, and not the opening of a new sugar beet processing factory.

Even if I were to find the Agricultural Adjustment Act of 1938 language is ambiguous, which I do not, the legislative history would be of no help to Petitioner. Senator Conrad pointed out that the Farm Security and Rural Investment Act of 2002 was designed to create "a method for establishing allotments that is fair and open and provides some certainty and predictability to the industry." The amorphous standard suggested by Petitioner, which would require the CCC to determine that "opening" a sugar beet processing factory includes expanding a factory's capacity more than an unspecified amount (and suggests that a factory must be found to have "closed" if capacity has diminished by a likewise unspecified amount), provides neither

certainty nor predictability and does not comport with the objectives mentioned by Senator Conrad.

Petitioner also contends "[a] conservative and common sense reading" (Initial Post-Hearing Brief of Southern Minnesota Beet Sugar Cooperative at 23) of Senator Conrad's statement that the Secretary of Agriculture has the authority to adjust allocations "if an individual processor experienced disaster-related losses during that period or opened or closed a processing facility or increased processing capacity through improved technology to extract more sugar from beets" means a beet sugar processor who increases processing capacity through improved technology is entitled to an adjustment to its allocation. However, reading Senator Conrad's statement in conjunction with the four bases for adjusting allocations provided in the Agricultural Adjustment Act of 1938, it is evident that the phrase concerning "increased processing capacity through improved technology to extract more sugar from beets" refers not to an increase in beet slicing capacity or a modernization of technology but rather to the allocation increase for constructing a molasses desugarization facility. Looking at Senator Conrad's comments in context, it is apparent he is making a reference to each of the four bases for adjustments—opening a factory, closing a factory, disaster-related losses, and construction of a molasses desugarization facility. Further, the phrase in question refers to technologies to "extract more sugar from beets." Increasing the capacity of a sugar beet processing factory, as Petitioner did with the Renville, Minnesota, factory, does not increase the amount of sugar Petitioner can extract from beets, but primarily allows Petitioner to process more beets. Thus, Senator Conrad's statement, which constitutes the legislative history for these provisions, does not support Petitioner's position.

Finally, the CCC's adjustment of the Pacific Northwest Sugar Company allocation is not inconsistent with the Agricultural Adjustment Act of 1938 and with CCC's handling of Petitioner's allocation. The Renville, Minnesota, sugar beet processing factory was never closed during the period of its expansion, other than during the normal off-season for the beet end of the factory. The Moses Lake factory for which Pacific Northwest Sugar Company was awarded an adjustment of its allocation for opening a sugar beet processing facility had been closed for 20 years. That it was a closed factory for 20 years is

manifest—most of the old equipment had been removed from the site. There had been no sugar beet processing at that location from 1978 until Pacific Northwest Sugar Company opened a sugar beet processing factory at the same site in 1998. (Tr. I at 95-98.) The two situations are simply not analogous.

Petitioner is Not Entitled to a Second Adjustment for Substantial Quality Losses on Stored Sugar Beets

I affirm the Executive Vice President's denial of an adjustment for substantial quality losses on stored sugar beets for the 1999 crop year. I find the clear, unambiguous language of the Agricultural Adjustment Act of 1938 only allows a single adjustment for substantial quality losses on stored sugar beets during the three crop years (1998 through 2000) that are used to calculate each beet sugar processor's allocation and the CCC had already allowed Petitioner such an adjustment for the 2000 crop year. Further, the legislative history offers no help to Petitioner's interpretation.

The Agricultural Adjustment Act of 1938 provides for an adjustment if the Secretary of Agriculture determines the beet sugar processor, "during the 1998 through 2000 crop years, suffered substantial quality losses on sugar beets stored during any such crop year."[2] Petitioner contends it is entitled to a second adjustment for the 1999 crop year, in addition to the quality loss adjustment Petitioner received for the 2000 crop year, while the Executive Vice President contends that it was immaterial and irrelevant whether Petitioner suffered substantial quality losses in the 1999 crop year. The Executive Vice President and Intervenors contend, in order to properly apply the statutory provision, the CCC never had to decide the issue of whether Petitioner had suffered substantial quality losses in the 1999 crop year since suffering substantial quality losses during the 2000 crop year was a sufficient basis for the CCC to make the single adjustment permitted under the Agricultural Adjustment Act of 1938.

The CCC interpretation is in accord with the clear and unambiguous language of the Agricultural Adjustment Act of 1938. There are four

[2] 7 U.S.C. § 1359dd(b)(2)(D)(i)(IV).

different bases for adjustments under the Agricultural Adjustment Act of 1938, and three of them—for opening or closing a sugar beet processing factory and for constructing a molasses desugarization facility, apply to each opening, closing, or construction. In contrast, the adjustment for substantial quality losses on sugar beets stored during any crop year from 1998 through 2000 does not specify that the adjustment applies to each such loss. The rules of statutory construction require the presumption that Congress' word choices are intentional and that where Congress uses one word—each—in describing three of the bases for adjustments, while not using that word to apply to the fourth basis for an adjustment, then Congress must have had a purpose in so doing. Where Congress includes particular language in one section of a statute, but omits that language in another section of the statute, "it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Bates v. United States*, 522 U.S. 23, 29-30 (1997). Where Congress provided that an adjustment be made for each opening, closing, or construction in 7 U.S.C. § 1359dd(b)(2)(D)(ii)(I)-(III) and chose a different approach in 7 U.S.C. § 1359dd(b)(2)(D)(ii)(IV), the only proper conclusion is that Congress did not want the same standard to apply.

Once again, even if I found that I needed to look to the legislative history, I find nothing that would support Petitioner's interpretation. The legislative history does not address whether Congress intended there to be one, two, or three adjustments based on sustaining substantial quality losses. While all parties agree that the purpose of the adjustment provisions of the Agricultural Adjustment Act of 1938 are to provide a predictable, transparent, and equitable formula, Senator Conrad's statements shed no light, one way or the other, as to how this particular adjustment is to be applied.

A considerable portion of the hearing was devoted to testimony and exhibits as to what Congress meant by "substantial quality losses" on stored sugar beets. Because I affirm the Executive Vice President's determination that the Agricultural Adjustment Act of 1938 only allows for one quality loss adjustment and because the CCC has already awarded Petitioner such an adjustment for the 2000 crop year, I do not find it necessary to make any determination as to whether Petitioner showed it has suffered substantial quality losses on stored sugar beets

during the 1999 crop year and what standards would apply to make such a determination.

Petitioner's Due Process, Regulatory Taking, and Significant Impact Claims Provide No Basis for Overturning the Executive Vice President's Decision

Petitioner alleges its due process rights were violated by the Executive Vice President's lack of a "thorough and proper investigation" of Petitioner's request that the Executive Vice President reconsider the CCC's October 1, 2002, beet sugar marketing allotment allocation decision; denying it the requested allocation adjustments would constitute a regulatory taking; and the impact of a denial of the requested allocation adjustments would be significant and discriminatory (Initial Post-Hearing Brief of Southern Minnesota Beet Sugar Cooperative at 13-15).

The Judicial Officer's jurisdiction to rule on constitutional claims is limited. I cannot declare an Act of Congress unconstitutional. "[G]enerally an administrative tribunal has no authority to declare unconstitutional a statute that it administers." *In re Jerry Goetz*, 61 Agric. Dec. 282, 287 (2002). However, I am charged with assuring that parties receive due process.

Petitioner has received ample due process. Petitioner's principal due process contention appears to be that, on reconsideration, the Executive Vice President did not conduct a hearing; however, neither the Agricultural Adjustment Act of 1938 nor the Sugar Program regulations entitles Petitioner to a hearing before the Executive Vice President. Moreover, Petitioner received an in-person hearing before the Chief ALJ and had a full opportunity to adduce the facts that would support Petitioner's claim for an increase in its beet sugar marketing allotment allocation.

Petitioner's regulatory taking and unfair impact arguments are essentially disagreements with Congress' legislative decisions in crafting the Agricultural Adjustment Act of 1938. Since I have sustained the CCC's interpretations as totally consistent with the Agricultural Adjustment Act of 1938 and since I have no authority to alter or overrule the statutory scheme authorized by Congress, I find no

basis for reversing the determination of the Executive Vice President.

Findings and Conclusions

1. Petitioner, during the years 1996 through 2000, engaged in a significant modernization and expansion of its sugar beet processing factory in Renville, Minnesota.

2. Petitioner's significant modernization and expansion of its sugar beet processing factory in Renville, Minnesota, did not constitute opening a new sugar beet processing factory.

3. Petitioner is not entitled to an increase in its beet sugar marketing allotment allocation for opening a sugar beet processing factory.

4. Petitioner received an increase in its beet sugar marketing allotment allocation as a result of suffering substantial quality losses on stored sugar beets during the 2000 crop year.

5. Under the Agricultural Adjustment Act of 1938, no beet sugar processor is entitled to more than one adjustment for substantial quality losses on stored sugar beets during the 1998 through 2000 crop years.

6. Petitioner is not entitled to an increase in its beet sugar marketing allotment allocation for suffering substantial quality losses on stored sugar beets during the 1999 crop year.

7. Petitioner was not denied due process during the course of this proceeding.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Petitioner raises 11 issues in "Southern Minnesota Beet Sugar Cooperative Appeal Petition to the Judicial Officer" [hereinafter Petitioner's Appeal Petition] and "Southern Minnesota Beet Sugar Cooperative Brief in Support of Appeal Petition" [hereinafter Petitioner's Appeal Brief].

First, Petitioner contends the Chief ALJ's finding that the Agricultural Adjustment Act of 1938 is clear and unambiguous, is error. Petitioner contends the word *opened*, as used in the adjustment provisions of the Agricultural Adjustment Act of 1938, is ambiguous because it is not defined in the Agricultural Adjustment Act of 1938 or in the Sugar Program regulations. Petitioner asserts a beet sugar

processor that significantly increases sugar beet processing capacity at an existing sugar beet processing factory has *opened a sugar beet processing factory* as that term is used in the Agricultural Adjustment Act of 1938. (Petitioner's Appeal Pet. at 2; Petitioner's Appeal Brief at 15-21.)

As an initial matter, Petitioner cites no authority, and I cannot find authority, for Petitioner's position that words used in a statute that are not defined in that statute are ambiguous *per se*. Instead, it has long been held, when not defined by statute, words of a statute are to be given their ordinary or common meaning in the absence of a contrary intent or unless giving the words their ordinary or common meaning would defeat the purpose for which the statute was enacted.[3]

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[3]*Leocal v. Ashcroft*, ___ U.S. ___, 125 S. Ct. 377, 382 (2004) (stating, when interpreting a statute, words must be given their ordinary or natural meaning); *Williams v. Taylor*, 529 U.S. 420, 431 (2000) (stating we give the words of a statute their ordinary, contemporary, common meaning absent an indication Congress intended them to bear some different import); *Walters v. Metropolitan Educational Enterprises, Inc.*, 519 U.S. 202, 207 (1997) (stating, in the absence of an indication to the contrary, words in a statute are assumed to bear their ordinary, contemporary, common meaning); *Smith v. United States*, 508 U.S. 223, 228 (1993) (stating, when a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning); *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 388 (1993) (stating courts properly assume, absent sufficient indication to the contrary, that Congress intends the words in its enactments to carry their ordinary, contemporary, common meaning); *Diamond v. Diehr*, 450 U.S. 175, 182 (1981) (stating, in cases of statutory construction, we begin with the language of the statute; unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning); *Perrin v. United States*, 444 U.S. 37, 42 (1979) (stating a fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning); *Burns v. Alcala*, 420 U.S. 575, 580-81 (1975) (stating words used in a statute are to be given their ordinary meaning in the absence of persuasive reasons to the contrary); *Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459, 465 (1968) (stating, in the absence of persuasive reasons to the contrary, we attribute to the words of a statute their ordinary meaning); *Crane v. Commissioner*, 331 U.S. 1, 6 (1947) (stating words of statutes should be interpreted where possible in their ordinary, everyday senses); *United States v. Stewart*, 311 U.S. 60, 63 (1940) (stating Congress will be presumed to have used a word in its usual and well-settled sense); *City of Lincoln v. Ricketts*, 297 U.S. 373, 376 (1936) (stating, in construing the words of an act of Congress, we seek the legislative intent; we give to the words their natural significance unless that leads to an unreasonable result plainly at

(continued...)

The common and ordinary meaning of the verb *to open* (as in *opened a sugar beet processing factory*) is "to make available for or active in regular function ([opened] a new store),"[4] "[t]o begin; initiate; commence . . .[t]o commence the operation of."[5] I cannot locate any authority which indicates that the word *opened* in relation to a business, factory, or other establishment would commonly or ordinarily be understood to include the modification of an existing establishment.

Second, Petitioner asserts the word *opened*, as used in the Agricultural Adjustment Act of 1938, when examined in conjunction with the congressional intent to account for a beet sugar processor's addition of sugar beet processing capacity, directly supports Petitioner's entitlement to an allocation adjustment (Petitioner's Appeal Pet. at 2-3; Petitioner's Appeal Brief at 21-25).

The legislative history contains only one reference to *capacity*: Senator Conrad, during Senate debate on the Farm Security and Rural Investment Act of 2002, stated, as follows:

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[3](...continued)
variance with the evident purpose of the legislation); *Old Colony R.R. v. Commissioner*, 284 U.S. 552, 560 (1932) (stating the legislature must be presumed to use words in their known and ordinary signification); *De Ganay v. Lederer*, 250 U.S. 376, 381 (1919) (stating, unless the contrary appears, statutory words are presumed to be used in their ordinary and usual sense and with the meaning commonly attributed to them); *Greenleaf v. Goodrich*, 101 U.S. 278, 285 (1879) (stating the popular or received import of words furnishes the general rule for the interpretation of public laws); *Maillard v. Lawrence*, 16 How. 251, 261 (1853) (stating the popular or received import of words furnishes the general rule for the interpretation of public laws; and whenever the legislature enacts a law, the just conclusion from such a course must be that the legislators not only themselves comprehended the meaning of the language they have selected, but have chosen it with reference to the known apprehension of those to whom the legislative language is addressed, and for whom it is designed to constitute a rule of conduct, namely, the community at large); *Levy v. McCartee*, 6 Pet. 102, 110 (1832) (stating the legislature must be presumed to use words in their known and ordinary signification, unless that sense be repelled by the context); *Minor v. Mechanics' Bank of Alexandria*, 1 Pet. 46, 64 (1828) (stating the ordinary meaning of the language of a statute must be presumed to be intended, unless it would manifestly defeat the object of the provisions).

[4]Merriam-Webster's Collegiate Dictionary 814 (10th ed. 1997).

[5]The American Heritage Dictionary of the English Language 920 (1976).

> I am pleased to say the amendment I am offering today with the Senator from Idaho reflects producers' efforts to forge that consensus. It provides that any future allotments will be based on each processor's weighted-average production during the years 1998 through 2000, with authority for the Secretary of Agriculture to make adjustments in the formula if an individual processor experienced disaster-related losses during that period or opened or closed a processing facility or *increased processing capacity through improved technology to extract more sugar from beets*.

148 Cong. Rec. S514 (daily ed. Feb. 8, 2002) (statement of Sen. Conrad) (emphasis added).

Looking at Senator Conrad's statement in context, it is apparent he is making a reference to each of the four bases for adjustment of the weighted average quantity of beet sugar produced by a beet sugar processor during the 1998 through 2000 crop years—opening a sugar beet processing factory, closing a sugar beet processing factory, disaster-related losses, and construction of a molasses desugarization facility. Further, the phrase in question refers to technologies to "extract more sugar from beets." Increasing the capacity of a sugar beet processing factory, as Petitioner did with the Renville, Minnesota, factory, does not increase the amount of sugar Petitioner can extract from beets, but primarily allows Petitioner to process more beets. Thus, Senator Conrad's statement, which constitutes the legislative history for the adjustment provisions of the Agricultural Adjustment Act of 1938, does not support Petitioner's position that its modification of the existing Renville, Minnesota, sugar beet processing factory entitles Petitioner to an allocation adjustment.

Third, Petitioner contends an adjustment for an increase in capacity of a sugar beet processing factory is consistent with the purpose of the Agricultural Adjustment Act of 1938. Petitioner states the purpose of the baseline formula and related adjustments is to establish a fair, equitable, and representative allotment allocation for each sugar beet processor. (Petitioner's Appeal Pet. at 3; Petitioner's Appeal Brief at 25.)

Again, Petitioner ignores the plain language of the Agricultural Adjustment Act of 1938 which specifically refers to an adjustment of the weighted average quantity of beet sugar produced by a beet sugar processor which, during the 1996 through 2000 crop years, *opened* a sugar beet processing factory (7 U.S.C. § 1359dd(b)(2)(D)(i)(I), (b)(2)(D)(ii)(I)). Moreover, I find no legislative history that supports Petitioner's contention that Congress intended that the Secretary of Agriculture adjust the weighted average quantity of beet sugar produced by a beet sugar processor which, during the 1996 through 2000 crop years, expanded the capacity of an existing sugar beet processing factory.

Petitioner also cites Pacific Northwest Sugar Company as an example of a beet sugar processor that was provided an adjustment for increasing the capacity of a sugar beet processing factory (Petitioner's Appeal Brief at 25). However, Petitioner's assertion is not supported by the record which establishes that the CCC adjusted Pacific Northwest Sugar Company's weighted average quantity of beet sugar based on Pacific Northwest Sugar Company's opening a sugar beet processing factory. Moreover, Petitioner undermines its contention that Pacific Northwest Sugar Company was provided an adjustment for increasing the capacity of its Moses Lake, Washington, sugar beet processing factory by also asserting that the Pacific Northwest Sugar Company decreased the Moses Lake, Washington, sugar beet processing factory capacity from 10,000 tons of beets per day to 6,000 tons of beets per day (Petitioner's Appeal Brief at 32).

Fourth, Petitioner contends the Beet Processor Production History Adjustment Survey conducted by the CCC is irrelevant to the determination of whether Petitioner is entitled to an adjustment for opening a sugar beet processing factory and the Chief ALJ erroneously placed significant weight on the survey and the mistaken way in which Petitioner completed the survey (Petitioner's Appeal Pet. at 3; Petitioner's Appeal Brief at 26-27).

The Chief ALJ found significant, but not controlling, that, in response to the Beet Processor Production History Adjustment Survey conducted by the CCC, Petitioner indicated it had not opened a sugar beet processing factory during the time period that would trigger the increased allocation. The Chief ALJ concluded Petitioner's answer to

the Beet Processor Production History Adjustment Survey makes apparent that, at the time of the survey, Petitioner considered its renovation of its Renville, Minnesota, sugar beet processing factory just that, a renovation, and not the opening of a sugar beet processing factory. (Initial Decision at 15.)

I agree with the weight the Chief ALJ placed on Petitioner's response to the Beet Processor Production History Adjustment Survey and the conclusion the Chief ALJ drew from Petitioner's response. Moreover, I find Petitioner's assertion, that it did not understand the significance of an incorrect response to the Beet Processor Production History Adjustment Survey, was belied by the care with which Petitioner explained its affirmative answer to the question regarding substantial quality losses on stored sugar beets during the period October 1, 1998, through September 30, 2001; by Petitioner's entrusting the completion and return of the Beet Processor Production History Adjustment Survey to its comptroller, Ron T. Bailey; and by Petitioner's concern that it return the Beet Processor Production History Adjustment Survey to the CCC before the CCC's deadline for issuing beet sugar marketing allotment allocations.

Fifth, Petitioner contends the Chief ALJ erroneously found credible Intervenors' claims that, if Petitioner is granted an adjustment to its weighted average baseline beet sugar production quantity for opening a sugar beet processing factory, various Intervenors would also be entitled to the same adjustment (Petitioner's Appeal Pet. at 3; Petitioner's Appeal Brief at 27-30).

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).[6] The Administrative Procedure Act provides that, on appeal from

[6]*See also In re Excel Corp.*, 62 Agric. Dec. 196, 244-46 (2003), *enforced as modified*, 397 F.3d 1285 (10th Cir. 2005); *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. 173, 210 (2002), *aff'd*, 351 F.3d 447 (10th Cir. 2003), *cert. denied*, 125 S. Ct. 38 (2004); *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. (continued...)

an administrative law judge's initial decision, the agency has all the powers it would have in making an initial decision, as follows:

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[6](...continued)
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 Aldovin Dairy, Inc.*, 42 Agric. Dec. 1791, 1797-98 (1983), *aff'd*, No. 84-0088 (M.D. Pa. Nov. 20, 1984); *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 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 (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).

§ 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, 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.[7]

I have examined the record and find no basis to reverse the Chief ALJ's credibility determinations with respect to Intervenors' claims that they undertook significant and highly costly modifications and improvements to their sugar beet processing factories.

Sixth, Petitioner contends the Chief ALJ erroneously found Petitioner's situation is not analogous to that of Pacific Northwest Sugar Company in which the CCC awarded Pacific Northwest Sugar Company an increase in its beet sugar marketing allocation for opening its Moses Lake, Washington, sugar beet processing factory. Petitioner asserts the undisputed evidence establishes Pacific Northwest Sugar Company built the sugar beet processing factory on the site of an existing, but non-operational, sugar beet processing factory and used existing, used, and new equipment and buildings. Petitioner argues, in awarding an adjustment to Pacific Northwest Sugar Company, the CCC determined that the use of existing, used, and new equipment to create

[7] *In re Excel Corp.*, 62 Agric. Dec. 196, 244-46 (2003), *enforced as modified*, 397 F.3d 1285 (10th Cir. 2005); *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. 173, 210 (2002), *aff'd*, 351 F.3d 447 (10th Cir. 2003), *cert. denied*, 125 S. Ct. 38 (2004); *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*, 12 Fed. Appx. 718, 2001 WL 401594 (10th Cir.), *cert. denied*, 534 U.S. 1440 (2001); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 89 (1997) (Order Denying Pet. for Recons.); *In re Andershock's 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).

new sugar beet processing capacity on the footprint of a previously-operational sugar beet processing factory constitutes opening a sugar beet processing factory. (Petitioner's Appeal Pet. at 4; Petitioner's Appeal Brief at 30-32.)

I agree with the Chief ALJ's finding that Petitioner's situation is not analogous to that of Pacific Northwest Sugar Company. The Chief ALJ very clearly articulates the stark difference between Petitioner's situation and that of Pacific Northwest Sugar Company (Initial Decision at 9-10, 18), and I have adopted, with very minor modifications, the Chief ALJ's discussion in this Decision and Order, *supra*. I find no reason to reiterate that discussion here.

Seventh, Petitioner contends the Chief ALJ erroneously held that no more than one substantial quality loss adjustment may be made under the Agricultural Adjustment Act of 1938. Petitioner contends it is entitled to two adjustments for the two substantial quality losses on stored sugar beets that Petitioner suffered during the 1998 through 2000 crop years—one in crop year 1999, the other, for which Petitioner was given an adjustment, in crop year 2000. Petitioner argues the use of the plural (substantial quality *losses* on stored sugar beets) in the adjustment provisions of the Agricultural Adjustment Act of 1938 means the Secretary of Agriculture must adjust the weighted average quantity of beet sugar produced by a beet sugar processor for each substantial quality loss suffered during any crop year from 1998 through 2000. (Petitioner's Appeal Pet. at 4; Petitioner's Appeal Brief at 34-40).

A beet sugar processor can be awarded more than one of each of the first three permissible adjustments in section 359d(b)(2)(D)(i)(I)-(III) of the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359dd(b)(2)(D)(i)(I)-(III)); however, the language of each of these three bases for adjustment is in the singular so that it conforms to the parallel language in section 359d(b)(2)(D)(ii)(I)-(III) of the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359dd(b)(2)(D)(ii)(I)-(III)) awarding an adjustment for *each* event. Thus, for instance, the Secretary of Agriculture may make an adjustment if the Secretary determines a beet sugar processor has opened *a* sugar beet processing factory (7 U.S.C. § 1359dd(b)(2)(i)(D)(I)) and the amount of the adjustment is 1.25 percent for *each* sugar beet processing factory that is opened by the beet sugar processor (7 U.S.C. § 1359dd(b)(2)(ii)(D)(I)).

However, in section 359d(b)(2)(i)(D)(IV) of the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359dd(b)(2)(i)(D)(IV)), which provides for adjustment based upon substantial quality losses, the singular is not needed because the parallel provision in section 359d(b)(2)(ii)(D)(IV) of the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359dd(b)(2)(ii)(D)(IV)) does not provide for an adjustment for *each* event.

Congress provided for an adjustment for *each* sugar beet processing factory that is opened by a beet sugar processor, for *each* sugar beet processing factory that is closed by a beet sugar processor, and for *each* molasses desugarization facility that is constructed by a beet sugar processor. Congress did not provide for an adjustment for each substantial quality loss on stored sugar beets suffered by a beet sugar processor; instead, Congress provided for an adjustment in the case of a beet sugar processor that has suffered substantial quality losses on stored sugar beets.

Petitioner, referring to Senator Conrad's statement, argues the legislative history establishes that the Secretary of Agriculture is to make *adjustments* (plural) when a beet sugar processor suffers substantial quality losses on stored sugar beets (Petitioner's Appeal Brief at 39).

Again, I disagree with Petitioner. Senator Conrad states:

> I am pleased to say the amendment I am offering today with the Senator from Idaho reflects producers' efforts to forge that consensus. It provides that any future allotments will be based on each processor's weighted-average production during the years 1998 through 2000, with authority for the Secretary of Agriculture to make *adjustments* in the formula if an individual processor experienced disaster-related losses during that period or opened or closed a processing facility or increased processing capacity through improved technology to extract more sugar from beets.

148 Cong. Rec. S514 (daily ed. Feb. 8, 2002) (statement of Sen. Conrad) (emphasis added).

I find *adjustments* is plural not because Congress intended multiple

adjustments for substantial quality losses on stored sugar beets, but because Senator Conrad is referring to the four bases for adjustments: opening a sugar beet processing factory, closing a sugar beet processing factory, constructing a molasses desugarization facility, and suffering substantial quality losses on stored sugar beets.

Eighth, Petitioner contends the Chief ALJ erroneously failed to find that Petitioner met all the applicable standards for what constitutes substantial quality losses (Petitioner's Appeal Pet. at 4; Petitioner's Appeal Brief at 40-43).

The Chief ALJ did not find it necessary to make any determination as to whether Petitioner established that it suffered substantial quality losses on stored sugar beets during the 1999 crop year or to make any determination regarding the standards that would apply to determine whether a sugar beet processor has established that it suffered substantial quality losses on stored sugar beets. The Chief ALJ concluded he was not required to make these determinations because the Agricultural Adjustment Act of 1938 only allows one substantial quality loss adjustment on stored sugar beets suffered during the 1998 through 2000 crop years and the undisputed evidence establishes that Petitioner had already received an adjustment for substantial quality losses on stored sugar beets suffered during the 2000 crop year (Initial Decision at 20-21). I agree with the Chief ALJ's conclusions and the reasons for his conclusions that it is not necessary to make any determination as to whether Petitioner established that it suffered substantial quality losses on stored sugar beets during the 1999 crop year and what standards would apply to make such a determination.

Ninth, Petitioner contends the Chief ALJ erroneously granted deference to the CCC's interpretation of the Agricultural Adjustment Act of 1938 (Petitioner's Appeal Pet. at 4; Petitioner's Appeal Brief at 43-45).

While the Chief ALJ stated the CCC's interpretation of the Agricultural Adjustment Act of 1938 was entitled to some deference, the Chief ALJ clearly based the Initial Decision on what he independently found to be the plain language of the Agricultural Adjustment Act of 1938. Therefore, even if I agreed with Petitioner that the Chief ALJ's statements regarding the deference to be given the CCC's interpretation of the Agricultural Adjustment Act of 1938 was error, nevertheless, I

would find the Chief ALJ's statements harmless error. Moreover, I do not base this Decision and Order on deference to the CCC's interpretation of the Agricultural Adjustment Act of 1938. Instead, I find, without reference to the CCC's interpretation, that Petitioner did not open a sugar beet processing factory within the meaning of the adjustment provisions of the Agricultural Adjustment Act of 1938 and is not entitled under the adjustment provisions of the Agricultural Adjustment Act of 1938 to two adjustments for substantial quality losses on stored sugar beets during crop years 1998 through 2000.

Tenth, Petitioner asserts the Executive Vice President and Intervenors objected to Petitioner's right to a hearing at which oral and written evidence could be introduced. Petitioner contends these objections resulted in unnecessary delay in the proceeding; forced Petitioner to engage in an academic briefing exercise; and forced Petitioner to suffer for an extended period of time without its proper sugar marketing allotment allocation, while the rest of the industry benefited from an improper increased sugar marketing allotment allocation. Petitioner suggests the Executive Vice President's and Intervenors' challenge to Petitioner's right to a hearing resulted in a denial of due process. (Petitioner's Appeal Pet. at 5; Petitioner's Appeal Brief at 45-46.)

As an initial matter, the record indicates that the Executive Vice President and Intervenors filed briefs regarding the nature and purpose of the hearing in response to a May 14, 2003, request by Administrative Law Judge Jill S. Clifton, who was then assigned to conduct this proceeding (Brief of Southern Minnesota Beet Sugar Cooperative Concerning Suggested Procedural Matter at 1-2; Joint Response of the Intervenors To the Brief of the Petitioner Concerning Suggested Procedural Matter at 1-3; Brief of Commodity Credit Corporation Concerning Suggested Procedural Questions at 1-2). The record does not establish that the Executive Vice President or Intervenors challenged Petitioner's right to a hearing for purposes of delay. Further, the Chief ALJ, after consideration of the Executive Vice President's, Petitioner's, and Intervenors' briefs on procedural matters determined that an in-person hearing was warranted (Summary of Telephone Conference & Order Requiring Pre-Hearing Exchanges at 1). Subsequently, the Chief ALJ conducted a 3-day in-person hearing at which Petitioner introduced

oral and written testimony. Under these circumstances, I reject Petitioner's contention that it was denied due process.

Eleventh, Petitioner contends, if it does not receive the requested adjustments, Petitioner will suffer a regulatory taking (Petitioner's Appeal Pet. at 5; Petitioner's Appeal Brief at 45-48).

The inquiry into whether a taking has occurred is essentially an ad hoc factual inquiry not directed by a set formula. However, the Supreme Court of the United States has identified three factors to be taken into account when determining whether a governmental action has gone beyond regulation and effects a taking: (1) the character of the governmental action; (2) the economic impact of the governmental action; and (3) the governmental action's interference with reasonable investment-backed expectations.[8] A taking may more readily be found when the governmental interference with property can be characterized as a physical invasion by government, than when the interference arises from a public program adjusting the benefits and burdens of economic life to promote the common good.[9] I do not find the Secretary of Agriculture's denial of Petitioner's request for two adjustments to its weighted average quantity of beet sugar produced during the 1998 through 2000 crop years can be construed as an unconstitutional taking of Petitioner's property. In any event, this forum is not the proper forum for Petitioner's inverse condemnation claim.

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

ORDER

1. The determination made by the Executive Vice President on

[8] *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 294-96 (1981); *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 82-83 (1980); *Kaiser Aetna v. United States*, 444 U.S. 164, 174-75 (1979); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 123-24 (1978); *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962); *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958).

[9] *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 488 n.18 (1987); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

December 10, 2002, denying Petitioner's request for an increase in its beet sugar marketing allotment allocation under the Agricultural Adjustment Act of 1938 is sustained.

2. Petitioner's Petition for Review is denied.

In re: CARGILL, INC.
SMA Docket No. 03-0002.
Decision and Order.
Filed June 27, 2005.

SMA – Sugar Beets – Adjustment of allocation – Statutory construction – New entrant status.

Steven Adducci, Dave Bieging, John M. Gross, and Mathew J. Clark, for Complainants
Jeffrey Kahn and Bret Kappel, for Respondent
Phillip Fraas, for Intervenors
Decision and Order by Chief Administrative Law Judge Marc R. Hillson

Decision

In this decision, I deny the Petition of Cargill, Inc. to overturn the decision of the Executive Vice-President of the Commodity Credit Corporation (CCC) that it was not entitled to an allocation of beet sugar as a "new entrant" in the beet sugar processing industry. I find that the decision of the CCC is in accord with the new entrant provisions of the Agricultural Adjustment Act of 1938, as amended by section 1403 of the Farm Security and Rural Investment Act of 2002 (Act)(7 U.S.C. §1359dd(b)(2)(H)). I thus find that Cargill is not entitled to the 80,000 short ton allocation requested in its initial application to the CCC.

Procedural Background

This matter was initiated by Cargill's January 6, 2003 request, to the Executive Vice-President of the CCC, for a determination that Cargill's Dayton, Ohio factory was a sugar processing facility under the Act.

A.R. 001.[1] Submitted with the request was an application for a marketing allocation of 80,000 short tons of sugar produced from sugar beets. A.R. 005. On February 28, 2003, Daniel Colacicco, Director of the Dairy and Sweetness Analysis Group of USDA's Farm Service Agency, denied Cargill's request. A.R. 006-007. On March 10, 2003, Cargill asked the CCC to reconsider the denied application. A.R. 008-012. On June 16, 2003, a hearing on Cargill's reconsideration request (which was consolidated with another reconsideration request not at issue here) was conducted before James Little, the Executive Vice-President of the CCC. On July 17, 2003, Mr. Little formally denied Cargill's Request for Reconsideration. A.R. 065-066.

On August 6, 2003, Cargill filed its Petition for Review and Request for Hearing, asking that it be granted a hearing before an administrative law judge, and that the decision of the CCC be overturned. As per the Rules of Practice Applicable to Appeals of Reconsidered Determinations Issued by the Vice President, Commodity Credit Corporation, the CCC on August 26, 2003, filed its answer, along with a certified copy of the record upon which the Executive Vice President of the CCC made his determination. Pursuant to Rule 5(a), the CCC also filed a list of each person "affected" by the CCC decision. This list consisted of all ten sugar beet processors in the United States.[2] Pursuant to Rule 5(d), the Hearing Clerk served each affected person with a copy of Cargill's petition for review and the CCC's answer, and advised them of their right to intervene in the proceeding.

Southern Minnesota Beet Sugar Cooperative (SMBSC) intervened in favor of Cargill's petition, while Amalgamated Sugar Company, American Crystal Sugar Company, Imperial Sugar, Inc., Michigan Sugar Cooperative, Minn-Dak Farmers Cooperative, Monitor Sugar Company and Western Sugar Cooperative (Joint Intervenors) intervened in opposition to the petition.

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[1] A. R. refers to the certified administrative record of the proceedings before the CCC.

[2] As will be discussed in more detail, each year there is a fixed amount of sugar beets that can legally be marketed for human consumption in the United States, so that any increase or decrease in a company's allotment, or any allotment awarded to a new entrant, directly impacts all sugar beet processors.

On October 16, 2003, Cargill filed an "amended and restated" petition for review and request for hearing. The CCC and the Joint Intervenors moved to strike the amended petition. At a February 12, 2004 conference call, I denied the motion to strike, and directed Cargill to file a revised version of its amended petition indicating what was changed from the initial filing.

I conducted a hearing in this matter on June 15, 16 and 17, 2004 in Washington, D.C. Witnesses were called by Cargill, SMBSC and the Joint Intervenors. The CCC declined to present any testimony, but did cross-examine witnesses called by the other parties. A portion of the first day of testimony concerned confidential business information, and remains under seal. [3]

Statutory and Regulatory Background

The federal government has regulated sugar beets, along with other commodities, for many years. In 2002, Congress passed the Farm Security and Rural Investment Act, 7 U.S.C. § 1359 *et seq*. This Act required the Secretary to establish, by the beginning of each crop year, the overall allotment quantity (OAQ) of sugar produced from sugar beets and domestically produced sugar cane. The OAQ is divided so that 54.35 percent is allotted to producers of sugar derived from sugar beets, and 45.65 percent is allocated to producers of sugar derived from sugar cane. The marketing allotments for the processing of beet sugar are based on the average weighted quantity of beet sugar produced by a given processor during the 1998 to 2000 crop years. Thus, these allotments are intended to apply to processors already in the sugar beet processing business. Adjustments to the allotments of these producers for opening or closing a sugar beet processing facility, for constructing a molasses desugarization facility, or for suffering substantial quality losses on stored sugar beets are also provided for, but are not at issue here.

The Act also makes specific provision for "new entrants" into the sugar beet processing business. 7 U.S.C. § 1359dd(b)(2)(H) provides:

(H) New entrants starting production or reopening factories

[3] Tr. 78-117, and CX 18, 19 and 20

(i) In general

Except as provided by clause (ii), if an individual or entity that does not have an allocation of beet sugar under this subpart (referred to in this paragraph as a "new entrant") starts processing sugar beets after the date of enactment of this subparagraph, or acquires and reopens a factory that produced beet sugar during previous crop years that (at the time of acquisition) has no allocation associated with the factory under this subpart, the Secretary shall –

(I) assign an allocation for beet sugar to the new entrant that provides a fair and equitable distribution of the allocations for beet sugar; and

(II) reduce the allocations for beet sugar of all other processors on a pro rata basis to reflect the new allocation.

(ii) Exception

If a new entrant acquires and reopens a factory that previously produced beet sugar from sugar beets and from sugar beet molasses but the factory last processed sugar beets during the 1997 crop year and the new entrant starts to process sugar beets at such factory after May 13, 2002, the Secretary shall –

(I) assign an allocation for beet sugar to the new entrant that is not less than the greater of 1.67 percent of the total of the adjusted weighted average quantities of beet sugar produced by all processors during the 1998 through 2000 crop years as determined under subsection (b)(2)(C) of this section, or 1,500,000 hundredweights; and

(II) reduce the allocations for beet sugar of all other processors on a pro rata basis to reflect the new allocation.

Thus, in order to qualify as a new entrant, a company must start

processing sugar beets after the date the law was enacted (May 13, 2002). If a company satisfies this condition, the Secretary "shall" assign it an allocation, but the amount of the allocation, rather than being subject to the rigid criteria established for companies that are already sugar beet processors, must be "fair and equitable."

The Secretary adopted regulations to implement the statute, several of which are pertinent to this decision.

TITLE 7--AGRICULTURE

CHAPTER XIV--COMMODITY CREDIT CORPORATION, DEPARTMENT OF AGRICULTURE

PART 1435--SUGAR PROGRAM--Table of Contents

Subpart A--General Provisions

Sec. 1435.2 Definitions.

The definitions set forth in this section are applicable for all purposes of program administration.

Beet sugar means sugar that is processed directly or indirectly from sugar beets or sugar beet molasses.

Beet sugar allotment means that portion of the overall allotment quantity allocated to sugar beet processors.

. . .

In-process sugar means the intermediate sugar containing products, as CCC determines, produced in the processing of domestic sugar beets and sugarcane. It does not include raw sugar, liquid sugar, invert sugar, invert syrup, or other finished products that are otherwise eligible for a loan.

. . .

Overall allotment quantity means, on a national basis, the total quantity of sugar, raw value, processed from domestically produced sugarcane or domestically produced sugar from sugar beets, and the raw value equivalent of sugar in sugar products, that is

permitted to be marketed by processors, during a crop year or other period in which marketing allotments are in effect.

. . .

Raw sugar means any sugar that is to be further refined or improved in quality other than in-process sugar.

. . .

Sugar means any grade or type of saccharine product derived, directly or indirectly, from sugarcane or sugar beets and consisting of, or containing, sucrose or invert sugar, including raw sugar, refined crystalline sugar, liquid sugar, edible molasses, and edible cane syrup. For allotments, sugar means any grade or type of saccharine product processed, directly or indirectly, from sugarcane or sugar beets (including sugar produced from sugar beet or sugarcane molasses), produced for human consumption, and consisting of, or containing, sucrose or invert sugar, including raw sugar, refined crystalline sugar, edible molasses, edible cane syrup, and liquid sugar.

Sugar beet processor means a person who commercially produces sugar, directly or indirectly, from sugar beets (including sugar produced from sugar beet molasses), has a viable processing facility, and a supply of sugar beets for the applicable allotment year.

Sec. 1435.308 Transfer of allocation, new entrants

. . .

(f) New entrants, not acquiring existing facilities, may apply to the Executive Vice President, CCC, for an allocation.

(1) Applicants must demonstrate their ability to process, produce, and market sugar for the applicable crop year.

(2) CCC will consider adverse effects of the allocation upon existing processors and producers.

There is not much pertinent legislative history concerning beet sugar allocations. A statement by Senator Conrad, a co-sponsor of the Act,

gives some perspective on Congress's intent in establishing the current allocation program, but has nothing specific to say about the new entrant provision.

> The purpose of this amendment is to provide a predictable, transparent, and equitable formula for the Department of Agriculture to use in establishing beet sugar marketing allotments in the future. This is an amendment that enjoys widespread support within the sugar beet industry. Producers in that industry recall, as I do, the very difficult and contentious period just a few years ago when the Department of Agriculture last attempted to establish beet sugar allotments with very little direction in the law.
>
> . . .
>
> That experience left us all believing that there must be a better way, that we should seek a method for establishing allotments that is fair and open and provides some certainty and predictability to the industry. On that basis, I urged members of the industry to work together to see if they could agree on a reasonable formula.
>
> I am pleased to say the amendment I am offering today with the Senator from Idaho reflects producers' efforts to forge that consensus. It provides that any future allotments will be based on each processor's weighted-average production during the years 1998 through 2000 with authority for the Secretary of Agriculture to make adjustments in the formula if an individual processor experienced disaster related losses during that period or opened or closed a processing facility or increased processing capacity through improved technology to extract more sugar from beets.

107th Cong., 148 Cong. Rec. 10, p. S514 (Feb. 8, 2002).

The Facts

Petitioner Cargill is a large processor of agricultural commodities into food products. Among many other business interests, Cargill operates a sugar processing facility in Dayton, Ohio. A.R. 001. Cargill has considerable experience in marketing edible sugar suitable for human consumption from this facility. Tr. 119. This facility, operating on the site of an idle corn processing plant, begin operating in August 2000, and primarily was used to manufacture sugar products from intermediate sugar products such as liquid cane molasses. Tr. 30-31. Although details of the cost of this facility were testified to in closed session, it is fair to state that the cost of adapting this facility to handle beet thick juice was dramatically less than the typical cost for starting up a full-scale sugar beet processing facility.

Intervenor SMBSC, a beet sugar processing cooperative located in Renville, Minnesota, and a supporter of Cargill's petition, has indicated that it has unused capacity at its factory. Tr. 144-5, 151-2, 167. Cargill and SMBSC have both testified that some sort of an agreement exists between the two companies, where Cargill is effectively buying sugar beets from SMBSC, Tr. 45, is paying SMBSC to process the beets into beet thick juice, Tr. 74, and then arranges to have the beet thick juice transported from Renville to Dayton where Cargill performs the final stages of processing into other sugar products. Tr. 34-35, 76, 181-4. Although this agreement was mentioned numerous times during this proceeding by Cargill and SMBSC, and there are several disparities between the two parties as to what the agreement actually provides for, no agreement was ever submitted as part of this record.

According to Cargill and SMBSC, all processing of the sugar beets allegedly owned by Cargill at SMBSC's factory would be accomplished under the terms of a "tolling" agreement. Tr. 48-52, 58. Traditionally, in the sugar beet processing business, a tolling agreement is a set-up where one processor performs some processing functions on beets owned by another processor. Its usage in the business is not uncommon.

The beet sugar allocation program is a form of "zero-sum game," as the parties readily admit. Thus, when the Secretary issues the annual total allocation, it is divided among all the beet sugar processors according to the formula spelled out in the statute, based on production

during the 1998-2000 crop years, and subject to the adjustments for opening or closing a factory, for opening a molasses desugarization facility or for substantial quality losses. Any additions to a processor's allocation result in a proportional reduction of the allocations of the other processors. Cargill has requested that it be allocated 80,000 short tons of beet sugar as a "new entrant" in the sugar beet processing field. A.R. 001-2. If granted, this would result in a combined 80,000 ton reduction of the allocations of the other sugar beet processors, to be shared proportional to their initial allocation. While SMBSC would also share in this reduction, it would at the same time substantially profit from the additional sales of sugar beets and the payment for the processing of these beets by Cargill, since its farmers would be allowed to grow more beets, and its factory would be more fully utilized.

One of the key factual determinations made by the CCC is that, for the purposes of the Act, beet thick juice is sugar. Since Cargill was already receiving sugar in the form of beet thick juice at its Dayton plant, it could not be processing the juice into sugar, but was rather just refining one form of sugar into another form of sugar. A.R. 006. Indeed, this determination was totally consistent with an earlier determination, sought by SMBSC in September 2002, that beet sugar was sugar for purposes of the Act, and that specifically selling of beet thick juice constituted the selling of sugar. John Richmond, SMBSC's Chief Executive Officer, acknowledged at the hearing that the product his company was shipping to Cargill, even in the form of beet thick juice, was sugar for purposes of the sugar program. Tr. 193.

I heard considerable testimony on the financial impact of granting the proposed allocation to Cargill. Unsurprisingly, Cargill and SMBSC contended that the financial impact would not be significant, even stating that it was de minimus and comparing it to the 2 percent discount for prompt payment that is prevalent in the industry. The Joint Intervenors, equally unsurprisingly, portrayed the losses they would suffer as significant, and the additional revenues SMBSC would receive as "windfall" and worth approximately $138,000,000 over the period from 2004 to 2008 inclusive. While SMBSC would have to suffer the same proportional loss in allotment as the other sugar beet processors if Cargill was granted the requested allocation, it is abundantly clear as

well that, from a financial perspective, they would be far and away the prime beneficiary of the granting of Cargill's petition.

Other financial testimony, including expert testimony, examined the alleged losses that would be suffered by various parties, and the gains that would be experienced by SMBSC, from a marginal cost perspective. In addition to losses in revenues and profits, the Joint Intervenors testified that granting of Cargill's petition would result in "a significant loss of asset values for other allotment holders," JIX 9, p. 8, Report of Patrick M. O'Brien, while SMBSC would achieve significant gains in revenues, profits and asset values.

The Joint Intervenors also contended that if Cargill's petition was granted and SMBSC could have the ability to utilize a tolling arrangement with someone who was only a processor of a product that was already "sugar," such as beet thick juice, everyone else in the industry could easily execute similar agreements, throwing the entire carefully crafted allotment system into chaos. They contended, as did the CCC, that the ease of such "copycatting"—and there was no dispute that any of the Joint Intervenors who had available capacity and the ability to grow more sugar beets could enter into a similar arrangement to the one Cargill had with SMBSC—would lead to a situation, counter to the one anticipated by the Act, where the processors of sugar beets would be subject to numerous allocation changes, in a serial fashion, and that the sugar beet program would operate in a manner quite the opposite of the "certainty and predictability" anticipated by Senator Conrad.

Discussion

Cargill is not entitled to a beet sugar marketing allocation as a new entrant. The CCC determination that granting Cargill new entrant status would be inconsistent with the Act is amply supported by the evidence, as well as the statute, the underlying regulations, and the limited legislative history. Although my holding that Cargill is not entitled to new entrant status eliminates the need for me to address some of the other issues brought up by the parties, I make several additional findings in this area in the event my new entrant ruling is overturned subsequently. Thus, I hold that if a party is a new entrant, it is

mandatory that the CCC grant it an allocation, but that the CCC may consider a variety of factors in determining the size of the allocation. 7 C.F.R. § 1435.308(f).

Cargill does not process sugar beets as contemplated by the new entrant provisions of the Act. While the downstream conversion of beet thick juice into edible sugar is a part of the overall process of making commercially useful sugar out of the sugar beet, the definitions and determinations of the CCC, A.R. 006, make it clear that beet thick juice is already considered sugar under the Act, so that the processing of beet thick juice at a remote facility cannot be considered the processing of sugar beets so as to entitle Cargill to a new entrant allocation.

While Cargill and SMBSC contend that Cargill is entitled to an allocation based on the fact that it is simply purchasing beets from SMBSC's growers and is having the greater part of the processing performed through a tolling arrangement with SMBSC, there is no documentary evidence supporting this contention, and the testimony supporting the existence of such an agreement, not to mention its specific terms, is less than convincing. No agreement between the two companies was ever introduced into evidence, and I have some doubt as to whether such a written agreement, with definite terms and fixed obligations, even exists. Cargill and SMBSC had ample opportunity to submit such an agreement, and it could have been kept under seal, as were other testimony and exhibits in this case, but they chose not to do so. Further, I heard markedly conflicting testimony from witnesses employed by the two companies as to what the "agreement" stated.

Indeed, in its request that the CCC determine that it was a new entrant sugar beet processor under the Act, A.R. 001-005, Cargill indicated that it had entered into an agreement for the purchase of sugar beets from SMBSC. Daniel Pearson testified before the CCC that the sugar beets were to be purchased from the growers of SMBSC, and that the beet thick juice would "at no time" be the property of SMBSC. *Id.*, at 25. At the hearing before me, no evidence was introduced to substantiate these contentions. On the contrary, John Richmond, SMBSC's CEO and President, testified that it was SMBSC as an entity, not the growers, who would contract with Cargill. Tr. 181-2. Rather than owning beets it specifically purchased from growers, SMBSC

might just be selling "some portion of the beets that we have in the pile," Tr. 182, and that beets "owned" by SMBSC and Cargill would likely be commingled. Tr. 183-6. It might be just as likely that the SMBSC growers would receive their payment for the "Cargill" beets from SMBSC as they would from Cargill. Tr. 202-3. Basically, the cumulative written and oral testimony, as well as the failure to produce any written contract, fall far short of convincing me that there is some sort of contract in effect whereby Cargill is buying beets from the growers, and maintaining ownership, and the inherent risks of ownership, from harvest through the processing of the beets into sugar.

I agree with the CCC and the Joint Intervenors that Cargill does not meet the statutory criteria for new entrant status. The new entrant provisions are designed so that an entity that has expanded the substantial funds necessary to purchase or build a sugar beet processing facility receives a fair allocation of the OAQ that it would otherwise be shut out of, since the allocation, in the absence of a new entrant, is distributed among sugar beet processing facilities according to their 1998 through 2000 weighted average crop year production. It allows a company the opportunity to benefit from a significant investment, and is not designed to allow a company to bootstrap itself into an allocation by making relatively little or no investment into a small part of the process. Nor is it designed to allow a company, such as SMBSC, to circumvent the statutory process by contracting with another company to perform a small part of the process, and effectively increase its own allocation to utilize excess unused capacity.

In order to be a new entrant, Cargill must show it is a "sugar beet processor." To so qualify, it must commercially produce sugar, directly or indirectly, from sugar beets. 7 C.F.R. § 1435.2. Yet the product it would receive from SMBSC is already "sugar," as SMBSC is well aware, it having requested and received an interpretation from the CCC that beet thick juice constitutes sugar under the Act. Thus, if Cargill is only processing one form of sugar into other forms of sugar, it could not be a sugar beet processor under the Act or regulations. However, Cargill and SMBSC contend that by purchasing beets from SMBSC growers and then having SMBSC handle all aspects of the processing of the beets

through the beet thick juice stage by means of a tolling agreement, Cargill still qualifies as a new entrant. I disagree.

In the sugar beet industry, tolling is a process by which one processor pays another to handle a portion of the processing of the beets into sugar. Here, Cargill contends it had a contract with SMBSC "to purchase beets to toll through the plant," and that "we have rented the plant for a certain percentage of their capacity" for which they pay a "toll fee." Tr. 48. Cargill and SMSBC have represented that their tolling arrangement is similar to many others in the industry. However, the CCC and Joint Intervenors have pointed out that the agreements of other parties cited by Cargill and SMBSC give little support to the position that a non-sugar beet processor can achieve new entrant status by utilizing tolling agreements as attempted here. SMBSC Opening Brief at 17-19. None of the three examples cited involved a company seeking a new entrant allocation. Indeed, none of the three examples even took place in a time period where both new entrant and similar allocation provisions were present.

No evidence presented by Cargill or SMBSC demonstrates that tolling has ever been utilized to bootstrap a non-sugar beet processor into processor status. Since Cargill, by processing beet thick juice, is only processing a product that has already been classified as "sugar," the only real question is whether a tolling agreement can, in and of itself, propel Cargill into new entrant status. By attempting to classify itself as a sugar beet processor, through a combination of a tolling agreement and contractual agreements that are not even a part of this record, and by its processing of a product that is already sugar, Cargill is no different from any individual, corporation or other entity who could enter into a contract to "toll" sugar beets through SMBSC, and thereby be entitled to new entrant status. In other words, if I were to find that Cargill is entitled to new entrant status, there would be no bar on anyone entering into a tolling agreement with an existing sugar beet processor with unused capacity to grow and process sugar beets, and thereby attain an allotment.

It is obvious that the real beneficiary of awarding new entrant status to Cargill would be SMBSC. As was discussed in great detail in *In re: Southern Minnesota Beet Sugar Cooperative*, 64 Agric. Dec. (July 21,

2004), affirmed by the Judicial Officer at 64 Agric. Dec. 65 (May 9, 2005), SMBSC spent roughly $100,000,000 to renovate its sugar beet processing facility, a significant sum of money, but not inconsistent with funds expended by similar facilities to modernize. Tr. 129. Throughout the litigation of that case, the parties expounded on the major expenditures that were necessary to engage in the sugar beet processing industry.[4] At the same time, it is clear that Cargill's expenditures to attempt to become a sugar beet processing facility were relatively minimal.[5] In the earlier case, and again in this case, it was made clear by SMBSC that it had significant unused capacity as a result of the renovation and expansion, capacity which it obviously seeks to utilize through its dealings with Cargill. While their efforts to increase their allocation in the above-cited case proved unsuccessful, the instant case was proceeding concurrently.

Cargill and SMBSC rely on an "unused capacity" argument—that the capacity added by SMBSC and not used to calculate SMBSC's allotment arguably constitutes a new facility, which Cargill can utilize as a new entrant. Such a contention is unconvincing and inconsistent with the Act. It is exceedingly clear in the Act that a sugar beet processor's allotment is calculated based on its actual production of sugar from sugar beets during the 1998-2000 crop years. Whether the capacity of a processor was used or not, or increased or decreased, is simply not relevant to allotments. The only thing that matters is actual production, subject to the adjustments also permitted in the statute, none of which are at issue here.

It would also be unreasonable to allow Cargill's petition in the face of statutory language requiring that a new entrant be an entity that "starts

[4] Thus, American Crystal Company testified that it had committed $134,000,000 to two major expansions between 1996 and 2000, Western Sugar Cooperative spent $22.5 million and Minn-Dak Farmers Cooperative underwent a $93,000,000 expansion. *Southern Minnesota, supra,* J.O. decision slip op., 10-11.

[5] The costs of setting up operations at Cargill's Dayton plant to accommodate the receipt of beet thick juice were discussed in closed session, with that portion of the transcript under seal. Tr. 115-7. Since Cargill's facility was already handling cane sugar products, the accommodation to handle the beet thick juice was relatively insignificant. *Id.*

processing sugar beets after the date of enactment of this subparagraph." 7 U.S.C. § 1359dd(2)(H)(i). While Cargill claims that it is just entering the sugar beet processing business, the entity that would be doing all the sugar beet processing for Cargill was operating for several decades before the passage of the subparagraph in question. Moreover, all the capacity that would be utilized by Cargill under the "tolling" agreements was already in existence two crop years before the subparagraph in question was enacted. That the very excess capacity that SMSBC was not allowed to use in its own right could be used to entitle a non-sugar beet processor like Cargill to generate an allocation is inimical to the statute. As the CCC contends in its brief, interpreting the statute in Cargill's (and thereby SMBSC's) favor, "would totally undermine the statutory formula for making beet sugar allocations, opening up a free-for-all as all processors under various guises file for new entrant status on the basis of their unused capacity." CCC opening brief at 15.

While there is nothing wrong with exploiting a statutory or regulatory loophole for one's benefit, I agree with the CCC that there simply is not the loophole here that Cargill and SMBSC insist exists. The CCC interpretation of the statute is the only one that properly considers the relationship between the beet sugar marketing allocation provisions and the new entrant provisions. Any other interpretation of the Act would likely lead not to the "certainty and predictability" that was in the minds of the drafters of the Act as summarized by Senator Conrad, but would instead lead to a constant flow of petitions for adjustment of allocations as sugar beet processors with unused capacity and sugar beet farmers with unplanted land could engage in round after round of "contracts" with entities that are not even sugar beet processors to increase their allotments and to reduce market share of other processors who are actually in the business of processing sugar beets.

Thus, I agree with the CCC that a finding "that granting Cargill a new entrant allocation under the proposed arrangement with the Southern Minnesota Beet Sugar Cooperative (Southern Minnesota) is not consistent with the beet sugar allocation formula under the sugar marketing allocation program" is mandated by the Act. A.R. 063. Similarly, the CCC's holding that granting Cargill's petition would

"subvert the carefully crafted beet sugar allocation formula for existing beet processors," *Id.*, is well supported by this record.

Granting of the petition, and acceptance of the arguments of Cargill and SMBSC, could lead to bizarre outcomes that even more strongly illustrate the correctness of the CCC interpretation. Thus, if Cargill simply purchased SMBSC's entire operation, there is little question that it would be entitled to nothing but SMBSC's current allocation, based on the SMBSC 1998-2000 production of sugar from sugar beets. 7 C.F.R. 1435.308(d). Yet by not buying SMBSC's factory, and effectively buying the unused capacity of the factory, Cargill and SMBSC would create out of whole cloth an additional 80,000 tons of sugar production out of the exact same factory that has already been ruled not entitled to any additional allocation. Alternatively, if Cargill were awarded new entrant status and given an allocation, there would be nothing stopping SMBSC from purchasing Cargill's "sugar beet processing facility" and its allocation, and thus, by gaming the system, effectively gaining an allocation for its unused capacity at the expense of the other sugar beet processors. This would wreak havoc on the system carefully crafted by Congress, and would greatly exacerbate the uncertainty that Congress sought to avoid in promulgating the Act.

In affirming the decision of the CCC, I find that the clear language of the statute, the legislative history, the regulations, and the nature of the sugar beet industry mandate a finding that Cargill is not entitled to new entrant status, and that their petition was properly denied. When one reads the requirements for determining the quantity of allocations provisions of the Act in conjunction with the new entrant provisions, the conclusion that a new entrant must be a full-scale sugar beet processor, with the requisite investment in a sugar beet processing facility, in order to achieve new entrant status, is inescapable. While such a construction might not be mandated by looking at the new entrant provision standing alone, when the new entrant provision is read along with the allocation provision, it is clear that construing the new entrant provision to allow Cargill's petition would undercut the detailed and balanced allocation system devised by Congress.

Moreover, while the legislative history is sparse, its principal theme, that the allocation process must be one that is "fair and open and

provides some certainty and predictability to the industry," is fully embraced by the CCC decision and would be utterly disregarded if the Cargill/SMBSC interpretation prevailed. The uncertainties imposed upon the system, condoning artifice and encouraging bootstrapping, would be just the opposite of the system carefully crafted by Congress and managed by the CCC. [6]

I do agree with Petitioner and SMBSC that, if Cargill was entitled to new entrant status, the CCC would be required to assign Cargill "a fair and equitable" allocation. However, since neither the CCC nor I find that Cargill qualifies as a new entrant, there is no need to determine what a fair and equitable allocation would be. Thus, although there was significant testimony at the hearing as to the economic impact of granting the requested allocation, the CCC never got to the point of making the regulatory required determination of considering "adverse effects of the allocation upon existing processors and producers." 7 C.F.R. § 1435.308(f)(2). If I had found that Cargill was entitled to new entrant status, I would have remanded this matter to the CCC to make a determination of what a fair and equitable allocation would be.

Findings and Conclusions

1. Petitioner, a large processor of agricultural commodities into food products, operates a sugar processing facility in Dayton, Ohio.
2. Among many products received for processing at the Dayton facility is beet thick juice, which is a form of sugar.

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[6] Even if the statute was subject to multiple interpretations, I find the CCC would be entitled to some deference in its interpretation of a statute which Congress charged it with administering. However, as I discussed in the *Southern Minnesota* case, Supra, slip up at 17. CCC would not be entitled to the full deference accorded in *Chevron USA, Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837 (1984), because that holding specifically applies to federal judicial review of final agency actions. Since the Judicial Officer acts for the Secretary on appeals from administrative law judge decisions, perhaps the federal courts will give his decision full *Chevron* deference. I still believe that the CCC is the "agency" "charged" with the administration of the statute, *Udall v. Tallman*, 380 U.S. 1, 16 (1965), and that some deference is due the CCC, but because I hold that because the statute itself requires this result, and the legislative history strongly supports this result, I do not rely on deference to sustain the CCC decision.

3. Petitioner does not qualify as a new entrant under the Act because it does not process sugar beets within the meaning of the Act.
4. Intervenor SMBSC is a processor of sugar beets who engaged in a significant and costly renovation of their Renville, Minnesota facility from 1996-2000. This renovation left SMBSC with capacity to process sugar beets in excess of their statutory allocation.
5. Granting of the petition would result in SMBSC being able to grow and process sugar beets which they would not be allowed to grow and process under their own beet sugar allocations, and would constitute a circumvention of the carefully crafted sugar beet allotment program.
6. The preponderance of the evidence does not support a finding that there is a contract between Petitioner and SMBSC under which Cargill purchases sugar beets directly from SMBSC growers, and owns said beets throughout their processing into sugar.
7. In the sugar beet processing industry, a tolling agreement is made between two sugar beet processors where, for a fee, one processor will process the sugar beets of another processor. Since Petitioner is not a sugar beet processor, it cannot bootstrap itself into new entrant status through a tolling agreement with an entity that is a sugar beet processor.
8. Granting of the petition would cause great uncertainty in the sugar beet processing industry, would inevitably result in significant copycatting by other processors who find they have unused capacity, and is counter to the statutory provisions, the legislative history, and the regulations governing this industry.

Conclusion and Order

The determinations made by the Executive Vice-President of the CCC on July 17, 2003 denying Petitioner's request for beet sugar allocations as a new entrant under the Act are sustained. The Petition for Review is DENIED.

This decision shall become final 25 days after service on the Executive Vice-President of the CCC, unless a party or an intervenor files an appeal petition to the Judicial Officer pursuant to Rule 11.

Copies hereof shall be served upon the parties.

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GENERAL

MISCELLANEOUS ORDERS

In re: BOGHOSIAN RAISIN PACKING CO., INC.
2004 AMA Docket No. F&V 989-1.
Dismissal Order.
Filed February 16, 2005.

Frank Martin, Jr., for Respondent.
Howard Sagaser, for Petitioner.
Dismissal Order issued by Victor W. Palmer, Administrative Law Judge.

Petitioner, Boghosian Raisin Packing Co., Inc., is represented by Howard A. Sagaser, Esq. Respondent, Administrator of the Agricultural Marketing Service, U.S. Department of Agriculture, is represented by Frank Martin, Esq.

At the hearing scheduled to start **Wednesday, February 16, 2005,** Counsel for Petitioner informed that Petitioner is withdrawing its Petition for Review.

Accordingly, this case is **DISMISSED** with prejudice.

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

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In re: LION RAISINS, INC., A CALIFORNIA CORPORATION.
2005 AMA Docket No. F&V 989-1.
Order.
Filed March 7, 2005.

Colleen A. Carroll, for Respondent.
Brian C. Leighton, for Petitioner.
Order issued by Peter M. Davenport, Administrative Law Judge.

This matter is before the Administrative Law Judge upon the Motions of the Administrator of the Agricultural Marketing Service filed on February 14, 2005 for a Decision on the Motion to Dismiss and To Strike

the Amended Petition to Enforce and/or Modify Raisin Marketing Order Provisions/Regulations; To Exempt Petitioner from Mandatory Inspection Services by USDA for Incoming and Outgoing Raisins, To Preclude the Raisin Administrative Committee from Receiving the Otherwise Required Raisin Administrative Committee Forms; Petition to Allow Buyers and Producers to Call for Inspection Services, and to Delete Certain Obligations Imposed in Connection Therewith That are not in Accordance with Law, or in the alternative, for a thirty day extension of time in which to file a motion to dismiss or answer.

This action was commenced by the filing of a Petition by the Petitioner on November 10, 2004 seeking various relief from certain Raisin Marketing Order provisions. The Administrator sought and received an extension of time until December 29, 2004 in which to file a response to the Petition and on December 29, 2004 filed Motion to Dismiss the Petition.

The Petitioner then sought and obtained an Extension of Time in which to Respond to the Respondent's Motion to Dismiss the Petition By Order dated January 21, 2005, the Petitioner was granted until and through February 9, 2005 in which to respond. On February 8, 2005, the Petitioner filed an Amended Petition seeking essentially the same relief sought before, but remedying certain of the matters raised in the Motion to Dismiss. The case was reassigned to the undersigned by Order dated March 1, 2005.

This case presents an apparent oversight or omission in the Rules of Practice. Rule 1.130 of the Rules of Practice (titled Scope and applicability of this subpart) clearly includes certain proceedings under the Agricultural Marketing Act of 1937, as amended. Section 8c(14), 7 U.S.C. 608c(14). Under the usual provisions of the rules, a party may (pursuant to Rule 1.137), amend a complaint, petition for review, answer or response to petition for review at any time prior to the filing of a motion for a hearing. Unfortunately for the Petitioner in this case, the legal basis for their petition, if any, comes within the ambit of section 608c(15), 7 U.S.C. 608c(15) and the usual rule does not apply, but rather the more obscure provisions found in 7 C.F.R. 900.52 which authorize the filing of an amended petition within twenty days after the entry of a Judge's order dismissing the petition or at any time prior to the close of the hearing pursuant to 7 C.F.R. 900.52b.

If the amended petition is viewed as premature and consideration of the Motion to Dismiss is required prior to allowing the amendment of the petition, the Respondent's Motion is well founded as the original petition is clearly deficient as it lacks certain of the elements required by Section

900.52(b). The Petitioner failed to directly respond to the Motion to Dismiss, but rather sought to correct the deficiencies with the Amended Petition. Such a failure likely would not be fatal in other forums or for that matter in most federal practice; however, strict compliance with procedural requirements has been sought by the Respondent. Given the history of the disputes between the parties, it is easy to predict that such a result may well only delay the ultimate resolution of this case, an argument advanced against allowing the amendment; however, alternative approaches resolving all issues at one time still consistent with the Regulations have not been advanced.

Accordingly, being sufficiently advised, it is **ORDERED** as follows:

1. The Motion to Strike the Amended Petition as being premature is **GRANTED.**

2. The Motion to Dismiss for failure to comply with form and content requirements of the Regulations is **GRANTED.**

3. The Petitioner may, consistent with 7 C.F.R. 900.52(c)(2), file any amended petition within twenty (20) days of service of this Order by the Hearing Clerk's Office.

Copies of this Order shall be served upon the parties by the Hearing Clerk's Office.

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In re: MARK MCDOWELL; JIM JOENS; RICHARD SMITH; AND THE CAMPAIGN FOR FAMILY FARMS, INCLUDING IOWA CITIZENS FOR COMMUNITY IMPROVEMENT, LAND STEWARDSHIP PROJECT, MISSOURI RURAL CRISIS CENTER, ILLINOIS STEWARDSHIP ALLIANCE, AND CITIZENS ACTION COALITION OF INDIANA ON BEHALF OF THEIR PORK CHECKOFF-PAYING HOG FARMER MEMBERS.
AMA PPRCIA Docket No. 05-0001.
Dismissal Without Prejudice.
Filed April 12, 2005.

Susan Stokes, for Petitioner.
Respondent, Frank Martin, Jr.
Dismissal Without Prejudice issued by Jill S. Clifton, Administrative Law Judge.

[1]A letter dated March 2, 2005, on Farmers' Legal Action Group, Incorporated (FLAG) letterhead, over the signature of Susan E. Stokes, Legal Director, addressed to the Secretary of Agriculture, has become the "Petition" in this case.

[2]The "Petition" identifies the following as "Petitioners": Iowa hog farmer Mark McDowell, Minnesota hog farmers Jim Joens and Richard Smith, and the Campaign for Family Farms, including Iowa Citizens for Community Improvement, Land Stewardship Project, Missouri Rural Crisis Center, Illinois Stewardship Alliance, and Citizens Action Coalition of Indiana on behalf of their pork checkoff-paying hog farmer members.

[3]The "Petition" was filed with the Hearing Clerk, United States Department of Agriculture ("USDA"), on March 14, 2005. The Hearing Clerk docketed the case as AMA PPRCIA (Pork Promotion, Research, and Consumer Information Act) Docket No. 05-0001. The case was assigned to me on April 6, 2005.

[4]A Motion to Dismiss was filed on April 1, 2005, by the Administrator of the Agricultural Marketing Service, United States Department of Agriculture. The applicable Rules of Practice are found at 7 C.F.R. Part 1200, specifically 7 C.F.R. § 1200.52. For the reasons stated in the Motion to Dismiss, I find that the "Petition" should be and hereby is **dismissed, without prejudice**.

[5]Copies of this Dismissal shall be served by the Hearing Clerk upon "Petitioners" at the only address provided, that is, the address of Farmers' Legal Action Group, Incorporated (FLAG), attention: Susan E. Stokes, Legal Director; and upon the Administrator of the Agricultural Marketing Service; **together with a copy of Respondent's Motion to Dismiss filed April 1, 2005**. The Hearing Clerk shall notify "Petitioners" that any request for reconsideration of this Dismissal and any papers submitted in opposition to the Motion to Dismiss shall be filed with the Hearing Clerk within twenty (20) days of service.

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In re: LION RAISINS, INC., A CALIFORNIA CORPORATION.
2005 AMA Docket No. F&V 989-2.
Order Dismissing Petition With Prejudice.
Filed May 3, 2005.

Colleen A. Carroll, for Respondent.
Brian C. Leighton, for Petitioner.
Order Dismissing Petition With Prejudice issued by Victor W. Palmer, Administrative Law Judge.

Lion Raisins, Inc. ("Lion") instituted this proceeding by filing a petition on March 1, 2005, pursuant to § 608c (15)(A) of the Agricultural Marketing Agreement Act, as amended (7 U.S.C. §§ 601-627; § 608c (15)(A); the "AMAA"). The petition purportedly challenges obligations imposed upon Lion under the marketing order issued pursuant to the AMAA, that regulates the handling of "Raisins Produced From Grapes Grown in California" (7 C.F.R. Part 989; "Raisin Order" or "Order").

On March 11, 2005, Respondent, the Administrator of the Agricultural Marketing Service, filed a Motion to Dismiss Petition. On April 4, 2005, Petitioner filed an Opposition to Respondent's Motion fo Dismiss. This proceeding was thereupon assigned to me.

Upon consideration of the Petition and the arguments of the parties as set forth in the Motion to Dismiss and the Opposition thereto, I have decided that the Petition should be dismissed with prejudice.

Lion seeks to add language to an implementing regulation (7 C.F.R. § 989.159(d), issued pursuant to section 989.59(d) of the Raisin Order (7 C.F.R. § 989.59(d), to require the Processed Products Standardization and Inspection Branch of USDA ("Inspection Service") to transmit original inspection certificates to Lion's customers upon request. Lion also seeks a ruling allowing it to issue certificates of analysis to its customers that contain test results from multiple sources, including the Inspection Service, which the Inspection Service may not then construe to be improperly created facsimiles of USDA certificates.

Lion premises its requests upon that fact that, since 1990, it has been preparing certificates of analysis for its raisin customers that contain various test results from Lion, USDA, and/or indpendent testing laboratories. Lion does this to satisfy customer requests and because it believes information on the USDA certificates prepared by the Inspection Service is inaccurate.

This practice has led to charges by the Inspection Service accusing Lion of altering or forging USDA certificates and issuing "facsimile" certificates misrepresenting USDA test results to its customers.

As Respondent points out, 7 C.F.R.. § 989.59(d), the provision Lion specifies as supporting its right to file a petition under the AMAA, says nothing about a handler obtaining original certificates of inspection or how the inspection agency may choose to transmit them. 7 C.F.R. § 989.59(d) states:

> (d) Inspection and certification. Unless otherwise provided in this section, each handler shall, at his own expense, before shipping or otherwise making final disposition of raisins, cause an inspection to be made of such raisins to determine whether they meet the then applicable minimum grade and condition standards for natural condition raisins or the then applicable minimum grade standards for packed raisins. Such handler shall obtain a certificate that such raisins meet the aforementioned applicable minimum standards and shall submit or cause to be submitted to the committee a copy of such certificate together with such other documents or records as the committee may require. The certificate shall be issued by the Processed Products Standardization and Inspection Branch of the Untied States Department of Agriculture, unless the committee determines, and the Secretary concurs in such determination, that inspection by another agency will improve the administration of this amended subpart. Any certificate issued pursuant to this paragraph shall be valid only for such period of time as the committee may specify, with the approval of the Secretary, in appropriate rules and regulations.

The full extent of Lion's obligation under the Raisin Order is to have the raisins it handles inspected by the Inspection Service and send the Raisin Order's administrative committee, copies of the certificates obtained frm the Inspection Service. Apparently, Lion also uses the inspection certificates as a marketing tool. It is this additional use for the certificates as well as its preparation and use of other certificates of analysis that have caused it to be in conflict with the Inspection Service.

The regulation that the Inspection Service has applied to charge Lion with fraud or misrepresentation in its use of inspection certificates and

"facsimiles" (7 C.F.R. § 52.54(a)(1)(2005)), was promulgated pursuant to section 203 (h) of the Agricultural Marketing Act of 1946 (7 U.S.C. § 1622 (h); "the 46 Act"). Modifications and exemptions from that regulation cannot be sought or obtained in a proceeding brought pursuant to § 608(c)(15)(A) of the AMAA. Likewise, the refusal of the Inspection Service to send original certificates of inspection directly to Lion's customers, is not based upon powers conferred upon the Inspection Service by the AMAA, but by the 46 Act. The two statutes are different, and the provisions of the AMAA for challenging marketing orders and obligations under marketing orders do not extend to other USDA regulatory programs.

We recently stated that a proceeding under § 8(c)(5)(A) of the AMAA may not be used as forum to debate questions of policy, desirability, or effectiveness of a marketing order's provisions. *In re: Lion Raisin*, *et al.*, 63 *Agric. Dec.* 1, WL2619833 (2004). So too, a section 8(c)(15)(A) AMAA proceeding cannot be used to challenge the policy, desirability, or effectiveness or regulations and practices that are based upon a completely different statute.

Accordingly, the Petition is Dismissed with Prejudice.

In re: DAVID McCAULEY.
AWA Docket No. 02-0010.
Order Denying Late Appeal.
Filed July 12, 2004.[*]

AWA – Late appeal.

The Judicial Officer denied Respondent's late-filed appeal. The Judicial Officer concluded that he had no jurisdiction to hear Respondent's appeal filed after Administrative Law Judge Marc R. Hillson's decision became final.

Robert A. Ertman, for Complainant.
Respondent, Pro se.
Initial decision issued by Marc R. Hillson, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

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[*]This case was inadvertently left out of *63 Agric. Dec. Jul-Dec*. (2004). Editor.

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 Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-2.133) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges that David McCauley [hereinafter Respondent] operated as a dealer as defined in the Animal Welfare Act and the Regulations without an Animal Welfare Act license, in willful violation of section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1 of the Regulations (9 C.F.R. § 2.1) (Compl. ¶ II). On March 15, 2002, Respondent filed an answer denying the material allegations of the Complaint.

On October 9, 2002, Complainant filed a "Motion for Hearing," and on December 3, 2002, former Chief Administrative Law Judge James W. Hunt[1] [hereinafter the former Chief ALJ] conducted a telephone conference with Complainant's counsel and Respondent during which the former Chief ALJ scheduled a hearing to begin on July 16, 2003, in San Antonio, Texas.[2] On July 10, 2003, the former Chief ALJ postponed the hearing scheduled to begin on July 16, 2003.[3] On July 18, 2003, the former Chief ALJ

[1]Chief Administrative Law Judge James W. Hunt retired from federal service effective August 1, 2003.

[2]"Summary of Telephone Conference--Scheduling of Hearing."

[3]"Order Postponing Hearing."

reassigned the proceeding to Administrative Law Judge Marc R. Hillson [hereinafter the ALJ].[4]

On July 28, 2003, the ALJ conducted a telephone conference with Complainant's counsel and Respondent in which the ALJ scheduled the hearing to begin on October 22, 2003, in San Antonio, Texas.[5] On August 26, 2003, with the agreement of Complainant and Respondent, the ALJ changed the commencement of the hearing from October 22, 2003, to October 23, 2003.[6] On October 2, 2003, the ALJ issued a notice setting the specific time for the commencement of the October 23, 2003, hearing and the specific location of the October 23, 2003, hearing.[7]

Respondent failed to appear at the hearing. Section 1.141(e)(1) of the Rules of Practice (7 C.F.R. § 1.141(e)(1)) provides, if a respondent fails to appear at the hearing, the complainant may follow the procedure set forth in section 1.139 of the Rules of Practice (7 C.F.R. § 1.139) or present evidence before the administrative law judge, as follows:

> **§ 1.141 Procedure for hearing.**
>
> . . . .
>
> (e) *Failure to appear.* (1) A respondent 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 respondent shall also constitute an admission of all the material allegations of fact contained in the complaint. Complainant shall have an election whether to follow the procedure set forth in § 1.139 or whether to present evidence, in whole or in part, in the form of affidavits or by oral testimony before the Judge. Failure to appear at a hearing shall not be deemed to be

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[4] "Order."

[5] "Summary of Telephone Conference-Rescheduling of Hearing."

[6] "Rescheduling of Hearing."

[7] "Notice of Hearing."

> a waiver of the right to be served with a copy of the Judge's decision and to appeal and request oral argument before the Judicial Officer with respect thereto in the manner provided in § 1.145.

7 C.F.R. § 1.141(e)(1).

Complainant chose to proceed by presenting oral testimony before the ALJ, and on October 23, 2003, the ALJ conducted a hearing in San Antonio, Texas. Robert A. Ertman, Office of the General Counsel, Washington, DC, represented Complainant. Complainant presented the testimony of two witnesses and submitted 43 exhibits, which the ALJ received into evidence.[8]

On December 12, 2003, Complainant filed a "Proposed Decision and Order Upon Admission of Facts By Reason of Default and Motion for Adoption." On January 30, 2004, the ALJ filed a "Decision": (1) concluding that Respondent operated as a dealer as defined in the Animal Welfare Act and the Regulations without an Animal Welfare Act license, in willful violation of the Animal Welfare Act and section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1)); (2) directing Respondent to cease and desist from violating the Animal Welfare Act and the Regulations; (3) assessing Respondent a $10,000 civil penalty; and (4) revoking Respondent's class B Animal Welfare Act license (Decision at 5-6).

On February 11, 2004, the Hearing Clerk served Respondent with the ALJ's Decision.[9] On May 13, 2004, Respondent appealed to the Judicial Officer. On June 1, 2004, Complainant filed "Memorandum in Response to Late Appeal." On June 7, 2004, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

CONCLUSION BY THE JUDICIAL OFFICER

[8]Transcript and Complainant's Exhibits.

[9]United States Postal Service Domestic Return Receipt for Article Number 7001 0360 0000 0310 4078.

The record establishes that the Hearing Clerk served Respondent with the ALJ's Decision on February 11, 2004.[10] Section 1.145(a) of the Rules of Practice provides that an administrative law judge's written decision must be appealed to the Judicial Officer within 30 days after service, as follows:

§ 1.145 Appeal to Judicial Officer.

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

7 C.F.R. § 1.145(a).

Therefore, Respondent was required to file his appeal petition with the Hearing Clerk no later than March 12, 2004. Respondent did not file his appeal petition with the Hearing Clerk until May 13, 2004.

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 administrative law judge's decision becomes final.[11] The ALJ's Decision became

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[10]See note 9.

[11]*In re Belinda Atherton*, 62 *Agric. Dec.* 683 (2003) (dismissing the respondent's appeal petition filed the day the administrative law judge's decision and order became final); *In re Samuel K. Angel*, 61 *Agric. Dec.* 275 (2002) (dismissing the respondent's appeal petition filed 3 days after the administrative law judge's decision and order became final); *In re Paul Eugenio*, 60 *Agric. Dec.* 676 (2001) (dismissing the respondent's appeal petition filed 1 day after the administrative law judge's 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 administrative law judge's 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 (continued...)

[11](...continued)
Kevin Ackerman's appeal petition filed 1 day after the administrative law judge's decision and order became final); *In re Severin Peterson*, 57 *Agric. Dec.* 1304 (1998) (dismissing the applicants' appeal petition filed 23 days after the administrative law judge's decision and order became final); *In re Queen City Farms, Inc.*, 57 *Agric. Dec.* 813 (1998) (dismissing the respondent's appeal petition filed 58 days after the administrative law judge's decision and order became final); *In re Gail Davis*, 56 *Agric. Dec.* 373 (1997) (dismissing the respondent's appeal petition filed 41 days after the administrative law judge's decision and order became final); *In re Field Market Produce, Inc.*, 55 *Agric. Dec.* 1418 (1996) (dismissing the respondent's appeal petition filed 8 days after the administrative law judge's decision and order became effective); *In re Ow Duk Kwon*, 55 *Agric. Dec.* 78 (1996) (dismissing the respondent's appeal petition filed 35 days after the administrative law judge's decision and order became effective); *In re New York Primate Center, Inc.*, 53 *Agric. Dec.* 529 (1994) (dismissing the respondents' appeal petition filed 2 days after the administrative law judge's decision and order became final); *In re K. Lester*, 52 *Agric. Dec.* 332 (1993) (dismissing the respondent's appeal petition filed 14 days after the administrative law judge's decision and order became final and effective); *In re Amril L. Carrington*, 52 *Agric. Dec.* 331 (1993) (dismissing the respondent's appeal petition filed 7 days after the administrative law judge's decision and order became final and effective); *In re Teofilo Benicta*, 52 *Agric. Dec.* 321 (1993) (dismissing the respondent's appeal petition filed 6 days after the administrative law judge's decision and order became final and effective); *In re Newark Produce Distributors, Inc.*, 51 *Agric. Dec.* 955 (1992) (dismissing the respondent's appeal petition filed after the administrative law judge's decision and order became final and effective); *In re Laura May Kurjan*, 51 *Agric. Dec.* 438 (1992) (dismissing the respondent's appeal petition filed after the administrative law judge's decision and order became final); *In re Kermit Breed*, 50 *Agric. Dec.* 675 (1991) (dismissing the respondent's late-filed appeal petition); *In re Bihari Lall*, 49 *Agric. Dec.* 896 (1990) (stating the respondent's appeal petition, filed after the administrative law judge's decision became final, must be dismissed because it was not timely filed); *In re Dale Haley*, 48 *Agric. Dec.* 1072 (1989) (stating the respondents' appeal petition, filed after the administrative law judge's decision became final and effective, must be dismissed because it was not timely filed); *In re Mary Fran Hamilton*, 45 *Agric. Dec.* 2395 (1986) (dismissing the respondent's appeal petition filed with the Hearing Clerk on the day the administrative law judge's decision and order had become final and effective); *In re Bushelle Cattle Co.*, 45 *Agric. Dec.* 1131 (1986) (dismissing the respondent's appeal petition filed 2 days after the administrative law judge's decision and order became final and effective); *In re William T. Powell*, 44 *Agric. Dec.* 1220 (1985) (stating it has consistently been held that, under the Rules of Practice, the Judicial Officer has no jurisdiction to hear an appeal after the administrative law judge's decision and order becomes final); *In re Toscony Provision Co.*, 43 *Agric. Dec.* 1106 (1984) (stating the Judicial Officer has no jurisdiction to hear an appeal that is filed after the administrative law judge's decision becomes final), *aff'd*, No. 81-1729 (D.N.J. Mar. 11, 1985) (court reviewed merits notwithstanding late administrative appeal), *aff'd*, 782 F.2d 1031 (3d Cir. 1986)
(continued...)

final on March 17, 2004.[12] Respondent filed an appeal petition with the Hearing Clerk on May 13, 2004, 1 month 26 days after the ALJ's Decision became final. Therefore, I have no jurisdiction to hear Respondent's appeal.

The United States Department of Agriculture's construction of the Rules of Practice is, in this respect, consistent with the construction of the Federal Rules of Appellate Procedure. Rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure provides, as follows:

> **Rule 4. Appeal as of Right—When Taken**
>
> **(a) Appeal in a Civil Case.**
>
> (1) **Time for Filing a Notice of Appeal.**

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[11](...continued)
(unpublished); *In re Dock Case Brokerage Co.*, 42 *Agric. Dec.* 1950 (1983) (dismissing the respondents' appeal petition filed 5 days after the administrative law judge's decision and order became final); *In re Veg-Pro Distributors*, 42 *Agric. Dec.* 1173 (1983) (denying the respondent's appeal petition filed 1 day after the default decision and order became final); *In re Samuel Simon Petro*, 42 *Agric. Dec.* 921 (1983) (stating the Judicial Officer has no jurisdiction to hear an appeal that is filed after the administrative law judge's decision and order becomes final and effective); *In re Yankee Brokerage, Inc.*, 42 *Agric. Dec.* 427 (1983) (dismissing the respondent's appeal petition filed on the day the administrative law judge's decision became effective); *In re Charles Brink*, 41 *Agric. Dec.* 2146 (1982) (stating the Judicial Officer has no jurisdiction to consider the respondent's appeal dated before the administrative law judge's decision and order became final, but not filed until 4 days after the administrative law judge's decision and order became final and effective), *reconsideration denied*, 41 *Agric. Dec.* 2147 (1982); *In re Mel's Produce, Inc.*, 40 *Agric. Dec.* 792 (1981) (stating since the respondent's petition for reconsideration was not filed within 35 days after service of the default decision, the default decision became final and neither the administrative law judge nor the Judicial Officer has jurisdiction to consider the respondent's petition); *In re Animal Research Center of Massachusetts, Inc.*, 38 *Agric. Dec.* 379 (1978) (stating failure to file an appeal petition before the effective date of the administrative law judge's decision is jurisdictional); *In re Willie Cook*, 39 *Agric. Dec.* 116 (1978) (stating it is the consistent policy of the United States Department of Agriculture not to consider appeals filed more than 35 days after service of the administrative law judge's decision).

[12]7 C.F.R. § 1.142(c)(4); Decision at 6.

> (A) In a civil case . . . the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

As stated in *Eaton v. Jamrog*, 984 F.2d 760, 762 (6th Cir. 1993):

> We have repeatedly held that compliance with Rule 4(a)(1) is a mandatory and jurisdictional prerequisite which this court may neither waive nor extend. *See, e.g., Baker v. Raulie*, 879 F.2d 1396, 1398 (6th Cir. 1989) (per curiam); *Myers v. Ace Hardware, Inc.*, 777 F.2d 1099, 1102 (6th Cir. 1985). So strictly has this rule been applied, that even a notice of appeal filed five minutes late has been deemed untimely. *Baker*, 879 F.2d at 1398.[13]

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[13] *Accord Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 203 (1988) (stating since the court of appeals properly held petitioner's notice of appeal from the decision on the merits to be untimely filed, and since the time of an appeal is mandatory and jurisdictional, the court of appeals was without jurisdiction to review the decision on the merits); *Browder v. Director, Dep't of Corr. of Illinois*, 434 U.S. 257, 264 (1978) (stating under Fed. R. App. P. 4(a) and 28 U.S.C. § 2107, a notice of appeal in a civil case must be filed within 30 days of entry of the judgment or order from which the appeal is taken; this 30-day time limit is mandatory and jurisdictional), *rehearing denied*, 434 U.S. 1089 (1978); *Martinez v. Hoke*, 38 F.3d 655, 656 (2d Cir. 1994) (per curiam) (stating under the Federal Rules of Appellate Procedure, the time for filing an appeal is mandatory and jurisdictional and the court of appeals has no authority to extend time for filing); *Price v. Seydel*, 961 F.2d 1470, 1473 (9th Cir. 1992) (stating the filing of notice of appeal within the 30-day period specified in Fed. R. App. P. 4(a)(1) is mandatory and jurisdictional, and unless appellant's notice is timely, the appeal must be dismissed); *In re Eichelberger*, 943 F.2d 536, 540 (5th Cir. 1991) (stating Rule 4(a) of the Federal Rules of Appellate Procedure requires that a notice of appeal be filed with the clerk of the district court within 30 days after entry of the judgment; Rule 4(a)'s provisions are mandatory and jurisdictional); *Washington v. Bumgarner*, 882 F.2d 899, 900 (4th Cir. 1989) (stating the time limit in Fed. R. App. P. 4(a)(1) is mandatory and jurisdictional; failure to comply with Rule 4(a) requires dismissal of the appeal and the fact that appellant is incarcerated and proceeding pro se does not change the clear language of the Rule), *cert. denied*, 493 U.S. 1060 (1990); *Jerningham v. Humphreys*, 868 F.2d 846 (6th Cir. 1989) (Order) (stating the failure of an appellant to timely file a notice of appeal deprives an appellate court of jurisdiction; compliance with Rule 4(a) of the Federal Rules of Appellate Procedure is a mandatory and jurisdictional prerequisite which this court can neither waive nor extend).

The Rules of Practice do not provide for an extension of time (for good cause or excusable neglect) for filing a notice of appeal after an administrative law judge's decision has become final. Under the Federal Rules of Appellate Procedure, the district court, upon a showing of excusable neglect or good cause, may extend the time to file a notice of appeal upon a motion filed no later than 30 days after the expiration of the time otherwise provided in the rules for the filing of a notice of appeal.[14] The absence of such a rule in the Rules of Practice emphasizes that no such jurisdiction has been granted to the Judicial Officer to extend the time for filing an appeal after an administrative law judge's decision has become final. Therefore, under the Rules of Practice, I cannot extend the time for Respondent's filing an appeal petition after the ALJ's Decision became final.

Moreover, the jurisdictional bar under the Rules of Practice, which precludes the Judicial Officer from hearing an appeal that is filed after an administrative law judge's decision becomes final, is consistent with the judicial construction of the Administrative Orders Review Act ("Hobbs Act"). As stated in *Illinois Cent. Gulf R.R. v. ICC*, 720 F.2d 958, 960 (7th Cir. 1983) (footnote omitted):

> The Administrative Orders Review Act ("Hobbs Act") requires a petition to review a final order of an administrative agency to be brought within sixty days of the entry of the order. 28 U.S.C. § 2344 (1976). This sixty-day time limit is jurisdictional in nature and may not be enlarged by the courts. *Natural Resources Defense Council v. Nuclear Regulatory Commission*, 666 F.2d 595, 602 (D.C. Cir. 1981). The purpose of the time limit is to impart finality into the administrative process, thereby conserving administrative resources and protecting the reliance interests of those who might conform their conduct to the administrative regulations. *Id.* at 602.[15]

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[14]Fed. R. App. P. 4(a)(5).

[15]*Accord Jem Broadcasting Co. v. FCC*, 22 F.3d 320, 324-26 (D.C. Cir. 1994) (stating the court's baseline standard long has been that statutory limitations on petitions for review are jurisdictional in nature and appellant's petition filed after the 60-day limitation in the

(continued...)

Accordingly, Respondent's appeal petition must be denied, since it is too late for the matter to be further considered. Moreover, the matter should not be considered by a reviewing court since, under section 1.142(c)(4) of the Rules of Practice (7 C.F.R. § 1.142(c)(4)), "no decision shall be final for purposes of judicial review except a final decision of the Judicial Officer upon appeal."

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

ORDER

Respondent's appeal petition, filed May 13, 2004, is denied. Administrative Law Judge Marc R. Hillson's Decision, filed January 30, 2004, is the final decision in this proceeding.

In re: JOHN F. CUNEO, JR., AN INDIVIDUAL; THE HAWTHORN CORPORATION, AN ILLINOIS CORPORATION; THOMAS M. THOMPSON, AN INDIVIDUAL; JAMES G. ZAJICEK, AN INDIVIDUAL; JOHN N. CAUDILL, III, AN INDIVIDUAL; JOHN N. CAUDILL, JR., AN INDIVIDUAL; WALKER BROTHER'S CIRCUS, INC., A FLORIDA CORPORATION; AND DAVID A. CREECH, AN INDIVIDUAL.
AWA Docket No. 03-0023.
Ruling Denying Complainant's Motion for Shortened Time for John F. Cuneo, Jr., and The Hawthorn Corporation to File a Response to Complainant's Appeal Petition.
Filed August 31, 2004.[*]

AWA – Animal Welfare Act – Appeal petition – Motion for shortened time to respond.

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[15](...continued)
Hobbs Act will not be entertained); *Friends of Sierra R.R. v. ICC*, 881 F.2d 663, 666 (9th Cir. 1989) (stating the time limit in 28 U.S.C. § 2344 is jurisdictional), *cert. denied sub nom. Tuolumne Park & Recreation Dist. v. ICC*, 493 U.S. 1093 (1990).

[*]This case was inadvertently left out of 63 *Agric. Dec.* Jul-Dec. (2004). Editor.

Bernadette R. Juarez and Colleen A. Carroll, for Complainant.
Vincent J. Colatriano, Derek L. Shaffer, and Michael Weitzner, Washington, DC, for Respondents.
Ruling issued by William G. Jenson, Judicial Officer.

On August 26, 2004, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], filed "Complainant's Appeal Petition" and "Complainant's Motion for Shortened Time for Respondents to File Response to Appeal Petition." On August 27, 2004, John F. Cuneo, Jr., and The Hawthorn Corporation [hereinafter Respondents] filed "Hawthorn Respondents' Opposition to Complainant's Motion for Shortened Time for Respondents to File Response to Appeal Petition."

Section 1.145(b) of the rules of practice applicable to this proceeding* provides that a party may respond to an appeal petition within 20 days after the Hearing Clerk serves the party with the 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).

Complainant requests that I shorten Respondents' time for filing a response to Complainant's Appeal Petition from 20 days after the Hearing Clerk serves Respondents with Complainant's Appeal Petition to 3 days after the Hearing Clerk serves Respondents with Complainant's Appeal

*The rules of practice applicable to this proceeding are the "Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes" (7 C.F.R. §§ 1.130-.151).

Petition (Complainant's Motion for Shortened Time for Respondents to File Response to Appeal Petition at 7). I carefully reviewed Complainant's Motion for Shortened Time for Respondents to File Response to Appeal Petition, and I do not find good reason to shorten Respondents' time for filing a response to Complainant's Appeal Petition.

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

RULING

Complainant's Motion for Shortened Time for Respondents to File Response to Appeal Petition, filed August 26, 2004, is denied.

In re: DAVID McCAULEY.
AWA Docket No. 02-0010.
Order Denying Petition for Reconsideration.
Filed September 2, 2004.[*]

AWA – Animal Welfare Act – Late-filed petition for reconsideration.

The Judicial Officer denied Respondent's petition for reconsideration because it was not filed within 10 days after the date the Hearing Clerk served Respondent with the Order Denying Late Appeal, as required by 7 C.F.R. § 1.146(a)(3).

Robert A. Ertman, for Complainant.
Respondent, Pro se.
Initial decision issued by Marc R. Hillson, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a "Complaint" on February 4, 2002. Complainant instituted the proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal

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[*]This case was inadvertently left out of 63 *Agric. Dec.* Jul-Dec. (2004). Editor.

Welfare Act]; the regulations issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-2.133) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges David McCauley [hereinafter Respondent] operated as a dealer as defined in the Animal Welfare Act and the Regulations without an Animal Welfare Act license, in willful violation of section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1 of the Regulations (9 C.F.R. § 2.1) (Compl. ¶ II). On March 15, 2002, Respondent filed an answer denying the material allegations of the Complaint.

Administrative Law Judge Marc R. Hillson [hereinafter the ALJ] scheduled a hearing to commence in San Antonio, Texas, on October 23, 2003. Respondent failed to appear at the hearing. Section 1.141(e)(1) of the Rules of Practice (7 C.F.R. § 1.141(e)(1)) provides, if a respondent fails to appear at the hearing, the complainant may follow the procedure set forth in section 1.139 of the Rules of Practice (7 C.F.R. § 1.139) or present evidence, in whole or in part, in the form of affidavits or by oral testimony before the administrative law judge. Complainant chose to proceed by presenting oral testimony before the ALJ, and on October 23, 2003, the ALJ conducted a hearing in San Antonio, Texas.

Following the hearing, Complainant filed a "Proposed Decision and Order Upon Admission of Facts By Reason of Default and Motion for Adoption." On January 30, 2004, the ALJ filed a "Decision," which the Hearing Clerk served on Respondent, on February 11, 2004.[1] On May 13, 2004, Respondent appealed to the Judicial Officer. On June 1, 2004, Complainant filed "Memorandum in Response to Late Appeal," and on July 12, 2004, I issued an Order Denying Late Appeal in which I denied Respondent's late-filed appeal petition and stated the ALJ's Decision, filed January 30, 2004, is the final decision in this proceeding. *In re David McCauley*, 64 *Agric. Dec.* 639 (2004) (Order Denying Late Appeal).

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[1]United States Postal Service Domestic Return Receipt for Article Number 7001 0360 0000 0310 4078.

On July 15, 2004, the Hearing Clerk served Respondent with the Order Denying Late Appeal.[2] On August 17, 2004, Respondent filed a petition for reconsideration.[3] On August 31, 2004, Complainant filed "Memorandum in Response to Late Petition for Reconsideration." On September 1, 2004, the Hearing Clerk transmitted the record to the Judicial Officer for reconsideration of the July 12, 2004, Order Denying Late Appeal.

CONCLUSIONS BY THE JUDICIAL OFFICER ON RECONSIDERATION

Section 1.146(a)(3) of the Rules of Practice provides that a petition for reconsideration of the Judicial Officer's decision must be filed within 10 days after service of the decision, as follows:

> **§ 1.146 Petitions for reopening hearing; for rehearing or reargument of proceeding; or for reconsideration of the decision of the Judicial Officer.**
>
> (a) *Petition requisite*. . . .
>
> . . . .
>
> (3) *Petition to rehear or reargue proceeding, or to reconsider the decision of the Judicial Officer*. A petition to rehear or reargue the proceeding or to reconsider the decision of the Judicial Officer shall be filed within 10 days after the date of service of such decision upon

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[2]United States Postal Service Domestic Return Receipt for Article Number 7003 0500 0000 1056 0762.

[3]Respondent entitles his August 17, 2004, filing "Appeal." However, Respondent previously filed an appeal petition on May 13, 2004. The Rules of Practice do not provide that a party may file multiple appeal petitions, and Respondent did not request the opportunity to supplement his May 13, 2004, appeal petition. Moreover, section 1.145(a) of the Rules of Practice (7 C.F.R. § 1.145(a)) provides that, within 30 days after receiving service of the administrative law judge's written decision, a party who disagrees with that decision may appeal to the Judicial Officer by filing an appeal petition with the Hearing Clerk. Thus, Respondent's August 17, 2004, filing is not a timely-filed appeal petition. Based on Respondent's having previously filed an appeal petition and the contents of Respondent's August 17, 2004, filing, I infer the August 17, 2004, filing is Respondent's petition for reconsideration.

> the party filing the petition. Every petition must state specifically the matters claimed to have been erroneously decided and alleged errors must be briefly stated.

7 C.F.R. § 1.146(a)(3).

Respondent filed his petition for reconsideration 1 month 2 days after the date the Hearing Clerk served Respondent with the Order Denying Late Appeal. Accordingly, Respondent's petition for reconsideration is late and must be denied.[4]

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[4]*See In re Heartland Kennels, Inc.*, 61 *Agric. Dec.* 562 (2002) (Order Denying Second Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 50 days after the date the Hearing Clerk served the respondents with the decision and order); *In re David Finch*, 61 *Agric. Dec.* 593 (2002) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 15 days after the date the Hearing Clerk served the respondent with the decision and order); *In re JSG Trading Corp*., 61 *Agric. Dec.* 409 (2002) (Rulings as to JSG Trading Corp. Denying: (1) Motion to Vacate; (2) Motion to Reopen; (3) Motion for Stay; and (4) Request for Pardon or Lesser Sanction) (denying, as late-filed, a petition for reconsideration filed 2 years 2 months 26 days after the date the Hearing Clerk served the respondent with the decision and order on remand); *In re Jerry Goetz*, 61 *Agric. Dec.* 282 (2002) (Order Lifting Stay) (denying, as late-filed, a petition for reconsideration filed 4 years 2 months 4 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Beth Lutz*, 60 *Agric. Dec.* 68 (2001) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 2 months 2 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Mary Meyers*, 58 *Agric. Dec.* 861 (1999) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 2 years 5 months 20 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Anna Mae Noell*, 58 *Agric. Dec.* 855 (1999) (Order Denying the Chimp Farm Inc.'s Motion to Vacate) (denying, as late-filed, a petition for reconsideration filed 6 months 11 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Paul W. Thomas*, 58 *Agric. Dec.* 875 (1999) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 19 days after the date the Hearing Clerk served the applicants with the decision and order); *In re Nkiambi Jean Lema*, 58 *Agric. Dec.* 302 (1999) (Order Denying Pet. for Recons. and Mot. to Transfer Venue) (denying, as late-filed, a petition for reconsideration filed 35 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Kevin Ackerman*, 58 *Agric. Dec.* 349 (1999) (Order Denying Pet. for Recons. as to Kevin Ackerman) (denying, as late-filed, a petition for reconsideration filed 17 days after the date the Hearing Clerk served the respondent with the order denying late appeal as to Kevin Ackerman); *In re Marilyn Shepherd*, 57 *Agric. Dec.* 1280 (1998) (continued...)

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

ORDER

Respondent's petition for reconsideration, filed August 17, 2004, is denied.

In re: DIANA R. McCOURT, AN INDIVIDUAL FORMERLY KNOWN AS DIANA R. CZIRAKY; AND SIBERIAN TIGER CONSERVATION ASSOCIATION, A DELAWARE CORPORATION.
AWA Docket No. 05-0003.
Order Vacating Decision and Order.

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[4](...continued)
(Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 11 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Jack Stepp*, 57 *Agric. Dec.* 323 (1998) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 16 days after the date the Hearing Clerk served the respondents with the decision and order); *In re Billy Jacobs, Sr.*, 55 *Agric. Dec.* 1057 (1996) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 13 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Jim Fobber*, 55 *Agric. Dec.* 74 (1996) (Order Denying Respondent Jim Fobber's Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 12 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Robert L. Heywood*, 53 *Agric. Dec.* 541 (1994) (Order Dismissing Pet. for Recons.) (dismissing, as late-filed, a petition for reconsideration filed approximately 2 months after the date the Hearing Clerk served the respondent with the decision and order); *In re Christian King*, 52 *Agric. Dec.* 1348 (1993) (Order Denying Pet. for Recons.) (dismissing, as late-filed, a petition for reconsideration, since it was not filed within 10 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Charles Crook Wholesale Produce & Grocery Co.*, 48 *Agric. Dec.* 1123 (1989) (Order Dismissing Untimely Pet. for Recons.) (dismissing, as late-filed, a petition for reconsideration filed more than 4 months after the date the Hearing Clerk served the respondent with the decision and order); *In re Toscony Provision Co.*, 45 *Agric. Dec.* 583 (1986) (Order Denying Pet. for Recons. and Extension of Time) (dismissing a petition for reconsideration because it was not filed within 10 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Charles Brink*, 41 *Agric. Dec.* 2147 (1982) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 17 days after the date the Hearing Clerk served the respondent with the decision and order).

Filed April 8, 2005.

AWA – Animal Welfare Act – Order vacating default decision.

Colleen A. Carroll and Frank Martin, Jr., for Complainant.
Richard D. Rogovin, Columbus, Ohio, for Respondents.
Order issued by William G. Jenson, Judicial Officer.

On March 29, 2005, I issued a Decision and Order finding Diana R. McCourt and Siberian Tiger Conservation Association [hereinafter Respondents] in default as a result of their failure to file a timely answer.[1] On April 7, 2005, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], filed a motion to vacate the March 29, 2005, Decision and Order. On April 7, 2005, Respondents' counsel informed me Respondents decline the opportunity to file a written response to Complainant's motion to vacate, but fully support Complainant's motion. Based on the agreement of the parties and my finding that vacating the March 29, 2005, Decision and Order would not harm the public interest, the following Order should be issued.

ORDER

The Judicial Officer's Decision and Order, filed March 29, 2005, is vacated and this proceeding is remanded to Chief Administrative Law Judge Marc R. Hillson for further proceedings 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).

In re: RICKY M. WATSON, AN INDIVIDUAL; CHERI WATSON, AN INDIVIDUAL; TIGER'S EYES, INC., A TEXAS DOMESTIC NONPROFIT CORPORATION, d/b/a NOAH'S LAND WILDLIFE PARK; AND RICHARD J. BURNS, AN INDIVIDUAL.
AWA Docket No. 04-0017.

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[1] *In re Diana R. McCourt*, 64 *Agric. Dec.* 223 (2005).

Order Denying Petition to Reconsider as to Ricky M. Watson and Cheri Watson.
Filed April 13, 2005.

AWA – Animal Welfare Act – Failure to file timely answer – Default decision – Sanction – Cease and desist order – Civil penalty.

The Judicial Officer rejected Respondents' request for a reduction of the $17,050 civil penalty assessed against each Respondent for 31 willful violations of the Animal Welfare Act and the regulations and standards issued under the Animal Welfare Act. The Judicial Officer rejected Respondents' contention that their violations were not willful stating, based on Respondents' failure to file a timely answer to the Complaint, Respondents were deemed to have admitted their violations were willful as alleged in the Complaint. The Judicial Officer found Respondents' reason for filing a late answer and the tax-exempt status and non-profit status of Respondents' business irrelevant to Respondents' request that the Judicial Officer reduce the civil penalty. The Judicial Officer rejected Respondents' contention that they did not operate a large business. The Judicial Officer also found Respondents' 31 willful violations of the Animal Welfare Act and the regulations and standards issued under the Animal Welfare Act belied Respondents' assertion that they "tried to do the right thing as far as [their] animals were concerned." Finally, the Judicial Officer rejected Respondents' contention that their cessation of all activities regulated under the Animal Welfare Act was a basis for reducing the civil penalty. The Judicial Officer pointed out that the civil penalty assessed against Respondents was 20 percent of the maximum that could have been assessed and that the civil penalty was not only appropriate and necessary to deter Respondents from future violations of the Animal Welfare Act, but also appropriate and necessary to deter others from future violations of the Animal Welfare Act.

Bernadette R. Juarez, for Complainant.
Respondents Ricky M. Watson and Cheri Watson, Pro se.
Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on May 19, 2004. Complainant instituted the proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations and Standards]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by

the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges Ricky M. Watson, Cheri Watson, Tiger's Eyes, Inc., and Richard J. Burns willfully violated the Animal Welfare Act and the Regulations and Standards (Compl. ¶¶ 6-12).

The Hearing Clerk served Respondents Ricky M. Watson and Cheri Watson with the Complaint, the Rules of Practice, and a service letter on May 26, 2004.[1] Respondents Ricky M. Watson and Cheri Watson were required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) to file an answer to the Complaint within 20 days after service. Respondents Ricky M. Watson and Cheri Watson filed an answer to the Complaint on June 22, 2004, 27 days after the Hearing Clerk served them with the Complaint.

On September 3, 2004, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a "Motion for Adoption of Proposed Decision and Order" [hereinafter Motion for Default Decision] and a proposed "Decision and Order as to Ricky M. Watson and Cheri Watson By Reason of Admission of Facts" [hereinafter Proposed Default Decision as to Ricky M. Watson and Cheri Watson]. On September 20, 2004, the Hearing Clerk served Respondents Ricky M. Watson and Cheri Watson with Complainant's Motion for Default Decision and Complainant's Proposed Default Decision as to Ricky M. Watson and Cheri Watson.[2] On October 12, 2004, Respondents Ricky M. Watson and Cheri Watson filed objections to Complainant's Motion for Default Decision.

On November 17, 2004, during a teleconference with Respondents Ricky M. Watson and Cheri Watson, representatives of Tiger's Eyes, Inc., counsel for Respondent Richard J. Burns, and counsel for Complainant,

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[1]United States Postal Service Domestic Return Receipts for Article Number 7001 0360 0000 0304 8488 and Article Number 7001 0360 0000 0304 8471.

[2]United States Postal Service Domestic Return Receipts for Article Number 7003 2260 0005 5721 4318 and Article Number 7003 2260 0005 5721 4325.

Administrative Law Judge Victor W. Palmer [hereinafter the ALJ] denied Complainant's Motion for Default Decision.[3]

On November 26, 2004, Complainant appealed the ALJ's denial of Complainant's Motion for Default Decision to the Judicial Officer.[4] On January 5, 2005, Respondent Ricky M. Watson filed a response in opposition to Complainant's Appeal Petition. On January 18, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision. On February 23, 2005, I issued a Decision and Order as to Ricky M. Watson and Cheri Watson reversing the ALJ's denial of Complainant's Motion for Default Decision and concluding Respondents Ricky M. Watson and Cheri Watson willfully violated the Animal Welfare Act and the Regulations and Standards.[5]

On March 18, 2005, Respondents Ricky M. Watson and Cheri Watson filed a petition to reconsider *In re Ricky M. Watson* (Decision as to Ricky M. Watson and Cheri Watson), 64 *Agric. Dec.* 159 (2005). On April 7, 2005, Complainant filed "Complainant's Reply to Respondents' Petition for Reconsideration." On April 11, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Respondents Ricky M. Watson's and Cheri Watson's petition to reconsider.

CONCLUSIONS BY THE JUDICIAL OFFICER ON RECONSIDERATION

Respondents Ricky M. Watson and Cheri Watson request that I reduce the $17,050 civil penalty assessed against each of them in *In re Ricky M. Watson* (Decision as to Ricky M. Watson and Cheri Watson), 64 *Agric. Dec.* 159, 198 (2005). Respondents Ricky M. Watson and Cheri Watson state six bases for their request that I reduce the civil penalty. First, Respondents Ricky M. Watson and Cheri Watson contend they were not "willfully neglectful" as alleged in the Complaint (Pet. to Reconsider at 1).

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[3]Summary of Teleconference; Hearing Notice and Exchange Deadlines at 1, filed by the ALJ on November 22, 2004.

[4]Complainant's Appeal Petition.

[5]*In re Ricky M. Watson* (Decision as to Ricky M. Watson and Cheri Watson), 64 *Agric. Dec.* 159 (2005).

As an initial matter, I cannot locate, and Respondents Ricky M. Watson and Cheri Watson do not cite, any allegation in the Complaint that Respondents Ricky M. Watson and Cheri Watson were "willfully neglectful"; however, Complainant alleges Respondents Ricky M. Watson and Cheri Watson "willfully violated" the Animal Welfare Act and the Regulations and Standards (Compl. ¶¶ 8-14).

Respondents Ricky M. Watson and Cheri Watson are deemed, for purposes of this proceeding, to have admitted the allegations in the Complaint that they willfully violated the Animal Welfare Act and the Regulations and Standards because they failed to file an answer to the Complaint within 20 days after the Hearing Clerk served them with the Complaint.[6] Therefore, I find no basis upon which to conclude Respondents Ricky M. Watson's and Cheri Watson's violations of the Animal Welfare Act and the Regulations and Standards were not willful.

Second, Respondents Ricky M. Watson and Cheri Watson contend the reason for their late-filed answer was their effort to rationally explain the allegations of the Complaint (Pet. to Reconsider at 1).

Often, as Respondents Ricky M. Watson and Cheri Watson suggest, preparation of an answer that explains each allegation of a complaint is more difficult and time consuming than preparation of an answer that merely admits or denies each allegation of the complaint. However, I do not find Respondents Ricky M. Watson's and Cheri Watson's reason for failing to file a timely answer relevant to their request that I reduce the $17,050 civil penalty assessed against each of them in *In re Ricky M. Watson* (Decision as to Ricky M. Watson and Cheri Watson), 64 *Agric. Dec.* 159, 198 (2005).

Third, Respondents Ricky M. Watson and Cheri Watson contend, while they often maintained more than 200 animals, they did not operate a large business because the vast majority of their animals were free-roaming on more than 200 acres of grassland and required less care and attention than animals that were caged. Consequently, Respondents Ricky M. Watson and Cheri Watson state they "never needed more than 2 paid workers." Moreover, Respondents Ricky M. Watson and Cheri Watson state their

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[6]7 C.F.R. § 1.136(a), (c).

income from customers was approximately $1,000 per month. (Pet. to Reconsider at 1.)

One of the factors that I must consider when determining the amount of the civil penalty to be assessed for violations of the Animal Welfare Act and the Regulations and Standards is the size of the violator's business.[7] I based my finding that Respondents Ricky M. Watson and Cheri Watson operated a large business on the number of animals Respondents Ricky M. Watson and Cheri Watson are deemed to have admitted that they maintained at their facility. Respondents Ricky M. Watson and Cheri Watson confirm this number in their petition to reconsider *In re Ricky M. Watson* (Decision as to Ricky M. Watson and Cheri Watson), 64 *Agric. Dec.* 159 (2005) (Pet. to Reconsider at 1). Moreover, while the number of Respondents Ricky M. Watson's and Cheri Watson's paid employees and the income from customers would indicate Respondents Ricky M. Watson's and Cheri Watson's business was not large, the 200 or more acres on which Respondents Ricky M. Watson and Cheri Watson assert they operated the business supports my conclusion that Respondents Ricky M. Watson and Cheri Watson operated a large business. Therefore, I decline to reconsider my conclusion that Respondents Ricky M. Watson and Cheri Watson operated a large business.

Fourth, Respondents Ricky M. Watson and Cheri Watson assert they operated a tax-exempt, non-profit sanctuary and all new, tax-exempt, non-profit sanctuaries go through "growing pains." Moreover, Respondents Ricky M. Watson and Cheri Watson assert their "record is better than most new sanctuaries." (Pet. to Reconsider at 1-2.)

Neither the tax-exempt status nor the non-profit status of Respondents Ricky M. Watson's and Cheri Watson's sanctuary is relevant to the civil penalty assessed against Respondents Ricky M. Watson and Cheri Watson. Moreover, the failure of other new sanctuaries to comply with the Animal Welfare Act and the Regulations and Standards is not relevant to the civil penalty assessed against Respondents Ricky M. Watson and Cheri Watson for their violations of the Animal Welfare Act and the Regulations and Standards.

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[7] 7 U.S.C. § 2149(b).

Fifth, Respondents Ricky M. Watson and Cheri Watson assert they "continuously tried to do the right thing as far as [the] animals were concerned" (Pet. to Reconsider at 1-2).

Respondents Ricky M. Watson's and Cheri Watson's assertion regarding the treatment of their animals is belied by the 31 willful violations of the Animal Welfare Act and the Regulations and Standards each are deemed to have committed. Moreover, as stated in *In re Ricky M. Watson* (Decision as to Ricky M. Watson and Cheri Watson), 64 *Agric. Dec.* 159, 195 (2005), many of Respondents Ricky M. Watson's and Cheri Watson's violations are serious violations which directly jeopardized the health and well-being of Respondents Ricky M. Watson's and Cheri Watson's animals.

Sixth, Respondents Ricky M. Watson and Cheri Watson contend they: (1) ceased operations, (2) allowed their Animal Welfare Act license to lapse, and (3) do not intend to apply for another Animal Welfare Act license (Pet. to Reconsider at 2).

Respondents Ricky M. Watson's and Cheri Watson's cessation of all activities regulated under the Animal Welfare Act and intention to refrain from activities regulated under the Animal Welfare Act are not bases for reducing the $17,050 civil penalty assessed against each of them. Respondents Ricky M. Watson and Cheri Watson each committed 31 willful violations of the Animal Welfare Act and the Regulations and Standards. Respondents Ricky M. Watson and Cheri Watson could each be assessed a maximum civil penalty of $85,250 for their violations of the Animal Welfare Act and the Regulations and Standards.[8] The civil penalty assessed against Respondents Ricky M. Watson and Cheri Watson is only 20 percent of the maximum civil penalty which I conclude could be assessed against each of them. Moreover, the civil penalty which I assess against Respondents Ricky M. Watson and Cheri Watson are not only

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[8]Section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) provides that the Secretary of Agriculture may assess a civil penalty of not more than $2,500 for each violation of the Animal Welfare Act and the Regulations and Standards. Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), the Secretary of Agriculture adjusted the civil penalty that may be assessed under section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) for each violation of the Animal Welfare Act and the Regulations and Standards by increasing the maximum civil penalty from $2,500 to $2,750 (7 C.F.R. § 3.91(b)(2)(v)).

appropriate and necessary to deter Respondent Ricky M. Watson and Respondent Cheri Watson from future violations of the Animal Welfare Act and the Regulations and Standards, but also appropriate and necessary to deter others from violating the Animal Welfare Act and the Regulations and Standards. Therefore, even if I were to find that Respondents Ricky M. Watson and Cheri Watson would never again engage in activities regulated under the Animal Welfare Act, I would assess each of them a $17,050 civil penalty.

For the foregoing reasons and the reasons set forth in *In re Ricky M. Watson* (Decision as to Ricky M. Watson and Cheri Watson), 64 *Agric. Dec.* 159 (2005), Respondents Ricky M. Watson's and Cheri Watson's petition to reconsider 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 to reconsider. Respondents Ricky M. Watson's and Cheri Watson's petition to reconsider was timely filed and automatically stayed *In re Ricky M. Watson* (Decision as to Ricky M. Watson and Cheri Watson), 64 *Agric. Dec.* 159 (2005). Therefore, since Respondents Ricky M. Watson's and Cheri Watson's petition to reconsider is denied, I hereby lift the automatic stay, and the Order in *In re Ricky M. Watson* (Decision as to Ricky M. Watson and Cheri Watson), 64 *Agric. Dec.* 159 (2005), is reinstated; except that the effective date of the Order is the date indicated in the Order in this Order Denying Petition to Reconsider as to Ricky M. Watson and Cheri Watson.

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

ORDER

1. Respondents Ricky M. Watson and Cheri Watson, their agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards.

The cease and desist provisions of this Order shall become effective on the day after service of this Order on Respondents Ricky M. Watson and Cheri Watson.

2. Respondents Ricky M. Watson and Cheri Watson are each assessed a $17,050 civil penalty. The civil penalties shall be paid by certified checks

or money orders made payable to the Treasurer of the United States and sent to:

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

Payment of the civil penalties shall be sent to, and received by, Bernadette R. Juarez within 60 days after service of this Order on Respondents Ricky M. Watson and Cheri Watson. Respondents Ricky M. Watson and Cheri Watson shall state on the certified checks or money orders that payment is in reference to AWA Docket No. 04-0017.

RIGHT TO JUDICIAL REVIEW

Respondents Ricky M. Watson and Cheri Watson have the right to seek judicial review of this Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341, 2343-2350. Such court has exclusive jurisdiction to enjoin, to set aside, to suspend (in whole or in part), or to determine the validity of this Order. Respondents Ricky M. Watson and Cheri Watson must seek judicial review within 60 days after entry of this Order.[9] The date of entry of this Order is April 13, 2005.

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In re: DELTA AIR LINES, INC.
AWA Docket No. 00-0033.
Order Dismissing Case.
Filed May 26, 2005.

Colleen A. Carroll, for Complainant.

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[9]See 7 U.S.C. § 2149(c).

Respondent, Pro se.
Order Dismissing Case issued by Marc R. Hillson, Chief Administrative Law Judge.

Complainant's Notice of Withdrawal of Complaint is **GRANTED.** It is hereby ordered that the Complaint, filed herein on May 26, 2000, be withdrawn.

Accordingly, this case is **DISMISSED.**

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In re: JAMES B. GARRETSON d/b/a JUNGLE PARADISE ZOO.
AWA Docket No. D-05-0001.
Order Dismissing Case.
Filed June 1, 2005.

Colleen A. Carroll, for Complainant.
Respondent, Pro se.
Order Dismissing Case issued by Jill S. Clifton, Administrative Law Judge.

During a teleconference on June 1, 2005, Applicant/Petitioner Mr. James B. Garretson, doing business as Jungle Paradise Zoo, representing himself, orally withdrew his request for hearing. Counsel for Respondent Animal and Plant Health Inspection Service of the United States Department of Agriculture (APHIS), Colleen A. Carroll, Esq., indicated that APHIS had no objection.

Accordingly, this case is **DISMISSED.**

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

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In re: RICKY M. WATSON, AN INDIVIDUAL; CHERI WATSON, AN INDIVIDUAL; TIGER'S EYES, INC., A TEXAS DOMESTIC NONPROFIT CORPORATION, d/b/a NOAH'S LAND WILDLIFE PARK; AND RICHARD J. BURNS, AN INDIVIDUAL.
AWA Docket No. 04-0017.
Order Granting Motion to Withdraw Appeal Petition and Vacate Decision.
Filed June 3, 2005.

AWA – Animal Welfare Act – Withdrawal of appeal petition – Order vacating decision.

Bernadette R. Juarez, for Complainant.
Respondents Ricky M. Watson and Cheri Watson, Pro se.
Order issued by William G. Jenson, Judicial Officer.

The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on May 19, 2004. Ricky M. Watson and Cheri Watson failed to file timely answers to the Complaint, and on September 3, 2004, Complainant filed a motion for a default decision, which Administrative Law Judge Victor W. Palmer [hereinafter the ALJ] denied.

On November 26, 2004, Complainant appealed the ALJ's denial of Complainant's motion for a default decision, and on February 23, 2005, I issued a Decision and Order as to Ricky M. Watson and Cheri Watson reversing the ALJ's denial of Complainant's motion for a default decision.[1]

On June 1, 2005, Complainant filed a motion to withdraw his appeal petition and vacate the February 23, 2005, Decision and Order as to Ricky M. Watson and Cheri Watson. On June 2, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Complainant's motion.

A party's motion to withdraw its own appeal petition is generally granted; however, withdrawal of an appeal petition is not a matter of right. In considering whether to grant a motion to withdraw an appeal petition, the Judicial Officer must consider the public interest.[2] Based on the record

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[1] *In re Ricky M. Watson* (Decision as to Ricky M. Watson and Cheri Watson), 64 *Agric. Dec.* 159 (2005). *See also In re Ricky M. Watson* (Order Denying Pet. to Reconsider as to Ricky M. Watson and Cheri Watson), 64 *Agric. Dec.* 655 (2005).

[2] *See Ford Motor Co. v. NLRB*, 305 U.S. 364, 370 (1939) (stating where the NLRB petitions for enforcement of its order against an employer and jurisdiction of the court has attached, permission to withdraw the petition rests in the sound discretion of the court to be exercised in light of the particular circumstances of the case); *American Automobile Mfrs. Ass'n v. Commissioner, Massachusetts Dep't of Envtl. Prot.*, 31 F.3d 18, 22 (1st Cir. 1994) (stating the court of appeals has broad discretion to grant or deny voluntary motions to (continued...)

before me, I find no basis for denying Complainant's motion to withdraw his appeal petition and vacate the February 23, 2005, Decision and Order as to Ricky M. Watson and Cheri Watson.

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

ORDER

Complainant's June 1, 2005, motion to withdraw his appeal petition is granted. The Judicial Officer's February 23, 2005, Decision and Order as to Ricky M. Watson and Cheri Watson and the Judicial Officer's April 13, 2005, Order Denying Petition to Reconsider as to Ricky M. Watson and Cheri Watson are vacated. This proceeding is remanded to the ALJ for further proceedings 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).

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[2](...continued)
dismiss appeal); *HCA Health Services of Virginia v. Metropolitan Life Ins. Co.*, 957 F.2d 120, 123 (4th Cir. 1992) (stating an appellant's motion to voluntarily dismiss its own appeal is generally granted, although courts of appeal have discretionary authority not to dismiss the case in appropriate circumstances); *United States v. State of Washington, Dep't of Fisheries*, 573 F.2d 1117, 1118 (9th Cir. 1978) (stating the court has discretionary authority to decline to grant the appellants' motion to dismiss their own appeal); *In re Hartford Packing Co.*, 60 *Agric. Dec.* 851, 853 (2001) (Order Granting Motion to Withdraw Appeal) (stating a party's motion to withdraw its own appeal petition is generally granted; however, withdrawal of an appeal petition is not a matter of right); *In re Vermont Meat Packers, Inc.*, 48 *Agric. Dec.* 158 (1989) (Order Permitting Withdrawal of Appeal) (stating withdrawal of appeal is not a matter of right); *In re Smith Waller*, 34 *Agric. Dec.* 373, 374 (1975) (Order Granting Motion to Withdraw Appeal) (stating the rules of practice do not permit a party to withdraw an appeal as a matter of right; in considering whether to grant a motion to withdraw an appeal, the Judicial Officer must consider the public interest); *In re Henry S. Shatkin*, 34 *Agric. Dec.* 296, 297 (1975) (Order Granting Motion to Withdraw Appeal) (stating the rules of practice do not permit a party to withdraw an appeal as a matter of right; in considering whether to grant a motion to withdraw an appeal, the Judicial Officer must consider the public interest).

In re: FOR THE BIRDS, INC., AN IDAHO CORPORATION; AND JERRY L. KORN, AN INDIVIDUAL, AND SUSAN F. KORN, AN INDIVIDUAL, d/b/a FOR THE BIRDS; AND BEN KORN, AN INDIVIDUAL.
AWA Docket No. 04-0033.
Remand Order as to Susan F. Korn.
Filed June 22, 2005.

AWA – Animal Welfare Act – Opportunity to file objections – Remand order.

The Judicial Officer concluded that Administrative Law Judge Peter M. Davenport (ALJ) failed to provide Susan F. Korn 20 days within which to file objections to Complainant's motion for a default decision as required by the applicable rules of practice (7 C.F.R. § 1.139). Consequently, the Judicial Officer vacated the ALJ's February 25, 2005, Initial Decision, as it relates to Susan F. Korn, and remanded the proceeding, as it relates to Susan F. Korn, to the ALJ to provide Susan F. Korn an opportunity to file objections to Complainant's motion for default decision.

Colleen A. Carroll, for Complainant.
Respondent Susan F. Korn, Pro se.
Initial Decision issued by Administrative Law Judge Peter M. Davenport.
Remand Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on September 8, 2004. Complainant instituted the proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations and Standards]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges that during the period March 2001 through August 2003, For The Birds, Inc., Jerry L. Korn, Susan F. Korn, and Ben Korn willfully violated the Regulations and Standards (Compl. ¶¶ 8-52). For The Birds, Inc., Jerry L. Korn, and Susan F. Korn failed to file answers to the

Complaint within 20 days after service, as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)).

On January 19, 2005, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed: (1) a Motion for Adoption of Decision and Order as to Respondent Jerry L. Korn [hereinafter Motion for Default Decision as to Jerry L. Korn] and a proposed Decision and Order as to Respondent Jerry L. Korn [hereinafter Proposed Default Decision as to Jerry L. Korn]; (2) a Motion for Adoption of Decision and Order as to Respondent Susan F. Korn [hereinafter Motion for Default Decision as to Susan F. Korn] and a proposed Decision and Order as to Respondent Susan F. Korn [hereinafter Proposed Default Decision as to Susan F. Korn]; and (3) a Motion for Adoption of Decision and Order as to For The Birds, Inc. [hereinafter Motion for Default Decision as to For The Birds, Inc.], and a proposed Decision and Order as to Respondent For The Birds, Inc. [hereinafter Proposed Default Decision as to For The Birds, Inc.].

On January 27, 2005, the Hearing Clerk served: (1) Jerry L. Korn with Complainant's Motion for Default Decision as to Jerry L. Korn, Complainant's Proposed Default Decision as to Jerry L. Korn, and a service letter; and (2) For The Birds, Inc., with Complainant's Motion for Default Decision as to For The Birds, Inc., Complainant's Proposed Default Decision as to For The Birds, Inc., and a service letter.[1] On February 16, 2005, Jerry L. Korn and For The Birds, Inc., filed objections to Complainant's Motion for Default Decision as to Jerry L. Korn, Complainant's Proposed Default Decision as to Jerry L. Korn, Complainant's Motion for Default Decision as to For The Birds, Inc., and Complainant's Proposed Default Decision as to For The Birds, Inc.[2] On February 25, 2005, the Hearing Clerk served Susan F. Korn with Complainant's Motion for Default Decision as to Susan F. Korn,

[1]United States Postal Service Domestic Return Receipts for Article Number 7003 2260 0005 5721 3786 and Article Number 7003 2260 0005 5721 3779.

[2]Objection to Motion for Adoption of Decision and Order as to Respondents Jerry L. Korn, For the Birds, Inc., and Ben Korn; and Request for Telephonic Hearing.

Complainant's Proposed Default Decision as to Susan F. Korn, and a service letter.[3]

On February 25, 2005, Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] issued a Decision and Order [hereinafter Initial Decision]: (1) concluding For The Birds, Inc., Jerry L. Korn, and Susan F. Korn willfully violated the Regulations and Standards; (2) directing For The Birds, Inc., Jerry L. Korn, and Susan F. Korn to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; and (3) assessing For The Birds, Inc., Jerry L. Korn, and Susan F. Korn, jointly and severally, a $28,050 civil penalty (Initial Decision at 21-30).

On March 11, 2005, Complainant filed Complainant's Appeal Petition. For The Birds, Inc., and Jerry L. Korn failed to file responses to Complainant's Appeal Petition. On May 26, 2005, Susan F. Korn filed a late-filed response to Complainant's Appeal Petition. On May 27, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision as to For The Birds, Inc., Jerry L. Korn, and Susan F. Korn. Simultaneous with my filing this Remand Order as to Susan F. Korn, I file a Decision and Order as to For The Birds, Inc., and Jerry L. Korn.

CONCLUSION BY THE JUDICIAL OFFICER

Section 1.139 of the Rules of Practice provides that a respondent may file objections to a complainant's motion for a default decision within 20 days after service of the motion, as follows:

> **§ 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 adoption thereof, both of which shall be served upon the

[3]Memorandum to File from Tonya Fisher dated February 25, 2005.

> 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.

7 C.F.R. § 1.139.

The record establishes that the Hearing Clerk served Susan F. Korn with Complainant's Motion for Default Decision as to Susan F. Korn and Complainant's Proposed Default Decision as to Susan F. Korn on February 25, 2005,[4] the same day the ALJ issued the Initial Decision. As the ALJ did not provide Susan F. Korn with 20 days within which to file objections to Complainant's Motion for Default Decision as to Susan F. Korn and Complainant's Proposed Default Decision as to Susan F. Korn, the proceeding as it relates to Susan F. Korn should be remanded to the ALJ to provide Susan F. Korn an opportunity to file objections in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

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

ORDER

1. Administrative Law Judge Peter M. Davenport's February 25, 2005, Initial Decision as it relates to Susan F. Korn is vacated.

2. The proceeding, as it relates to Susan F. Korn, is remanded to Administrative Law Judge Peter M. Davenport:

   (a) to provide Susan F. Korn an opportunity to file objections to Complainant's Motion for Default Decision as to Susan F. Korn and Complainant's Proposed Default Decision as to Susan F. Korn in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139); and

   (b) for further proceedings as to Susan F. Korn in accordance with the Rules of Practice.

In re: CITETEC.
CRPA Docket No. 04-0001.

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[4]See note 3.

Order Dismissing Case.
Filed June 6, 2005.

Babak Rastgoufard, for Respondent.
Alan Charles Raul, for Petitioner.
Order Dismissing Case issued by Victor W. Palmer, Administrative Law Judge.

Petitioner's request, pursuant to 7 C.F.R. §§ 1200.52(d) and 900.53, to withdraw its Petition, filed June 3, 2005 is **GRANTED**.

Accordingly, this case is **DISMISSED.**

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

In re: ALLEN SPRENGER.
FCIA Docket No. 05-0004.
Order.
Filed March 3, 2005.

Donald A. Brittenham, Jr., for Complainant
David M. Cran, for Respondent.
Order issued by Peter M. Davenport, Administrative Law Judge.

This matter is before the Administrative Law Judge upon the Complainant's Request for Dismissal as a Result of Settlement.

Being sufficiently advised, it is **ORDERED** that this action be **DISMISSED** as settled and the same is **STRICKEN** from the Docket.

Copies of this Order shall be served upon the parties by the Hearing Clerk's Office.

In re: PLATINUM FOODS OF FLORIDA, INC., AND JOSEPH CANOSSA, SR.
FMIA Docket No. 04-0001.
PPIA Docket No. 04-0001.
Order To Terminate Stipulation and Consent Order.
Filed June 1, 2005.

Thomas Bolick, for Complainant.
Eric N. Olsen, for Respondent.
Order issued by Marc R. Hillson, Administrative Law Judge.

This is a proceeding under the Federal Meat Inspection Act, as amended (21 U.S.C. §§ 601 *et seq*.) ("FMIA"), the Poultry Product Inspection Act, as amended (21 U.S.C. §§ 451 *et seq.)* ("PPIA"), and the applicable Rules of Practice (7 C.F.R. §§ 1.130 *et seq*. and 9 C.F.R. §§ 500 *et seq*.) to withdraw Federal Inspection services from respondent Platinum Foods of Florida, Inc. This proceeding was commenced by a complaint filed on October 29, 2003, by the Administrator of the Food Safety and Inspection Service (FSIS), United States Department of Agriculture (USDA), which is responsible for the administration of Federal meat inspection and poultry product inspection services. On January 16, 2004, the parties agreed that this proceeding should be terminated by entry of the Stipulation and Consent Order which was filed and effective on that same date. Upon consideration of the joint motion filed by respondent Platinum Foods of Florida, Inc. ("Platinum Foods"), and Complainant to terminate the agreed Stipulation and Consent Order with respect to respondent Platinum Foods, it is hereby

ORDERED that, except for the terms and provisions set forth below, all the terms and provisions affecting respondent Platinum Foods that were set forth in the Stipulation and Consent Order in this matter shall be terminated on the date this Order is signed by the Administrative Law Judge.

1. Respondent Platinum Foods admits all the jurisdictional allegations of the Complaint filed in this matter on October 29, 2003, and waives:

(a) Any further procedural steps:

(b) Any requirement that the final decision and order in this proceeding contain any findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof; and

(c) All rights to seek judicial review or to otherwise challenge or contest the validity of this order and this proceeding.

2. Respondent Platinum Foods waives any action against the USDA under the Equal Access to Justice Act of 1980, as amended (5 U.S.C. §§ 504 *et seq*.) for fees and other expenses incurred by respondents in connection with this proceeding.

3. Respondent Platinum Foods and its owners, officers, directors, partners, successors, assigns, and affiliates waive, in addition to the action waived in paragraph 2 above, any other action against USDA or its employees in connection with any actions taken by them in reference to this proceeding.

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In re: STATE OF CALIFORNIA, HEALTH AND HUMAN SERVICES AGENCY.
FSP Docket No. 02-0004.
Order Dismissing Case.
Filed March 8, 2005.

Angela Gusky and Jill Maze, for Appelle.
Brian McCalmon, for Appellant.
Order Dismissing Case issued by Marc R. Hillson, Chief Administrative Law Judge.

On March 8, 2005, Appellant withdrew its Notice of Appeal for the above-captioned case.

Accordingly, this case is **DISMISSED.**

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In re: STATE OF CALIFORNIA, HEALTH AND HUMAN SERVICES AGENCY.
FSP Docket No. 03-0004.
Order Dismissing Case.
Filed March 8, 2005.

Angela Gusky and Jill Maze, for Appelle.
Brian McCalmon, for Appellant.
Order Dismissing Case issued by Marc R. Hillson, Chief Administrative Law Judge.

On March 8, 2005, Appellant withdrew its Notice of Appeal for the above-captioned case.

Accordingly, this case is **DISMISSED.**

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In re: TIM GRAY, an individual.

HPA Docket No. 01-D022 (formerly
HPA Docket No. 01-A022 (formerly
HPA Docket No. 01-0022)
Confirmation of Oral Decision and Order.
Filed March 10, 2005.

Colleen A. Carroll, for Complainant.
Respondent, Pro se.
Confirmation of Oral Decision and Order issued by Jill S. Clifton, Administrative Law Judge.

Complainant, the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture, is represented by Colleen A. Carroll, Esq. Respondent, Tim Gray, is representing himself.

This proceeding was instituted under the Horse Protection Act (15 U.S.C. § 1821 *et seq*.) (the "Act"), by a complaint filed on June 28, 2001, alleging, among other things, that on or about May 27, 2000, Respondent Tim Gray violated section 5(2)(B) of the Act by entering a horse named "JFK All Over" in a horse show while the horse was sore. Respondent Tim Gray timely filed an answer to the complaint, which, among other things, denied the horse was sore.

On March 7, 2005, I issued my Decision and Order as to Respondent Tim Gray **orally** at the close of the hearing, in accordance with 7 C.F.R. § 1.142(c)(1). The transcript may not be available to the Hearing Clerk or the parties for weeks, so I provide this documentation. This writing confirms my oral Decision and Order and instructs the Hearing Clerk to comply with 7 C.F.R. § 1.142 (c)(2): see attached Appendix 2.

Four witnesses testified and I now identify the exhibits that were admitted into evidence. The four videotapes (CX10, CX11, CX12, and CX13) and CX2 are all located in Complainant's exhibit notebook marked HPA Docket No. 01-0022 and used for the first time in HPA Docket No. 01-B022. The remainer of the exhibits admitted in this case are located with this record file: CX3, CX4a, CX4b, CX4c, CX7 and CX20.

Abbreviated Summary of Findings of Fact Announced Orally

___1.Respondent Tim Gray is an individual whose mailing address is 3125 Highway 231 North, Shelbyville, Tennessee 37160, and who is engaged in the business of training and showing Tennessee Walking Horses.

2. On or about May 27, 2000, Respondent Tim Gray entered "JFK All Over" in the 30th Annual Spring Fun Show in Shelbyville, Tennessee, (the "Fun Show"), as entry number 252 in class number 34 ("Three-Year-Old Walking Stallions") for the purpose of showing the horse in that class.

3. On or about May 27, 2000, Respondent Tim Gray entered "JFK All Over" in the Fun Show, as entry number 252 in class number 34, while the horse was "sore," as that term is defined in the Act, for the purpose of showing the horse in that class, in violation of section 5(2)(B) of the Act (15 U.S.C. § 1824(2)(B)).

Abbreviated Summary of Conclusions Announced Orally

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

2. Respondent Tim Gray has violated section 5(2)(B) of the Horse Protection Act. 15 U.S.C. § 1824(2)(B).

3. The following order is authorized by the Act and warranted under the circumstances.

Abbreviated Summary of Order Announced Orally

1. Respondent Tim Gray is assessed a civil penalty of $2,200, which shall be paid by May 6, 2005, by a certified check or money order or cashier's check, made payable to the order of, the Treasurer of the United States.

2. Respondent Tim Gray is disqualified for two years 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, or horse sale or auction.[1]

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[1]"Participating" means engaging in any activity beyond that of a spectator, and includes, without limitation, transporting or arranging for the transportation of horses to or from equine events, personally giving instructions to exhibitors, being present in any area where

(continued...)

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

My oral Decision and Order becomes final and effective without further proceedings on **Monday, April 11, 2005**, UNLESS an appeal to the Judicial Officer is filed with the Hearing Clerk by **Wednesday, April 6, 2005**, in accordance with 7 C.F.R. § 1.145 (see attached Appendix 1).

Copies of this Confirmation shall be served by the Hearing Clerk upon the parties; Respondent's copy shall be sent by ordinary mail, and also by FAX to 931-684-0379, in addition to being served by certified mail. Further, the Hearing Clerk shall use the same means to serve the transcript excerpt when it is available.

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In re: PATTI MAGEE AND MICHAEL MAGEE.
HPA Docket No. 02-0004.
Ruling Dismissing Complainant's Motion to Abrogate Consent Decision.
Filed March 22, 2005.

HPA – Motions entertained by Judicial Officer.

The Judicial Officer dismissed Complainant's Motion to Abrogate Consent Decision. The Judicial Officer stated the Rules of Practice (7 C.F.R. § 1.143(a)) provides that motions filed or made prior to the filing of an appeal of an administrative law judge's decision, except motions which directly relate to an appeal, shall be ruled on by the administrative law judge. As no appeal from an administrative law judge's decision had been filed in the proceeding and Complainant's motion did not relate to an appeal from an administrative law judge's decision, the Judicial Officer could not entertain Complainant's motion.

Donald A. Tracy, for Complainant.
Brenda S. Bramlett, Shelbyville, Tennessee, for Respondents.
Ruling issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

(...continued)
spectators are not allowed, and financing the participation of others in equine events.

On November 24, 2004, Administrative Law Judge William B. Moran [hereinafter the ALJ] entered a Consent Decision agreed to by Patti Magee and Michael Magee [hereinafter Respondents] and the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant]. On February 25, 2005, Complainant requested that the Judicial Officer abrogate the Consent Decision based upon Respondents' purported failure to comply with the terms of the Consent Decision.[2] On March 14, 2005, Respondents filed a response to Complainant's Motion To Judicial Officer To Abrogate Consent Decision denying there is a basis for abrogating the Consent Decision.[3] On March 17, 2005, Complainant filed a response to Respondents' response to Complainant's Motion To Judicial Officer To Abrogate Consent Decision.[4] On March 18, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Complainant's Motion To Judicial Officer To Abrogate Consent Decision.

CONCLUSION BY THE JUDICIAL OFFICER

Section 1.143(a) of the rules of practice applicable to this proceeding[5] provides that motions filed or made prior to the filing of an appeal of an administrative law judge's decision, except motions which directly relate to an appeal, shall be ruled on by the administrative law judge, as follows:

§ 1.143 Motions and requests.

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[2]"Complainant's Motion To Judicial Officer To Abrogate Consent Decision."

[3]"Respondents' Response to Complainant's Motion To Judicial Officer To Abrogate Consent Decision."

[4]"Complainant's Response to Respondents Response To Complainant's Motion To Judicial Officer To Abrogate Consent Decision."

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

> (a) *General.* All motions and requests shall be filed with the Hearing Clerk, and served upon all the parties, except (1) requests for extensions of time pursuant to § 1.147, (2) requests for subpoenas pursuant to § 1.149, and (3) motions and requests made on the record during the oral hearing. *The Judge shall rule upon all motions and requests filed or made prior to the filing of an appeal of the Judge's decision pursuant to § 1.145, except motions directly relating to the appeal.* Thereafter, the Judicial Officer will rule on any motions and requests, as well as the motions directly relating to the appeal.

7 C.F.R. § 1.143(a) (emphasis added).

No appeal from the ALJ's Consent Decision has been filed in this proceeding. Moreover, Complainant's Motion To Judicial Officer To Abrogate Consent Decision does not relate to an appeal from the ALJ's Consent Decision. Therefore, the Judicial Officer cannot entertain Complainant's Motion To Judicial Officer To Abrogate Consent Decision and Complainant's Motion To Judicial Officer To Abrogate Consent Decision must be dismissed.[6]

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

RULING

Complainant's Motion To Judicial Officer To Abrogate Consent Decision, filed February 25, 2005, is dismissed.

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In re: ROBERT B. McCLOY, JR.
HPA Docket No. 99-0020.
Order Lifting Stay Order.
Filed March 22, 2005.

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

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[6] *See In re Lion Raisins, Inc.*, 63 *Agric. Dec.* 828, 830, (2004).

PROCEDURAL HISTORY

On March 22, 2002, I issued a Decision and Order concluding Robert B. McCloy, Jr. [hereinafter Respondent], violated the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831).[1] On April 22, 2002, Respondent filed a petition for reconsideration of the March 22, 2002, Decision and Order, which I denied.[2]

On July 15, 2002, Respondent requested a stay of the Order in *In re Robert B. McCloy, Jr.*, 61 *Agric. Dec.* 173 (2002), pending the outcome of proceedings for judicial review, and on July 17, 2002, I granted Respondent's request for a stay.[3]

On December 2, 2003, the United States Court of Appeals for the Tenth Circuit affirmed *In re Robert B. McCloy, Jr.*, 61 *Agric. Dec.* 173 (2002),[4] and on October 4, 2004, the Supreme Court of the United States denied Respondent's petition for writ of certiorari.[5] On February 14, 2005, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], filed a motion to lift the July 17, 2002, Stay Order on the ground that proceedings for judicial review have been concluded.[6] The Hearing Clerk served Respondent with Complainant's Motion to Lift Stay Order on February 15, 2005. Respondent failed to file a response to Complainant's Motion to Lift Stay Order within 20 days after service, as required by the rules of practice applicable to this proceeding.[7] On March 15, 2005, the Hearing Clerk

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[1]*In re Robert B. McCloy, Jr.*, 61 *Agric. Dec.* 173 (2002).

[2]*In re Robert B. McCloy, Jr.*, 61 *Agric. Dec.* 228 (2002) (Order Denying Pet. for Recons.).

[3]*In re Robert B. McCloy, Jr.*, 61 *Agric. Dec.* 745 (2002) (Stay Order).

[4]*McCloy v. United States Dep't of Agric.*, 351 F.3d 447 (10th Cir. 2003).

[5]*McCloy v. United States Dep't of Agric.*, ___ U.S. ___, 125 S. Ct. 38 (2004).

[6]Complainant's Motion to Lift Stay Order.

[7]See 7 C.F.R. §§ 1.130-.151 and, in particular, 7 C.F.R. § 1.143(d).

transmitted the record of the proceeding to the Judicial Officer for a ruling on Complainant's Motion to Lift Stay Order.

CONCLUSION BY THE JUDICIAL OFFICER

I issued the July 17, 2002, Stay Order to postpone the effective date of the Order issued in *In re Robert B. McCloy, Jr.*, 61 *Agric. Dec.* 173 (2002), pending the outcome of proceedings for judicial review. Proceedings for judicial review are concluded. Therefore, Complainant's Motion to Lift Stay Order is granted; the July 17, 2002, Stay Order is lifted; and the Order issued in *In re Robert B. McCloy, Jr.*, 61 *Agric. Dec.* 173 (2002), is effective, as set forth in the following Order.

ORDER

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

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

Respondent's payment of the civil penalty shall be forwarded to, and received by, Ms. Carroll within 30 days after service of this Order on Respondent. Respondent shall indicate on the certified check or money order that payment is in reference to HPA Docket No. 99-0020.

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

to exhibitors; (c) being present in the warm-up areas, inspection areas, or other areas where spectators are not allowed at any horse show, horse exhibition, horse sale, or horse auction; and (d) financing the participation of others in any horse show, horse exhibition, horse sale, or horse auction.

The disqualification of Respondent shall become effective on the 30th day after service of this Order on Respondent.

In re: ROBERT RAYMOND BLACK, II, AN INDIVIDUAL; CHRISTOPHER B. WARLEY, AN INDIVIDUAL; BLACK GOLD FARM, INC., A TEXAS CORPORATION; ROBBIE J. WARLEY, AN INDIVIDUAL, d/b/a BLACK GOLD FARMS; AND HERBERT DERICKSON AND JILL DERICKSON, INDIVIDUALS, d/b/a HERBERT DERICKSON TRAINING FACILITY, a/k/a HERBERT DERICKSON STABLES, a/k/a HERBERT DERICKSON BREEDING AND TRAINING FACILITY.
HPA Docket No. 04-0003.
Order Dismissing Interlocutory Appeal as to Robert Raymond Black, II, and Remanding the Proceeding to the ALJ.
Filed May 3, 2005.

HPA – Interlocutory appeal.

The Judicial Officer dismissed Complainant's appeal of Administrative Law Judge (ALJ) Peter M. Davenport's January 21, 2005, Order. The Judicial Officer rejected Complainant's contention that the ALJ's Order denied Complainant's motion for a default decision and found Complainant's appeal was interlocutory. The Judicial Officer held Complainant's interlocutory appeal must be dismissed because the Rules of Practice do not permit interlocutory appeals.

Colleen A. Carroll, for Complainant.
Jack G. Heffington, Christiana, TN, for Respondent Robert Raymond Black, II.
Order issued by Peter M. Davenport, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant],

instituted this disciplinary administrative proceeding by filing a Complaint on August 19, 2004. Complainant instituted the proceeding under the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) [hereinafter the Horse Protection Act]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges that on or about March 21, 2002, Robert Raymond Black, II [hereinafter Respondent], violated section 5(1) and (2)(B) of the Horse Protection Act (15 U.S.C. § 1824(1), (2)(B)) (Compl. ¶¶ 11-12).

On August 20, 2004, the Hearing Clerk sent Respondent, by certified mail, the Complaint, the Rules of Practice, and a service letter. On September 8, 2004, the United States Postal Service returned the August 20, 2004, certified mailing to the Hearing Clerk marked "Not Deliverable As Addressed/Unable to Forward/Return to Sender."[1] On September 13, 2004, the Hearing Clerk sent Respondent, by regular mail, the Complaint, the Rules of Practice, and the Hearing Clerk's August 20, 2004, service letter.[2] Respondent failed to answer the Complaint within 20 days after the date the Hearing Clerk mailed the Complaint to Respondent by regular mail, and, on October 19, 2004, the Hearing Clerk sent Respondent a letter informing him that he had failed to file an answer within the time prescribed by section 1.136 of the Rules of Practice (7 C.F.R. § 1.136).[3]

On October 21, 2004, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a "Motion for Adoption of Proposed Decision and Order" [hereinafter Motion for Default Decision] and a proposed "Decision and Order as to Robert Raymond Black II, by Reason of Admission of Facts" [hereinafter Proposed Default Decision]. On November 22, 2004, the Hearing Clerk served Respondent with

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[1]Memorandum of Lolita Ellis, Assistant Hearing Clerk, dated September 13, 2004, and envelope in which the Hearing Clerk sent Respondent, by certified mail, the Complaint, the Rules of Practice, and the August 20, 2004, service letter.

[2]Memorandum of Lolita Ellis, Assistant Hearing Clerk, dated September 13, 2004.

[3]Letter dated October 19, 2003 [sic], from Joyce A. Dawson, Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture, to Robert Raymond Black, II.

Complainant's Motion for Default Decision and Complainant's Proposed Default Decision.[4]

On January 21, 2005, Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] issued an Order: (1) directing the Hearing Clerk to provide Respondent with the Complaint and all other pleadings; (2) providing Respondent 20 days in which to file an answer; and (3) deferring consideration of Complainant's Motion for Default Decision (ALJ's January 21, 2005, Order at 2-3).

On March 11, 2005, Complainant appealed the ALJ's January 21, 2005, Order to the Judicial Officer. On April 26, 2005, Respondent filed "Respondent Robert Raymond Black's Response to Complainant's Appeal Petition." On April 29, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

CONCLUSIONS BY THE JUDICIAL OFFICER

Complainant filed Complainant's Appeal Petition and Complainant's Supplement to Appeal Petition pursuant to sections 1.139 and 1.145(a) of the Rules of Practice (7 C.F.R. §§ 1.139, .145(a)). Complainant contends the ALJ erroneously denied Complainant's Motion for Default Decision in the ALJ's January 21, 2005, Order.

Section 1.139 of the Rules of Practice provides a party may appeal an administrative law judge's denial of a complainant's motion for adoption of a proposed decision, as follows:

> **§ 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

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[4]See United States Postal Service Domestic Return Receipt for Article Number 7099 3400 0014 4584 7328 establishing the Hearing Clerk served Respondent with Complainant's Motion for Default Decision and Complainant's Proposed Default Decision on November 22, 2004.

> 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. Copies of the decision or denial of complainant's Motion shall be served by the Hearing Clerk upon each of the parties and may be appealed pursuant to § 1.145. Where the decision as proposed by complainant is entered, such decision shall become final and effective without further proceedings 35 days after the date of service thereof upon the respondent, unless there is an appeal to the Judicial Officer by a party to the proceeding pursuant to § 1.145: *Provided, however*, That no decision shall be final for purposes of judicial review except a final decision of the Judicial Officer upon appeal.

7 C.F.R. § 1.139.

I have reviewed the ALJ's January 21, 2005, Order, and I do not find the ALJ denied Complainant's Motion for Default Decision, as Complainant asserts. To the contrary, the ALJ explicitly states "[c]onsideration of the Complainant's Motion for Adoption of Proposed Decision and Order is deferred" (ALJ's January 21, 2005, Order at 3). Moreover, the ALJ's January 21, 2005, Order is not a decision issued under section 1.139 or section 1.142(c) of the Rules of Practice (7 C.F.R. §§ 1.139, .142(c)) that may be appealed to the Judicial Officer. Finally, the Rules of Practice do not permit interlocutory appeals.[5] Therefore, Complainant's Appeal Petition and Complainant's Supplement to Appeal Petition must be rejected as premature.

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

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[5]*In re Velasam Veal Connection*, 55 *Agric. Dec.* 300, 304 (1996) (Order Dismissing Appeal); *In re L. P. Feuerstein*, 48 *Agric. Dec.* 896 (1989) (Order Dismissing Appeal); *In re Landmark Beef Processors, Inc.*, 43 *Agric. Dec.* 1541 (1984) (Order Dismissing Appeal); *In re Orie S. LeaVell*, 40 *Agric. Dec.* 783 (1980) (Order Dismissing Appeal by Respondent Spencer Livestock, Inc.).

ORDER

1. Complainant's interlocutory appeal, filed March 11, 2005, is dismissed.

2. The proceeding is remanded to the ALJ to conduct the proceeding in accordance with the Rules of Practice.

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In re: CHAD WAY, AN INDIVIDUAL, AND CHAD WAY STABLES, INC., A TENNESSEE CORPORATION.
HPA Docket No. 03-0005.
Stay Order.
Filed May 17, 2005.

Bernadette R. Juarez, for Complainant.
Aubrey B. Harwell, III, Nashville, TN, for Respondents.
Order issued by William G. Jenson, Judicial Officer.

On April 11, 2005, I issued a Decision and Order: (1) concluding Chad Way and Chad Way Stables, Inc. [hereinafter Respondents], violated the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) [hereinafter the Horse Protection Act], and regulations issued under the Horse Protection Act (9 C.F.R. pt. 11); (2) assessing Respondents a $4,400 civil penalty; and (3) disqualifying Respondents for 2 years 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.[1]

On May 10, 2005, Respondents filed a petition for review of *In re Chad Way*, 64 *Agric. Dec.*401 (2005), with the United States Court of Appeals for the Sixth Circuit. On May 11, 2005, Respondents filed a Motion for Order of Stay requesting a stay of the Order in *In re Chad Way*, 64 *Agric. Dec.* 401 (2005), pending the outcome of proceedings for judicial review.

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[1] *In re Chad Way*, 64 *Agric. Dec.* 401 (2005).

On May 16, 2005, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, informed the Office of the Judicial Officer, through counsel, by telephone, that he has no objection to Respondents' Motion for Order of Stay.

In accordance with 5 U.S.C. § 705, Respondents' Motion for Order of Stay is granted.

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

ORDER

The Order in *In re Chad Way*, 64 *Agric. Dec.*401 (2005), is stayed pending the outcome of proceedings for judicial review. This Stay Order shall remain effective until lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

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In re: PATTI MAGEE and MICHAEL MAGEE.
HPA Docket No. 02-0004.
Order.
Filed June 7, 2005.

Bernadette Juarez, for Complainant.
Brenda Bramlett, for Respondents.
Order issued by Peter M. Davenport, Administrative Law Judge.

This matter is before the Administrative Law Judge upon the Complainant's Request to Withdraw their Motion to Vacate the Consent Decision and Motion to Strike Respondents' Response to Complainant's Motion to Abrogate.

It appearing that Respondent Michael Magee has paid his assessed civil penalty and satisfactory representation has been made to when Respondent Patti Magee will satisfy her obligation, it is **ORDERED** that the Request to Withdraw their Motion to Vacate Consent Decision will be **GRANTED** and this matter is stricken from the active docket.

Copies of this Order will be served upon the parties by the Hearing Clerk.

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In re: LION RAISINS, INC., A CALIFORNIA CORPORATION FORMERLY KNOWN AS LION ENTERPRISES, INC.; LION RAISIN COMPANY, A PARTNERSHIP OR UNINCORPORATED ASSOCIATION; LION PACKING COMPANY, A PARTNERSHIP OR UNINCORPORATED ASSOCIATION; AL LION, JR., AN INDIVIDUAL; DAN LION, AN INDIVIDUAL; JEFF LION, AN INDIVIDUAL; and BRUCE LION, AN INDIVIDUAL.
I & G Docket No. 03-0001.
Remand Order.
Filed June 30, 2005.

I&G – Remand order.

The Judicial Officer stated the United States District Court for the Eastern District of California found the Judicial Officer had abused his discretion by entering a default judgment against Respondents because of their minor deviation from the Rules of Practice with no showing of prejudice to Complainant and remanded the case to the Judicial Officer for further proceedings. *Lion Raisins, Inc. v. United States Dep't of Agric.* No. CV-F-04-5844 REC DLB (E.D. Cal. May 12, 2005). Therefore, the Judicial Officer remanded the proceeding to the administrative law judge to whom the case had been previously assigned for further proceedings in accordance with the Rules of Practice.

Colleen A. Carroll, for Complainant.
Brian C. Leighton, Clovis, California, and Charles Pashayan, Jr., Fresno, California, and Washington, DC, for Respondents.
Order issued by William G. Jenson, Judicial Officer.

Kenneth C. Clayton, Associate Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on October 11, 2002. Complainant instituted the proceeding under the Agricultural Marketing Act of 1946, as amended (7 U.S.C. §§ 1621-1632 (1994)) [hereinafter the Agricultural Marketing Act]; the regulations and standards governing the inspection and certification of processed fruits and vegetables (7 C.F.R. pt. 52) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) and the Rules of Practice Governing Withdrawal of Inspection and Grading Services (7 C.F.R. pt. 50) [hereinafter the Rules of Practice].

On May 24, 2004, I issued a Decision and Order: (1) finding Lion Raisins, Inc.; Lion Raisin Company; Lion Packing Company; Al Lion, Jr.; Dan Lion; Jeff Lion; and Bruce Lion [hereinafter Respondents] failed to file a timely answer to the Complaint; (2) holding Respondents are deemed, based upon their failure to file a timely answer, to have admitted the allegations of the Complaint and waived the opportunity for hearing; (3) concluding Respondents violated the Agricultural Marketing Act and the Regulations, as alleged in the Complaint; and (4) debarring Respondents for 1 year from receiving inspection services under the Agricultural Marketing Act.[1]

Respondents sought judicial review of *In re Lion Raisins, Inc.*, 63 *Agric. Dec.* 211 (2004). On May 12, 2005, the United States District Court for the Eastern District of California found that I abused my discretion by entering a default judgment against Respondents because of their minor deviation from the Rules of Practice with no showing of prejudice to Complainant and remanded the case to me for further proceedings.[2] A notice of appeal of *Lion Raisins, Inc. v. United States Dep't of Agric.*, No. CV-F-04-5844 REC DLB (E.D. Cal. May 12, 2005), is not due until July 11, 2005; however, on June 28, 2005, I received a determination against appeal issued on June 16, 2005, by the United States Department of Justice, Civil Division.

As proceedings for judicial review are concluded and the United States District Court for the Eastern District of California has remanded the case to me, the proceeding should be remanded to the administrative law judge to whom the case was previously assigned for further proceedings in accordance with the Rules of Practice.

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

ORDER

This proceeding is remanded to Administrative Law Judge Jill S. Clifton for further proceedings in accordance with the Rules of Practice.

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[1] *In re Lion Raisins, Inc.*, 63 *Agric. Dec.* 211 (2004).

[2] *Lion Raisins, Inc. v. United States Dep't of Agric.* No. CV-F-04-5844 REC DLB (E.D. Cal. May 12, 2005).

In re: GALLO CATTLE COMPANY, A CALIFORNIA LIMITED PARTNERSHIP.
NDPRB Docket No. 05-0001.
Order Denying Interim Relief.
Filed May 20, 2005.

NDPRB – Application for interim relief.

Sharlene Deskins, for Respondent.
Brian C. Leighton, Clovis, CA, and Marshall C. Whitney, Fresno, CA, for Petitioner.
Order issued by William G. Jenson, Judicial Officer.

On April 20, 2005, Gallo Cattle Company [hereinafter Petitioner] filed a petition[1] pursuant to section 118(a) of the Dairy Production Stabilization Act of 1983 (7 U.S.C. § 4509(a)), requesting an exemption from, or modification of, the Dairy Promotion and Research Order (7 C.F.R. §§ 1150.101-.187). Petitioner also requests interim relief, as follows:

> 3. Petitioner is also entitled to interim relief, injunctive relief allowing Petitioner to escrow assessments in an interest type bearing account pending the decision of the case on the merits so that Petitioner's assessments are not used by the [National Dairy Promotion and Research] Board to convey the speech complained of herein, so that there is available source of money to refund when Petitioner prevails, and for the government to comply with the U.S. Supreme Court decision of *Chicago Teachers Union v. Hudson*[.]

Pet. at 9.

On May 17, 2005, the Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], filed

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[1]Petitioner entitles its petition "Petition Pursuant To 7 U.S.C. § 4509 Contending That The National Dairy Promotion Program (7 U.S.C. § 4501 *et seq.*), Legislation, The Rules And Regulations Promulgated Thereunder, And The Assessments Imposed For The Same Violates Petitioner's Rights Guaranteed Under The First Amendment Of The United States Constitution, And Seeking A Modification Of The Order, An Exemption From The Order, And A Refund Of Assessments (7 C.F.R. § 1150.131 *Et seq.* And 7 C.F.R. § 900.50; Request For Interim Relief And An Escrowing Of Assessments" [hereinafter Petition].

Answer of Respondent. On May 18, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration of Petitioner's request for interim relief.

Petitioner's request for interim relief is denied for the following three reasons. First, interim relief is not available to Petitioner. The rules of practice governing this proceeding (7 C.F.R. §§ 900.52(c)(2)-.71, 1200.50-.52) [hereinafter the Rules of Practice] provide that a person who has filed a petition pursuant to 7 C.F.R. § 900.52 may, by separate application filed with the Hearing Clerk, apply to the Secretary of Agriculture for interim relief, pending final determination of the proceeding.[2] However, Petitioner filed the Petition pursuant to 7 C.F.R. § 1200.52, not 7 C.F.R. § 900.52; therefore, interim relief is not available to Petitioner.

Second, even if interim relief were available in this proceeding, Petitioner has not filed a separate application for interim relief, as required by the Rules of Practice.[3] Instead, Petitioner's request for interim relief is included in its Petition for exemption from, or modification of, the Dairy Promotion and Research Order.

Third, even if interim relief were available to Petitioner and Petitioner had filed a separate application for interim relief, Petitioner's request for interim relief would be denied based upon established precedent. The Judicial Officer consistently denies applications for interim relief from marketing orders because interim relief would work directly in opposition to the purposes of the marketing order from which interim relief is sought and the act under which the marketing order is issued, and could harm the public interest if provisions of the marketing order were, in effect, suddenly terminated by granting interim relief to the applicant and others who plan to file similar applications for interim relief.[4] The reasons for denial of

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[2]7 C.F.R. § 900.70(a).

[3]7 C.F.R. § 900.70(a).

[4]*In re Dole DF&N, Inc.*, 53 *Agric. Dec.* 527 (1994); *In re Cal–Almond, Inc.*, 53 *Agric. Dec.* 527 (1994); *In re Gerawan Farming, Inc.*, 52 *Agric. Dec.* 925 (1993); *In re Independent Handlers*, 51 *Agric. Dec.* 122 (1992); *In re Cal-Almond, Inc.*, 50 *Agric. Dec.* 670 (1991); *In re Saulsbury Orchards & Almond Processing, Inc.*, 49 *Agric. Dec.* 836 (1990); *In re Lansing Dairy, Inc.*, 48 *Agric. Dec.* 867 (1989); *In re Gerawan Co.,* 48 *Agric. Dec.* 79 (1989); *In re Cal-Almond, Inc.*, 48 *Agric. Dec.* 15 (1989); *In re Wileman Bros. &*

(continued...)

applications for interim relief from marketing orders are applicable to Petitioner's application for interim relief from the Dairy Promotion and Research Order issued pursuant to the Dairy Production Stabilization Act of 1983.[5]

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

ORDER

Petitioner's application for interim relief is denied.

_____

[4](...continued)
Elliott, Inc., 47 *Agric. Dec.* 1109 (1988), *reconsideration denied*, 47 *Agric. Dec.* 1263 (1988); *In re Wileman Bros. & Elliott, Inc.*, 46 *Agric. Dec.* 765 (1987), *reconsideration denied*, 46 *Agric. Dec.* 765 (1987); *In re Saulsbury Orchards & Almond Processing, Inc.*, 46 *Agric. Dec.* 561 (1987); *In re Borden, Inc.*, 44 *Agric. Dec.* 661 (1985); *In re Sequoia Orange Co.*, 43 *Agric. Dec.* 1719 (1984); *In re Dean Foods Co.*, 42 *Agric. Dec.* 1048 (1983); *In re Moser Farm Dairy, Inc.*, 40 *Agric. Dec.* 1246 (1981).

[5]*In re Gallo Cattle Co.*, 55 *Agric. Dec.* 340 (1996). *See generally In re Handlers Against Promoflor*, 55 *Agric. Dec.* 1042, 1044 (1996) (stating the reasons for denial of interim relief from marketing orders are applicable to petitioner's application for interim relief from the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Order issued pursuant to the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993).

In re: SHI-E CHIANG and FU-TSEND CHEN.
P.Q. Docket No. 05-0010.
Order Dismissing Case.
Filed February 11, 2005.

Thomas Bolick, for Complainant.
Respondent, Pro se.
Order Dismissing Case issued by Marc R. Hillson, Chief Administrative Law Judge.

The Motion of Complainant to dismiss the above-captioned matter is **GRANTED.**

Accordingly, this case is **DISMISSED.**

———————

In re: ALPHA OMEGA IMPORT and EXPORT, INC.
P.Q. Docket No. 04-0009.
Order.
Filed March 11, 2005.

Thomas Bolick, for Complainant.
Respondent, Pro se.
Order issued by Peter M. Davenport, Administrative Law Judge.

This matter is before the Administrative Law Judge upon the Notice of Withdrawal of Alpha Omega Import and Export, Inc. as a Respondent in this action filed by the Complainant.

Being sufficiently advised, it is **ORDERED** that so much of the Complaint as relates to Alpha Omega Import and Export, Inc. is dismissed as a Respondent in this action. The caption in this case shall be amended to reflect only Alliance Airlines as a Respondent.

Copies of this Order shall be served upon the remaining parties by the Hearing Clerk.

———————

In re: NICLAS MAGNUSSON.
P.Q. Docket No. 05-0013.
Order.
Filed May 13, 2005.

Krishna Ramaraju, for Complainant.
Respondent, Pro se.
Order issued by Peter M. Davenport, Administrative Law Judge.

This matter is before the Administrative Law Judge upon the Motion of the Complainant to Withdraw the Complaint and Motion for Adoption of Proposed Decision and Order as attempts to locate the Respondent have been unsuccessful.

Being sufficiently advised, it is **ORDERED** that the Complaint and Motion for Adoption of Proposed Decision are withdrawn and this action is **DISMISSED,** without prejudice.

———————

In re: ISSAM ZIEN. CHARRI.
P.Q. Docket No. 05-0011.
Order Dismissing Case.
Filed June 1, 2005.

Krishna Ramaraju, for Complainant.
Respondent, Pro se.
Order issued by Marc R. Hillson, Chief Administrative Law Judge.

Complainant's Motion to Withdraw Complaint is **GRANTED.** It is hereby ordered that the Complaint, filed herein on January 7, 2005, be withdrawn.

Accordingly, this case is **DISMISSED.**

———————

In re: ABX AIR, INC, a/k/a AIRBORNE EXPRESS.
P.Q. Docket No. 05-0022.
AQ. Docket No. 05-0009.
Order Dismissing Case.

Filed June 22, 2005.

Krishna Ramaraju, for Complainant.
Respondent, Pro se.
Order Dismissing Case issued by Marc R. Hillson, Chief Administrative Law Judge.

Complainant's Motion to Withdraw Complaint is **GRANTED.** It is hereby ordered that the Complaint, filed herein on April 22, 2005, be withdrawn.

Accordingly, this case is **DISMISSED** without prejudice.

———————

In re: AMALGAMATED SUGAR COMPANY, L.L.C
SMA Docket No. 04-0003.
Order Denying Motions to Dismiss.
Petitioner and Motion For Summary Judgment
Filed June 23, 2004.[*]

SMA – Termination of operations, permanent – Sale of all assets – Allocation, transfer of.

Steven Z. Kaplan, David P. Bunde, Daniel C. Mott for Petitioners.
Jeffrey Kahn, for Respondent.
Kevin Brosch, David A. Beiging, Michael Greear for Intervenors
Order filed by Administrative Law Judge Victor M. Palmer.

Background

The parties in this case are, on one side, the Petitioner, Amalgamated Sugar Company, L.L.C. (Amalgamated), and two supporting Intervenors, Southern Minnesota Beet Sugar Cooperative L.L.C. (SMBSC), and Wyoming Sugar Company (Wyoming). On the other side are the Commodity Credit Corporation (CCC) and its supporting Intervenor, American Crystal Sugar Company (American Crystal).

Amalgamated filed a Petition on December 4, 2003, to challenge the action taken by CCC in a decision issued on November 14, 2003, by James

[*]This case was inadvertently left out of *63 Agric. Dec. Jan.* - Jun. (2004) – Editor.

R. Little, CCC's Executive Vice President. In the decision, Mr. Little responded to Amalgamated's Request for Reconsideration of CCC's decision of September 16, 2003, transferring the marketing allocation of Pacific Northwest Sugar Company (Pacific Northwest or PNW) to American Crystal. He stated that "after careful reconsideration, I cannot find justification to overturn CCC's decision." He justified his decision as in accordance with section 359d(b)(2)(F) and section 359d(b)(2)(E) of the Farm Security and Rural Investment Act of 2002 (the Act). The two subparagraphs read as follows:

> (F) SALE OF ALL ASSETS OF A PROCESSOR TO ANOTHER PROCESSOR – If a processor of beet sugar (or all of the assets of the processor) is sold to another processor of beet sugar, the Secretary shall transfer the allocation of the seller to the buyer unless the allocation has been distributed to other beet processors under subparagraph (E)
>
> (E) PERMANENT TERMINATION OF OPERATIONS OF A PROCESSOR- If a processor of beet sugar has been dissolved, liquidated in a bankruptcy proceeding, or otherwise has permanently terminated operations (other than in conjunction with a sale or other disposition of the processor or the assets of the processor), the Secretary shall -
>
> (i) eliminate the allocation of the processor provided under this section; and
>
> (ii) distribute the allocation to other beet sugar processors on a pro rata basis.

Mr. Little's decision went on to state:

> CCC determined that PNW was certainly not dissolved nor liquidated in a bankruptcy proceeding, but instead permanently terminated in conjunction with the sale of its assets. The act of permanent termination was simultaneous with the act of closing the deal on the sale of PNW's assets. The former event did not precede the latter. If CCC had determined PNW was permanently terminated for reasons other than in conjunction with the sale of its assets,

> paragraph E would have dictated the outcome. While the statute does not define what it means to be 'permanently terminated', PNW was still recognized by CCC as a processor at the time of the sale, September 8, 2003.

As the beneficiary of CCC's decision, American Crystal has intervened to protect itself from losing the transferred Pacific Northwest marketing allocation. Petitioner and its two supporting Intervenors seek to eventually benefit from the overturn of the CCC decision as beet sugar processors who would share in the distribution of the marketing allocation under subparagraph E which should control if paragraph F does not.

Amalgamated filed its petition initiating this proceeding on December 4, 2003. CCC filed an Answer and a Motion to Dismiss on December 23, 2003. American Crystal filed a Notice of Intervention, Answer and Motion to Dismiss on January 14, 2004. Amalgamated filed a brief opposing the Motion to Dismiss on January 20, 2004. Both SMBSC and Wyoming filed Notices of Intervention on January 20, 2004. On March 2, 2004, Judge Jill S. Clifton who was then assigned to this case, held a telephone conference and set a schedule for the parties to follow in respect to a Motion for Summary Judgment American Crystal indicated it would file. On March 25, 2004, American Crystal filed a Memorandum in Support of its Motion to Dismiss the Petition or in the Alternative for Summary Judgment. Also filed at that time, was an affidavit attesting to facts by American Crystal's Counsel, Steven Z. Kaplan. SMBSC filed its response to the Motions on May 3, 2004. American Crystal filed a reply to SMBSC's response on May 21, 2004.

Upon consideration of these motions and the written arguments of the parties, I am denying the Motions to Dismiss and the Motion for Summary Judgment.

Motions to Dismiss

1. Subject Matter Jurisdiction

CCC and American Crystal assert that I do not have subject matter jurisdiction to hear and decide the petition under section 359i of the Agricultural Adjustment Act of 1938, as amended (7 U.S.C. § 359 i). The section states:

> An appeal may be taken to the Secretary from any decision under section 359d establishing allocations of marketing allotments, or under section 359 f, by any person adversely affected by reason of any such decision. (Emphasis supplied)

CCC and American Crystal contend that the words "establishing allocations" limits the appeal process to those decisions under 359 d(b)(2)(A) that "make allocations" of beet sugar each year after allotments are determined, and do not allow appeals of decisions respecting a "transfer" of an allocation under 359d(b)(2)(F).

However, there is nothing in the Act or CCC's regulations that so define "establishing", or in any way restrict appeals from "any decision under section 359 d" to only those under 359d (b)(2)(A).

> The word 'any' is generally used in the sense of 'all' or 'every' and the meaning is most comprehensive. *Fleck v. KDI Sylvan Pools, Inc.,* 981 F.2d 107, 115 (3rd Cir. 1992).

Moreover, CCC's own regulations specifically direct, at 7 C.F.R. §1435.319 (b), that:

> For issues arising under §§ 359d, 359f (b) and (c), and 359 (i)... a person adversely affected by a reconsidered determination may appeal such determination by filing a written notice of appeal... with the Hearing Clerk.

Whereas the regulation expressly limits appeals arising under section 359 f to paragraphs (b) and (c), it places no limitation upon appeals under section 359 d. It is a basic rule of construction that when a limitation is expressed in one part of a statute or regulation, no further limitation will be implied. *See e.g., Russello v. United States*, 464 U.S. 16, 23 (1983).

Furthermore, the word "establish" that is undefined in both the statute and the implementing regulations, must be given its normal and ordinary meaning. *Richards v. United States,* 369 U.S. 1, 9 (1962); and *Shook v. District of Columbia Financial Responsibility and Management Assistance Authority,* 964 F. Supp. 416, 428 (D.D.C. 1997).

Both Webster's Third New International Dictionary (1986) and the Oxford English Dictionary, Second Edition, Vol V, p 404, state that

"establish" is a word that is used to denote the legal settlement of rights or privileges.

Webster lists as a meaning of "establish":

"to settle (as an estate) upon someone; secure (as rights) to a group."

So too, the Oxford English Dictionary lists as a principal meaning of "establish":

"to secure or settle (property, privileges, etc.) to or upon persons."

The Oxford English Dictionary (p 404, 2b) explains that this usage was employed and recognized in the English common law.

It stands to reason that the Secretary secures the rights or privileges of marketing certain amounts of sugar by a particular entity vis-a-vis other competing interests whenever she makes or transfers marketing allotments.

One must conclude that in allowing affected parties to file an administrative appeal from "any decision under section 359 d", Congress intended to provide such recourse from any decision that secures or settles the benefits of a marketing allocation upon a particular person or group of persons.

2. Cognizable Claim Under the Act

CCC and American have also moved to dismiss the petition for failure to state a legally cognizable claim.

The Act specifically allows any one affected by an adverse decision respecting a marketing allocation established pursuant to Section 359d, to file an appeal to obtain a hearing by an Administrative Law Judge pursuant to the Administrative Procedure Act. When Mr. Little denied Amalgamated's request for reconsideration of CCC's transfer of Pacific Northwest market allocation to American Crystal, his denial adversely affected Amalgamated in two ways. First, a major competitor had been given added market share. Second, as Mr. Little acknowledged, if he had not granted the transfer of the market allocation under Paragraph F, the allocation would have been available under Paragraph E to Amalgamated and the Intervenor Processors.

A legally cognizable claim under the Act does exist and the Motions to Dismiss alleging the contrary are denied.

3. Judicial Estoppel

CCC and American Crystal further contend that in a prior proceeding in which Pacific Northwest Sugar Company sought to increase its 2003 crop year allocation, Amalgamated asserted facts and circumstances inconsistent with those now set forth in its petition. In the prior proceeding, Amalgamated along with American Crystal and other affected parties, argued against the increase sought, but did not argue that Pacific Northwest's existing allocation should be distributed to other beet sugar processors because Pacific Northwest had permanently terminated its operations. For this reason, CCC and American Crystal contend that Petitioner is now barred, under the doctrine of judicial estoppel, from making this assertion in this proceeding.

A succinct explanation of the use of estoppel doctrines by courts was given by the United States Court of Appeals for the District of Columbia Circuit in *Konstantinidis v. Chen*, 626 F. 2d 933, 936-940 (1980).

The court first explained that "judicial estoppel" differs from "equitable estoppel". For equitable estoppel to apply, the invoking party must have been an adverse party in the prior proceeding and must have acted in reliance upon his opponent's prior position and would be harmed if his opponent were now to change positions. Judicial estoppel, however, does not require proof of privity, reliance or prejudice. Whereas, equitable estoppel looks to the integrity of the relationship of parties to each other, judicial estoppel focuses on the integrity of the judicial process. Of particular concern is the sanctity of the oath and the placing of a restraint upon reckless and false sworn testimony and even if prior inconsistent statements were not made under oath, the doctrine may be invoked to prevent a party from playing fast and loose with the courts.

Under both estoppel doctrines, there must be a prior judicial acceptance of a factual assertion made by the party who now advances an inconsistent contention. A review of testimony and the filings in the prior proceeding in which Pacific Northwest sought to have its 2003 crop allocation increased, shows that Amalgamated, American Crystal and others referenced facts which are not inconsistent with the Petition's allegations.

The President of Amalgamated, Ralph Burton, testified in respect to Pacific Northwest's operations as of June of 2003, (Ex. H, pages 70-71 attached to Response of Intervenor, SMBSC):

> ...the crop hasn't been grown for 2 years, nothing planted this year. Probably other portions of the farm bill will soon come into play in this regard, and at such time as that operation becomes viable, then I think the new processor portion of the farm bill can come into play.

His concerns about the viability of Pacific Northwest as a sugar processor were shared by others at the hearing. John Richmond, the President of Southern Minnesota Beet Sugar Cooperative testified (Id, pp 74-76):

> ... However, we also believe that the CCC should clarify when an entity is no longer a beet sugar processor that should receive an allocation. The 2002 farm bill says, and I quote, if a processor has been dissolved, liquidated in a bankruptcy proceeding, or otherwise has permanently terminated operations other than in conjunction with the sale or disposition of the processor or assets of the processor, the allocation is to be eliminated and distributed pro rata to the other processors.
>
> The regulations, however, take a more limited approach, saying under paragraph (a) of this section, where growers can take their crop to other locations, that CCC will eliminate the allocation of a processor who has been dissolved or liquidated in a bankruptcy proceeding, a bit narrower definition, and the allocation distributed to other processors on a pro rata basis.
>
> From the information we have, it would appear that Pacific Northwest has been dissolved within the meaning of the 2002 farm bill, since we understand that the factory have (sic) also been sold, and that no sugar beets have been planted for 3 years.

If that is true, then it does not matter whether Pacific Northwest suffers a substantial quality loss or if it opened a molasses desugarization facility, because it wouldn't have any allocation to be adjusted at all.

In short, there is not only a lack of evidence of prior inconsistent statements by Amalgamated or by any of the Intervenors who support its Petition, but in fact their concerns about Pacific Northwest's viability as a sugar processor were specifically brought to the attention of CCC at the

prior hearing. It so happens that CCC used a different reason for denying the application of Pacific Northwest for an increase in its sugar allocation. But this was not because the Petitioner or any of the Intervenors misled CCC. Without evidence of Amalgamated having acted in bad faith, judicial estoppel is inappropriate. *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F. 3d 355, 362 (3rd Cir. 1996)

> Additionally as the *Konstantinidis* decision further elaborated, at 938:
> Moreover, judicial estoppel has not been followed by anything approaching a majority of jurisdictions, nor is there a discernible modern trend in that direction.
>
> . . .
>
> Furthermore, we agree with the Tenth Circuit that utilization of the judicial estoppel theory would be out of harmony with [the modern rules of pleading] and would discourage the determination of cases on the basis of the true facts as they might be established ultimately.

Parkinson v. California Co., 233 F. 2d at 438.

The *Konstantinidis* Court concluded that (supra at 940):

> Judicial estoppel has yet to make its way into the law of this jurisdiction, and we do not believe that there is any tendency in favor of its adoption. Furthermore, the District of Columbia Court of Appeals would not adopt the doctrine on the facts before us.

On the basis of the facts before me, I do not find that the adoption of this doctrine is warranted or appropriate in this proceeding.

Motion for Summary Judgment

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law, *Anderson v. Liberty Lobby*, 477 U.S. 242, 247 (1986). It will not be granted if "... there are any 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, supra,* at 250. As will be demonstrated, the present record does not support such a resolution of this proceeding.

CCC and American Crystal argue that the plain meaning of section 359d(b)(2)(F) required CCC to transfer Pacific Northwest's market allocation to American Crystal because a finding had not yet been made that Pacific Northwest had permanently terminated operations and its market allocation had not been distributed to other sugar beet processors under section 359d(b)(2)(E).

However, before such a result may be said to be required, section 359d(b)(2)(F) specifies that one of two conditions must exist. Either the processor of beet sugar itself must be the subject of the sale to another processor of beet sugar; or the sale must be for "all of the assets of the processor."

American Crystal did not buy Northwest Pacific itself, and the present record does not identify the assets that were treated as still being Pacific Northwest assets at the time CCC transferred its market allocation to American Crystal.

The factory and the processing equipment had been previously sold to others. Pacific Northwest had no outstanding contracts for sugar beet crops and its production supply and processing operations had ended years before. Petitioner and SMBSC state that for these reasons alone, the statutory provision failed to authorize the transfer of market allocation to American Crystal. They contend that for the provision to be applicable, Pacific Northwest must have still been a viable processor selling assets it still owned.

I take it that CCC and American Crystal believe, to the contrary, that it is sufficient under the section for American Crystal to have acquired the assets Pacific Northwest formerly used to function as a sugar beet processor and the fact that they were owned and sold by entities other than Pacific Northwest did not matter. But the decision that is the subject of the Petition for Review does not elucidate reasoning that supports such an interpretation.

It may be that the market allocation itself was considered by CCC to be a marketable asset of Pacific Northwest which Pacific Northwest could pass to American Crystal because CCC had not yet redistributed the market allocation to others. If so, CCC's basis for such an interpretation needs to be supplied

All that the Executive Vice President's decisional letter of November 14, 2003, tells us is that he denied Amalgamated's request for reconsideration on the basis that Pacific Northwest "was permanently terminated in conjunction with the sale of its assets". But the decision does not specify what assets he considered to still be Pacific Northwest assets and to be the subject of the sale. Also, the decision does not clarify why assets that were acquired secondhand so to speak from others were treated as constituting a sale of Pacific Northwest assets.

There is also a troubling, apparent inconsistency that needs explanation. When Washington Sugar Company previously sought the transfer of Pacific Northwest's market allocation as part of its contemplated acquisition of virtually all of the assets of Pacific Northwest, CCC on October 11, 2002, advised it (Ex D, attached to Affidavit of Steven Z. Kaplan):

> ... Therefore, CCC will transfer Pacific Northwest's 2002 allocation of 15, 000 tons, raw value, to the Washington Sugar Company upon receipt of a copy of the bill of sale showing that virtually all of the assets of Pacific Northwest, including the factory, have been acquired by the Washington Sugar Company ... (emphasis supplied)

Inasmuch as American Crystal did not acquire Pacific Northwest's factory, this requirement was evidently dropped. But why?

American Crystal has also argued that in the event I believe the statutory provisions to be silent or ambiguous with respect to the specific issues before us I should accord *Chevron* deference to CCC's interpretation as set forth in Mr. Little's letter. *See Chevron, U.S.A., Inc. v. Natural Resources Defense*, 467 U.S. 837 (1984).

It is customary in USDA adjudicatory proceedings to look for guidance from those officials who administer the day-to-day operations of the various programs entrusted to USDA. *See*, *Greenville Packing Co., Inc*., 59 *Agric. Dec.* 194, 226 (2000) and In re: 50 *Agric. Dec.* 476, 497 (1991), *aff'd*, 991 F.2d 803, (9th Cir. 1993) (not to be treated as a precedent under 9th Circuit Rule 36-3). But controlling deference of the sort American Crystal urges should now be given the Executive Vice President's decision would be excessive and would vitiate the very review I am presently conducting on behalf of the Secretary. *Chevron* deference is only accorded to final action by an agency. That has not yet occurred. Additionally, before an agency

interpretation may receive *Chevron* deference, it must be found to be reasonable and based on a permissible construction of the statute. *See Chevron, supra* 467 U.S. 843-844.

There must also be a reasoned analysis demonstrating a rational connection between the facts and the decision made. *Orengo Caraballo v. Reich,* 11 F. 3d 186, 193 (D.C. Cir. 1993).

Without taking further evidence, I am as yet unable to come to that conclusion.

Accordingly, the Motions to Dismiss and the Motion for Summary Judgment are each denied.

———————

In re: PACIFIC NORTHWEST SUGAR COMPANY, INC. (Appeal of Southern Minnesota Beet Sugar Cooperative of Reconsidered Opinion of Beet Sugar Marketing Allotment Allocation Transfer From Pacific Northwest Sugar Company By Executive Vice President, Commodity Credit Corporation).
SMA Docket No. 04-0004.
Order.
Filed February 14, 2005.

SMA – Allocation, Transfer of.

Jeffrey Kahn, for Respondent.
Steven A. Adducci, for Petitioner.
Order issued by Peter M. Davenport, Administrative Law Judge.

This action involves a Petition for Review filed by Southern Minnesota Beet Sugar Cooperative (hereafter "SMBSC") on March 22, 2004 of the Reconsidered Opinion of the Beet Sugar Marketing Allotment Allocation Transfer from Pacific Northwest Sugar Company to American Crystal Sugar Company, (hereafter "ACS") by the Executive Vice President of Commodity Credit Corporation (hereafter "CCC"). It will be noted that this action involves the same transfer of quota which was the subject of *In re: Amalgamated Sugar Company, L.L.C.*, SMA Docket No. 04-0003, decided by Judge Victor W. Palmer on February 7, 2005.

An Answer and Motion to Dismiss was filed by the Executive Vice President of Commodity Credit Corporation on April 12, 2004. On April 22, 2004, the transferee, American Crystal Sugar Company, filed a Notice

of Intervention and Answer, SMBSC filed their Response to the Motion to Dismiss filed by CCC on May 3, 2004.

In its Motion to Dismiss, CCC asserted, *inter alia*[1] that the doctrine of *res judicata* would apply as the transfer of the quota was the subject of the previously noted parallel litigation before Judge Palmer. In *In re: Amalgamated Sugar Company, L.L.C.,* SMA Docket No. 04-0003, Judge Palmer held:

> CCC employed inconsistent standards for the transfer of the allocation that it has not fully explained. American Crystal was only required to acquire some of Pacific Northwest's assets. But previously, both Washington Sugar and Amalgamated had been advised that they would need to acquire virtually all of Pacific Northwest's assets including factory. ...
>
> ...the Reconsidered Determination by the Executive Vice President of CCC which is the subject of the appeal is hereby reversed. Upon this decision becoming final and effective, CCC shall distribute in future crop years, the amount of the marketing allocation that was transferred to American Crystal from Pacific Northwest to all sugar beet processors on a pro rata basis in accordance with 7 U.S.C. § 1359dd(b)(2)(E) of Act. ...

(Slip Opinion at pages 36 and 37)

The specific relief sought in this action (i.e. to reverse the Reconsidered Determination of the Executive Vice President of CCC transferring the allocation from Pacific Northwest to American Crystal and having the allocation distributed to all sugar beet processors on a pro rata basis) having been granted in the parallel action, there is no longer a cause in controversy and this action may be dismissed.

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[1] CCC asserted that Administrative Law Judges lacked subject matter jurisdiction and that the complaint failed to state cause upon which relief could be granted. Both of these grounds were rejected by Judge Palmer. In the instant action, CCC additionally argued that there was no reconsidered opinion and that the claim was time barred. In view of the disposition in the companion case and CCC's position that *res judicata* is applicable, it is unnecessary to address those arguments.

Accordingly, being sufficiently advised, there no longer being a cause in controversy, this action will be and hereby is **DISMISSED.**

AGRICULTURAL MARKETING AGREEMENT ACT

DEFAULT DECISIONS

In re: JAMES L. QUINN, d/b/a GOOD EARTH FARMS.
AMAA Docket No. 04-0001.
Decision and Order upon Admission of Facts by Reason of Default.
Filed March 11, 2005.

AMMA – Default.

Robert Ertman, for Complainant.
Respondent, Pro Se.
Decision and Order filed by Administrative Law Judge Peter M. Davenport.

Preliminary Statement

This proceeding was instituted under the Agricultural Marketing Agreement Act of 1937 ("Act"), as amended (7 U.S.C. ' 601 *et seq*.), by a complaint filed by the Administrator of the Agricultural Marketing Service, United States Department of Agriculture, alleging that the Respondent willfully violated the Marketing Orders for Nectarines Grown in California, 7 C.F.R. Part 916 (the "Nectarine Order") and for Peaches Grown in California, 7 C.F.R. Part 917 (the "Peach Order"), issued pursuant to 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, were served on the Respondent by certified mail received on February 9, 2004. The Respondent has failed to file an Answer within the time prescribed in accordance with Section 1.136 of the Rules of Practice, or at all, and the material facts alleged in the complaint, which are admitted by the Respondent's failure to file an answer, are adopted and set forth herein as Findings of Fact and Conclusions of Law. This decision and order are issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R.§ 1.139.

Findings of Fact and Conclusions of Law

1. Respondent James L. Quinn is an individual whose mailing address is 7176 E. Butler, Fresno, California. Respondent Quinn does business as, and is the sole proprietor of, Good Earth Farms, located at the same address.

2. At all times mentioned herein, Respondent James L. Quinn, dba Good Earth Farms, operated as a "handler" of nectarines and peaches as defined in section 916.10 of the Nectarine Order (7 C.F.R. § 916.10) and section 917.6 of the Peach Order (7 C.F.R. § 917.6) during the 2000/01, 2001/02, and 2002/03 fiscal periods (beginning April 1, ending May 31). The Respondent has been a handler since at least 1989.

3. The Nectarine and Peach Orders require that handlers who handle nectarines and peaches shall, prior thereto, cause such nectarines and peaches to be inspected by the Federal or Federal-State Inspection Service and certified as meeting the applicable requirements of such regulations, and promptly after inspection and certification, the handlers must submit a copy of the certificate of inspection to the Nectarine Administrative Committee and the Peach Control Committee (Committees). 7 C.F.R. §§ 916.55 and 917.45.

4. The Nectarine and Peach Orders require that handlers pay an assessment on nectarines and peaches that they handled pursuant to a rate established by the Secretary. 7 C.F.R. §§ 916.41 and 917.37.

5. The rate of assessment on nectarines handled after March 1, 2001, is $0.20 per 25-pound container or container equivalent of nectarines. 7 C.F.R. § 916.234.

6. The rate of assessment on peaches handled after March 1, 1996, is $0.1900 per 25-pound container or container equivalent of peaches. 7 C.F.R. § 917.258.

7. The Nectarine and Peach Orders require that handlers must furnish to the Committees, prompt, accurate and periodic reports covering detailed information such as name of shipper and shipping point, identification of carrier, date and time of shipment, number and type of containers shipped, the quantities shipped with the variety, grade and size of fruit, destination, identification of the inspection certificate or waiver pursuant to which the fruits were handled, and price per package of peaches at which sold. 7 C.F.R.§§ 916.60 and 917.50.

8. The Orders require that handlers must furnish to the Committees a recapitulation of shipments of each variety shipped and destination reports, at such times and for such periods as the Committees may designate.

9. During the 2000/01 fiscal period, and continuing to the present, Respondent handled at least 180 cartons of nectarines that he shipped without inspection prior to their shipment in violation of the Order. 7 C.F.R.§ 916.55.

10. During the 2001/02 fiscal period, and continuing to the present, Respondent handled at least 996 cartons of nectarines that he shipped without inspection prior to their shipment in violation of the Order. 7 C.F.R.§ 916.55.

11. During the 2002/03 fiscal period, and continuing to the present, Respondent handled at least 600cartons of nectarines that he shipped without inspection prior to their shipment in violation of the Order. 7 C.F.R.§ 916.55.

12. During the 2000/01 fiscal period, and continuing to the present, Respondent handled at least 2,626 cartons of peaches that he shipped without inspection prior to their shipment in violation of the Order. 7 C.F.R.§ 917.45.

13. During the 2001/02 fiscal period, and continuing to the present, Respondent handled at least 1,654 cartons of peaches that he shipped without inspection prior to their shipment in violation of the Order. 7 C.F.R.§ 917.45.

14. Respondent handled at least 780 cartons of nectarines during the 2000/01 fiscal period. During this fiscal period, and continuing to the present, Respondent as a handler of nectarines failed to pay to the California Tree Fruit Agreement, the amount ($144.30) of assessments due on nectarines that he has handled in violation of 7 C.F.R.§ 916.41. Each day that Respondent failed to remit the assessments constitutes a separate violation of the Act and Order. 7 U.S.C.§ 608c(14)(B).

15. Respondent handled at least 2,207 cartons of nectarines during the 2001/02 fiscal period. During this fiscal period, and continuing to the present, Respondent as a handler of nectarines failed to pay to the California Tree Fruit Agreement, the amount ($441.40) of assessments due on nectarines that he has handled in violation of 7 C.F.R.§ 916.41.

Each day that Respondent failed to remit the assessments constitutes a separate violation of the Act and Order. 7 U.S.C.§ 608c(14)(B).

16. Respondent handled at least 1,181 cartons of nectarines during the 2002/03 fiscal period. During this fiscal period, and continuing to the present, Respondent as a handler of nectarines failed to pay to the California Tree Fruit Agreement, the amount ($357.39) of assessments due on nectarines that he has handled in violation of 7 C.F.R.§ 916.41. Each day that Respondent failed to remit the assessments constitutes a separate violation of the Act and Order. 7 U.S.C. § 608c(14)(B).

17. Respondent handled at least 3,091 cartons of peaches during the 2000/01 fiscal period. During this fiscal period, and continuing to the present, Respondent as a handler of peaches failed to pay to the California Tree Fruit Agreement, the amount ($587.29) of assessments due on peaches that he has handled in violation of 7 C.F.R.§ 917.37. Each day that Respondent failed to remit the assessments constitutes a separate violation of the Act and Order. 7 U.S.C.§ 608c(14)(B).

18. Respondent handled at least 2,578 cartons of peaches during the 2001/02 fiscal period. During this fiscal period, and continuing to the present, Respondent as a handler of peaches failed to pay to the California Tree Fruit Agreement, the amount ($489.82) of assessments due on peaches that he has handled in violation of 7 C.F.R.§ 917.37. Each day that Respondent failed to remit the assessments constitutes a separate violation of the Act and Order. 7 U.S.C.§ 608c(14)(B).

19. Respondent handled at least 828 cartons of peaches during the 2002/03 fiscal period. During this fiscal period, and continuing to the present, Respondent as a handler of peaches failed to pay to the California Tree Fruit Agreement, the amount ($157.32) of assessments due on peaches that he has handled in violation of 7 C.F.R.§ 917.37. Each day that Respondent failed to remit the assessments constitutes a separate violation of the Act and Order. 7 U.S.C.§ 608c(14)(B).

20. Respondent violated sections 916.60(a) and 916.160(b) of the Nectarine Order (7 C.F.R. §§ 916.60(a) and 916.160(b)) by failing to file accurate reports for nectarines he handled during 2002. Respondent has failed to submit an amended report on nectarines he handled during 2002 and was 215 days late in submitting the amended report as of June 18, 2003.

21. Respondent violated sections 916.160(b) and 916.160(c) of the Nectarine Order (7 C.F.R. §§ 916.160(b) and 916.160(c)) by failing to file required reports on or before November 15 of 2000. Respondent has failed to submit Recapitulation Shipment and Destination reports on nectarines he handled during fiscal period 2000/01.

22. Respondent violated sections 916.160(b) and 916.160(c) of the Nectarine Order (7 C.F.R. §§ 916.160(b) and 916.160(c)) by failing to file required reports on or before November 15 of 2001. Respondent has failed to submit Recapitulation Shipment and Destination reports on nectarines he handled during fiscal period 2001/02.

23. Respondent violated sections 916.160(b) and 916.160(c) of the Nectarine Order (7 C.F.R. §§ 916.160(b) and 916.160(c)) by failing to file required reports on or before November 15 of 2002. Respondent has failed to submit Recapitulation Shipment and Destination reports on nectarines he handled during fiscal period 2002/03.

24. Respondent violated sections 917.178(b) and 917.178(c) of the Peach Order (7 C.F.R. §§ 917.178(b) and 917.178(c)) by failing to file required reports on or before November 15 of 2000. Respondent has failed to submit Recapitulation Shipment and Destination reports on peaches he handled during fiscal period 2000/01.

25. Respondent violated sections 917.178(b) and 917.178(c) of the Peach Order (7 C.F.R. §§ 917.178(b) and 917.178(c)) by failing to file required reports on or before November 15 of 2001. Respondent has failed to submit Recapitulation Shipment and Destination reports on peaches he handled during fiscal period 2001/02.

26. Respondent violated sections 917.178(b) and 917.178(c) of the Peach Order (7 C.F.R. §§ 917.178(b) and 917.178(c)) by failing to file required reports on or before November 15 of 2002. Respondent has failed to submit Recapitulation Shipment and Destination reports on peaches he handled during fiscal period 2002/03.

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.The Respondent is assessed a civil penalty of $15,000, which shall be paid by a certified check or money order made payable to the Treasurer of United States and shall be sent to Robert A. Ertman, Attorney, Office of the General Counsel, United States Department of Agriculture, Room 2014 South Building, Washington, D.C. 20250.

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

(a) from failing to file complete, accurate, and timely reports as required by the Nectarine and Peach Orders;

(b) from failing to have fruit inspected prior to shipment, as required by the Nectarine and Peach Orders;

(c) from failing to pay to the California Tree Fruit Agreement $943.09 in past due assessments under the Nectarine Order for fiscal periods 2000/01, 2001/02, and 2002/03; $1234.43 in past due assessments under the Peach Order for fiscal periods 2000/01, 2001/02, and 2002.03; and

(d) from failing to pay assessments under the Nectarine and Peach Orders in a timely manner, as required by the Orders.

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.

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In re: MEDHAT MAHMOUD, an individual d/b/a MEDHAT MAHMOUD PRODUCE, a soleproprietorship; JOSE LUIS TORRES, an individual; and FERNANDO TORRES, an individual d/b/a TORRES DATES, a sole proprietorship,
AMAA Docket No. 04-0003.
Decision and Order as to MEDHAT MAHMOUD, anindividual d/b/a MEDHAT MAHMOUD PRODUCE, a sole proprietorship.
Filed May 9, 2005.

AMAA - Default.

Bernadette Juarez, for Complainant.
Respondent, Pro se.
Decision and Order issued by Marc R. Hillson, Administrative Law Judge.

This proceeding was instituted under the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. § 601 *et seq.* (the "Act"), and the Marketing Order for Domestic Dates Produced or Packed in Riverside County, California, 7 C.F.R. §§ 987.1 - 987.84 ("Marketing Order"), and the Administrative Rules, 7 C.F.R. §§ 987.101-172 ("Rules"), by a complaint filed on July 21, 2004, by the Administrator of the Agricultural Marketing Service, United States Department of Agriculture, alleging that respondent Medhat Mahmoud violated the Marketing Order.

On November 15, 2004, the Hearing Clerk sent to respondent Medhat Mahmoud, by certified mail to his last known address, return receipt requested, a copy of the complaint and Rules of Practice governing proceedings under the Act (7 C.F.R. §§ 1.130-1.151).[1] The United States Postal Service marked said mailing "unclaimed" and returned it to the Hearing Clerk.

On January 4, 2005, in accordance with section 1.147(c)(1) of the rules of Practice, the Hearing Clerk served respondent Medhat Mahmoud, by regular mail, a copy of the complaint and the Rules of Practice governing proceedings under the Act (7 C.F.R. §§ 1.130-1.151). Respondent Medhat Mahmoud 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 Medhat Mahmoud has failed to file an answer. The material facts alleged in the complaint, which are admitted by respondent Medhat Mahmoud's failure to file an answer, are adopted and set forth herein as Findings of Fact. This Decision and Order is issued pursuant to section 1.139 of the Rules of Practice.

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[1] *See* Domestic Return Receipt for Article Number 7004 1160 0001 9221 3649.

Findings of Fact

1. Respondent Medhat Mahmoud is an individual doing business as Medhat Mahmoud Produce, whose last known mailing address was The Green Connection, 746 Market Court, Unit B-243, Los Angeles California 90021; and whose previous address was 1314 W. Vine Avenue, West Covina, California 91790. Medhat Mahmoud Produce is a sole proprietorship located at the same address. At all times mentioned herein, respondent Medhat Mahmoud was engaged in business as a handler of dates grown in Riverside County, California, and was subject to the Act and Marketing Order and Rules.

2. On or about October 31, 2001, respondent Medhat Mahmoud handled approximately 8,400 pounds of dates without having them inspected, in violation of section 987.41(a) of the Marketing Order. 7 C.F.R. § 987.41(a).

Conclusions

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

2. By reason of the facts set forth in the Findings of Fact above, respondent Medhat Mahmoud has violated section 987.41(a) of the Marketing Order. 7 C.F.R. § 987.41(a)).

3. The following Order is authorized by the Act and warranted under the circumstances.

Order

1. Respondent Medhat Mahmoud, an individual doing business as Medhat Mahmoud Produce, 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 Marketing Order and Rules, and in particular, from handling dates without having them inspected.

2. Respondent Medhat Mahmoud is assessed a civil penalty of **$1,100**, in accordance with section 608c(14)(B) of the Act. 7 U.S.C. § 608c(14)(B). Respondent Medhat Mahmoud shall pay the $1,100 by cashier's check, certified check, or money order, made payable to the order of the **Treasurer of the United States** and forwarded within 30

days from the effective date of this Order by a commercial carrier such as FedEx or UPS to:

Bernadette R. Juarez, Esq.
United States Department of Agriculture
Office of the General Counsel, Marketing Division
South Building, Room 2343
1400 Independence Avenue SW
Washington DC 20250-1417

Respondent Medhat Mahmoud shall indicate that the payment is in reference to: AMAA Docket No. 04-0003.

3. This Order shall be effective on the first day after this Decision and Order becomes final. This Decision and Order shall have the same force and effect as if entered after a full hearing and shall be final without further proceedings 35 days after service unless an appeal to the Judicial Officer is filed within 30 days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145, see attached Appendix A).

Copies of this Decision and Order shall be served by the Hearing Clerk upon each of the parties, including counsel for the remaining respondents

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ANIMAL QUARANTINE ACT

DEFAULT DECISIONS

In re: VIRGILIO VASQUEZ VARELA.
A.Q. Docket No. 03-0001.
PQ. Docket No. 04-0007.
Decision and Order.
Filed April 30, 2004.[*]

AQ and PQ – Default.

James Holt, for Complainant.
Respondent, Pro se.
Decision and Order issued by Jill S. Clifton, Administrative Law Judge.

[1] This proceeding was instituted under the Act of February 2, 1903, as amended (21 U.S.C. § 111); the Plant Protection Act, as amended (7 U.S.C. § 7701 *et seq.*); and the regulations promulgated under those Acts (9 C.F.R. § 94 *et seq.* and 7 C.F.R. § 319.56 *et seq.*); by a complaint filed on October 11, 2002, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint was originally assigned A.Q. Docket No. 03-0001; I have added P.Q. Docket No. 04-0007.

[2] The respondent, Virgilio Vasquez Varela, was served with a copy of the complaint on October 21, 2002. Respondent Virgilio Vasquez Varela's answer was due no later than November 10, 2002, twenty days after service of the complaint (7 C.F.R. § 136(a)).

[3] Respondent Virgilio Vasquez Varela failed to file an answer within 20 days after service. To date, Respondent Virgilio Vasquez Varela has still not filed an answer to the complaint. The Rules of Practice provide 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. 7 C.F.R. §1.136(c). Further, the failure to file an answer constitutes a waiver of hearing. 7 C.F.R. § 1.139. [4] Respondent Virgilio Vasquez Varela was informed in the complaint, and in the

[*]Note: This case was inadvertently omitted from Vol. 63 Agric. Dec. Jan. - Jun. (2004). - Editor.

Hearing Clerk's letter accompanying the complaint, that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to file an answer within twenty (20) days after service of the complaint constitutes an admission of the allegations in the complaint and waiver of a hearing. The Hearing Clerk's Office mailed respondent Virgilio Vasquez Varela a "No Answer Letter" on November 22, 2002.

[5] Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision as the Findings of Fact, and this Decision is issued pursuant to the Rules of Practice. (7 C.F.R. § 1.139). *See* 7 C.F.R. §1.130 *et seq.*; *see also* 7 C.F.R. §380.1 *et seq.*

Findings of Fact

[6] Respondent Virgilio Vasquez Varela is an individual with a mailing address of 5201 Camelback Road, Lot E 150, Phoenix, Arizona 85301.

[7] On or about April 9, 2001, respondent Virgilio Vasquez Varela imported into the United States at Douglas Port of Entry, Arizona, approximately 472 pounds of bologna, which contained pork and poultry products, without a certificate, in violation of 9 C.F.R. § 94.6 and 9 C.F.R. § 94.9.

[8] On or about April 9, 2001, respondent Virgilio Vasquez Varela imported into the United States at Douglas Port of Entry, Arizona, approximately one pound of oranges from Mexico without a phytosanitary certificate, in violation of 7 C.F.R. § 319.56-2t.

Conclusion

[9] By reason of the Findings of Fact set forth above, respondent Virgilio Vasquez Varela has violated the Act of February 2, 1903, as amended (21 U.S.C. § 111); the Plant Protection Act, as amended (7 U.S.C. §§ 7701 *et seq.*); and the regulations issued under those Acts, specifically, 9 C.F.R. § 94.6, 9 C.F.R. § 94.9, and 7 C.F.R. § 319.56-2t. Therefore, the following Order is issued.

Order

[10] Respondent Virgilio Vasquez Varela is hereby assessed a civil penalty of three thousand dollars ($3,000.00). Respondent Virgilio Vasquez Varela shall pay the $3,000.00 by cashier's check or money order, made payable to the order of the "**Treasurer of the United States**" and forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondent Virgilio Vasquez Varela shall indicate that payment is in reference to **A.Q. Docket No. 03-0001 and P.Q. Docket No. 04-0007**.

[11] This Decision and 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 upon of this Default Decision and Order upon respondent Virgilio Vasquez Varela, unless an appeal to the Judicial Officer is filed within thirty (30) days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145, see attached Appendix A).

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

[This Decision and Order became final June 9, 2004.-Editor]

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APPENDIX A

7 C.F.R.:

TITLE 7—-AGRICULTURE

SUBTITLE A—-OFFICE OF THE SECRETARY OF AGRICULTURE

PART 1—-ADMINISTRATIVE REGULATIONS

. . . .

SUBPART H—-RULES OF PRACTICE GOVERNING FORMAL

ADJUDICATORY PROCEEDINGS INSTITUTED BY THE SECRETARY UNDER

VARIOUS STATUTES

. . .

§ 1.145 Appeal to Judicial Officer.

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

(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.

(c) *Transmittal of record*. Whenever an appeal of a Judge's decision is filed and a response thereto has been filed or time for filing a response has expired, the Hearing Clerk shall transmit to the Judicial Officer the record of the proceeding. Such record shall include: the pleadings; motions and requests filed and rulings thereon; the transcript or

recording of the testimony taken at the hearing, together with the exhibits filed in connection therewith; any documents or papers filed in connection with a pre-hearing conference; such proposed findings of fact, conclusions, and orders, and briefs in support thereof, as may have been filed in connection with the proceeding; the Judge's decision; such exceptions, statements of objections and briefs in support thereof as may have been filed in the proceeding; and the appeal petition, and such briefs in support thereof and responses thereto as may have been filed in the proceeding.

(d) *Oral argument.* A party bringing an appeal may request, within the prescribed time for filing such appeal, an opportunity for oral argument before the Judicial Officer. Within the time allowed for filing a response, appellee may file a request in writing for opportunity for such an oral argument. Failure to make such request in writing, within the prescribed time period, shall be deemed a waiver of oral argument. The Judicial Officer may grant, refuse, or limit any request for oral argument. Oral argument shall not be transcribed unless so ordered in advance by the Judicial Officer for good cause shown upon request of a party or upon the Judicial Officer's own motion.

(e) *Scope of argument.* Argument to be heard on appeal, whether oral or on brief,

shall be limited to the issues raised in the appeal or in the response to the appeal, except that if the Judicial Officer determines that additional issues should be argued, the parties shall be given reasonable notice of such determination, so as to permit preparation of adequate arguments on all issues to be argued.

(f) *Notice of argument; postponement.* The Hearing Clerk shall advise all parties of the time and place at which oral argument will be heard. A request for postponement of the argument must be made by motion filed a reasonable amount of time in advance of the date fixed for argument.

(g) *Order of argument.* The appellant is entitled to open and conclude the argument.

(h) *Submission on briefs.* By agreement of the parties, an appeal may be submitted for decision on the briefs, but the Judicial Officer may direct that the appeal be argued orally.

(i) *Decision of the [J]udicial [O]fficer on appeal.* As soon as practicable after the receipt of the record from the Hearing Clerk, or, in case oral argument was had, as soon as practicable thereafter, the Judicial Officer, upon the basis of and after due consideration of the record and any matter of which official notice is taken, shall rule on the appeal. If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum. A final order issued by the Judicial Officer shall be filed with the Hearing Clerk. Such order may be regarded by the respondent as final for purposes of judicial review without filing a petition for rehearing, reargument, or reconsideration of the decision of the Judicial Officer.

[42 FR 743, Jan. 4, 1977, as amended at 60 FR 8456, Feb. 14, 1995; 68 FR 6341, Feb. 7, 2003]

7 C.F.R. § 1.145

SUVIT ASAWAPORNSNIT d/b/a VEGASRACE.COM.
A.Q. Docket No. 05-0001.
Decision and Order.
Filed January 31, 2005.

A.Q. – Default.

Krishna Ramaraju, for Complainant.
Respondent, Pro Se.
Decision filed by Administrative Law Judge Peter M. Davenport.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the movement of birds in violation of a quarantine zone imposed due to an outbreak of Exotic Newcastle Disease (9 C.F.R. § 82.1 *et seq.*) (hereinafter referred

to as the regulations), in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq.* and 9 C.F.R. §§ 99.1 *et seq.*.

This proceeding was instituted under the Animal Health Protection Act (7 U.S.C. §§ 8301 *et seq.*)(Act), by an Amended complaint filed by the Administrator of the Animal and Plant Health Inspection Service (APHIS) on November 30, 2004, alleging that respondent Suvit Asawapornsnit d/b/a Vegasrace.com violated the Act and regulations promulgated under the Act (9 C.F.R. § 82.1 *et seq.*).

The complaint sought civil penalties as authorized by 7 U.S.C. § 8313. This complaint specifically alleged that on or about the period between January 25 and February 1, 2003, respondent shipped approximately fifty-eight (58) pigeons to approximately thirty-nine (39) different individuals throughout the United States, knowingly in violation of a quarantine then imposed on the Clark County/Las Vegas Nevada area by the Secretary of Agriculture, in response to an outbreak of Exotic Newcastle Disease ("END").

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

Findings of Fact

1. Suvit Asawapornsnit, herein referred to as the respondent, is an individual doing business as Vegasrace.com (an unincorporated business).
2. Respondent is a resident of the State of Nevada, whose business mailing address is 5411 S. Oakridge Avenue, Pahrump, NY 89048.
3. On or about the period between January 25 and February 1, 2003, the respondent transported approximately fifty-eight (58) pigeons from Nevada to approximately thirty-nine different addresses, in

commerce and through the United States Postal Service, in violation of a quarantine then imposed by the Secretary of Agriculture ("Secretary") in designated areas, including at all times relevant herein, the area of Clark County/Las Vegas, Nevada in response to an outbreak of Exotic Newcastle Disease ("END"), 9 C.F.R. § 82.3 (c). Respondent violated section 82.5(b) of the regulations (9 C.F.R. § 82.5(b)) by moving such pigeons out of an END quarantine area without complying with the requirements of 9 C.F.R. § 82.11. The respondent transported the subject pigeons, with knowledge of said END quarantine, to the numbered parties listed below, between January 25, 2003 and February 1, 2003, as follows:

1)	Dennis Turk 1916 Sandpebble Street Stockton, CA 95206	1 pigeon
2)	S. David Plummer 877 Signal Fruit Heights, UT 84037	1 pigeon
3)	Bill Jeffers 7315 W. Union Hills Glendale, AZ 85308	1 pigeon
4)	Wally Sabell 2451 Kipling Street, #314 Lakewood, CO 80215	1 pigeon
5)	Eric Houchin 4132 E. Regina Avenue Mead, WA 99021	1 pigeon
6)	Neil Migliore 20 Winchester Drive Mottontown, NY 11545	1 pigeon
7)	Barry Yu	6 pigeons

	2112 Brenham Drive McKinney, TX 75070	
8)	Reese Bishop 1143 Georgean Street Hayward, CA 94541	5 pigeons
9)	Jim Brennan 15 Julia Court Tappan, NY 10983	3 pigeons
10)	Daryl Phelps 38002 Parkmont Commons Fremont, CA 94536	2 pigeons
11)	Gayle Renfroe 10913 Jackson Road Krum, TX 76249	3 pigeons
12)	Allen Hughe 1110 Harrison Street Bristol, PA 19007	1 pigeon
13)	Dave Dudle 714 W. Grant Avenue Pueblo, CO 81004	4 pigeons
14)	J.W. Page 8581 Locust Road Elverta, CA 95626	1 pigeon
15)	Jim Benne 16339 Connemara Lane Spring Hill, FL 34610	1 pigeon
	Ray Buyner	2 pigeons

16)	1010 Prater Way Sparks, NV 89431	
17)	Jack Blazier 1041 Tipperary Road Oregon, WI 53575	1 pigeon
18)	Ed Minnevelle 1721 Main Street Jeanerette, LA 70544	1 pigeon
19)	Fred Dickhaut 3733 Drybread Road Cottenwood, CA 96022	1 pigeon
20)	Chic and Judy Brooks 6772 S. Orange Avenue Fresno, CA 93725	1 pigeon
21)	Terry Kay 311 E. Pine Street Roselle, IL 60172	1 pigeon
22)	Sam Medeoros 1063 Daniel Drive Petaluma, CA 94954	1 pigeon
23)	Richard Callahan Cole County Court House 301 E. High Street Jefferson City, MO 65101	2 pigeons
24)	John Palumbo 313 N. Jerome Street Allentown, PA 18109	1 pigeon

25)	George So 178 Loneview Drive Daly City, CA 94015	2 pigeons
26)	Kevin Malley 8 Sunrise Drive Stony Point, NY 10980	1 pigeon
27)	John Belland 3196 Danville Boulevard Alamo, CA 94507	1 pigeon
28)	Bill Traw 16630 Crossandra Lane Spring Hill, FL 34610	1 pigeon
29)	Bill Hill 2930 E. 161st Street Bixby, OK 74008	1 pigeon
30)	Horst Thiel 1654 El Dorado Way Redding, CA 96002	1 pigeon
31)	Richard Colson P.O. Box 13 Turner, MT 59542	1 pigeon
32)	David Brotzler 4565 Wild Rice Drive, NE Wyoming, MN 55092	1 pigeon
33)	Joe Hanzich 18911 Angel Mountain Drive Leander, TX 78641	1 pigeon
34)	Ed Mills	1 pigeon

	1217 E. 340th Street Eastlake, OH 44095	
35)	Barry Venn 1211 Garden Creek Road Casper, WY 82601	1 pigeon
36)	Ron Allen P.O. Box 558 Rutherford, CA 94573	1 pigeon
37)	Dr. John Razmierzak 568 Gand Avenue W. Trenton, NJ 08628	1 pigeon
38)	Bill Kempkie 6094 Feather Lane Sanford, FL 32771	1 pigeon
39)	Robin Burdette 6509 Silver View Lane Fort Worth, TX 76135	1 pigeon

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Act and the regulations issued under the Act (9 C.F.R. § 82.1 *et seq*.). Therefore, the following Order is issued.

Order

Respondent is assessed a civil penalty of two hundred and fifty thousand dollars ($250,000). This civil penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and

shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondents shall indicate on the certified check or money order that payment is in reference to A.Q. Docket No. 05-0001.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145 of the Rules of Practice.

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

In re: MARLA GARCIA GONZALEZ.
A.Q. Docket No. 05-0004.
Decision and Order.
Filed February 11, 2005.

A.Q. – Default.

Krishna Ramarjau, for Complainant.
Respondent, Pro Se.
Order filed by Administrative Law Judge Peter M. Davenport.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the importation of certain restricted pork products from Spain into the United States (9 C.F.R. § 94.1 *et seq*.) hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. § 1.130 *et seq*. and 9 C.F.R. §§ 99.1 *et seq*..

This proceeding was instituted under the Animal Health Protection Act (7 U.S.C. §§ 8301 *et seq.*)(Act), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service (APHIS) on November 17, 2004, alleging that respondent Marla Garcia Gonzalez violated the Act and regulations promulgated under the Acts (9 C.F.R. §' 94.1 *et seq.*).

The complaint sought civil penalties as authorized by 7 U.S.C. § 8313. This complaint specifically alleged that on or about August 13, 2002 respondent imported into the United States from Spain, where classical swine fever is known to exist, approximately 1.5 kilograms of pork products, without the specified treatment, certificates, processing or inspection by a representative of the USDA.

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

Findings of Fact

1. Marla Garcia Gonzalez, hereinafter referred to as respondent, is an individual with a mailing address of 8600 SW 101st Avenue, Miami, FL 33173.

2 On August 13, 2002, the respondent violated 9 C.F.R. § 94.9(b) by importing into the United States approximately 1.5 kilograms of pork from Spain, where classical swine fever is known to exist, without the specified treatment, certificates, processing or inspection by a representative of the USDA.

Conclusion

By reason of the Findings of Fact set forth above, the respondent(s) has violated the Act and the regulations issued under the Act (9 C.F.R. § 94.1 *et seq*). Therefore, the following Order is issued.

Order

Respondent Marla Garcia Gonzalez is assessed a civil penalty of five hundred dollars ($500). This civil penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondents shall indicate on the certified check or money order that payment is in reference to A.Q. Docket No. 05-0004.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145 of the Rules of Practice.

In re: DARIO CORTEZ.
A.Q. Docket No. 05-0002.
Decision and Order.
Filed March 9, 2005.

AQ - Default.

Krishna Ramaraju, for Complainant.
Respondent, Pro se.
Decision and Order issued by Marc R. Hillson, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the requirements for the importation of birds from Mexico into the United States (9 C.F.R. § 93.100 *et seq*.) hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq*. and 9 C.F.R. §§ 99.1 *et seq*.

This proceeding was instituted under the Act of February 2, 1903, amended, (21 U.S.C. § 111)(Act), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service (APHIS) on October 29, 2004, alleging that respondent Dario Cortez violated the Act and regulations promulgated under the Act (9 C.F.R. § 93.100 *et seq*.).

The complaint sought civil penalties as authorized by section 3 of the Act (21 U.S.C. § 122). This complaint specifically alleged that on or about December 15, 2000 respondent imported, failed to apply for an import permit for, failed to provide a Mexican government veterinary certificate for, and failed to provide for inspection by a port veterinarian at the Customs port of entry for twenty-five (25) Yellow Cheeked Amazon parrots at the Otay Mesa Border Crossing .

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

Findings of Fact

1. Dario Cortez, respondent herein, is an individual with a mailing address of 921 Perrisito Street, Perris, California 92570.

2. On or about December 15, 2000, the respondent failed to apply for an import permit for approximately twenty-five (25) Yellow

Cheeked Amazon Parrots that the respondent imported from Mexico into the United States at Otay Mesa Border Crossing, in violation of 9 C.F.R. § 93.103(a).

3. On or about December 15, 2000, the respondent failed to provide a certificate issued by a veterinary officer of the national government of the exporting region, herein Mexico, for approximately twenty-five (25) Yellow Cheeked Amazon Parrots that the respondent imported from Mexico into the United States at Otay Mesa Border Crossing, in violation of 9 C.F.R. § 93.104(a).

4. On or about December 15, 2000, the respondent failed to have approximately twenty-five (25) Yellow Cheeked Amazon Parrots that the respondent imported from Mexico into the United States at Otay Mesa Border Crossing inspected by the port veterinarian at the Customs port of entry, in violation of 9 C.F.R. § 93.105.

Conclusion

By reason of the Findings of Fact set forth above, the respondent(s) has violated the Act and the regulations issued under the Act (9 C.F.R. § 93.100 *et seq*). Therefore, the following Order is issued.

Order

Respondent Dario Cortez is assessed a civil penalty of three thousand dollars ($3,000). This civil penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondents shall indicate on the certified check or money order that payment is in reference to A.Q. Docket No. 05-0002.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145 of the Rules of Practice.

[This Decision and Order became final May 24, 2005.- Editor]

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ANIMAL WELFARE ACT

DEFAULT DECISIONS

In re: LISA R. WHITEAKER, AN INDIVIDUAL d/b/a MONKEYS-N-MORE; MONKEYS-N-MORE, INC., A NEVADA DOMESTIC CORPORATION, AND; SHANE LOGAN, AN INDIVIDUAL.
AWA Docket No. 04-0026.
Decision and Order ast Lisa R. Whiteaker.
Filed January 4, 2005.

AWA - Default.

Bernadette Juarez, for Complainant.
Respondent, Pro se.
Decision and Order issued by Marc R. Hillson, 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 an amended complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent willfully violated the Act and the regulations and standards issued thereunder (the "Regulations" and "Standards") (9 C.F.R. § 1.1 *et seq.*).

On September 17, 2004, the Hearing Clerk sent to respondent Lisa R. Whiteaker ("respondent"), by certified mail, return receipt requested, copies of the amended complaint and service letter. Respondent was informed in the accompanying letter of service that an answer to the amended complaint should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the amended complaint would constitute an admission of that allegation. Respondent actually received the amended complaint on September 28, 2004.[1] Respondent failed to file an answer within the time prescribed in the Rules of Practice, thus, the material facts alleged in the amended complaint, which are admitted by said respondent's default, are adopted and set forth herein as Findings

[1] *See* Domestic Return Receipt for Article Number 7003 2260 0005 5721 4387.

of Fact. This Decision and Order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139.

Findings of Fact

1. Respondent Lisa R. Whiteaker is an individual doing business as Monkeys-N-More, and whose address is 9031 Baysinger Drive, Las Vegas, Nevada 89129-7001. At all times mentioned herein respondent was operating as a dealer and/or exhibitor as those terms are defined in the Act and the Regulations. Between February 24, 2003, and February 24, 2004, respondent held Animal Welfare Act license number 88-B-0016, issued to "LISA R. WHITEAKER."

Between June 29, 2001, and July 1, 2002, respondent Whiteaker was also a principal, manager, officer and agent of respondent Monkeys-N-More, Inc., and the acts, omissions, and failures to act by respondent Whiteaker alleged herein were within the scope of said respondent's office, and are deemed to be the acts, omissions and failures of respondent Monkeys-N-More, Inc., as well as of respondent Whiteaker, for the purpose of construing or enforcing the provisions of the Act.

2. APHIS personnel conducted inspections of respondent's facilities, records and animals for the purpose of determining respondent's compliance with the Act, Regulations, and Standards on October 16, 2002, and December 4, 2002.

3. On or about June 16, 2002, respondent failed to handle a Bolivian Squirrel Monkey ("Zackery") as carefully as possible in a manner that does not cause trauma.

4. On or about June 16, 2002, respondent failed to handle a Bolivian Squirrel Monkey ("Zackery") as carefully as possible in a manner that does not cause behavioral stress.

5. On or about June 16, 2002, respondent failed to handle a Bolivian Squirrel Monkey ("Zackery") as carefully as possible in a manner that does not cause physical harm.

6. On or about June 16, 2002, respondent failed to handle a Bolivian Squirrel Monkey ("Zackery") as carefully as possible in a manner that does not cause unnecessary discomfort.

7. On or about June 16, 2002, respondent failed to meet the minimum standards for humane handling, care and treatment of nonhuman primates, by failing to employ adequately-trained personnel to handle and care for nonhuman primates, and specifically, allowed an inadequately-trained person to handle a Bolivian Squirrel Monkey ("Zackery"), contributing to the animal's death.

8. On or about June 26, 2002, respondent failed to notify APHIS officials, within ten days, of any change in the name, address, management, or ownership of business or of any additional sites, and specifically, failed to notify APHIS officials of additional sites housing animals.

9. On or about August 1, 2002, through on or about December 11, 2002, respondent held herself out as a facility licensed in accordance with the Animal Welfare Act and operated as an exhibitor without having a valid license.

10. On October 16, 2002, respondent failed to make, keep, and maintain records that fully and correctly disclose required information concerning animals in the possession of respondent, and specifically, failed to maintain accurate records concerning the acquisition and disposition of animals.

11. On or about October 28, 2002, respondent failed to meet the minimum facilities and operating standards for other animals, by failing to construct facilities so that they were structurally sound and to maintain them in good repair to protect the animals from injury and to contain the animals, and specifically, two juvenile tigers escaped from their enclosure.

12. On December 4, 2002, respondent failed to make, keep, and maintain records that fully and correctly disclose required information concerning animals in the possession of respondent, and specifically, failed to maintain accurate records concerning the acquisition and disposition of animals.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. On or about June 16, 2002, respondent willfully violated section 2.131(a)(1) of the Regulations by failing to handle a Bolivian Squirrel

Monkey ("Zackery") as carefully as possible in a manner that does not cause trauma. 9 C.F.R. § 2.131(a)(1).

3. On or about June 16, 2002, respondent willfully violated section 2.131(a)(1) of the Regulations by failing to handle a Bolivian Squirrel Monkey ("Zackery") as carefully as possible in a manner that does not cause behavioral stress. 9 C.F.R. § 2.131(a)(1).

4. On or about June 16, 2002, respondent willfully violated section 2.131(a)(1) of the Regulations by failing to handle a Bolivian Squirrel Monkey ("Zackery") as carefully as possible in a manner that does not cause physical harm. 9 C.F.R. § 2.131(a)(1).

5. On or about June 16, 2002, respondent willfully violated section 2.131(a)(1) of the Regulations by failing to handle a Bolivian Squirrel Monkey ("Zackery") as carefully as possible in a manner that does not cause unnecessary discomfort. 9 C.F.R. § 2.131(a)(1).

6. On or about June 16, 2002, respondent willfully violated section 2.100(a) of the Regulations and section 3.85 of the Standards. 9 C.F.R. §§ 2.100(a), 3.85.

7. On or about June 26, 2002, respondent willfully violated section 2.8 of the Regulations. 9 C.F.R. § 2.8.

8. On or about August 1, 2002, through on or about December 11, 2002, respondent willfully violated sections 2.1(a)(1) and 2.100(a) of the Regulations. 9 C.F.R. §§ 2.1(a)(1), 2.100(a).

9. On October 16, 2002, and December 4, 2002, respondent willfully violated section 2.75 of the Regulations. 9 C.F.R. § 2.75(b)(1).

10. On or about October 28, 2002, respondent willfully violated sections 2.100(a) of the Regulations and section 3.125(a) of the Standards. 9 C.F.R. §§ 2.100(a), 3.125(a).

Order

1. Respondent, her agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the Regulations and Standards.

2. Respondent is assessed a $ 3,025 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the Treasurer of the United States and sent to:

Bernadette R. Juarez
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 shall state on the certified check or money order that the payment is in reference to AWA Docket No. 04-0026.

3. Respondent Lisa R. Whiteaker's Animal Welfare Act license (Animal Welfare Act license number 88-B-0016) is 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 5, 2005. - Editor]

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In re: CHRIS McDONALD AND DONIA McDONALD AS TO CHRIS MCDONALD d/b/a MCDONALDS FARM, AND DONIA McDONALD.
AWA Docket No. 03-0012.
Decision and Order by Reason of Admission of Facts.
Filed January 4, 2005.

AWA – Default.

Decision filed by Chief Administrative Law Judge Marc Hillson.

Preliminary Statement

This proceeding was instituted under the Animal Welfare Act ("Act"), as amended (7 U.S.C. § 2131 *et seq.*), by an amended complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondents

willfully violated the Act and the regulations and standards issued thereunder (the "Regulations" and "Standards") (9 C.F.R. § 1.1 *et seq*.).

On September 3, 2004, the Hearing Clerk sent to each respondent, by certified mail to their last known residence, return receipt requested, a copies of the amended complaint, order granting complainant's motion to amend complaint, and service letter dated September 3. 2004.[1] The United States Postal Service marked each mailing "unclaimed" and returned the mailings to the Hearing Clerk. On October 5, 2004, in accordance with section 1.147(c)(1) of the Rules of Practice, the Hearing Clerk remailed, by ordinary mail to the same address, the amended complaint, order granting complainant's motion to amend complaint, and service letter dated September 3. 2004. The Hearing Clerk informed each respondent in the accompanying September 3, 2004, service letter that an answer to the amended complaints must be filed pursuant the Rules of Practice and that failure to answer any allegation in the amended complaint would constitute an admission of that allegation. Respondents failed to file an answer within the time prescribed in the Rules of Practice, thus, the material facts alleged in the amended complaint, which are admitted by said respondents' default, are adopted and set forth herein as Findings of Fact. This Decision and Order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R.§ 1.139.

Findings of Fact

1. Chris McDonald is an individual, doing business as McDonalds Farm, hereinafter referred to as respondent, whose mailing address is 2134 40th Street, Peabody, Kansas 66866.

2. Donia McDonald is an individual, doing business as McDonalds Farm, hereinafter referred to as respondent, whose mailing address is 2134 40th Street, Peabody, Kansas 66866.

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[1] *See* Domestic Return Receipt for Article Number 7003 2260 0005 5721 4295 (Chris McDonald); *See* Domestic Return Receipt for Article Number 7003 2260 0005 5721 4301 (Donia McDonald).

3. At all times mentioned herein, said respondents were licensed and operating as exhibitors, as that term is defined in the Act and the Regulations, under Animal Welfare Act license number 48-C-0126, issued to Chris and Donia McDonald, doing business as "McDonalds Farm."

4. In August 2001, respondents received an official warning notice from complainant for alleged violations of the Regulations, documented in Animal Welfare investigation No. KS-01012-AC.

5. APHIS personnel conducted inspections of respondent's facilities, records and animals for the purpose of determining respondents' compliance with the Act, Regulations, and Standards on October 25, 2001, December 28, 2001, March 29, 2002 (unable to inspect), June 20, 2002, August 15, 2002, November 1, 2002, April 1, 2003, July 18, 2003, August 28, 2003, November 25, 2003, November 26, 2003, November 28, 2003, December 1, 2003, December 5, 2003, December 11, 2003, and December 30, 2003.

6. On the following dates, respondents failed to have an attending veterinarian provide adequate veterinary care to their animals:

a. November 26, 2003. Respondents failed to provide adequate veterinary treatment to three tigers that appeared thin, with the spinous processes and the pin bones of the hips protruding out from under their skin, and had hair loss, skin irritation and respiratory dysfunction.

b. December 5, 2003. Respondents failed to obtain treatment for three tigers that appeared emaciated, and suffered from hair loss and skin irritation.

7. On the following dates, respondents failed to employ a full-time attending veterinarian, or to employ a part-time attending veterinarian under formal arrangements that included a written program of veterinary care:

a. October 25, 2001. Respondents failed to arrange for regularly scheduled veterinary visits to the premises.

b. December 28, 2001. Respondents failed to arrange for regularly scheduled veterinary visits to the premises.

c. November 28, 2003. Respondents failed employ a part-time attending veterinarian under formal arrangements that included a written program of veterinary care.

d. December 30, 2003. Respondents failed employ a part-time attending veterinarian under formal arrangements that included a written program of veterinary care.

8. On the following dates, respondents failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate facilities, personnel, equipment, and services to comply with the Regulations and Standards:

a. December 9, 2003. Respondents failed to provide an appropriate method to capture, contain, restrain, and ultimately euthanize an adult female tiger ("Shania").

b. December 9, 2003. Respondents failed to provide an appropriate method to capture, contain, and restrain a hybrid wolf.

c. December 12, 2003. Respondents failed to provide an appropriate method to contain, restrain, and euthanize an adult male tiger ("Tia-Tia").

9. On the following dates, respondents failed to establish and maintain a program of adequate veterinary care that included the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and the availability of emergency, weekend, and holiday care:

a. November 25, 2003. Respondents failed to obtain treatment for three tigers that appeared thin, with the spinous processes and the pin bones of the hips protruding out from under their skin, and suffered hair loss, skin irritation and respiratory dysfunction.

b. November 25, 2003. Respondents failed to obtain treatment a bobcat whose right ear was bent over.

c. November 26, 2003. Respondents failed to prevent, control, treat or diagnose the cause of the hair loss, skin irritation, apparent emaciation, and respiratory dysfunction suffered by three tigers.

d. December 5, 2003. Respondents failed to prevent, control, treat or diagnose the cause of the hair loss, skin irritation, apparent emaciation, and respiratory dysfunction suffered by three tigers.

e. December 9, 2003. Respondents failed prevent injury to an adult female tiger ("Shania"), and specifically, respondents killed the animal despite the fact that the animal was contained in its enclosure.

f. December 11, 2003. Respondents failed to control and treat, as directed by their attending veterinarian, the hair loss, skin irritation, and emaciation of three tigers.

g. December 12, 2003. Respondents failed prevent injury to an adult male tiger ("Tia-Tia"), and specifically, respondents killed the animal despite the fact that the animal was contained in its enclosure.

10.On the following dates, respondents failed to establish and maintain a program of adequate veterinary care that included daily observation of all animals to assess their health and well-being, including a mechanism of direct and frequent communication:

a. On October 25, 2001. Respondents failed observe and assess the daily health of a hybrid wolf that was thin and not tracking in a straight line.

b. June 20, 2002. Respondents failed observe and assess the daily health of four juvenile hybrid wolves whose skeletal frames were protruding beneath their skin and were not tracking in a straight line, and were, therefore, unable to covey accurate information regarding the animals' health and well-being to the attending veterinarian.

c. June 20, 2002. Respondents failed observe, assess, and obtain veterinary treatment for a male tiger with open sores on its shoulders and tail head.

d. November 25, 2003. Respondents failed to observe and assess the daily health of three tigers that appeared thin, with the spinous processes and the pin bones of the hips protruding out from under their skin, and exhibited hair loss, skin irritation, and respiratory dysfunction, and a bobcat whose right ear was bent over, and were, therefore, unable to convey accurate information as to the animals' health, behavior and well-being to their attending veterinarian.

e. December 5, 2003. Respondents failed to observe and assess the daily health of three tigers suffering hair loss, skin irritation, and apparent emaciation, and were, therefore, unable to convey accurate information as to the animals' health, behavior and well-being to their attending veterinarian.

f. December 30, 2003. Respondents failed to observe and assess the daily health of a newly born leopard cub, and were, therefore, unable to convey accurate information as to the animal's health, behavior and well-being to their attending veterinarian and to obtain treatment, contributing to the animal's death.

11.On the following dates, respondents failed to establish and maintain a program of adequate veterinary care that included adequate

guidance to personnel involved in the care and use of animals regarding handling, immobilization, anesthesia, analgesia, tranquilization, and euthanasia:

a. December 9, 2003. Respondents failed to maintain an adequate program of veterinary care regarding euthanasia, and specifically, attempted to euthanize an adult female tiger ("Shania") by shooting the animal behind the front leg in its shoulder before finally directing a sheriff's officer to kill the animal.

b. December 12, 2003. Respondents failed to maintain an adequate program of veterinary care regarding euthanasia, and specifically, directed a sheriff's officer to shoot an adult male tiger ("Tia-Tia") because respondents feared the animal would escape its enclosure.

12. Respondents failed to comply with the record keeping regulations, as follows:

a. June 20, 2002. Respondents failed to maintain any records concerning the animals at their facility.

b. December 30, 2003. Respondents failed to maintain any records concerning the animals at their facility.

13. On March 29, 2002, respondents failed to have a responsible party available during business hours to permit APHIS officials to conduct an inspection of respondent's animal facilities.

14. On the following dates, respondents failed to handle animals as expeditiously and carefully as possible in a manner that did not cause trauma, behavior stress, physical harm, and unnecessary discomfort:

a. December 9, 2003. Respondents handled an adult female tiger ("Shania") and a hybrid wolf in a manner that caused trauma, behavioral stress, physical harm, and unnecessary discomfort.

b. December 12, 2003. Respondents handled an adult male tiger ("Tia-Tia") in a manner that caused trauma, behavioral stress, physical harm, and unnecessary discomfort.

15. On the following dates, respondents failed during public exhibition, to handle animals so there is minimal risk of harm to the animal and to the public, with sufficient distance and/or barriers between the general viewing public so as to assure the safety of the animals and the public:

a. July 17, 2003. Respondents exhibited a fourteen month old tiger, to the general viewing public, without sufficient distance or barriers, resulting the animal pulling a three year old boy into its enclosure bars.
b. July 18, 2003. Respondents exhibited a seven month old tiger, to the general viewing public, by walking the animal on a leash without sufficient distance or a barrier.

16. On the following dates, respondents failed to meet the minimum facilities and operating standards for dogs, by failing to ensure that the housing facilities for hybrid wolves were structurally sound and maintained in good repair to protect animals from injury:
a. December 1, 2003. Respondents failed to fill a hole under the structural fencing in the hybrid wolf's enclosure.
b. December 9, 2003. Respondents housed a hybrid wolf in an inadequately maintained enclosure that permitted the animal to escape.

17. On the following dates, respondents failed to meet the minimum facilities and operating standards for dogs, and specifically, failed to remove excreta and food waste from primary enclosures daily, and from under the primary enclosures as often as necessary to prevent excessive accumulation of feces and food waste:
a. December 28, 2001. Excessive excreta was present in the hybrid wolves' enclosure.
b. August 15, 2002. Excessive excreta and food waste was present in an enclosure housing two hybrid wolves.
c. April 1, 2003. Respondents housed a wolf hybrid in an enclosure with excessive amounts of accumulated waste.
d. August 28, 2003. Respondents housed a wolf hybrid in an enclosure with excessive amounts of accumulated waste.

18. On the following dates, respondents failed to meet the minimum facilities and operating standards for dogs, by failing to provide potable water in water receptacles that are clean and sanitized:
a. October 25, 2001. Respondents provided a hybrid wolf with water and a water receptacle that contained green algae.
b. August 28, 2003. Respondents provided a hybrid wolf with water and a water receptacle that contained green algae.

19. On August 15, 2002, respondents failed to meet the minimum facilities and operating standards for dogs, by failing to provide sufficient space to allow each dog to turn about freely, to stand, sit, and

lie in a comfortable, normal position, and to walk in a normal manner, and specifically, respondent's six hybrid wolves were unable to turn about freely, stand, sit, and lie in a comfortable, normal position, and to walk in a normal manner in their enclosure.

20.On April 1, 2003, respondents failed to meet the minimum facilities and operating standards for dogs, by failing to feed dogs, at least one each day, food that is uncontaminated, wholesome, palatable, and of sufficient quantity and nutritive value to maintain the normal condition and weight of the animal, and specifically, fed a hybrid wolf deteriorated calf carcass that had been in the animal's enclosure for three days.

21.On the following dates, respondents failed to meet the minimum standards for humane handling, care and treatment of other animals, by failing to construct indoor and outdoor housing facilities so that they were structurally sound and to maintain them in good repair to protect the animals from injury and contain them therein:

a. December 28, 2001. Respondents failed to repair exposed nails on top of the wood shelter box used by a Canadian Lynx.

b. April 1, 2003. Respondents failed to repair the chewed, jagged plywood in a leopard's enclosure.

c. November 25, 2003. Respondents housed a leopard in an enclosure with rusted, jagged metal, and two tigers in an enclosure (west) that lacked sufficient structural strength to contain the tigers.

d. November 28, 2003. Respondents failed to repair the broken, torn, and protruding wire mesh attached to the cattle panel in the enclosure housing six juvenile tigers.

e. November 28, 2003 through December 5, 2003. Respondents failed to repair the jagged and protruding plywood ceiling in the enclosure (transport trailer used as primary enclosure) housing five tigers and a black leopard.

f. December 9, 2003. Respondents housed an adult female tiger ("Shania") in an inadequately maintained enclosure that permitted the animal to escape.

g. December 11, 2003. Respondents housed numerous animals in structurally unsound enclosures, risking escape and injury, to wit:

(i) The guillotine door in the leopard's enclosure was secured by weaving wire around broken cattle panel fencing.

(ii) The side panels of the enclosure housing four tigers and a lioness curled, bowed, and were not secured to the ground.
(iii) The wire mesh side panels in the enclosure housing two juvenile leopards (one male and one female) were detached from the top rail bar, and there was a hole in the fencing's south-side, upper corner.
(iv) The wire mesh on the north entrance gate in an adult male tiger's ("Tia-Tia") enclosure was detached and curled, and the fencing, in general, lacked structurally integrity.
h. December 12, 2003. Respondents housed adult male tiger ("Tia-Tia") in an inadequately maintained enclosure that permitted the animal to escape.
i. December 30, 2003. Respondents housed numerous animals in structurally unsound enclosures, risking escape and injury, to wit:

(i) A black leopard's enclosure ("Rocky") had a 3" gap between the fencing and unstable tin top that shifted in the wind, the metal shelter box was rusted on the lower left hand side, and the fencing was detached from the metal frame in the double entry.

(ii) Housed three tigers, a lioness, and a black leopard in an enclosure (far southeast) with loose fencing that bowed and was not secured to the metal frame, the animals' metal shelter box was torn and jagged on the east side, and there was a hole, approximately 9" in diameter, in the fencing on the east side.

(iii) Housed a black leopard ("Kera") in an enclosure with broken and rusted cattle panel strands, cattle panels that were not secured to the metal frame, and old wire held the front gate together.

22. On the following dates, respondents failed to meet the minimum standards for humane handling, care and treatment of other animals, by failing to store supplies of food in facilities that adequately protected them from deterioration, molding or contamination by vermin:
a. December 28, 2001. Respondents failed to store cattle carcasses in a manner that prevented contamination, deterioration, or consumption by vermin.
b. June 20, 2002. Respondents stored chicken in a manner that resulted in deterioration and fly infestation.
c. November 25, 2003. Thawing chicken wings were contaminated with rodent feces.

23. On the following dates, respondents failed to meet the minimum standards for humane handling, care and treatment of other animals, and specifically, failed to remove and dispose of animal and food wastes, bedding, dead animals, trash and debris:

a. December 28, 2001. Respondents allowed excessive amounts of waste to accumulate in a tiger's enclosure.

b. June 20, 2002. Respondent allowed excessive amounts of waste to accumulate in five exotic felids' enclosures.

24. On August 28, 2003, respondents failed to meet the minimum standards for humane handling, care and treatment of other animals, by failing to provide sufficient shade by natural or artificial means to animals kept outdoors to protect themselves from direct sunlight, and specifically, failed to provide two tigers with adequate over-head shade to protect themselves from direct sunlight.

25. On the following dates, respondents failed failing to meet the minimum standards for humane handling, care and treatment of other animals, and specifically, failed to provide adequate natural or artificial shelter to animals kept outdoors:

a. November 25, 2003. Respondents failed to provide any bedding to six exotic felids.

b. November 25, 2003. Respondents provided inadequate shelter to four adult tigers and one adult lioness; the animals shared two, open front shelter boxes measuring approximately 2.5' by 3'.

c. November 28, 2003. Respondents provided inadequate shelter to animals, to wit:

(i) Two adult tigers and one adult lioness shared one, open front shelter box measuring approximately 2.5' by 3'.

(ii) Six juvenile tigers (weighting approximately 85 to 110 pounds) shared one, open front shelter box measuring approximately 2.5' by 3'.

(iii) Five tigers and a black leopard shared an over-turned, inaccessible shelter box.

d. December 5, 2003. Respondents failed to provide any shelter to five tigers and a black leopard housed in the transport trailer.

e. December 11, 2003. Respondents provided inadequate shelter to animals, to wit:

(i) Five tigers and a leopard had no shelter from climatic conditions.

(ii) The open front, uninsulated metal shelter boxes provided to the other animals failed to restrict air flow, rain, snow, or help maintain body head, and the available bedding was old and soiled.

f. December 30, 2003. Respondents provided inadequate shelter to animals, to wit:

(i) The only source of shelter to many animals consisted of open front, uninsulated shelter boxes that failed to restrict air flow, rain, snow, or help maintain body head.

(ii) Two tigers and a lioness (far southeast enclosure) shared a decrepit, make-shift shelter box.

(iii) Six felids had no bedding at all.

26. On the following dates, respondents failed to meet the minimum standards for humane handling, care and treatment of other animals, and specifically, failed to provide a suitable method to rapidly eliminate excess water:

a. June 20, 2002. Housed two tigers in an enclosure with standing water and mud, such that the animals were unable to remain clean and dry.

b. August 15, 2002. Standing water and mud covered approximately thirty-percent of the floor area in an enclosure housing two tigers.

c. April 1, 2003. Respondents housed two tigers in a muddy enclosure, such that the animals were unable to remain clean and dry.

d. December 5, 2003. Standing water and mud covered approximately ninety-percent of the floor area in the far southeast enclosure housing two tigers and a lioness.

e. December 30, 2003. Housed a female tiger ("Rasha") in an enclosure with standing water that covered an area approximately three feet.

27. On or about April 1, 2003, through on or about December 30, 2003, respondents failed to meet the minimum standards for humane handling, care and treatment of other animals, and specifically, failed to construct a perimeter fence to keep animals and unauthorized persons out, and to function as a secondary containment system for the animals in the facility.

28. On the following dates, respondents failed to meet the minimum standards for humane handling, care and treatment of other animals, and specifically, failed to construct enclosures so as to provide sufficient space to allow each animal to make normal postural adjustments with adequate freedom of movement:

a. December 28, 2001. Respondents' leopards were unable to make normal postural and social adjustments with adequate freedom of movement in their enclosure.

b. June 20, 2002. Respondents' leopards were unable make normal postural and social adjustments with adequate freedom of movement in their enclosure.

29. On the following dates, respondents failed to meet the minimum standards for humane handling, care and treatment of other animals, and specifically, failed to provide animals with food of sufficient quantity and nutritive value to maintain good animal health, that was prepared with consideration for the age, species, condition, size, and type of animal:

a. November 25, 2003. At least three of respondents tigers were malnourished, with the spinous processes and the pin bones of the hips protruding out from under their skin.

b. November 26, 2003. Respondents failed to provide a diet of sufficient quantity and nutritive value to maintain all animals in good health, to wit:

(i) At least three of respondents tigers appeared malnourished with the spinous processes and the pin bones of the hips protruding out from under their skin.

(ii) The adult tigers, aside from those in the travel trailer, had faded coats and poor body condition.

(iii) The tiger cubs (northwest enclosure) lacked fat, were thin over the top, with faded coats and rounded bellies.

c. December 11, 2003. Respondents fed 22 large felids, 2 bob cats, and 2 leopard cubs a diet that consisted solely of chicken, and failed to adequately dispense a nutritional supplement (calcium phosphorous), as directed by their attending veterinarian.

30. On the following dates, respondents failed to meet the minimum standards for humane handling, care and treatment of other animals, and specifically, failed to make potable water accessible to the animals at all

times, or as often as necessary for the animals' health and comfort, and to keep water receptacles clean and sanitary:
a. October 25, 2001. Respondents' water receptacle (metal water tank) used by a tiger contained green algae and needed to be sanitized.
b. June 20, 2002. Respondents' water receptacle used by the bobcats contained green algae and needed to be sanitized.
c. August 15, 2002. Respondents' water receptacle used by two tigers contained green algae and needed to be sanitized.
d. November 25, 2003. Respondents failed to provide any water to four tigers and a lioness (far east enclosure) and the black leopard's water receptacle was caked with mud.
e. November 28, 2003. Respondents provided water receptacles and water to two tigers (far southeast enclosure) that contained mud and dry leaves.
f. December 11, 2003. Respondents provided frozen water receptacles and water to 22 large felids, 2 bobcats, and 2 leopard cubs.
g. December 30, 2003. Respondents' water receptacle and water, if any, contained dirt, caked mud, and, in one instance, feces (bobcat enclosure).

31. On the following dates, respondents failed to meet the minimum standards for humane handling, care and treatment of other animals, and specifically, failed to remove excreta from primary enclosures to prevent contamination of animals, minimize disease hazards, and reduce odors:
a. April 1, 2003. Respondents housed two tigers in an enclosure (north) with excessive excreta.
b. August 28, 2003. Respondents housed two tigers in an enclosure (north) with excessive excreta.
c. November 25, 2003. Respondents housed two tigers in an enclosure (north) with excessive excreta.
d. December 11, 2003. Respondents failed to remove accumulated excreta from all animal enclosures.

32. On the following dates, respondents failed to meet the minimum standards for humane handling, care and treatment of other animals, and specifically, failed to keep premises clean and in good repair:
a. June 20, 2002. Respondents failed to remove weeds that were two to four feet tall, from around the outdoor housing facilities and premises.

b. August 15, 2002. Respondents failed to remove weeds that were two to four feet tall, from around the outdoor housing facilities and premises.
c. April 1, 2003. Respondents failed to remove dozens of old bones, a wood pile, broken barrels, a kitchen appliance, and tires from around the outdoor housing facilities and premises.
d. August 28, 2003. Respondents failed to remove weeds that were three to five feet tall, dozens of empty card board boxes, and other trash from around the outdoor housing facilities and premises.
e. November 25, 2003. Respondents failed to remove weeds that were three to five feet tall, dozens of empty card board boxes, and other trash (old car battery, tires, plastic, papers, clothes, sheet metal, pipes, carcasses) from around the outdoor housing facilities and premises.
f. December 1, 2003. Respondents failed to remove a dead rabbit and old bones from around the outdoor housing facilities and premises.
g. December 11, 2003. Respondents failed to remove dead weeds that were three to five feet tall, a dozen old carcases, fencing, sheet metal, pipes, and other house trash from around the outdoor housing facilities and premises.
h. December 30, 2003. Respondents failed to remove dead weeds that were three to five feet tall, and animal and house trash from around the outdoor housing facilities and premises.

33. On December 30, 2003, respondents failed to meet the minimum standards for humane handling, care and treatment of other animals, by failing to establish and maintain an adequate program of pest control, and specifically, failed to take minimally-adequate steps to eradicate respondents' rodent infestation.

34. On the following dates, respondents failed to meet the minimum standards for humane handling, care and treatment of other animals, and specifically, failed to employ a sufficient number of adequately-trained employees to maintain a professionally-acceptable level of husbandry practices, under a supervisor with a background in animal care:
a. December 9, 2003. Respondents failed to have a sufficient number of adequately-trained employees to comply with the Regulation and Standards, and, therefore, required the assistance of a sheriff's officer to capture and kill an adult female tiger ("Shania").
b. December 12, 2003. Respondents failed to have a sufficient number of adequately-trained employees to comply with the Regulation and

Standards, and, therefore, required the assistance of a sheriff's officer to kill an adult male tiger ("Tia-Tia").

35. On July 18, 2003, respondents failed to construct primary enclosures, such as transport cages used to transport animals, of structural strength sufficient to contain the live animals and to withstand the rigors of travel, and specifically, transported six tigers in a transport trailer with deteriorating doors and floors, and an unsecured portable outdoor exercise area.

36. On July 18, 2003, respondents allowed live animals to travel with any material, substance, or device which may reasonably expected to be injurious to the health and well-being of the animals, and specifically, housed a tiger in a travel compartment with cleaning materials.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. On November 26, 2003 and December 5, 2003, respondents willfully violated section 2.40(a) of the Regulations. 9 C.F.R. § 2.40(a).

3. On October 25, 2001, December 28, 2001, November 28, 2003, and December 30, 2003, respondents willfully violated section 2.40(a)(1) the Regulations. 9 C.F.R. § 2.40(a)(1).

4. On December 9, 2003 and December 12, 2003, respondents willfully violated section 2.40(b)(1) of the Regulations. 9 C.F.R. § 2.40(b)(1).

5. On November 25, 2003, November 26, 2003, December 5, 2003, December 9, 2003, December 11, 2003, and December 12, 2003, respondents willfully violated section 2.40(b)(2) of the Regulations. 9 C.F.R. § 2.40(b)(2).

6. On October 25, 2001, June 20, 2002, November 25, 2003, December 5, 2003, and December 30, 2003, respondents willfully violated section 2.40(b)(3) of the Regulations. 9 C.F.R. § 2.40(b)(3).

7. On December 9, 2003, and December 12, 2003, respondents willfully violated section 2.40(b)(4) of the Regulations. 9 C.F.R. § 2.40(b)(4).

8. On June 20, 2002, and December 30, 2003, respondents willfully violated section 2.75 of the Regulations. 9 C.F.R. § 2.75.

9. On March 29, 2002, respondents willfully violated section 2.100(a) of the Regulations and section 2.126(a) of the Standards. 9 C.F.R. §§ 2.100(a), 2.126(a).

10. On December 9, 2003 and December 12, 2003, respondents willfully violated section 2.131(a)(1) of the Regulations. 9 C.F.R. § 2.131(a)(1).

11. On July 17, 2003, and July 18, 2003, respondents willfully violated section 2.131(b)(1) of the Regulations. 9 C.F.R. § 2.131(b)(1).

12. On December 1, 2003, and December 9, 2003, respondents willfully violated section 2.100(a) of the Regulations and section 3.1(a) of the Standards. 9 C.F.R. § 2.100(a), 3.1(a).

13. On December 28, 2001, August 15, 2002, April 1, 2003, and August 28, 2003, respondents willfully violated section 2.100(a) of the Regulations and section 3.11(a) Standards. 9 C.F.R. § 2.100(a), 3.11(a).

14. On October 25, 2001, and August 28, 2003, respondents willfully section 2.100(a) of the Regulations and section 3.10 of the Standards. 9 C.F.R. § 2.100(a), 3.10.

15. On August 15, 2002, respondents willfully section 2.100(a) of the Regulations and section 3.6(a)(2)(xi) of the Standards. 9 C.F.R. § 2.100(a), 3.6(a)(2)(xi).

16. On April 1, 2003, respondents willfully section 2.100(a) of the Regulations and section 3.9(a) Standards. 9 C.F.R. § 2.100(a), 3.9(a).

17. On December 28, 2001, April 1, 2003, November 25, 2003, November 28, 2003 through December 5, 2003, December 9, 2003, December 11, 2003, December 12, 2003, and December 30, 2003, respondents willfully violated section 2.100(a) of the Regulations and section 3.125(a) of the Standards. 9 C.F.R. § 2.100(a), 3.125(a)).

18. On December 28, 2001, June 20, 2002, and November 25, 2003, respondents willfully violated section 2.100(a) of the Regulations and section 3.125(c) of the Standards. 9 C.F.R. § 2.100(a), 3.125(c).

19. On December 28, 2001, and June 20, 2002, respondents willfully violated section 2.100(a) of the Regulations and section 3.125(d) of the Standards. 9 C.F.R. § 2.100(a), 3.125(d).

20. On August 28, 2003, respondents willfully violated section 2.100(a) of the Regulations and section 3.127(a) of the Standards. 9 C.F.R. § 2.100(a), 3.127(a).

21.On November 25, 2003, November 28, 2003, December 5, 2003, December 11, 2003, and December 30, 2003, respondents willfully violated section 2.100(a) of the Regulations and section 3.127(b) of the Standards. 9 C.F.R. § 2.100(a), 3.127(b).

22.On June 20, 2002, August 15, 2002, April 1, 2003, December 5, 2003, and December 30, 2003, respondents willfully violated section 2.100(a) of the Regulations and section 3.127(c) of the Standards. 9 C.F.R. § 2.100(a), æ.127(c).

23.On or about April 1, 2003, through on or about December 30, 2003, respondents willfully violated section 2.100(a) of the Regulations and 3.127(d) of the Standards. 9 C.F.R. § 2.100(a), 3.127(d).

24.On December 28, 2001, and June 20, 2002, respondents willfully violated section 2.100(a) of the Regulations and section 3.128 of the Standards. 9 C.F.R. § 2.100(a), 3.128.

25.On November 25, 2003, November 26, 2003, and December 11, 2003, respondents willfully violated section 2.100(a) of the Regulations and section 3.129(a) of the Standards. 9 C.F.R. § 2.100(a), 3.129(a).

26.On October 25, 2001, June 20, 2002, August 15, 2002, November 25, 2003, November 28, 2003, December 11, 2003, and December 30, 2003, respondents willfully violated section 2.100(a) of the Regulations and section' 3.130 of the Standards. 9 C.F.R. § 2.100(a), 3.130.

27.On April 1, 2003, August 28, 2003, November 25, 2003, December 11, 2003, respondents willfully violated section 2.100(a) of the Regulations and section 3.131(a) of the Standards. 9 C.F.R. § 2.100(a), 3.131(a).

28.On June 20, 2002, August 15, 2002, April 1, 2003, August 28, 2003, November 25, 2003, December 1, 2003, December 11, 2003, and December 30, 2003, respondents willfully violated section 2.100(a) of the Regulations and section 3.131(c) of the Standards. 9 C.F.R. § 2.100(a), 3.131(c).

29.On December 30, 2003, respondents willfully violated section 2.100(a) of the Regulations and section 3.131(d) of the Standards. 9 C.F.R. § 2.100(a), 3.131(d).

30.On December 9, 2003, and December 12, 2003, respondents willfully violated section 2.100(a) of the Regulations and section 3.132 of the Standards. 9 C.F.R. § 2.100(a), 3.132.

31. On July 18, 2003, respondents willfully violated section 2.100(a) of the Regulations and section 3.137(a)(1) of the Standards. 9 C.F.R. § 2.100(a), 3.137(a)(1).

32. On July 18, 2003, respondents willfully violated section 2.100(a) of the Regulations and section 3.138(f) of the Standards. 9 C.F.R. § 2.100(a), 3.138(f).

Order

1. Respondents, their agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the Regulations and Standards.

2. Respondents are jointly and severally assessed a $ 14,905 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the Treasurer of the United States and sent to:

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

Respondents shall state on the certified check or money order that the payment is in reference to AWA Docket No. 03-0012.

3. Respondent Donia McDonald's Animal Welfare Act license (Animal Welfare Act license number 48-C-0126) is 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.

In re: BODIE S. KNAPP, AN INDIVIDUAL d/b/a WAYNE'S WORLD SAFARI.
AWA Docket No. 04-0029.
Decision and Order.
Filed January 4, 2005.

AWA- Default.

Colleen Carroll, for Complainant.
Respondent, Pro se.
Decision and Order issued by Marc R. Hillson, 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 respondent Bodie S. Knapp, an individual doing business as Wayne's World Safari, willfully violated the Act and the Regulations and Standards promulgated thereunder (9 C.F.R. § 1.1 *et seq.*)(the "Regulations" and "Standards").

On August 31, 2004, the Hearing Clerk sent to respondent Bodie S. Knapp, 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 Knapp 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 Knapp actually received the complaint on September 4, 2004. Said respondent has failed to file an answer to the complaint.

Pursuant to sections 1.136 and 1.139 of the Rules of Practice, the material facts alleged in the complaint, are all admitted by said respondent's failure to file an answer or to deny. They are adopted and set forth herein as Findings of Fact and Conclusions of Law, and this decision and order is issued pursuant to section 1.139 of the Rules of Practice.

Findings of Fact

1. Respondent Bodie Knapp is an individual doing business as "Wayne's World Safari" and whose address is 11212 Highway 359, Mathis, Texas 78368. At all times mentioned herein, said respondent was operating as a dealer and as an exhibitor, as those terms are defined in the Regulations, and held Animal Welfare Act license number 74-C-0533.

2. Respondent exhibits approximately 200 wild and exotic animals to the public. Respondent's exhibition business is significant. Respondent has many customers each year, and also solicits and accepts donations from the public. The gravity of the violations alleged in this complaint is great, and involve willful, deliberate violations of the handling and veterinary care regulations, and repeated failures to comply with the facilities standards. The violations themselves demonstrate a lack of good faith on the part of the respondent. Respondent Bodie Knapp has also exhibited bad faith by lying to APHIS officials about the circumstances surrounding the death of two adult tigers in December 2003, and specifically, by telling APHIS officials that the animals died in a fight, when in fact both animals had died at the hand of respondent Bodie Knapp. Respondent Bodie Knapp is a respondent in another enforcement proceeding under the Animal Welfare Act: *In re Corpus Christi Zoological Association; Robert Brock; Michelle Brock; Bodie Knapp; and Charles Knapp*, AWA Docket No. 04-0015.

3. On or about the following dates, respondent willfully violated the veterinary care Regulations (9 C.F.R. § 2.40), as follows:

a. March 13, 2002. Respondent failed to have an attending veterinarian provide adequate veterinary care to animals as required, and specifically, failed to have an attending veterinarian provide care to a porcupine (Scarface) that needed veterinary medical attention for her left eye. 9 C.F.R. § 2.40(a).

b. September 5, 2003. Respondent failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate facilities and equipment to comply with the provisions of the Regulations, and specifically, lacked facilities to prevent the escape of the brown bears. 9 C.F.R. § 2.40(b)(1).

4. On or about the following dates, respondent willfully violated section 2.131 of the Regulations (9 C.F.R. § 2.131), as follows:

a. March 13, 2002. Respondent failed to handle a rhinoceros during public exhibition so there was minimal risk of harm to the animal and to the public, with sufficient distance and/or barriers between the rhinoceros and the general viewing public so as to assure the safety of the animals and the public, and specifically, there was no barrier between the rhinoceros and the public. 9 C.F.R. § 2.131(b)(1).

b. March 13, 2002. Respondent failed to have a responsible, knowledgeable, and readily-identifiable employee or attendant present during periods of public contact with animals, and specifically, respondent had no employee or attendant present at respondent's petting zoo, when customers were allowed to be in contact with animals. 9 C.F.R. § 2.131(c)(2).

c. January 9, 2003. Respondent failed to handle a rhinoceros during public exhibition so there was minimal risk of harm to the animal and to the public, with sufficient distance and/or barriers between the rhinoceros and the general viewing public so as to assure the safety of the animals and the public, and specifically, the barrier at the gate at the front of respondent's rhinoceros exhibit was only 18 inches high, and was constructed of cattle paneling. 9 C.F.R. § 2.131(b)(1).

d. April 11, 2003. Respondent failed to handle a giraffe during public exhibition so there was minimal risk of harm to the animal and to the public, with sufficient distance and/or barriers between the giraffe and the general viewing public so as to assure the safety of the animals and the public, and specifically, the public barrier was bowed, broken, sagging, and generally structurally compromised. 9 C.F.R. § 2.131(b)(1).

e. April 11, 2003. Respondent failed to have a responsible, knowledgeable, and readily-identifiable employee or attendant present during periods of public contact with animals, and specifically, respondent had no employee or attendant present at respondent's petting zoo, when customers were allowed to be in contact with animals. 9 C.F.R. § 2.131(c)(2).

f. September 5, 2003. Respondent failed to handle a giraffe during public exhibition so there was minimal risk of harm to the animal and to the public, with sufficient distance and/or barriers between the giraffe and the general viewing public so as to assure the safety of the animals and the public, and specifically, the public barrier was bowed,

broken, sagging, and generally structurally compromised. 9 C.F.R. § 2.131(b)(1).

g. September 5, 2003. Respondent failed to have a responsible, knowledgeable, and readily-identifiable employee or attendant present during periods of public contact with animals, and specifically, respondent had no employee or attendant present at respondent's petting zoo, when customers were allowed to be in contact with animals. 9 C.F.R. § 2.131(c)(2).

h. March 11, 2004. Respondent failed to have a responsible, knowledgeable, and readily-identifiable employee or attendant present during periods of public contact with animals, and specifically, respondent had no employee or attendant present at respondent's petting zoo, when customers were allowed to be in contact with animals. 9 C.F.R. § 2.131(c)(2).

i. March 11, 2004. Respondent failed to handle a giraffe during public exhibition so there was minimal risk of harm to the animal and to the public, with sufficient distance and/or barriers between the giraffe and the general viewing public so as to assure the safety of the animals and the public, and specifically, the public barrier was bowed, broken, sagging, and generally structurally compromised. 9 C.F.R. § 2.131(b)(1).

5. On or about the following dates, respondent willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)), by failing to meet the minimum Standards for nonhuman primates (9 C.F.R. §§ 3.75-92), as follows:

a. March 13, 2002. Respondent failed to provide sufficient water to nonhuman primates continually or as often as necessary for the health and comfort of the animals, and specifically, respondent provided no drinking water to the spider monkeys. 9 C.F.R. § 3.83.

b. September 5, 2002. Respondent failed to remove excreta from primary enclosures daily, and specifically, there was a build-up of excreta in the muntjac and spot-nosed monkey enclosure. 9 C.F.R. § 3.84(a).

c. January 9, 2003. Respondent failed to remove excreta from primary enclosures daily, and specifically, there was a build-up of

excreta in the muntjac and spot-nosed monkey enclosure. 9 C.F.R. § 3.84(a).

d. April 11, 2003. Respondent failed to ensure that surfaces of housing facilities that come into contact with nonhuman primates are free of excessive rust that prevents the required cleaning and sanitization, or affects the structural strength of the surface, and specifically, respondent's primate barn contained numerous rusty surfaces that prevented cleaning and sanitization. 9 C.F.R. § 3.75(c)(1)(i).

e. April 11, 2003. Respondent failed to ensure that surfaces of housing facilities that come into contact with nonhuman primates are free of excessive rust that prevents the required cleaning and sanitization, or affects the structural strength of the surface, and specifically, the supports and framework of the doors and lock-out area of respondent's baboon enclosure were excessively rusted and structurally compromised. 9 C.F.R. § 3.75(c)(1)(i).

f. September 5, 2003. Respondent failed to ensure that surfaces of housing facilities that come into contact with nonhuman primates are free of excessive rust that prevents the required cleaning and sanitization, or affects the structural strength of the surface, and specifically, respondent's primate barn contained numerous rusty surfaces that prevented cleaning and sanitization. 9 C.F.R. § 3.75(c)(1)(i).

g. September 5, 2003. Respondent failed to ensure that surfaces of housing facilities that come into contact with nonhuman primates are free of excessive rust that prevents the required cleaning and sanitization, or affects the structural strength of the surface, and specifically, the supports and framework of the doors and lock-out area of respondent's baboon enclosure were excessively rusted and structurally compromised. 9 C.F.R. § 3.75(c)(1)(i).

h. December 18, 2003. Respondent failed to ensure that surfaces of housing facilities that come into contact with nonhuman primates are free of excessive rust that prevents the required cleaning and sanitization, or affects the structural strength of the surface, and specifically, respondent's primate barn contained numerous rusty surfaces that prevented cleaning and sanitization. 9 C.F.R. § 3.75(c)(1)(i).

i. December 18, 2003. Respondent failed to ensure that surfaces of housing facilities that come into contact with nonhuman primates are free of excessive rust that prevents the required cleaning and sanitization, or affects the structural strength of the surface, and specifically, the supports and framework of the doors and lock-out area of respondent's baboon enclosure were excessively rusted and structurally compromised. 9 C.F.R. § 3.75(c)(1)(i).

j. March 11, 2004. Respondent failed to ensure that surfaces of housing facilities that come into contact with nonhuman primates are free of excessive rust that prevents the required cleaning and sanitization, or affects the structural strength of the surface, and specifically, respondent's primate barn contained numerous rusty surfaces that prevented cleaning and sanitization. 9 C.F.R. § 3.75(c)(1)(i).

k. March 11, 2004. Respondent failed to ensure that surfaces of housing facilities that come into contact with nonhuman primates are free of excessive rust that prevents the required cleaning and sanitization, or affects the structural strength of the surface, and specifically, respondent's primate barn contained numerous rusty surfaces that prevented cleaning and sanitization. 9 C.F.R. § 3.75(c)(1)(i).

6. On or about the following dates, respondent willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)), by failing to meet the minimum requirements for facilities in section 3.125 of the Standards (9 C.F.R. § 3.125), as follows:

a. March 13, 2002. Respondent failed to store supplies of food in facilities that adequately protect them against deterioration, molding or contamination by vermin, and specifically, stored meat in a freezer without any wrapping, leaving it susceptible to freezer burn. 9 C.F.R. § 3.125(c).

b. September 5, 2002. Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury, and specifically, respondent's coatimundi enclosure had wires protruding from the concrete base, which wires posed a danger to the animals housed inside. 9 C.F.R. § 3.125(a).

c. January 9, 2003. Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them, and specifically, the doors of respondent's bear enclosure were rusted and structurally compromised. 9 C.F.R. § 3.125(a).

d. January 9, 2003. Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them, and specifically, the doors of respondent's shelter box for lions were rusted and structurally compromised. 9 C.F.R. § 3.125(a).

e. January 9, 2003. Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them, and specifically, the doors of respondent's shelter box for tigers were rusted and structurally compromised. 9 C.F.R. § 3.125(a).

f. January 9, 2003. Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them, and specifically, the doors of respondent's shelter box for lions was rusted and structurally compromised. 9 C.F.R. § 3.125(a).

g. January 9, 2003. Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them, and specifically, one side of the giraffe barn had been kicked is loose, and its metal portions structurally compromised. 9 C.F.R. § 3.125(a).

h. April 11, 2003. Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them, and specifically, one side of the caracal enclosure was badly rusted, had holes, and was structurally compromised. 9 C.F.R. § 3.125(a).

i. April 11, 2003. Respondent failed to store supplies of food in facilities that adequately protect them against deterioration, molding or contamination by vermin, and specifically, stored animal food with chemicals, gasoline, oil, and pesticides. 9 C.F.R. § 3.125(c).

j. September 5, 2003. Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them, and

specifically, the front fence of the brown bear enclosure is not secure, and has been structurally compromised to the extent that the male bear can lift the fence up, and could easily escape. 9 C.F.R. § 3.125(a).

k. September 5, 2003. Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them, and specifically, the doors and door frame of the lion enclosure was badly rusted and its structural strength compromised to the extent that the animals could be injured or escape. 9 C.F.R. § 3.125(a).

l. September 5, 2003. Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them, and specifically, the doors and door frame of the tiger enclosure was badly rusted and its structural strength compromised to the extent that the animals could be injured or escape. 9 C.F.R. § 3.125(a).

m. September 5, 2003. Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them, and specifically, the doors and door frame of the white tiger enclosure was badly rusted and its structural strength compromised to the extent that the animals could be injured or escape. 9 C.F.R. § 3.125(a).

n. September 5, 2003. Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them, and specifically, the doors and door frame of the other tiger enclosure was badly rusted and its structural strength compromised to the extent that the animals could be injured or escape. 9 C.F.R. § 3.125(a).

o. September 5, 2003. Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them, and specifically, the doors and door frame of the leopard enclosure was badly rusted and its structural strength compromised to the extent that the animals could be injured or escape. 9 C.F.R. § 3.125(a).

p. September 5, 2003. Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them, and

specifically, the doors and door frame of the jaguar enclosure was badly rusted and its structural strength compromised to the extent that the animals could be injured or escape. 9 C.F.R. § 3.125(a).

q. September 5, 2003. Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them, and specifically, the wood of the back wall of the bobcat enclosure was badly rotted and has fallen off of the wall. 9 C.F.R. § 3.125(a).

r. September 5, 2003. Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them, and specifically, there is a hole in the fence that divides the leopard enclosure from the jaguar enclosure, which could allow the animals to be injured or to escape. 9 C.F.R. § 3.125(a).

s. September 5, 2003. Respondent failed to store supplies of food in facilities that adequately protect them against deterioration, molding or contamination by vermin, and specifically, stored food in a filthy freezer that had blood and food residue on the freezer's walls and floor. 9 C.F.R. § 3.125(c).

t. September 5, 2003. Respondent failed to store supplies of food in facilities that adequately protect them against deterioration, molding or contamination by vermin, and specifically, stored food in a chest freezer with a door that was broken, and allowed warm air to enter. 9 C.F.R. § 3.125(c).

u. December 18, 2003. Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them, and specifically, the doors and door frame of the lion enclosure was badly rusted and its structural strength compromised to the extent that the animals could be injured or escape. 9 C.F.R. § 3.125(a).

v. December 18, 2003. Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them, and specifically, the doors and door frame of the tiger enclosure was badly rusted and its structural strength compromised to the extent that the animals could be injured or escape. 9 C.F.R. § 3.125(a).

w. December 18, 2003. Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them, and specifically, the doors and door frame of the white tiger enclosure was badly rusted and its structural strength compromised to the extent that the animals could be injured or escape. 9 C.F.R. § 3.125(a).

x. December 18, 2003. Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them, and specifically, the doors and door frame of the other tiger enclosure was badly rusted and its structural strength compromised to the extent that the animals could be injured or escape. 9 C.F.R. § 3.125(a).

y. December 18, 2003. Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them, and specifically, the doors and door frame of the leopard enclosure was badly rusted and its structural strength compromised to the extent that the animals could be injured or escape. 9 C.F.R. § 3.125(a).

z. December 18, 2003. Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them, and specifically, the doors and door frame of the jaguar enclosure was badly rusted and its structural strength compromised to the extent that the animals could be injured or escape. 9 C.F.R. § 3.125(a).

aa. December 18, 2003. Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them, and specifically, the back wall of the serval enclosure was badly rusted and its structural strength compromised to the extent that the animals could be injured or escape. 9 C.F.R. § 3.125(a).

bb. March 11, 2004. Respondent failed to store supplies of food in facilities that adequately protect them against deterioration, molding or contamination by vermin, and specifically, stored animal food with chemicals, gasoline, oil, and pesticides. 9 C.F.R. § 3.125(c).

cc. March 11, 2004. Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good

repair to protect the animals from injury and contain them, and specifically, the back wall of the caracal enclosure was badly rusted and its structural strength compromised o the extent that the animals could be injured or escape. 9 C.F.R. § 3.125(a).

dd. March 11, 2004. Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them, and specifically, the front fence of the brown bear enclosure is not secure, and has been structurally compromised to the extent that the male bear can lift the fence up, and could easily escape. 9 C.F.R. § 3.125(a).

ee. March 11, 2004. Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them, and specifically, the doors and door frame of the lion enclosure was badly rusted and its structural strength compromised to the extent that the animals could be injured or escape. 9 C.F.R. § 3.125(a).

ff. March 11, 2004. Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them, and specifically, the wood of the back wall of the bobcat enclosure was badly rotted and has fallen off of the wall. 9 C.F.R. § 3.125(a).

gg. March 11, 2004. Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them, and specifically, there is a hole in the fence that divides the leopard enclosure from the jaguar enclosure, which could allow the animals to be injured or to escape. 9 C.F.R. § 3.125(a).

hh. March 13, 2004. Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them, and specifically, the doors and door frame of the lion enclosure was badly rusted and its structural strength compromised to the extent that the animals could be injured or escape. 9 C.F.R. § 3.125(a).

ii. March 13, 2004. Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them, and specifically, the back wall of the serval enclosure was badly rusted and

its structural strength compromised to the extent that the animals could be injured or escape. 9 C.F.R. § 3.125(a).

jj. March 13, 2004. Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them, and specifically, the doors and door frame of the leopard enclosure was badly rusted and its structural strength compromised to the extent that the animals could be injured or escape. 9 C.F.R. § 3.125(a).

kk. March 13, 2004. Respondent failed to ensure that his housing facilities for animals were structurally sound and maintained in good repair to protect the animals from injury and contain them, and specifically, the doors and door frame of the jaguar enclosure was badly rusted and its structural strength compromised to the extent that the animals could be injured or escape. 9 C.F.R. § 3.125(a).

7. On or about the following dates, respondent willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)), by failing to meet the minimum requirements for outdoor facilities in section 3.127 of the Standards (9 C.F.R. § 3.127), as follows:

a. March 13, 2002. Respondent failed to provide animals housed outdoors with sufficient shade by natural or artificial means to allow the animals protection from direct sunlight, and specifically, housed Patagonian cavies in an enclosure that did not allow the animals to protect themselves from direct sunlight. 9 C.F.R. § 3.127(a).

b. March 13, 2002. Respondent failed to provide animals housed outdoors with sufficient shade by natural or artificial means to allow the animals protection from direct sunlight, and specifically, housed reindeer in an enclosure that did not allow the animals to protect themselves from direct sunlight. 9 C.F.R. § 3.127(a).

c. September 5, 2002. Respondent failed to provide animals housed outdoors with sufficient shade by natural or artificial means to allow the animals protection from direct sunlight, and specifically, housed bears in an enclosure that did not allow the animals to protect themselves from direct sunlight. 9 C.F.R. § 3.127(a).

d. April 11, 2003. Respondent failed to provide animals housed outdoors with natural or artificial shelter to afford them protection and to prevent discomfort, and specifically, housed an adult male caracal in

an enclosure with a single shelter that could not accommodate him, and had no floor. 9 C.F.R. § 3.127(b).

e. September 5, 2003. Respondent failed to provide animals housed outdoors with natural or artificial shelter to afford them protection and to prevent discomfort, and specifically, housed five African crested porcupines in an enclosure with two dog-house shelters that could not accommodate all of the animals. 9 C.F.R. § 3.127(b).

f. September 5, 2003. Respondent failed to provide animals housed outdoors with sufficient shade by natural or artificial means to allow the animals protection from direct sunlight, and specifically, housed five African crested porcupines in an enclosure that did not allow the animals to protect themselves from direct sunlight. 9 C.F.R. § 3.127(a).

g. September 5, 2003. Respondent failed to provide animals housed outdoors with natural or artificial shelter to afford them protection and to prevent discomfort, and specifically, housed a sable, an eland, a fallow deer, and a bongo in an enclosure with a single shelter that did not protect all of these animals from mud. 9 C.F.R. § 3.127(b).

h. September 5, 2003. Respondent failed to provide a suitable method to rapidly eliminate excess water for animals housed outdoors, and specifically, a sable, an eland, a fallow deer, and a bongo were housed in an enclosure where the animals were required to stand in mud up to their knees. 9 C.F.R. § 3.127(c).

i. March 11, 2005. Respondent failed to provide animals housed outdoors with natural or artificial shelter to afford them protection and to prevent discomfort, and specifically, housed five African crested porcupines in an enclosure with two dog-house shelters that could not accommodate all of the animals. 9 C.F.R. § 3.127(b).

j. March 11, 2004. Respondent failed to provide animals housed outdoors with sufficient shade by natural or artificial means to allow the animals protection from direct sunlight, and specifically, housed five African crested porcupines in an enclosure that did not allow the animals to protect themselves from direct sunlight. 9 C.F.R. § 3.127(a).

k. March 11, 2005. Respondent failed to provide animals housed outdoors with natural or artificial shelter to afford them protection and

to prevent discomfort, and specifically, housed a caracal in an enclosure that could not accommodate him, and had no floor. 9 C.F.R. § 3.127(b).

8. On or about the following dates, respondent willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)), by failing to meet the minimum requirements for feeding in section 3.129 of the Standards (9 C.F.R. § 3.129), as follows:

a. March 13, 2002. Respondent failed to provide food to animals that was wholesome, palatable and free from contamination, and specifically, offered animals meat that had been stored in a freezer without any wrapping, leaving it susceptible to freezer burn. 9 C.F.R. § 3.129(a).

b. April 11, 2003. Respondent failed to provide food to animals that was wholesome, palatable and free from contamination, and specifically, offered animals food that had been stored with, and susceptible to contamination by, chemicals, gasoline, oil, and pesticides. 9 C.F.R. § 3.129(a).

c. September 5, 2003. Respondent failed to provide food to animals that was wholesome, palatable and free from contamination, and specifically, fruit intended to be offered to animals had been thawed and re-frozen into a large block. 9 C.F.R. § 3.129(a).

d. March 11, 2004. Respondent failed to provide food to animals that was wholesome, palatable and free from contamination, and specifically, offered animals food that had been stored with, and susceptible to contamination by, chemicals, gasoline, oil, and pesticides. 9 C.F.R. § 3.129(a).

9. On or about the following dates, respondent willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)), by failing to meet the minimum requirements for sanitation in section 3.131 of the Standards (9 C.F.R. § 3.131), as follows:

a. September 5, 2002. Respondent failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals therein, to minimize disease hazards and to reduce odors, and specifically, there was a build-up of excreta in the Patagonian cavy enclosure. 9 C.F.R. § 3.131(a).

b. September 5, 2002. Respondent failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the

animals therein, to minimize disease hazards and to reduce odors, and specifically, there was a build-up of excreta in the civit enclosure. 9 C.F.R. § 3.131(a).

c. September 5, 2002. Respondent failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals therein, to minimize disease hazards and to reduce odors, and specifically, there was a build-up of excreta in the rhinoceros enclosure. 9 C.F.R. § 3.131(a).

d. January 9, 2003. Respondent failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals therein, to minimize disease hazards and to reduce odors, and specifically, there was a build-up of excreta in the capybara enclosure. 9 C.F.R. § 3.131(a).

e. January 9, 2003. Respondent failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals therein, to minimize disease hazards and to reduce odors, and specifically, there was a build-up of excreta in the Patagonian cavy enclosure. 9 C.F.R. § 3.131(a).

f.. April 11, 2003. Respondent failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals therein, to minimize disease hazards and to reduce odors, and specifically, there was a build-up of excreta in the rhinoceros enclosure. 9 C.F.R. § 3.131(a).

g. September 5, 2003. Respondent failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals therein, to minimize disease hazards and to reduce odors, and specifically, there was a build-up of excreta in the rhinoceros enclosure. 9 C.F.R. § 3.131(a).

h. September 5, 2003. Respondent failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals therein, to minimize disease hazards and to reduce odors, and specifically, there was a build-up of excreta in the civit enclosure. 9 C.F.R. § 3.131(a).

i. December 18, 2003. Respondent failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals therein, to minimize disease hazards and to reduce odors,

and specifically, there was a build-up of excreta in the civit enclosure. 9 C.F.R. § 3.131(a).

j.. March 11, 2004. Respondent failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals therein, to minimize disease hazards and to reduce odors, and specifically, there was a build-up of excreta in the rhinoceros enclosure. 9 C.F.R. § 3.131(a).

k. March 11, 2004. Respondent failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals therein, to minimize disease hazards and to reduce odors, and specifically, there was a build-up of excreta in the civit enclosure. 9 C.F.R. § 3.131(a).

l. March 13, 2004. Respondent failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animals therein, to minimize disease hazards and to reduce odors, and specifically, there was a build-up of excreta in the civit enclosure. 9 C.F.R. § 3.131(a).

Conclusions of Law

1. By reason of the Findings of Fact set forth above, respondent has willfully violated the Act and the Regulations as set forth in paragraphs 2 through 14 of these Conclusions of Law.

2. On March 13, 2002, respondent willfully violated section 2.40(a) of the Regulations. 9 C.F.R. § 2.40(a).

3. On September 5, 2003, respondent willfully violated section 2.40(b) of the Regulations. 9 C.F.R. § 2.40(b)(1).

4. On March 13, 2002, January 9, 2003, April 11, 2003, September 5, 2003, and March 11, 2004, respondent willfully violated section 2.131(b)(1) of the Regulations. 9 C.F.R. § 2.131(b)(1) [now 2.131(c)(1)].

5. On March 13, 2002, April 11, 2003, September 5, 2003, and March 11, 2004, respondent willfully violated section 2.131(c)(2) of the Regulations. 9 C.F.R. § 2.131(c)(2) [now 2.131(d)(2)].

6. On March 13, 2002, respondent willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)), by failing to meet the minimum Standards for nonhuman primates (9 C.F.R. § 3.83).

7. On September 5, 2002, and January 9, 2003, respondent willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)), by failing to meet the minimum Standards for nonhuman primates (9 C.F.R. § 3.84(a)).

8. On April 11, 2003 (two instances), September 5, 2003 (two instances), December 18, 2003 (two instances), March 11, 2004 (two instances), respondent willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)), by failing to meet the minimum Standards for nonhuman primates (9 C.F.R. § 3.75(c)(1)(i)).

9. On September 5, 2002, January 9, 2003 (five instances), April 11, 2003, September 5, 2003 (nine instances), December 18, 2003, (eight instances), and March 11, 2004 (nine instances), respondent willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)), by failing to meet the minimum requirements for facilities in section 3.125 of the Standards (9 C.F.R. § 3.125)(a).

10. On March 13, 2002, April 11, 2003, and September 5, 2003 (two instances), respondent willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)), by failing to meet the minimum requirements for facilities in section 3.125 of the Standards (9 C.F.R. § 3.125)(c).

11. On March 13, 2002 (two instances), September 5, 2002, September 5, 2003, and March 11, 2004, respondent willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)), by failing to meet the minimum requirements for outdoor facilities in section 3.127 of the Standards (9 C.F.R. § 3.127(a)).

12. On April 11, 2003, September 5, 2003 (two instances), and March 11, 2004 (two instances), respondent willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)), by failing to meet the minimum requirements for outdoor facilities in section 3.127 of the Standards (9 C.F.R. § 3.127(b)).

12. On September 5, 2003, respondent willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)), by failing to meet the minimum requirements for outdoor facilities in section 3.127 of the Standards (9 C.F.R. § 3.127(c)).

13.On March 13, 2002, April 11, 2003, September 5, 2003, and March 11, 2004, respondent willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)), by failing to meet the minimum requirements for feeding in section 3.129 of the Standards (9 C.F.R. § 3.129(a)).

14.On September 5, 2002 (three instances), January 9, 2003 (two instances), April 11, 2003, September 5, 2003 (two instances), December 18, 2003, March 11, 2004 (two instances), and March 13, 2004, respondent willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)), by failing to meet the minimum requirements for sanitation in section 3.131 of the Standards (9 C.F.R. § 3.131(a)).

Order

1. Respondent Bodie S. Knapp, 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.
2. Animal Welfare Act license No. 74-C-0533 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.

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In re: PATRICIA MORRIS d/b/a PATS PETS KENNEL.
AWA Docket No. 04-0006.
Decision and Order.
Filed January 26, 2005.

AWA - Default.

Colleen A. Carroll, for Complainant.
Respondent, Pro se.
Decision and Order issued by Peter M. Davenport, 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 by certified mail sent on February 12, 2004. Respondent signed for the certified letter on February 17, 2004. The letter informed respondent that she must file an answer pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation.

Respondent Patricia Morris has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted as set forth herein by respondent's failure to file an answer, are adopted and set forth herein as Findings of Fact and Conclusions of Law.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139.

Findings of Fact and Conclusions of Law

I

A. Patricia Morris, hereinafter referred to as respondent, is an individual doing business as Pats Pets Kennel, whose address is Rt. 33, Box 36, Woodward, Oklahoma 73801.

B. The respondent, at all times material herein, was licensed and operating as dealers as defined in the Act and the regulations.

C. When the respondent became licensed and annually thereafter, she received a copy of the Act and the regulations and standards issued thereunder and agreed in writing to comply with them.

II

A. On March 24, 1998, APHIS inspected respondent's premises and found that respondents had failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide veterinary care to animals in need of care, in willful violation of section 2.40 of the regulations (9 C.F.R. § 2.40).

B. On March 24, 1998, 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. Housing facilities for dogs were not structurally sound and maintained in good repair so as to protect the animals from injury, contain the animals securely, and restrict other animals from entering (9 C.F.R. § 3.1(a));

2. The surfaces of housing facilities were not constructed in a manner and made of materials that allow them to be readily cleaned and sanitized, or removed or replaced when worn or soiled (9 C.F.R. § 3.1(c)(1)); and

3. Provisions were not made for the regular and frequent collection, removal, and disposal of animal and food wastes, bedding, debris, garbage, water, and other fluids and wastes, in a manner that minimizes contamination and disease risks (9 C.F.R. § 3.1(f)).

III

A. On October 7, 1998, APHIS inspected respondent's premises and found that respondents had failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide veterinary care to animals in need of care, in willful violation of section 2.40 of the regulations (9 C.F.R. § 2.40).

B. On October 7, 1998, 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. The surfaces of housing facilities were not constructed in a manner and made of materials that allow them to be readily

cleaned and sanitized, or removed or replaced when worn or soiled (9 C.F.R. § 3.1(c)(1));

2. Interior surfaces of housing facilities and surfaces that come in contact with dogs were not free of jagged edges and sharp points that might injure the animals (9 C.F.R. § 3.1(c)(1)(ii)); and

3. Interior height of primary enclosures were not the required 6 inches higher than the head of the tallest dog, when standing in a normal standing position (9 C.F.R. § 3.6(c)(1)(I)).

IV

On January 13, 1999, 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. Primary enclosures for dogs were not constructed and maintained so that they enable all surfaces in contact with the animals to be readily cleaned and sanitized, or be replaceable when worn or soiled (9 C.F.R. § 3.6(a)(2)(ix)); and

2. The surfaces of housing facilities were not constructed in a manner and made of materials that allow them to be readily cleaned and sanitized, or removed or replaced when worn or soiled (9 C.F.R. § 3.1(c)(1)).

V

On May 12, 1999, 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. Housing facilities for dogs were not structurally sound and maintained in good repair so as to protect the animals from injury, contain the animals securely, and restrict other animals from entering (9 C.F.R. § 3.1(a)); and

2. Primary enclosures for dogs were not structurally sound and maintained in good repair so that they contain the animals securely and keep other animals from entering the enclosure (9 C.F.R. § 3.6(a)(2)(iii)).

VI

On November 18, 1999, 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. Interior surfaces of housing facilities and surfaces that come in contact with dogs were not free of jagged edges and sharp points that might injure the animals (9 C.F.R. § 3.1(c)(1)(ii));
2. Primary enclosures for dogs were not structurally sound and maintained in good repair (9 C.F.R. § 3.6(a)(1)); and
3. Interior height of primary enclosures were not the required 6 inches higher than the head of the tallest dog, when standing in a normal standing position (9 C.F.R. § 3.6(c)(1)(I)).

VII

A. On June 15, 2000, APHIS inspected respondent's premises and found that respondents had failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide veterinary care to animals in need of care, in willful violation of section 2.40 of the regulations (9 C.F.R. § 2.40).

B. On June 15, 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. Interior surfaces of housing facilities and surfaces that come in contact with dogs were not free of jagged edges and sharp points that might injure the animals (9 C.F.R. § 3.1(c)(1)(ii));
2. Provisions were not made for the regular and frequent collection, removal, and disposal of animal and food wastes, bedding, debris, garbage, water, and other fluids and wastes, in a manner that minimizes contamination and disease risks (9 C.F.R. § 3.1(f));
3. Primary enclosures for dogs were not constructed and maintained so that they enable all surfaces in contact with the animals to be readily cleaned and sanitized, or be replaceable when worn or soiled (9 C.F.R. § 3.6(a)(2)(ix)); and

3. Interior height of primary enclosures were not the required 6 inches higher than the head of the tallest dog, when standing in a normal standing position (9 C.F.R. § 3.6(c)(1)(I)); and

4. The premises including buildings and surrounding grounds, were not kept in good repair, and clean and free of trash, junk, waste, and discarded matter, and weeds, grasses and bushes were not controlled, in order to protect the animals from injury and facilitate the required husbandry practices (9 C.F.R § 3.11(c)).

VIII

A. On March 8, 2001, APHIS inspected respondent's premises and found that respondents had failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide veterinary care to animals in need of care, in willful violation of section 2.40 of the regulations (9 C.F.R. § 2.40).

B. On March 8, 2001, 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. Housing facilities for dogs were not structurally sound and maintained in good repair so as to protect the animals from injury, contain the animals securely, and restrict other animals from entering (9 C.F.R. § 3.1(a));

2. Interior surfaces of housing facilities and surfaces that come in contact with dogs were not free of excessive rust that prevents the required cleaning and sanitization and that affects the structural strength of the surface (9 C.F.R. § 3.1(c)(1)(i));

3. Provisions were not made for the regular and frequent collection, removal, and disposal of animal and food wastes, bedding, debris, garbage, water, and other fluids and wastes, in a manner that minimizes contamination and disease risks (9 C.F.R. § 3.1(f)).

4. The surfaces of indoor floor areas of sheltered housing facilities for dogs that were in contact with the animals were not impervious to moisture (9 C.F.R. § 3.3(e)(1)(I));

5. Dogs in outdoor housing facilities were not provided with adequate protection from the elements and were not provided with clean, dry, bedding material when the ambient temperature was below 50 degrees Fahrenheit (9 C.F.R. § 3.4(b)); and
6. Watering receptacles for dogs were not kept clean and sanitized (9 C.F.R. § 3.10).

IX

On October 4, 2001, 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. Housing facilities for dogs were not structurally sound and maintained in good repair so as to protect the animals from injury, contain the animals securely, and restrict other animals from entering (9 C.F.R. § 3.1(a));
2. The surfaces of indoor floor areas of sheltered housing facilities for dogs that were in contact with the animals were not impervious to moisture (9 C.F.R. § 3.3(e)(1)(I));
3. Primary enclosures for dogs were not structurally sound and maintained in good repair (9 C.F.R. § 3.6(a)(1)); and
4. Excreta and food waste were not removed from primary enclosures daily, to prevent soiling of the dogs and to reduce disease hazards, insects, pests and odors (9 C.F.R. § 3.11(a)).

Conclusions

1. The Secretary has jurisdiction in this matter.
2. The following Order is authorized by the Act and warranted under the circumstances.

Order

1. Respondent, her agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist

from violating the Act and the regulations and standards issued thereunder, and in particular, shall cease and desist from:

(a) Failing to construct and maintain housing facilities for animals so that they are structurally sound and in good repair in order to protect the animals from injury;

(b) Failing to provide sufficient space for animals in primary enclosures;

(c) Failing to establish and maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine;

(d) Failing to construct and maintain housing facilities for animals so that surfaces may be readily cleaned and sanitized or be replaced when necessary;

(e) Failing to provide a suitable method for the rapid elimination of excess food and animal wastes from housing facilities for animals;

(f) Failing to maintain primary enclosures for animals in a clean and sanitary condition; and

(g) Failing to provide for adequate running potable water for the animals' drinking needs, for cleaning, and for carrying out other husbandry requirements.

2. The determination of the amount of the civil penalty to be assessed is reserved, pending receipt of evidence of reasonableness of the amount requested, considering the size of the business, gravity of the violations, the good faith of the licensee, history of prior violations, if any and any other factors material to the amount which should be imposed. Copies of this decision shall be served upon the parties.

[This Decision and Order became final April 1, 2005. - Editor]

In re: MICHAEL PITTMAN, AN INDIVIDUAL, a/k/a "SLICK" PITTMAN, WAYNE PITTMAN and ROGER TRENT PITTMAN.
AWA Docket No. 04-0022.
Decision and Order as to Michael Pittman.
Filed March 11, 2005.

AWA - Default.

Colleen A. Carroll, for Complainant.
Respondent, Pro se.
Decision and Order issued by Peter M. Davenport, 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 respondent willfully violated the Act.

On August 24, 2004, the Hearing Clerk served respondent Michael Pittman with copies of the complaint and the Rules of Practice governing proceedings under the Act (7 C.F.R. §§ 1.130-1.151), by certified mail, return receipt requested. The respondent was informed in the accompanying letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation. The respondent failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are all admitted by the respondent's failure to file an answer, are adopted and set forth herein as Findings of Fact. This decision and order is issued pursuant to section 1.139 of the Rules of Practice.

Findings of Fact

1. Respondent Michael Pittman (also known as "Slick" Pittman, Wayne Pittman, and Roger Trent Pittman) is an individual whose addresses are 510 Sassafras Trail, Ravenden Springs, Arkansas 72460, and 101 Pierce Road, Ravenden, Arkansas 72459. At all times mentioned herein, said respondent was operating as a dealer as that term is defined in the Act, without holding an Animal Welfare Act license.

2. Respondent operates a moderately-sized business, wherein he obtains dogs (including random-source dogs) for sale to other dealers. The violations alleged in this complaint include serious instances of noncompliance with the licensing regulations. Respondent has not shown good faith, in that he has ignored the licensing regulations. Respondent does not have a history of previous violations.

Respondent's violations alleged herein strike at the very heart of the Animal Welfare Act: the regulation of dealers and the protection of pet owners.

3. Between approximately May 2002 and March 2003, respondent operated as a dealer, as that term is defined in the Regulations, without having obtained a license from the Secretary to do so, as follows:

a. May 8, 2001. Respondent, while unlicensed, delivered for transportation, transported, sold, and negotiated the sale of eight dogs, for use in research, teaching, testing, or experimentation, to Chester C. Baird, also known as C.C. Baird, a licensed dealer, as that term is defined in the Act and the Regulations. Mr. Baird resold one of the eight dogs, a male black Labrador retriever (No. 34362) to East Tennessee State University, Johnson City, Tennessee, for use in research. On or about May 25, 2001, researchers at East Tennessee State University determined that the dog was likely someone's pet (as it had received an expensive medical procedure), and notified the U.S. Department of Agriculture.

b. January 15, 2003. Respondent, while unlicensed, delivered for transportation, transported, sold, and negotiated the sale of nine dogs, for use in research, teaching, testing, or experimentation, to Chester C. Baird, also known as C.C. Baird, a licensed dealer.

c. January 31, 2003. Respondent, while unlicensed, delivered for transportation, transported, sold, and negotiated the sale of four dogs, for use in research, teaching, testing, or experimentation, to Chester C. Baird, also known as C.C. Baird, a licensed dealer.

d. March 1, 2003. Respondent, while unlicensed, delivered for transportation, transported, sold, and negotiated the sale of one dog, for use in research, teaching, testing, or experimentation, to Chester C. Baird, also known as C.C. Baird, a licensed dealer.

Conclusions of Law

1. Between approximately May 2002 and March 2003, respondent operated as a dealer, as that term is defined in the Regulations, without having obtained a license from the Secretary to do so, in willful violation of section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1)), as follows:

a. May 8, 2001. Respondent, while unlicensed, delivered for transportation, transported, sold, and negotiated the sale of eight dogs, for use in research, teaching, testing, or experimentation, to Chester C. Baird, also known as C.C. Baird, a licensed dealer, as that term is defined in the Act and the Regulations. Mr. Baird resold one of the eight dogs, a male black Labrador retriever (No. 34362) to East Tennessee State University, Johnson City, Tennessee, for use in research. On or about May 25, 2001, researchers at East Tennessee State University determined that the dog was likely someone's pet (as it had received an expensive medical procedure), and notified the U.S. Department of Agriculture.

b. January 15, 2003. Respondent, while unlicensed, delivered for transportation, transported, sold, and negotiated the sale of nine dogs, for use in research, teaching, testing, or experimentation, to Chester C. Baird, also known as C.C. Baird, a licensed dealer.

c. January 31, 2003. Respondent, while unlicensed, delivered for transportation, transported, sold, and negotiated the sale of four dogs, for use in research, teaching, testing, or experimentation, to Chester C. Baird, also known as C.C. Baird, a licensed dealer.

d. March 1, 2003. Respondent, while unlicensed, delivered for transportation, transported, sold, and negotiated the sale of one dog, for use in research, teaching, testing, or experimentation, to Chester C. Baird, also known as C.C. Baird, a licensed dealer.

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.

2. Respondent Michael Pittman is assessed a civil penalty of $6,050, to be paid by certified check or money order made payable to the Treasurer of the United States within 60 days of the entry of this order.

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 April 25, 2005. - Editor]

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In re: SUSAN DEFRANCESCO and EAST COAST EXOTICS, INC., a CONNECTICUT CORPORATION.
AWA Docket No. 04-0010.
Decision and Order.
Filed February 8, 2005.

AWA - Default.

Sharlene Deskins, for Complainant.
Respondent, Pro se.
Decision and Order issued by Marc R. Hillson, Administrative Law Judge.

Preliminary Statement

This proceeding was instituted under the Animal Welfare Act ("Act"), as amended (7 U.S.C. § 2131 *et seq.*), by a Complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondents willfully violated the Act and the regulations 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 respondents by U.S. Mail on April 8, 2004. Respondents were informed in the letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation.

Respondents 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 respondents' failure to file an answer pursuant to the Rules of Practice, are adopted as set forth herein as Findings of Fact and Conclusions of Law.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139.

Findings of Fact and Conclusions of Law

I

A. Susan DeFrancesco is an individual whose mailing address is P.O. Box 364, Monroe, Connecticut 06468. Ms. DeFrancesco owns a trailer which is located at 29 Park Street, Milford, Connecticut 06460. Ms. DeFrancesco also operates under the business name of Wildlife Adventures Parties.

B. East Coast Exotics, Inc. is a Connecticut corporation. East Coast Exotics, Inc. has the same mailing address as Ms. DeFrancesco which is P.O. Box 364, Monroe, Connecticut 06468.

C. Ms. DeFrancesco as the owner, directed, managed and controlled the actions of East Coast Exotics. At all material times, Ms. DeFrancesco doing business as Wildlife Adventure Parties and East Coast Exotics (hereafter "Respondents") operated as an exhibitor as defined in the Act and the regulations.

D. The Respondents were previously licensed under the Animal Welfare Act. While the respondents were licensed they received annually copies of the Act, the regulations and standards issued thereunder and agreed in writing to comply with them. The Respondents were the subject of a previous complaint regarding their violations of the Act, regulations and standards. On or about July 1, 2000, the Respondents' license was suspended for 70 days and continuing thereafter until the Respondents comply with the order which required them to pay $20,000 and to cease and desist from violating the Act and regulations. See 59 *Agric. Dec.* 97 (2000). The Respondents have failed to pay the civil penalty so the license suspension has continued.

II

A. Since at least July 10, 2001, the Respondents have operated as an exhibitor as defined in the Act and the regulations, without having

obtained a license, in willful violation of section 4 of the Act (7 U.S.C. § 2134) and section 2.1 of the regulations (9 C.F.R. § 2.1). The Respondents' violated the Act and regulations by exhibiting animals as listed below.

1. On or about July 10, 2001, the Respondents exhibited animals at the Landmark Academy Early Learning Center in Redding, Connecticut.

2. On or about August 16, 2001, the Respondents exhibited animals at the L & M Hospital Child Care Center in New London, Connecticut.

3. On or about October 11, 2001, the Respondents exhibited animals at the Bright Horizons Family Solutions in Sheldon, Connecticut.

4. On or about June 17, 2002, the Respondents exhibited animals at Kindercare in Glastonbury, Connecticut.

5. On or about June 25, 2002, the Respondents exhibited animals at the Bright Horizons Family Solutions in Sheldon, Connecticut.

6. On or about July 2, 2002, the Respondents exhibited animals at the L & M Hospital Child Care Center in New London, Connecticut.

7. On or about July 2, 2002, the Respondents exhibited animals at the L & M Hospital Child Care Center in New London, Connecticut.

8. On or about April 7, 2003, the Respondents exhibited animals at the Weinberg Nature Center, 455 Mamaroneck Road, Scarsdale, New York 10583.

9. On or about April 14, 2003, the Respondents exhibited animals at the Weinberg Nature Center, 455 Mamaroneck Road, Scarsdale, New York 10583.

10. On or about April 28, 2003, the Respondents exhibited animals at the Weinberg Nature Center, 455 Mamaroneck Road, Scarsdale, New York 10583.

11. On or about May 5, 2003, the Respondents exhibited animals at the Weinberg Nature Center, 455 Mamaroneck Road, Scarsdale, New York 10583.

12. On or about May 12, 2003, the Respondents exhibited animals at the Weinberg Nature Center, 455 Mamaroneck Road, Scarsdale, New York 10583.

13. On or about May 12, 2003, the Respondents exhibited animals at the Weinberg Nature Center, 455 Mamaroneck Road, Scarsdale, New York 10583.

14. On or about July 23, 2003, the Respondents exhibited animals at Camp Totokot in Branford, Connecticut.

15. On or about January 21, 2004, the Respondents exhibited animals at the Greenwich Catholic School in Greenwich, Connecticut.

Conclusions

1. The Secretary has jurisdiction in this matter.

2. By reason of the facts set forth in the Findings of Fact above, the respondents have 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. Respondents, their agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the regulations issued thereunder, and in particular, shall cease and desist from exhibiting animals without a licence.

2. The respondents are jointly and severally assessed a civil penalty of $17,600, which shall be paid by a certified check or money order made payable to the Treasurer of the United States.

3. Respondents are disqualified from obtaining a license for five years from the effective date of this order. The Respondents' disqualification from obtaining a license shall continue until the respondents pay the civil penalty that was assessed in *In re Susan DeFrancesco and East Coast Exotics, Inc.*, 59 *Agric. Dec.* 97 (2000) and the civil penalty assessed in this case in full and any court costs that incurred in trying to collect the civil penalties from the respondents.

The provisions of this Order shall become effective on the first day after service of this decision on the respondents.

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 March 9, 2005. - Editor]

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In re: ERICA NICOLE deHAAN, f/k/a ERICA NICOLE MASHBURN, f/k/a ERICA NICOLE d/b/a BUNDLE OF JOY KENNEL AND RICKY deHAAN, AN INDIVIDUAL, ERICA NICOLE AVERY, AN INDIVIDUAL.
AWA Docket No. 04-0004
Decision and Order by Reason of Admission of Facts, as to Erica Nicole deHaan, formerly known as Erica Nicole Mashburn, formerly known as Erica Nicole Avery, an individual, d/b/a Bundle of Joy Kennel.
March 25, 2005.

AWA – Default.

Bernadette Juarez, for Complainant.
Respondent, Pro Se.
Decision and Order filed by Administrative Law Judge Jill S. Clifton.

Procedural History

[1] This proceeding was instituted under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*), by the Complaint filed on December 5, 2003, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondents willfully violated the Animal Welfare Act and the Regulations and Standards issued thereunder (9 C.F.R. § 1.1 *et seq.*).
[2] The Hearing Clerk sent to respondent Erica Nicole deHaan (formerly known as Erica Nicole Mashburn, formerly known as Erica Nicole Avery), doing business as Bundle of Joy Kennel, on December 9, 2003, by certified mail, return receipt requested, a copy of the Complaint and the Rules of Practice governing proceedings under the Act (7 C.F.R. §§ 1.130-1.151). The accompanying letter of service advised respondents that they would have 20 days from receipt in which to file an answer to the Complaint.

[3] Respondent Erica Nicole deHaan, also known as Nicole deHaan, was served with the Complaint and accompanying documents on December 13, 2003, when she signed to receive the certified mailing addressed to her.

[4] For this type of case, the only response to a Complaint authorized by the Rules of Practice is an ***answer***. Respondent Erica Nicole deHaan failed to file an ***answer*** to the Complaint as required; to this day, she still has not filed an ***answer*** to the Complaint.

[5] On December 22, 2003, according to respondent Erica Nicole deHaan, she sent a Motion to Dismiss to the Hearing Clerk. No such Motion was filed in the record until January 26, 2004, when respondent Erica Nicole deHaan filed a Motion to Dismiss, enclosing a copy of the Motion to Dismiss which she states she had already filed, together with color copies of United States Postal Service documents showing deliveries to the Hearing Clerk on December 29, 2003 and on December 31, 2003. She states that she sent 3 items for the 2 cases, "for this case and another case that I am forced to deal with." The other case may be AWA Docket No. 03-0010. The record file of AWA Docket No. 03-0010 also does not contain the Motion to Dismiss which she states she had already filed.

[6] Assuming respondent Erica Nicole deHaan did send a Motion to Dismiss to the Hearing Clerk on December 22, 2003, her timely response avails nothing, because she does not deny the allegations of the Complaint. Further, both of her Motions to Dismiss must be and hereby are denied. Under the Rules of Practice, any motion will be entertained ***other than a motion to dismiss*** on the pleading. *See* 7 C.F.R. § 1.143(b)(1).

[7] On January 8, 2004, the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture (APHIS), moved for adoption of a decision and order by reason of admission of facts against Respondent Erica Nicole deHaan. [8] The Hearing Clerk sent to Respondent Erica Nicole deHaan, on January 9, 2004, by certified mail, return receipt requested, a copy of APHIS's motion, together with a copy of the proposed decision and order by reason of admission of facts against respondent Erica Nicole deHaan,

and an accompanying letter of service that advised her that she would have 20 days from receipt in which to file objections.

[9] Respondent Erica Nicole deHaan was served with APHIS's motion for a decision and order against her, together with the proposed decision and order by reason of admission of facts, on January 21, 2004, when she signed to receive the certified mailing addressed to her.

[10] Respondent Erica Nicole deHaan failed to file ***objections*** to the proposed decision and order within 20 days after service, as required; to this day, she still has not filed ***objections*** to the proposed decision and order. *See* 7 C.F.R. §1.139. Her Motion to Dismiss filed January 26, 2004, does not constitute meritorious ***objections***; furthermore, both of her Motions to Dismiss have been denied. *See* paragraph [6].

[11] On February 6, 2004, this case was reassigned, to me.

[12] The Rules of Practice provide that the failure to file an answer within 20 days after service *(see* 7 C.F.R. § 1.136(a)) shall be deemed an admission of the allegations in the Complaint. 7 C.F.R. §1.136(c). Further, the failure to file an answer constitutes a waiver of hearing. 7 C.F.R. § 1.139. Accordingly, the material allegations in the Complaint are adopted and set forth in this Decision as the Findings of Fact, and this Decision is issued pursuant to the Rules of Practice. 7 C.F.R. § 1.139. *See* 7 C.F.R. §1.130 *et seq.*

Findings of Fact

[13] Respondent Erica Nicole deHann, formerly known as Erica Nicole Mashburn, formerly known as Erica Nicole Avery, doing business as Bundle of Joy Kennel, hereinafter referred to as respondent Erica Nicole deHann, is an individual.

[14] Respondent Erica Nicole deHaan's address is Rt. 3 Box 209-A, Ava, Missouri 65608.

[15] APHIS officials have determined that, at all material times mentioned herein, respondent Er ica Nicole deHaan was operating as a dealer, as defined in the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*) (Act), and the Regulations (9 C.F.R. § 1.1 *et seq.*) (Regulations).

[16] On June 3, 2003, respondent Erica Nicole deHaan operated as a dealer as defined in the Act and the Regulations, without being licensed, and sold dogs in commerce, for resale for use as pets, specifically, 4 Boston Terriers, to Puppy Love of Virginia, Inc.

[17] On June 10, 2003, respondent Erica Nicole deHaan operated as a dealer as defined in the Act and the Regulations, without being licensed, and sold dogs in commerce, for resale for use as pets, specifically, 1 Pug, 1 Eskimo, 4 Chihuahuas, and 2 Bichon Frise, to Puppy Love of Virginia, Inc.

[18] On July 1, 2003, respondent Erica Nicole deHaan operated as a dealer as defined in the Act and the Regulations, without being licensed, and sold dogs in commerce, for resale for use as pets, specifically, 3 Golden Retrievers and 2 Maltese, to Puppy Love of Virginia, Inc.

[19] On July 8, 2003, respondent Erica Nicole deHaan operated as a dealer as defined in the Act and the Regulations, without being licensed, and sold dogs in commerce, for resale for use as pets, specifically, 6 Eskimos, to Puppy Love of Virginia, Inc.

[20] On July 29, 2003, respondent Erica Nicole deHaan operated as a dealer as defined in the Act and the Regulations, without being licensed, and sold dogs in commerce, for resale for use as pets, specifically, 1 Basset Hound, 1 Bichon Frise, and 2 Boston Terriers, to National Breeders Association, Inc.

[21] On August 5, 2003, respondent Erica Nicole deHaan operated as a dealer as defined in the Act and the Regulations, without being licensed and sold dogs in commerce, for resale for use as pets, specifically, 1 Chihuahua, 3 Pekingese, and 1 Cocker Spaniel, to Puppy Love of Virginia, Inc.

[22] On August 6, 2003, respondent Erica Nicole deHaan operated as a dealer as defined in the Act and the Regulations, without being licensed, and sold dogs in commerce, for resale for use as pets, specifically, 1 Doberman Pinscher, 1 Wheaten Terrier, 1 Old English Sheepdog, 1 Shiba Inu, 1 Schnauzer, 1 Chihuahua, 2 Bichon Frise, 4 Labradors, 1 Cocker Spaniel, and 1 Wheaten Terrier, to National Breeders Association, Inc.

[23] On August 12, 2003, respondent Erica Nicole deHaan operated as a dealer as defined in the Act and the Regulations, without being licensed, and sold dogs in commerce, for resale for use as pets, specifically, 4 ShihTzus, 2 Golden Retrievers, 1 Pomeranian, 1 Poodle, 1 Dachshund, and 2 West Highland White Terriers, to Puppy Love of Virginia, Inc.

[24] On August 13, 2003, respondent Erica Nicole deHaan operated as a dealer as defined in the Act and the Regulations, without being licensed, and sold dogs in commerce, for resale for use as pets, specifically, 1 Golden Retriever, 1 Pug, 2 Cocker Spaniels, 2 Boxers, 1 Sheltie, 1 Pomeranian, 2 ShihTzus (Shitzu), 2 Labradors, and 1 Poodle, to National Breeders Association, Inc.

[25] On August 13, 2003, respondent Erica Nicole deHaan operated as a dealer as defined in the Act and the Regulations, without being licensed, and sold a dog in commerce, for resale for use as a pet, specifically, 1 Basset Hound to Bahuaka, Inc.

[26] On August 13, 2003, respondent Erica Nicole deHaan operated as a dealer as defined in the Act and the Regulations, without being licensed, and sold dogs in commerce, for resale for use as pets, specifically, 5 ShihTzus, to Stillwell Pets & Quality Pups.

[27] On August 19, 2003, respondent Erica Nicole deHaan operated as a dealer as defined in the Act and the Regulations, without being licensed, and sold dogs in commerce, for resale for use as pets, specifically, 2 Poodles and 2 Dachshunds, to Puppy Love of Virginia, Inc.

[28] On August 20, 2003, respondent Erica Nicole deHaan operated as a dealer as defined in the Act and the Regulations, without being licensed, and sold dogs in commerce, for resale for use as pets, specifically, 1 Basset Hound, 3 Labradors, 2 Bichon Frise, 1 Poodle, 2 Chihuahuas, 2 ShihTzus (Shitzus), 2 Golden Retrievers, and 1 Cocker Spaniel, to National Breeders Association, Inc.

[29] On August 21, 2003, respondent Erica Nicole deHaan operated as a dealer as defined in the Act and the Regulations, without being licensed, and sold a dog in commerce, for resale for use as a pet, specifically, 1 ShihTzu, to Stillwell Pets & Quality Pups.

[30] On August 26, 2003, respondent Erica Nicole deHaan operated as a dealer as defined in the Act and the Regulations, without being licensed, and sold dogs in commerce, for resale for use as pets, specifically, 2 Yorkshire Terriers, 1 Sheltie, and 2 Chi, to National Breeders Association, Inc.

[31] On or about September 30, 2003, respondent Erica Nicole deHaan operated as a dealer as defined in the Act and the Regulations, without being licensed, and sold a dog in commerce, for resale for use as a pet, specifically, 1 Rat Terrier, to Pets and the City, Inc.

[32] On or about October 6, 2003, respondent Erica Nicole deHaan operated as a dealer as defined in the Act and the Regulations, without being licensed, and sold 6 dogs in commerce, for resale for use as pets, including 1 Sky Terrier, to Pets and the City, Inc.

[33] On October 6, 2003, respondent Erica Nicole deHaan operated as a dealer as defined in the Act and the Regulations, without being licensed, and sold dogs in commerce, for resale for use as pets, specifically, 1 Rat Terrier and 1 American Eskimo, to United Pet Supply, Inc.

[34] On October 7, 2003, respondent Erica Nicole deHaan operated as a dealer as defined in the Act and the Regulations, without being licensed, and sold dogs in commerce, for resale for use as pets, specifically, 3 Dachshunds and 1 Jack Russell Terrier, to Precious Pet Cottage, Inc.

[35] On October 7, 2003, respondent Erica Nicole deHaan operated as a dealer as defined in the Act and the Regulations, without being licensed, and sold a dog in commerce, for resale for use as a pet, specifically, 1 Rat Terrier, to PetLand, Inc., Orlando East.

[36] On October 14, 2003, respondent Erica Nicole deHaan operated as a dealer as defined in the Act and the Regulations, without being licensed, and sold dogs in commerce, for resale for use as pets, specifically, 2 Dachshunds, to Precious Pet Cottage, Inc.

Conclusions

[37] The Secretary of Agriculture has jurisdiction.

[38] During the approximately 4-month period from June 3, 2003 through October 14, 2003, as shown in the Findings of Fact, respondent Erica Nicole deHaan was operating as a dealer without being licensed, in willful violation of the Animal Welfare Act, as amended, particularly 7 U.S.C. §§ 2131-2134, and the Regulations, particularly 9 C.F.R. § 2.1(a)(1).

[39] During that time, as shown in the Findings of Fact, Respondent Erica Nicole deHaan sold 116 dogs in commerce, for resale for use as pets, while operating as a dealer without being licensed.

[40] The sale of each dog constitutes a separate violation. 7 U.S.C. § 2149.

[41] Under these circumstances, $3,480.00 is a reasonable and appropriate civil penalty for these 116 violations of the Animal Welfare Act, in accordance with the statutory factors to be considered. 7 U.S.C. § 2149.

Order

[42] Respondent Erica Nicole deHaan, her agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards issued thereunder, and in particular, shall cease and desist from engaging in any activity for which a license is required under the Act and Regulations without being licensed as required.

[43] Respondent Erica Nicole deHaan is assessed a civil penalty of $3,480.00, which she shall pay by cashier's check or money order, made payable to the order of "**Treasurer of the United States**", and forwarded within thirty (30) days from the effective date of this Order by a commercial delivery service, such as FedEx or UPS, to

United States Department of Agriculture
Office of the General Counsel, Marketing Division
Attn.: Bernadette R. Juarez, Esq.
Room 2343 South Building, Stop 1417
1400 Independence Avenue SW
Washington, D.C. 20250-1417.

Respondent shall indicate that payment is in reference to **AWA Docket No. 04-0004**.

[44] This Decision and 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 upon respondent, unless an appeal to the Judicial Officer is filed within thirty (30) days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145, see attached Appendix A).

Copies of this Decision and Order as to respondent Erica Nicole deHaan by reason of admission of facts shall be served by the Hearing Clerk upon each of the parties.

* * *

APPENDIX A

7 C.F.R.:

TITLE 7—-AGRICULTURE

SUBTITLE A—-OFFICE OF THE SECRETARY OF AGRICULTURE

PART 1—-ADMINISTRATIVE REGULATIONS

. . . .

SUBPART H—-RULES OF PRACTICE GOVERNING FORMAL

ADJUDICATORY PROCEEDINGS INSTITUTED BY THE SECRETARY UNDER

VARIOUS STATUTES

. . .

§ 1.145 Appeal to Judicial Officer.

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

(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.

(c) *Transmittal of record*. Whenever an appeal of a Judge's decision is filed and a response thereto has been filed or time for filing a response has expired, the Hearing Clerk shall transmit to the Judicial Officer the record of the proceeding. Such record shall include: the pleadings; motions and requests filed and rulings thereon; the transcript or recording of the testimony taken at the hearing, together with the exhibits filed in connection therewith; any documents or papers filed in connection with a pre-hearing conference; such proposed findings of fact, conclusions, and orders, and briefs in support thereof, as may have been filed in connection with the proceeding; the Judge's decision; such exceptions, statements of objections and briefs in support thereof as may have been filed in the proceeding; and the appeal petition, and such briefs in support thereof and responses thereto as may have been filed in the proceeding.

(d) *Oral argument.* A party bringing an appeal may request, within the prescribed time for filing such appeal, an opportunity for oral argument before the Judicial Officer. Within the time allowed for filing

a response, appellee may file a request in writing for opportunity for such an oral argument. Failure to make such request in writing, within the prescribed time period, shall be deemed a waiver of oral argument. The Judicial Officer may grant, refuse, or limit any request for oral argument. Oral argument shall not be transcribed unless so ordered in advance by the Judicial Officer for good cause shown upon request of a party or upon the Judicial Officer's own motion.

(e) *Scope of argument.* Argument to be heard on appeal, whether oral or on brief, shall be limited to the issues raised in the appeal or in the response to the appeal, except that if the Judicial Officer determines that additional issues should be argued, the parties shall be given reasonable notice of such determination, so as to permit preparation of adequate arguments on all issues to be argued.

(f) *Notice of argument; postponement.* The Hearing Clerk shall advise all parties of the time and place at which oral argument will be heard. A request for postponement of the argument must be made by motion filed a reasonable amount of time in advance of the date fixed for argument.

(g) *Order of argument.* The appellant is entitled to open and conclude the argument.

(h) *Submission on briefs.* By agreement of the parties, an appeal may be submitted for decision on the briefs, but the Judicial Officer may direct that the appeal be argued orally.

(i) *Decision of the [J]udicial [O]fficer on appeal.* As soon as practicable after the receipt of the record from the Hearing Clerk, or, in case oral argument was had, as soon as practicable thereafter, the Judicial Officer, upon the basis of and after due consideration of the record and any matter of which official notice is taken, shall rule on the appeal. If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum. A final order issued by the Judicial Officer shall be filed with the Hearing Clerk. Such order may be regarded by the respondent as final for purposes of judicial review without filing a

petition for rehearing, reargument, or reconsideration of the decision of the Judicial Officer.

[42 FR 743, Jan. 4, 1977, as amended at 60 FR 8456, Feb. 14, 1995]

7 C.F.R. § 1.145

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In re: ERICA NICOLE deHAAN, f/k/a ERICA NICOLE MASHBURN, f/k/a ERICA NICOLE AVERY, AN INDIVIDUAL, d/b/a BUNDLE OF JOY KENNEL; and RICKY deHAAN, AN INDIVIDUAL.
AWA Docket No. 04-0004.
Second Decision and Order as to Erica Nicole Dehaan, F/k/a Erica Nicole Mashburn, f/k/a Erica Nicole Avery, an Individual, d/b/a Bundle of Joy Kennel.
Filed April 5, 2005.

AWA - Default.

Bernadette Juarez, for Complainant.
Respondent, Pro se.
Decision and Order issued by Jill S. Clifton, Administrative Law Judge.

Procedural History

[1] The parties participated in a teleconference with me on April 5, 2004. The Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture, was represented by Bernadette R. Juarez, Esq. Respondent Erica Nicole deHaan (formerly known as Erica Nicole Mashburn, formerly known as Erica Nicole Avery), doing business as Bundle of Joy Kennel, represented herself. Respondent Erica Nicole deHaan, doing business as Bundle of Joy Kennel, took responsibility for the alleged violations that were not addressed in my Decision and Order issued on March 25, 2004.

[2] This proceeding was instituted under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*), by the Complaint filed on December 5, 2003, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondents willfully violated the Animal Welfare Act and the Regulations and Standards issued thereunder (9 C.F.R. § 1.1 *et seq.*).

[3] The Hearing Clerk sent to respondent Erica Nicole deHaan (formerly known as Erica Nicole Mashburn, formerly known as Erica Nicole Avery), doing business as Bundle of Joy Kennel, on December 9, 2003, by certified mail, return receipt requested, a copy of the Complaint and the Rules of Practice governing proceedings under the Act (7 C.F.R. §§ 1.130-1.151). The accompanying letter of service advised respondents that they would have 20 days from receipt in which to file an answer to the Complaint.

[4] Respondent Erica Nicole deHaan, also known as Nicole deHaan, was served with the Complaint and accompanying documents on December 13, 2003, when she signed to receive the certified mailing addressed to her.

[5] For this type of case, the only response to a Complaint authorized by the Rules of Practice is an ***answer***. Respondent Erica Nicole deHaan failed to file an ***answer*** to the Complaint as required; to this day, she still has not filed an ***answer*** to the Complaint.

[6] On December 22, 2003, according to respondent Erica Nicole deHaan, she sent a Motion to Dismiss to the Hearing Clerk. No such Motion was filed in the record until January 26, 2004, when respondent Erica Nicole deHaan filed a Motion to Dismiss, enclosing a copy of the Motion to Dismiss which she states she had already filed, together with color copies of United States Postal Service documents showing deliveries to the Hearing Clerk on December 29, 2003 and on December 31, 2003. She states that she sent 3 items for the 2 cases, "for this case and another case that I am forced to deal with." The other case may be AWA Docket No. 03-0010. The record file of AWA Docket No. 03-0010 also does not contain the Motion to Dismiss which she states she had already filed.

[7] Assuming respondent Erica Nicole deHaan did send a Motion to Dismiss to the Hearing Clerk on December 22, 2003, her timely response avails nothing, because she does not deny the allegations of the Complaint. Further, both of her Motions to Dismiss must be and hereby are denied. Under the Rules of Practice, any motion will be entertained ***other than a motion to dismiss*** on the pleading. *See* 7 C.F.R. § 1.143(b)(1).

[8] On January 8, 2004, the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture (APHIS), moved for adoption of a decision and order by reason of admission of facts against Respondent Erica Nicole deHaan.

[9] The Hearing Clerk sent to Respondent Erica Nicole deHaan, on January 9, 2004, by certified mail, return receipt requested, a copy of APHIS's motion, together with a copy of the proposed decision and order by reason of admission of facts against respondent Erica Nicole deHaan, and an accompanying letter of service that advised her that she would have 20 days from receipt in which to file objections.

[10] Respondent Erica Nicole deHaan was served with APHIS's motion for a decision and order against her, together with the proposed decision and order by reason of admission of facts, on January 21, 2004, when she signed to receive the certified mailing addressed to her.

[11] Respondent Erica Nicole deHaan failed to file ***objections*** to the proposed decision and order within 20 days after service, as required; to this day, she still has not filed ***objections*** to the proposed decision and order. *See* 7 C.F.R. §1.139. Her Motion to Dismiss filed January 26, 2004, does not constitute meritorious ***objections***; furthermore, both of her Motions to Dismiss have been denied. *See* paragraph [6].

[12] On February 6, 2004, this case was reassigned, to me.

[13] The Rules of Practice provide that the failure to file an answer within 20 days after service *(see* 7 C.F.R. § 1.136(a)) shall be deemed an admission of the allegations in the Complaint. 7 C.F.R. §1.136(c). Further, the failure to file an answer constitutes a waiver of hearing. 7 C.F.R. § 1.139. Accordingly, the material allegations in the Complaint are adopted and set forth in this Decision as the Findings of Fact, and this Decision is issued pursuant to the Rules of Practice. 7 C.F.R. § 1.139. *See* 7 C.F.R. §1.130 *et seq.*

Findings of Fact

[14] Respondent Erica Nicole deHann, formerly known as Erica Nicole Mashburn, formerly known as Erica Nicole Avery, doing business as Bundle of Joy Kennel, hereinafter referred to as respondent Erica Nicole deHann, is an individual.
[15] Respondent Erica Nicole deHaan's address is Rt. 3 Box 209-A, Ava, Missouri 65608.
[16] APHIS officials have determined that, at all material times mentioned herein, respondent Erica Nicole deHaan was operating as a dealer, as defined in the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*) (Act), and the Regulations (9 C.F.R. § 1.1 *et seq.*) (Regulations).
[17] On April 1, 2003, respondent Erica Nicole deHaan operated as a dealer as defined in the Act and the Regulations, without being licensed, and sold dogs in commerce, for resale for use as pets, specifically, 3 Labradors, 4 Pugs, and 3 Eskimos, to Puppy Love of Virginia, Inc.
[18] On April 8, 2003, respondent Erica Nicole deHaan operated as a dealer as defined in the Act and the Regulations, without being licensed, and sold dogs in commerce, for resale for use as pets, specifically, 1 Pug, and 1 Golden Retriever, to Puppy Love of Virginia, Inc.
[19] Ricky deHaan, an individual, is the minor child of respondent Erica Nicole deHaan.

Conclusions

[20] The Secretary of Agriculture has jurisdiction.
[21] During the approximately 1-week period from April 1-8, 2003, as shown in the Findings of Fact, respondent Erica Nicole deHaan was operating as a dealer without being licensed, in willful violation of the Animal Welfare Act, as amended, particularly 7 U.S.C. §§ 2131-2134, and the Regulations, particularly 9 C.F.R. § 2.1(a)(1).
[22] During that time, as shown in the Findings of Fact, respondent Erica Nicole deHaan sold 12 dogs in commerce, for resale for use as pets, while operating as a dealer without being licensed.

[23] The sale of each dog constitutes a separate violation. 7 U.S.C. § 2149.
[24] Under these circumstances, $360.00 is a reasonable and appropriate civil penalty for these 12 violations of the Animal Welfare Act, in accordance with the statutory factors to be considered. 7 U.S.C. § 2149.
[25] All allegations against Ricky deHaan, an individual, the minor child of respondent Erica Nicole deHaan, should be dismissed.

Order

[26] Respondent Erica Nicole deHaan, her agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards issued thereunder, and in particular, shall cease and desist from engaging in any activity for which a license is required under the Act and Regulations without being licensed as required.
[27] Respondent Erica Nicole deHaan is assessed a civil penalty of $360.00, which she shall pay by cashier's check or money order, made payable to the order of "**Treasurer of the United States**", and forwarded within thirty (30) days from the effective date of this Order by a commercial delivery service, such as FedEx or UPS, to

United States Department of Agriculture
Office of the General Counsel, Marketing Division
Attn.: Bernadette R. Juarez, Esq.
Room 2343 South Building, Stop 1417
1400 Independence Avenue SW
Washington, D.C. 20250-1417.

Respondent shall indicate that payment is in reference to **AWA Docket No. 04-0004**.
[28] All allegations against Ricky deHaan, an individual, the minor child of respondent Erica Nicole deHaan, are hereby dismissed.

[29] This Second Decision and 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 upon respondent, unless an appeal to the Judicial Officer is filed within thirty (30) days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145, see attached Appendix A).

Copies of this Second Decision and Order as to respondent Erica Nicole deHaan by reason of admission of facts shall be served by the Hearing Clerk upon each of the parties.

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In re: LARRY DARRELL WINSLOW d/b/a BEAR BREEDERS, INC. and BETH THOMPSON-WINSLOW d/b/a BEAR BREEDERS, INC.
AWA Docket No. 04-0035.
Decision and Order.
Filed April 27, 2005.

AWA - Default.

Bernadette Juarez, for Complainant.
Respondents, Pro se.
Decision and Order issued by Peter M. Davenport, Administrative Law Judge.

This proceeding was instituted under the Animal Welfare Act ("Act"), as amended (7 U.S.C. § 2131 *et seq.*), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondents willfully violated the Act and the regulations and standards ("Regulations" and "Standards") issued thereunder (9 C.F.R. § 1.1 *et seq.*).

On October 29, 2004, the Hearing Clerk sent to respondents Larry Darrell Winslow and Beth Thompson-Winslow ("respondents"), by regular mail, copies of the complaint and the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted

by the Secretary (7 C.F.R.§ 1.130 *et seq.*).[1] Respondents were informed in the accompanying letter of service that an answer to the complaint 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.

Neither respondent filed an answer within the time prescribed in the Rules of Practice; however, the Respondent Larry Darrell Winslow telephonically requested leave to file his answer out of time, advising that he was without knowledge of the proceedings against him and that he is a blind, disabled and indigent veteran now separated and estranged from his wife. By Order dated March 23, 2005, he was given leave to file his answer out of time. He has since filed an answer. No response has been received from the Respondent Beth Thompson-Winslow.

Thus, the material facts alleged in the complaint are admitted by the said respondent Beth Thompson-Winslow's default, are adopted and set forth herein as Findings of Fact. This Decision and Order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139.

Findings of Fact

1. Respondent Beth Thompson-Winslow is an individual, doing business as Bear Breeders, Inc., a partnership or unincorporated association, and whose mailing address 24 Lawrence 236, Black Rock, Arkansas 72415. At all times herein said respondent was operating as a dealer as that term is defined in the Act and the Regulations and held Animal Welfare Act license number 71-A-0778, issued to "Larry Winslow & Beth Thomspon-Winslow DBA: Bear Breeders Inc." On October 3, 2004, Animal Welfare Act license number 71-A-0778 expired because it was not renewed.

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[1]On September 29, 2004, the Hearing Clerk sent respondents, by certified mail, return receipt requested, copies of the complaint and Rules of Practice. The United States Postal Service marked each mailing "refused" and returned the mailings to the Hearing Clerk on October 12, 2004. See Domestic Return Receipt for Article Number 7003 2260 0005 5721 3212 (respondent Larry Darrell Winslow); Domestic Return Receipt for Article Number 7003 2260 0005 5721 3205 (respondent Beth Thompson-Winslow).

2. APHIS personnel conducted inspections of respondents' facilities, records and animals for the purpose of determining respondents' compliance with the Act and the Regulations and Standards on January 24, 2003, July 25, 2003 (attempted inspection), and January 26, 2004 (attempted inspection).

3. On November 20, 2002, respondent Beth Thompson Winslow ("respondent") received an official warning notice from complainant for alleged violations of the Regulations, documented in Animal Welfare investigation No. AR03002-AC.

4. On January 24, 2003, respondent failed to identify all live dogs and cats on the premises, and specifically, failed to identify, by any means, at least six cats. (9 C.F.R. § 2.50(a)).

5. On January 24, 2003, respondent failed to maintain records that fully and accurately disclose information concerning cats and dogs, and specifically, failed to maintain, and make available for inspection, records concerning respondents' nine adult dogs and nine adult cats. (9 C.F.R. § 2.75(a)(1)).

6. On January 24, 2003, respondent failed to maintain records that fully and accurately disclose information concerning the disposition of cats and dogs, and specifically, the disposition records for seven puppies and five kittens were incomplete; all of the records lacked the animals' official USDA number and five records lacked the buyers' or receivers' complete address or USDA Animal Welfare Act license or registration number. (9 C.F.R. § 2.75(a)(1)(iv)).

7. On July 25, 2003, respondent failed to have a responsible party available during business hours to permit APHIS officials to conduct an inspection of respondents' animal facilities. (9 C.F.R. § 2.126(a)).

8. On January 26, 2004, respondent failed to have a responsible party available during business hours to permit APHIS officials to conduct an inspection of respondents' animal facilities. (9 C.F.R. § 2.126(a)).

9. On January 24, 2003, respondent failed to meet the minimum facilities and operating standards for dogs and cats (9 C.F.R. §§ 3.1-3.19), as follows:

a. Respondent failed to store food supplies in a manner that protects the food from spoilage, contamination, and vermin infestation by failing to keep food supplies in containers with tightly fitting lids, and specifically, the plastic food container used to store food for the animals lacked a lid. (9 C.F.R. §§ 2.100(a), 3.1(d)).

b. Respondent failed to maintain indoor housing facilities and any other surfaces in contact with the animals that are impervious to moisture, and specifically, housed an adult Miniature Pinscher in two rooms of respondents' home that had floors, walls and furniture that were not impervious to moisture. (9 C.F.R. §§ 2.100(a), 3.2(d)).

c. Respondent failed to house breeds of dogs that are not acclimated to the temperatures prevalent in the area or that cannot tolerate the prevalent temperature without stress or discomfort (such as short-haired breeds in cold climates) in outdoor facilities as specifically approved by the attending veterinarian, and specifically, housed seven adult, short-haired Miniature Pinschers in outdoor facilities without an auxiliary heat source when the ambient temperature was approximately 15 degrees Fahrenheit, contrary to respondents' attending veterinarian's approved outdoor housing for these animals. (9 C.F.R. §§ 2.100(a), 3.4(a)).

d. Respondent failed to provide dogs and cats housed outdoors with adequate shelter from the elements, and specifically, housed nine adult dogs and nine adult cats in outdoor enclosures that contained shelters with little or no bedding when the ambient temperature was approximately 15 degrees Fahrenheit; the shelters provided to nine adult dogs also lacked wind and rain breaks. (9 C.F.R. §§ 2.100(a), 3.4(b)(1), (3), (4)).

e. Respondent failed to construct surfaces in contact with animals housed outdoors that are impervious to moisture, and specifically, housed nine adult cats in an outdoor enclosure that allowed access to respondents' home, thereby placing the animals in contact with surfaces, such as a floor, walls, and other items, that were not impervious to moisture. (9 C.F.R. §§ 2.100(a), 3.4(c)).

f. Respondent failed to construct and maintain primary enclosures that protect dogs and cats from injury, and specifically, housed nine adult dogs and nine adult cats in primary enclosures that contained,

at least one of the following: unprotected electrical cords, light receptacles, and/or an extraneous glass light bulb. (9 C.F.R. §§ 2.100(a), 3.1(a), 3.6(a)(2)(ii)).

g. Respondent failed to use food receptacles for dogs and cats, and specifically, fed adult Miniature Pinschers by scattering dog food on the concrete in front of the shelters. (9 C.F.R. §§ 2.100(a), 3.9(b)).

h. Respondent failed to remove excreta and food waste from primary enclosures daily to prevent an excessive accumulation of feces and food waste, to prevent soiling of the dogs or cats contained in the primary enclosure and to reduce disease hazards, insects, pests, and odors, and specifically, the litter pans used by nine adult cats had excessive excreta that had accumulated over, at least, two days and the exercise pen used by nine adult Miniature Pinschers had several months worth of accumulated excreta. (9 C.F.R. §§ 2.100(a), 3.11(a)).

Conclusions of Law

1. The Secretary has jurisdiction over this matter.

2. On January 24, 2003, respondent willfully violated section 2.50(a) of the Regulations. (9 C.F.R. § 2.50(a)).

3. On January 24, 2003, respondent willfully violated section 2.75(a)(1) of the Regulations. (9 C.F.R. § 2.75(a)(1)).

4. On January 24, 2003, respondent willfully violated section 2.75(a)(1) of the Regulations. (9 C.F.R. § 2.75(a)(1)(iv)).

5. On July 25, 2003, respondent willfully violated section 2.126(a) of the Regulations. (9 C.F.R. § 2.126(a)).

6. On January 26, 2004, respondent willfully violated section 2.126(a) of the Regulations. (9 C.F.R. § 2.126(a)).

7. On January 24, 2003, respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. §§ 3.1-3.19), as follows:

a. Respondent failed to comply with section 3.1(d) of the Standards. (9 C.F.R. §§ 2.100(a), 3.1(d)).

b. Respondent failed to comply with section 3.2(d) of the Standards. (9 C.F.R. §§ 2.100(a), 3.2(d)).

c. Respondent failed to comply with section 3.4(a) of the Standards. (9 C.F.R. §§ 2.100(a), 3.4(a)).

d. Respondent failed to comply with sections 3.4(b)(1), (3), and (4) of the Standards. (9 C.F.R. §§ 2.100(a), 3.4(b)(1), (3), (4)).

e. Respondent failed to comply with section 3.4(c) of the Standards. (9 C.F.R. §§ 2.100(a), 3.4(c)).

f. Respondent failed to comply with sections 3.1(a), 3.6(a)(2)(ii) of the Standards. (9 C.F.R. §§ 2.100(a), 3.1(a), 3.6(a)(2)(ii)).

g. Respondent failed to comply with section 3.9(b) of the Standards. (9 C.F.R. §§ 2.100(a), 3.9(b)).

h. Respondent failed to comply with section 3.11(a) of the Standards. (9 C.F.R. §§ 2.100(a), 3.11(a)).

Order

1. Respondent, her agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the Regulations and Standards.

2. Respondent Beth Thompson-Winslow is assessed a civil penalty of $3,052. The civil penalty shall be paid by certified check or money order made payable to the Treasurer of the United States and sent to:

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

Respondents shall state on the certified check or money order that the payment is in reference to AWA Docket No. 04-0035.

3. Respondent's Animal Welfare Act license (Animal Welfare Act license number 71-A-0778) is 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 June 29, 2005-Editor]

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In re: MARY JEAN WILLIAMS, AN INDIVIDUAL; JOHN BRYAN WILLIAMS, AN INDIVIDUAL and DEBORAH ANN MILETTE, AN INDIVIDUAL
AWA Docket No. 04-0023.
Filed April 28, 2005.

AWA - Default.

Colleen Carroll, for Complainant.
Respondent, Pro se.
Decision and Order issued by Peter M. Davenport, Administrative Law Judge.

This action was commenced on August 19, 2004 by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, under the Animal Welfare Act, as amended (7 U.S.C. § 2131, *et seq.*, hereafter the "Act"), by a complaint alleging that the Respondents willfully violated the Act.

Service was effected upon The Respondent John Bryan Williams by certified mail on August 25, 2004. Service upon the Respondent Mary Jean Williams was attempted by certified mail, but was returned marked "unclaimed" after which she was served by remailing by regular mail on October 7, 2004. The original attempt at serving the Respondent Deborah Ann Milette by certified mail was unsuccessful and was returned as "undeliverable". After securing a new address, service was effected by certified mail on February 18, 2005.

Each of the Respondents were advised 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. None of the Respondents answered within the time prescribed by the Rules of Practice[1], and the material facts alleged in the complaint are admitted by reason of the Respondent's failure to answer in a timely fashion and are adopted and set forth herein as Findings of Fact.

Findings of Fact

1. Respondent Mary Jean Williams is an individual whose business mailing address is Route 1, Box 67, Ivanhoe, Texas 75447 and who at all times mentioned herein was a dealer as that term is defined in the Act and the Regulations.
2. Respondent John Bryan Williams is an individual whose business mailing address is Route 1, Box 67, Ivanhoe, Texas 75447 and who at all time mentioned herein as a dealer as that term is defined in the Act and the Regulations.
3. Respondent Deborah Ann Milette is an individual whose mailing address is 14 County Home Bridge Road, Warrensburg, New York 12885. At all times mentioned herein, the said respondent was a licensed exhibitor as that term is defined in the Act and the Regulations and held Animal Welfare Act License Number 21-C-2018.
4. The respondents have small businesses. The gravity of the violations alleged in the complaint is great and resulted in the death of a young tiger. The respondents have no record of prior violations.
5. On or about September 27 and 28, 2002, Respondents Mary Jean Williams and John Bryan Williams operated as dealers, as that term is defined in the Act and the Regulations, without obtaining a license from the Secretary to do so, and specifically, said respondents, while unlicensed, transported a young tiger for use in exhibition, from Hennepin, Illinois to Bloomington, Illinois.

[1] The Respondent Deborah Ann Milette did send a letter dated April 9, 2005 apparently after receiving a copy of the Complainant's Motion for Adoption of Proposed Decision in which she denies culpability; however, it was not received within the time prescribed for filing an answer. No good cause was advanced for its untimeliness and the facts alleged in the complaint will be deemed admitted pursuant to Rule 1.136(c).

6. On September 27, 2002, Respondents Mary Jean Williams and John Bryan Williams failed to have an attending veterinarian provide adequate veterinary care to a young tiger, and specifically, although none of the respondents is a veterinarian, the Respondent John Bryan Williams administered a sedative solution provided by the Respondent Deborah Ann Milette to the young tiger, with the approval and acquiescence of the Respondent Mary Jean Williams.
7. On September 27, 2002, Respondents Mary Jean Williams, John Bryan Williams and Deborah Ann Milette failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate personnel, and specifically, personnel capable of handling a tiger safely.
8. On September 28, 2002, Respondents Mary Jean Williams and John Bryan Williams failed to establish and maintain a program of adequate veterinary care that included the use of appropriate methods to prevent and control injuries, specifically lacking any plan to insure that a young tiger could not escape from its travel enclosure or to provide a plan for the animal's safe recapture.
9. On September 28, 2002, Respondents Mary Jean Williams and John Bryan Williams failed to establish and maintain a program of adequate veterinary care that included adequate guidance to personnel involved in the care and use of animals regarding handling, and specifically lacked the ability to adequately care for and handle a young tiger themselves and failed to employ other personnel capable of doing so.
10. On September 28, 2002, Respondents Mary Jean Williams and John Bryan Williams failed to handle animals as expeditiously and carefully as possible in a manner that would not cause trauma, unnecessary discomfort, behavioral stress, or physical harm, specifically allowing a young tiger to exit its travel enclosure and escape into a parking lot of a restaurant, which resulted in local authorities shooting and killing the animal.

Conclusions of Law

1. On September 27 and 28, 2002, Respondents Mary Jean Williams and John Bryan Williams operated as dealers as that term is defined in the Regulations, without obtaining a license from the Secretary to do so, in willful violation of 9 CFR §2.1(a)(1), specifically transporting a young tiger for use in exhibition from Hennepin, Illinois to Bloomington, Illinois.
2. On September 27, 2002, Respondents Mary Jean Williams, John Bryan Williams and Deborah Ann Milette failed to have an attending veterinarian provide adequate veterinary care to animals or to handle animals as expeditiously as possible in a manner that would not cause unnecessary discomfort, behavioral stress or physical harm, specifically, although none of the respondents is a veterinarian, John Bryan Williams administered a sedative solution provided by the Respondent Deborah Ann Milette to a young tiger with the approval and acquiescence of the Respondent Mary Jean Williams in willful violation of 9 CFR §2.131(a)(1) and 2.40(a).
3. On September 27, 2002, Respondents Mary Jean Williams and John Bryan Williams failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate personnel capable of safely handling a young tiger in willful violation of 9 CFR § 2.40(b).
4. On September 28, 2002, Respondents Mary Jean Williams and John Bryan Williams failed to establish and maintain a program of adequate veterinary care that included the use of appropriate methods to prevent and control injuries, specifically lacking plans to prevent a young tiger from escaping its travel enclosure, or plans to provide for the animals safe recapture in willful violation of 9 CFR § 2.40(b)(2).
5. On September 28, 2002, Respondents Mary Jean Williams and John Bryan Williams failed to establish and maintain a program of adequate veterinary care that included adequate guidance to personnel involved in the care and use of animals regarding handling, specifically lacking the ability to adequately care for and handle a young tiger themselves and failing to employ other personnel capable of doing so, in willful violation of 9 CFR § 2.40(b)(4).
6. On September 28, 2002, Respondents Mary Jean Williams and John Bryan Williams failed to handle a young tiger as expeditiously and

carefully as possible in a manner that would not cause trauma, unnecessary discomfort, behavioral stress or physical harm, specifically allowing a young tiger to exit its transport enclosure and escape into a parking lot of a restaurant, resulting in local authorities shooting and killing the animal, in willful violation of 9 CFR § 2.131(a)(1).

Order

1. The respondents, their agents and employees, successors and assigns, directly or through any corporate or other device, shall **CEASE** and **DESIST** from violating the Act and the Regulations and Standards.
2. Respondent Mary Jean Williams is assessed a civil penalty of Five Thousand Five Hundred Dollars ($5,500.00), to be paid by certified check or money order made payable to the Treasurer of the United States within sixty (60) days of entry of this Order.
3. Respondent John Bryan Williams is assessed a civil penalty of Five Thousand Five Hundred Dollars ($5,500.00), to be paid by certified check or money order made payable to the Treasurer of the United States within sixty (60) days of entry of this Order.
4. Respondent Deborah Ann Milette's Animal Welfare Act License (No. 21-C-0218) is hereby revoked.

The provisions of this Order shall become effective on the first day after this Decision becomes final. The Decision becomes final without further proceedings 35 days after service as provided in § 1.142 and 1.145 of the Rules of Practice.

Copies of this Decision and Order shall be served on the parties by the Hearing Clerk.

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In re: RICHARD MIELKE, AN INDIVIDUAL; KAYE MIELKE, AN INDIVIDUAL; AND MIELKE'S PEKE PATCH, AN UNINCORPORATED ASSOCIATION.
AWA Docket No. 05-0006.
Decision and Order as to Richard and Kaye Mielke.
Filed May 10, 2005.

AWA - Default.

Bernadette Juarez, for Complainant.
Respondents, Pro se.
Decision and Order issued by Jill S. Clifton, Administrative Law Judge.

[1] This proceeding was instituted under the Animal Welfare Act ("Act"), as amended (7 U.S.C. § 2131 *et seq.*), by a complaint filed on December 2, 2004, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture (hereinafter frequently "APHIS"), alleging that the respondents willfully violated the Act and the regulations and standards issued thereunder ("Regulations" and "Standards", 9 C.F.R. § 1.1 *et seq.*).

[2] On December 3, 2004, the Hearing Clerk sent to respondents, by certified mail, return receipt requested, copies of the complaint, Rules of Practice and a service letter. Respondents were informed in the accompanying letter of service that an answer to the complaint 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.

[3] Respondent Richard Mielke received the complaint on December 11, 2004,[1] and respondent Kaye Mielke received the complaint on December 10, 2004.[2] Respondents Richard Mielke and Kaye Mielke failed to file answers. Thus, the material facts alleged in the complaint, which are admitted by said respondents' default, are adopted and set forth herein as Findings of Fact. This Decision and Order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139.

[4] APHIS filed a Motion for Adoption of Proposed Decision and Order as to Richard Mielke and Kaye Mielke on January 14, 2005, identifying APHIS's request for "the maximum possible civil penalty, $30,800."

[1] *See* Domestic Return Receipt for Article Number 7003 2260 0005 5721 3472.

[2] *See* Domestic Return Receipt for Article Number 7003 2260 0005 5721 3489.

The Motion was served on Richard Mielke and on Kaye Mielke on January 24, 2005. Respondents Richard Mielke and Kaye Mielke failed to respond to APHIS's Motion.

[5] APHIS's Motion addresses the Act's guidance for appropriateness of the civil penalty amount. 7 U.S.C. § 2149(b). APHIS states that the size of the business of the person involved is small. APHIS states that the gravity of the violation is serious, because respondents have continued to operate as dealers after their Animal Welfare Act license was revoked. APHIS does not specifically address the good faith of respondents. APHIS shows the history of previous violations to have been those identified in the Consent Decision in *In re Richard Mielke, an individual; Kaye Mielke, an individual; and Mielke's Peke Patch, an unincorporated association*, 62 *Agric. Dec.* 726 (Dec. 3, 2003) (AWA Docket No. 03-0019) (finding at least 21 violations of the Act and Regulations, revoking respondents' Animal Welfare Act license, and assessing a civil penalty of $6,875, of which $5,875 was held in abeyance).

[6] Respondent Kaye Mielke filed a letter, postmarked March 14, 2005 and received by the Hearing Clerk on March 22, 2205, which was too late to be an answer and too late to be a response to APHIS's Motion for a default decision. APHIS filed a Motion to Strike the letter, on March 30, 2005. The Motion is denied. Perhaps APHIS will respond to the questions respondent Kaye Mielke asks.

Findings of Fact

[7] Respondent Richard Mielke is an individual whose mailing address is 4799 Tyrone Road, Houston, Missouri 65483.

[8] Respondent Kaye Mielke is an individual whose mailing address is 4799 Tyrone Road, Houston, Missouri 65483.

[9] On June 5, 2004, respondent Richard Mielke operated as a dealer as defined in the Act and the Regulations, without being licensed, and specifically, respondent Richard Mielke sold one male Pekingese, in commerce, through Southwest Auction Service to Phyllis Fish (Animal

Welfare Act license number 73-A-1594) of Duncan, Oklahoma. The sale of each dog constitutes a separate violation.

[10] On June 5, 2004, respondent Kaye Mielke operated as a dealer as defined in the Act and the Regulations, without being licensed, and specifically, respondent Kaye Mielke sold one male Pekingese, in commerce, through Southwest Auction Service to Hazel Gilpin (Animal Welfare Act license number 73-A-1979) of Big Cabin, Oklahoma. The sale of each dog constitutes a separate violation.

[11] On June 5, 2004, respondent Kaye Mielke operated as a dealer as defined in the Act and the Regulations, without being licensed, and specifically, respondent Kaye Mielke sold one male Pekingese, in commerce, through Southwest Auction Service to Michel Lasiter (Animal Welfare Act license number 43-A-4044) of Pierce City, Missouri. The sale of each dog constitutes a separate violation.

[12] On June 5, 2004, respondent Kaye Mielke operated as a dealer as defined in the Act and the Regulations, without being licensed, and specifically, respondent Kaye Mielke sold one male Pekingese, in commerce, through Southwest Auction Service to Glenn Manning (Animal Welfare Act license number 42-A-0775) of Waukon, Iowa. The sale of each dog constitutes a separate violation.

[13] On June 5, 2004, respondent Kaye Mielke operated as a dealer as defined in the Act and the Regulations, without being licensed, and specifically, respondent Kaye Mielke sold three female Pekingese, in commerce, through Southwest Auction Service to Steve Lewis (Animal Welfare Act license number 31-B-0113) of Newark. The sale of each dog constitutes a separate violation.

[14] Respondents Richard Mielke and Kaye Mielke were respondents in *In re Richard Mielke, an individual; Kaye Mielke, an individual; and Mielke's Peke Patch, an unincorporated association*, 62 *Agric. Dec.* 726 (Dec. 3, 2003) (AWA Docket No. 03-0019) (Consent Decision) (finding at least 21 violations of the Act and Regulations, revoking respondents' Animal Welfare Act license, assessing civil penalty of $6,875, of which $5,875 was held in abeyance provided that respondents complied with the provisions of the Act and the Regulations during an 18 month "probation period," and ordering respondents to cease and desist from future violations of the Act and Regulations and Standards).

[15] On or about June 5, 2004, respondents Richard Mielke and Kaye Mielke knowingly failed to obey the cease and desist order contained in the Consent Decision described above in paragraph [14].

Conclusions

[16] The Secretary has jurisdiction in this matter.

[17] On June 5, 2004, respondent Richard Mielke operated as a dealer as defined in the Act and the Regulations, without being licensed, in willful violation of section 2134 of the Act and section 2.1(a)(1) of the Regulations, and specifically, respondent Richard Mielke sold one male Pekingese, in commerce, through Southwest Auction Service to Phyllis Fish (Animal Welfare Act license number 73-A-1594) of Duncan, Oklahoma. The sale of each dog constitutes a separate violation. 7 U.S.C. §§ 2134, 2149, 9 C.F.R. § 2.1(a)(1).

[18] On June 5, 2004, respondent Kaye Mielke operated as a dealer as defined in the Act and the Regulations, without being licensed, in willful violation of section 2134 of the Act and section 2.1(a)(1) of the Regulations, and specifically, respondent Kaye Mielke sold one male Pekingese, in commerce, through Southwest Auction Service to Hazel Gilpin (Animal Welfare Act license number 73-A-1979) of Big Cabin, Oklahoma. The sale of each dog constitutes a separate violation. 7 U.S.C. §§ 2134, 2149, 9 C.F.R. § 2.1(a)(1).

[19] On June 5, 2004, respondent Kaye Mielke operated as a dealer as defined in the Act and the Regulations, without being licensed, in willful violation of section 2134 of the Act and section 2.1(a)(1) of the Regulations, and specifically, respondent Kaye Mielke sold one male Pekingese, in commerce, through Southwest Auction Service to Michel Lasiter (Animal Welfare Act license number 43-A-4044) of Pierce City, Missouri. The sale of each dog constitutes a separate violation. 7 U.S.C. §§ 2134, 2149, 9 C.F.R. § 2.1(a)(1).

[20] On June 5, 2004, respondent Kaye Mielke operated as a dealer as defined in the Act and the Regulations, without being licensed, in willful violation of section 2134 of the Act and section 2.1(a)(1) of the Regulations, and specifically, respondent Kaye Mielke sold one male

Pekingese, in commerce, through Southwest Auction Service to Glenn Manning (Animal Welfare Act license number 42-A-0775) of Waukon, Iowa. The sale of each dog constitutes a separate violation. 7 U.S.C. §§ 2134, 2149, 9 C.F.R. § 2.1(a)(1).

[21] On June 5, 2004, respondent Kaye Mielke operated as a dealer as defined in the Act and the Regulations, without being licensed, in willful violation of section 2134 of the Act and section 2.1(a)(1) of the Regulations, and specifically, respondent Kaye Mielke sold three female Pekingese, in commerce, through Southwest Auction Service to Steve Lewis (Animal Welfare Act license number 31-B-0113) of Newark. The sale of each dog constitutes a separate violation. 7 U.S.C. §§ 2134, 2149, 9 C.F.R. § 2.1(a)(1).

[22] On or about June 5, 2004, respondents Richard Mielke and Kaye Mielke knowingly failed to obey the cease and desist order made by the Secretary under section 2149(b) of the Act (7 U.S.C. § 2149(b)), in *In re Richard Mielke, and individual, Kaye Mielke, and individual; and Mielke's Peke Patch, an unincorporated association*, 62 *Agric. Dec.* 726 (Dec. 3, 2003) (AWA Docket No. 03-0019) (Consent Decision).

[23] The cease and desist order is paragraph one of the "Order" found on pages 10-11 of the Consent Decision and states: "Respondents, their agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the Regulations and Standards issued thereunder."

[24] The maximum civil penalty per offense for knowing failure to obey a cease and desist order is $1,650. 7 U.S.C. § 2149(b), 7 C.F.R. § 3.91(a), (b)(2)(v).

[25] The maximum civil penalty per violation of the Act is $2,750. 7 U.S.C. § 2149(b), 7 C.F.R. § 3.91(a), (b)(2)(v).

[26] The Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations. 7 U.S.C. § 2149(b).

[27] Maximum civil penalties are not warranted by the circumstances here. 7 U.S.C. § 2149(b).

[28] Adding the maximum civil penalty for each violation of the Act to the maximum civil penalty for failure to obey a cease and desist order

for the very same violation is not warranted by the circumstances here. 7 U.S.C. § 2149(b).

Order

[29] Respondents Richard Mielke and Kaye Mielke, their agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the Regulations and Standards, and, in particular, shall cease and desist from engaged in activity for which an Animal Welfare Act license is required.

[30] Respondents Richard Mielke and Kaye Mielke are jointly and severally assessed the **$5,875** civil penalty that was held in abeyance in AWA Docket No. 03-0019 (see paragraph [14]), to be paid as described below in paragraph [33].

[31] Respondent Richard Mielke is assessed an **additional $500** civil penalty, for his sale of one dog on June 5, 2004, a male Pekingese, to be paid as described below in paragraph [33].

[32] Respondent Kaye Mielke is assessed an **additional $3,000** civil penalty, for her sale of six dogs on June 5, 2004, three male Pekingese and three female Pekingese, to be paid as described below in paragraph [33].

[33] The **$9,375 total** in civil penalty shall be paid by cashier's check(s) or certified check(s) or money order(s) made payable to order of the **Treasurer of the United States** and forwarded within 30 days from the effective date of this Order by a commercial carrier such as FedEx or

UPS to: Bernadette R. Juarez, Esq.
United States Department of Agriculture
Office of the General Counsel, Marketing Division
Room 2343-South Building
1400 Independence Avenue, SW
Washington, DC 20250-1417

Respondents shall state on their cashier's checks, certified checks or money orders that the payment is in reference to **AWA Docket No. 05-0006**.

[34] This Order shall be effective on the first day after this Decision and Order becomes final. This Decision and Order shall have the same force and effect as if entered after a full hearing and shall be final without further proceedings 35 days after service unless an appeal to the Judicial Officer is filed within 30 days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145, see attached Appendix A).

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

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In re: DEBRA D. TETER, AN INDIVIDUAL d/b/a LUV ME KENNEL; and, MELISSA D. ADAMS, a/k/a MELISSA TETER, AN INDIVIDUAL.
d/b/a LUV ME KENNEL.
AWA Docket No. 05-0008.
Decision and Order as to Debra D. Teter and Melissa D. Adams By Reasons of Admission of Facts.
Filed May 18, 2005.

AWA – Default.

Bernadette Juarez, for Complainant.
Respondent, Pro Se.
Decision and Order by Administrative Law Judge Peter M. Davenport.

This proceeding was instituted under the Animal Welfare Act ("Act"), as amended (7 U.S.C. § 2131 *et seq.*), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondents willfully violated the Act and the regulations and standards ("Regulations" and "Standards") issued thereunder (9 C.F.R. § 1.1 *et seq.*).

On January 11, 2005, the Hearing Clerk sent respondents, by certified

mail, return receipt, copies of the complaint and the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary (7 C.F.R.§ 1.130 *et seq*.). Respondents were informed in the accompanying letter of service that an answer to the complaint 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. Respondents actually received the complaint on January 31, 2005. [1]

Respondents failed to file an answer within the time prescribed in the Rules of Practice, thus, the material facts alleged in the complaint, which are admitted by said respondent's default, are adopted and set forth herein as Findings of Fact. This Decision and Order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139.

Findings of Fact

1. Respondent Debra D. Teter is an individual, doing business as Luv Me Kennel, a partnership or unincorporated association, and whose mailing address Post Office Box 288, Shelbyville, Missouri 63469. At all times herein, said respondent was operating as a dealer as that term is defined in the Act and the Regulations and held Animal Welfare Act license number 43-A-3780, issued to "Debra & Melissa Teter DBA: Luv Me Kennel" On October 29, 2003, said respondent voluntarily terminated Animal Welfare Act license number 43-A-3780.

2. Respondent Melissa D. Adams, also known as Melissa Teter, is an individual, doing business as Luv Me Kennel, a partnership or unincorporated association, and whose mailing address Post Office Box 288, Shelbyville, Missouri 63469. At all times herein, said respondent was operating as a dealer as that term is defined in the Act and the Regulations and held Animal Welfare Act license number 43-A-3780, issued to "Debra & Melissa Teter DBA: Luv Me Kennel" On October

[1] *See* Domestic Return Receipt for Article Number 7003 2260 0005 5721 3632 (respondent Debra Teter); Domestic Return Receipt for Article Number 7003 2260 0005 5721 3649 (respondent Melissa Adams).

29, 2003, said respondent voluntarily terminated Animal Welfare Act license number 43-A-3780.

3. APHIS personnel conducted inspections of respondents' facilities, records and animals for the purpose of determining respondents' compliance with the Act and the Regulations and Standards on June 4, 2003 (120 adult, 4 young animals inspected), June 6, 2003, June 9, 2003 (120 adult, 4 young animals inspected), July 21, 2003 (137 adult, 13 young animals inspected), August 26, 2003 (133 adult animals inspected), September 9, 2003 (125 adult, 17 young animals inspected), October 2, 2003.

4. Respondents violated the attending veterinarian and veterinary care regulations (9 C.F.R. § 2.40), by failing have their attending veterinarian provide adequate veterinary care to their animals that included the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and specifically:

a. On or about June 4, 2003, through on or about October 2, 2003. Respondents failed to prevent, control, diagnose, and treat ectoparasites, blood parasites and intestinal parasites in dogs. (9 C.F.R.§ 2.40(a),(b)(2)).

b. June 4, 2003. Respondents failed to obtain veterinary treatment for thirty dogs, including: four dogs (Cocker Spaniels and Jack Russell Terriers) that had heavily matted that were nearly matted shut; twenty dogs that had extreme body matts that restricted the animals' normal movement; two dogs that exhibited severe hair loss over a third of their bodies; two dogs that had very loose, discolored stools; one dog that had a severed leg; and, one dog found dead during the inspection that was later diagnosed as suffering from, among other things, E. coli, Parvo virus, and bilateral conjunctivitis. (9 C.F.R. § 2.40(a),(b)(2)).

c. June 6, 2003. Respondents failed to obtain veterinary treatment for no fewer than sixteen dogs, including: seven dogs that had greenish, eye discharge; six dogs that had extreme body matts that restricted the animals' normal movement; two dogs that had severe hair loss over a third of their bodies; several dogs that had very loose, discolored stools; one dog that had a severed leg; and, one Cocker Spaniel that exhibited difficulty defecating or urinating. (9 C.F.R. § 2.40(a),(b)(2)).

d. June 9, 2003. Respondents failed to obtain veterinary treatment

for three dogs with heavily matted eyes such that the eyes were nearly matted shut, dogs with extreme body matts such that restricted normal movement, and one dog housed in the trailer (top run, west side) that appeared lethargic. (9 C.F.R. § 2.40(a),(b)(2)).

e. July 21, 2003. Respondents failed to obtain veterinary treatment for one dog (outdoor facility) that had a sore on its head and very cloudy eyes and one dog (trailer) that appeared to have a fractured leg. (9 C.F.R. § 2.40(a),(b)(2)).

f. On or about July 3, 2003, through on or about September 2, 2003. Respondents failed to obtain veterinary treatment for a Miniature Pinscher with a repeat, vaginal prolapse. (9 C.F.R. § 2.40(a),(b)(2)).

g. August 26, 2003. Respondents failed to obtain veterinary treatment for one small dog (#064053843) that had open wounds on its head and matted eyes, a Bichon Frise (#063631577) that had open wounds on both ears and shoulder area, and a very thin hair coat, and four Bichon Frise (pen #1, trailer) that had sores on their ears. (9 C.F.R. § 2.40(a),(b)(2)).

h. On or about July 3, 2003, through on or about September 4, 2003. Respondents failed to obtain veterinary treatment for Cocker Spaniel that had wounds on her ears, matted eyes, and an open, draining tumor on her belly that dragged on the ground. (9 C.F.R. § 2.40(a), (b)(2)).

i. On or about August 26, 2003, through on or about September 6, 2003. Respondents failed to obtain veterinary treatment for Cocker Spaniel (#063638559) that had open wounds on both ears and matted eyes. (9 C.F.R. § 2.40(a),(b)(2)).

j. September 9, 2003. Respondents failed to obtain veterinary treatment for a Shiba Inu (#051272082) that exhibited difficulty bearing weight on its right foreleg and an adult Bichon Frise (upper pen #15, indoor) that had exposed wounds on the right shoulder. (9 C.F.R. § 2.40(a),(b)(2)).

k. On or about September 9, 2003, through on or about October 2, 2003. Respondents failed to obtain veterinary treatment for: four adult Labrador Retrievers (second outdoor enclosure, westside) that had loose, tan-color stools; five adult Siberian Huskies (first outdoor enclosure, west side) that had loose, tan-color stools; a Bichon Frise (#063631577)

that had open wounds and tissue damage on both ears and hair loss on the right flank; an adult Bichon Frise (#063677262) that had hair loss on the left rear leg and caudal torso area; and a blond-color Cocker Spaniel (lower pen #15, indoor) that had a heavily matted left eye that were nearly swollen shut with cloudy exudate around and in the eye. (9 C.F.R.§ 2.40(a),(b)(2)).

l. October 2, 2003. Respondents failed to obtain veterinary treatment for a female Pug (garage) that appeared thin, weak, and was unstable on her right side and a Westie (trailer) with an open wound on its right front leg. (9 C.F.R. § 2.40(a),(b)(2)).

5. Respondents violated the attending veterinarian and veterinary care regulations (9 C.F.R. § 2.40) by failing to establish and maintain programs of adequate veterinary care that included daily observation of all animals to assess their health and well-being, and specifically:

a. June 4, 2003. Respondents failed to observe and record accurate information related to thirty-four dogs, including four dogs (Cocker Spaniels and Jack Russell Terriers) that had heavily matted eyes, twenty dogs that had extreme body matts, two dogs that exhibited severe hair loss, two dogs that had very loose, discolored stools, one dog whose right rear foot became severed after being wrapped in wire, and, five dogs found dead during the inspection, and were, therefore, unable to convey timely and accurate information concerning the dogs' health, behavior, and well-being to their attending veterinarian. (9 C.F.R. § 2.40(b)(3)).

b. June 6, 2003. Respondents failed to observe and record accurate information related to no fewer than sixteen dogs, including seven dogs that had greenish, eye discharge, six dogs that had extreme body matts that restricted the animals' normal movement, two dogs that exhibited severe hair loss over a third of their bodies, several dogs that had very loose, discolored stools, one dog with a severed leg, and, one Cocker Spaniel that exhibited difficulty defecating or urinating, and were, therefore, unable to convey timely and accurate information concerning the dogs' health, behavior, and well-being to their attending veterinarian. (9 C.F.R. § 2.40(b)(3)).

c. June 9, 2003. Respondents failed to observe and record accurate information related to three dogs that had heavily matted eyes, dogs with

extreme body matts, and one dog that appeared lethargic, and were, therefore, unable to convey timely and accurate information concerning the dogs' health, behavior, and well-being to their attending veterinarian. (9 C.F.R. § 2.40(b)(3)).

d. July 21, 2003. Respondents failed to observe and record accurate information related to one dog that had a sore on its head and very cloudy eyes, and one dog with a fractured leg and were, therefore, unable to convey timely and accurate information concerning the dogs' health, behavior, and well-being to their attending veterinarian. (9 C.F.R. § 2.40(b)(3)).

e. On or about July 21, 2003, through on or about September 2, 2003. Respondents failed to observe and record accurate information related to Miniature Pinscher that had a vaginal prolapse and were, therefore, unable to convey timely and accurate information concerning the dog's health, behavior, and well-being to their attending veterinarian. (9 C.F.R. § 2.40(b)(3)).

f. August 26, 2003. Respondents failed to observe and record accurate information related to one small dog (#064053843) that had open wounds on its head and matted eyes, a Bichon Frise (#063631577) that had open wounds on both ears and shoulder and a very thin hair coat, and four Bichon Frise (pen #1, trailer) that had sores on their ears, and were, therefore, unable to convey timely and accurate information concerning the dogs' health, behavior, and well-being to their attending veterinarian. (9 C.F.R. § 2.40(b)(3)).

g. On or about August 26, 2003, through on or about September 4, 2003. Respondents failed to observe and record accurate information related to a Cocker Spaniel that had wounds on her ears, matted eyes, and an open, draining tumor on her belly that dragged on the ground, and were, therefore, unable to convey timely and accurate information concerning the dog's health, behavior, and well-being to their attending veterinarian. (9 C.F.R. § 2.40(b)(3)).

h. On or about August 26, 2003, through on or about September 6, 2003. Respondents failed to observe and record accurate information related to a Cocker Spaniel (#063638559) that had open wounds on both ears and matted eyes, and were, therefore, unable to convey timely and

accurate information concerning the dog's health, behavior, and well-being to their attending veterinarian. (9 C.F.R. § 2.40(b)(3)).

i. September 9, 2003. Respondents failed to observe and record accurate information related to a Shiba Inu (#051272082) that exhibited difficulty bearing weight on its right foreleg and an adult Bichon Frise (upper pen #15, indoor) that had exposed wounds on the right shoulder, and were, therefore, unable to convey timely and accurate information concerning the dogs' health, behavior, and well-being to their attending veterinarian. (9 C.F.R. § 2.40(b)(3)).

j. On September 9, 2003, through on or about October 2, 2003. Respondents failed to observe and record accurate information related to four adult Labrador Retrievers (outdoor, westside) that had loose, tan-color stools, five adult Siberian Huskies (outdoor) that had loose, tan-color stools, a Bichon Frise (#063631577) that had open wounds and tissue damage on both ears and hair loss on the right flank, an adult Bichon Frise (#063677262) that had hair loss on the left rear leg an caudal torso area, a blond-color Cocker Spaniel (lower pen #15, indoor) that had a heavily matted left eye that was nearly swollen shut, with cloudy exudate around and in the eye, and were, therefore, unable to convey timely and accurate information concerning the dogs' health, behavior, and well-being to their attending veterinarian. (9 C.F.R. § 2.40(b)(3)).

k. October 2, 2003. Respondents failed to observe and record accurate information related to a female Pug (garage) that appeared thin, weak, and was unstable on her right side and a Westie (trailer) that had an open wound on its right front leg, and were, therefore, unable to convey timely and accurate information concerning the dogs' health, behavior, and well-being to their attending veterinarian. (9 C.F.R. § 2.40(b)(3)).

6. On or about June 4, 2003, through on or about August 26, 2003, respondents violated section 2.50(a) of the Regulations by failing to identify all live dogs and cats on the premises, and specifically, failed to identify adult dogs and weaned puppies. (9 C.F.R. § 2.50(a)).

7. On September 9, 2003, respondents failed to make, keep, and maintain records that fully and correctly disclose required information concerning animals in the possession of respondent, and specifically,

failed to maintain any records in connection with the disposition of a red Cocker Spaniel (#063638559), a blond Cocker Spaniel (with a ruptured tumor on her stomach), and a Miniature Pinscher (#225963560D). 9 C.F.R. § 2.75(a)(1).

8. On September 9, 2003, respondents failed to use Record of Acquisition of Dogs (APHIS Form 7005) and Record of Disposition of Dogs (APHIS Form 7006) to make keep, and maintain information required by the Regulations, and specifically, failed to maintain records in connection with the disposition of a red Cocker Spaniel (#063638559), a blond Cocker Spaniel (with a ruptured tumor on her stomach), and a Miniature Pinscher (#225963560D). 9 C.F.R. § 2.75(a)(2).

9. Respondents violated section 2.100(a) of the Regulations and Standards by failing to meet the minimum facilities and operating standards for dogs and cats (9 C.F.R. §§ 3.1-3.19), as follows:

a. On or about June 4, 2003, through on or about June 9, 2003, respondents failed to design and construction housing facilities for dogs so that they are structurally sound and kept in good repair to protect the animals from injury, and specifically, housed dogs in structurally unsound enclosures that previously collapsed injuring or killing several dogs. (9 C.F.R. §§ 2.100(a), 3.1(a)).

b. Respondents failed to provide for regular and frequent collection, removal, and disposal of animal and food wastes, bedding, debris, garbage, water other fluids and wastes, and dead animals in a manner that minimizes contamination and disease risks and failed to equip housing facilities with disposal facilities and drainage systems that are constructed and operated so that animal waste and water are rapidly eliminated and animals stay dry, and specifically:

i. June 4, 2003. Respondents failed to remove decomposing dog carcasses including four carcasses in an open trash can and pet taxi and another carcass on the ground. (9 C.F.R. §§ 2.100(a), 3.1(f)).

ii. June 4, 2003. Respondents housed dogs in primary enclosures with excessive standing water, mud, or both, preventing the dogs from being clean and dry. (9 C.F.R. §§ 2.100(a), 3.1(f)).

iii. June 6, 2003. Respondents failed to remove three decaying dog

carcasses located approximately 10 yards from the animal area. (9 C.F.R. §§ 2.100(a), 3.1(f)).

iv. June 6, 2003. Respondents housed all outdoor dogs in primary enclosures with excessive standing water, mud, or both, preventing the dogs from being clean and dry. (9 C.F.R. §§ 2.100(a), 3.1(f)).

c. On October 2, 2003, respondents failed to sufficiently heat indoor housing facilities to protect dogs from temperature or humidity extremes and to provide for their health and well-being, and specifically, failed to provide heat or bedding to all dogs housed in the trailer and seven adult dogs and nine puppies housed in the garage when the overnight and early morning temperatures were in the thirties. (9 C.F.R. §§ 2.100(a), 3.2(a)).

d. Respondents failed to provide dogs housed outdoors with adequate protection from the elements, and specifically:

i. June 4, 2003. Respondents housed approximately forty dogs in outdoor enclosures with shelters that lacked wind and rain breaks and forty other dogs completely lacked shelter from the elements. (9 C.F.R. §§ 2.100(a), 3.4(b)(3)).

ii. June 6, 2003. Respondents housed breeds of dogs, without express approval from the attending veterinarian, in outdoor facilities that could not tolerate the prevalent temperatures with out stress or discomfort (such as short-haired breeds in cold climates), and specifically, housed recently sheared dogs in outdoor enclosures with forecasted nighttime temperatures in the forties; the dogs appeared wet, cold, and shivered. (9 C.F.R. §§ 2.100(a), 3.4(a)(ii)).

iii. June 6, 2003. Respondents housed approximately thirty dogs in outdoor enclosures that lacked adequate shelter, and in some instances completely lacked shelter from the rain; the rain-soaked dogs shivered and appeared cold. (9 C.F.R. §§ 2.100(a), 3.4(b)).

iv. June 6, 2003. Respondents housed approximately forty dogs in outdoor enclosures with shelters that lacked wind and rain breaks. (9 C.F.R. §§ 2.100(a), 3.4(b)(3)).

v. June 9, 2003. Respondents failed to provide eleven dogs, housed in outdoor enclosures, with shelter that allowed each animal in the structure to sit, stand, lie in a normal manner, and turn about freely. (9 C.F.R. §§ 2.100(a), 3.4(b)).

vi. July 21, 2003. Respondents housed seven dogs in outdoor enclosures with shelters that lacked wind and rain breaks. (9 C.F.R. §§ 2.100(a), 3.4(b)(3)).

vii. July 21, 2003. Respondents failed to provide ten dogs, housed in outdoor enclosures, with shelter that allowed each animal in the structure to sit, stand, lie in a normal manner, and turn about freely. (9 C.F.R. §§ 2.100(a), 3.4(b)).

viii. August 26, 2003. Respondents housed seven dogs in outdoor enclosures with shelters that lacked wind and rain breaks. (9 C.F.R. §§ 2.100(a), 3.4(b)(3)).

ix. On or about September 9, 2003, through on or about October 2, 2003. Respondents housed twelve dogs in outdoor enclosures with shelters that lacked wind and rain breaks. (9 C.F.R.§§ 2.100(a), 3.4(b)(3)).

x. On or about September 9, 2003, through on or about October 2, 2003. Respondents failed to provide five Siberian Huskies (outdoor) and eight adult Cocker Spaniels (third outdoor enclosure, westside), with shelter that allowed each animal in the structure to sit, stand, lie in a normal manner, and turn about freely. (9 C.F.R. §§ 2.100(a), 3.4(b)).

xi. September 9, 2003. Respondents failed to provide four adult dogs and eleven puppies (garage), housed in outdoor enclosures, with shelter that allowed each animal in the structure to sit, stand, lie in a normal manner, and turn about freely. (9 C.F.R. §§ 2.100(a), 3.4(b)).

xii. October 2, 2003. Respondents failed to provide seven adult dogs and nine puppies (garage), housed in outdoor enclosures, with shelter that allowed each animal in the structure to sit, stand, lie in a normal manner, and turn about freely. (9 C.F.R. §§ 2.100(a), 3.4(b)).

xiii. October 2, 2003. Respondents failed to provide any bedding to the dogs housed outdoors when the overnight and morning temperatures were in the thirties. (9 C.F.R. §§ 2.100(a), 3.4(b)(1),(4)).

e. On August 26, 2003, respondents failed to provide each dog housed in a primary enclosures with the minimal amount of floor space, and specifically, provided 12 square feet of floor space to four Bichon Frise (pen #1, indoors) that measured 26 inches from the tip of nose to the base of the tail and, therefore, required no fewer than 28.48 square

feet of floor space. (9 C.F.R. §§ 2.100(a), 3.6(c)(1)(i)).

f. Respondent failed to construct and maintain primary enclosures with floors that are constructed in a manner that protects the dogs' feet and legs from injury, and that if of mesh or slatted, construction, do not allow the dogs' feet to pass through any openings in the floor, and specifically:

i. September 9, 2003. Respondents housed eleven puppies in an outdoor enclosure with flooring constructed of 1" by 1" coated wire mesh; APHIS officials observed the feet of no fewer than seven puppies pass through the mesh floor. (9 C.F.R. §§ 2.100(a), 3.6(a)(2)(x)).

ii. October 2, 2003. Respondents housed nine puppies in an outdoor enclosure with flooring constructed of 1" by 1" coated wire mesh; APHIS officials observed the feet of no fewer than three puppies pass through the mesh floor. (9 C.F.R. §§ 2.100(a), 3.6(a)(2)(x)).

g. On June 6, 2003, respondents failed to use food receptacles for dogs that minimized contamination by excreta and pests and that protected the food from rain and snow, and specifically, forty dogs housed outdoors had food receptacles that were muddy, had rain-soaked food and, in some instances, contained soggy food floating in dirty water. (9 C.F.R. §§ 2.100(a), 3.9(b)).

h. Respondents failed to offer potable water to dogs as often as necessary to ensure their health and well-being, if potable water is not continually available, in water receptacles that are kept clean and sanitized, and specifically:

i. June 4, 2003. All of the dogs had water contaminated with dirt, green algae, or both. (9 C.F.R. §§ 2.100(a), 3.10).

ii. June 6, 2003. All of the dogs had muddy water and water receptacles. (9 C.F.R. §§ 2.100(a), 3.10).

iii. July 21, 2003. Water receptacles provided to four dogs housed outdoors, were rusty, which prevented sanitization. (9 C.F.R. §§ 2.100(a), 3.10).

i. Respondents failed to remove excreta and food waste from primary enclosures daily, and from under primary enclosures as often as necessary to prevent an excessive accumulation of feces and food waste, to prevent soiling of the dogs contained in the primary enclosures, and to reduce disease hazards, insects, pests and orders, and failed, when

using stream or water to clean the primary enclosure, whether by hosing, flushing, or other methods, to remove dogs unless the enclosure is large enough to ensure the animal will not be harmed, wetted, or distressed in the process, and specifically:

i. June 4, 2003. Excessive feces and waste covered the ground in outdoor enclosures housing dogs and accumulated on grill-type floors and under the enclosures in the trailer housing dogs. (9 C.F.R. §§ 2.100(a), 3.11(a)).

ii. June 6, 2003. A soupy mixture of excessive feces and waste covered the ground in the outdoor enclosures housing dogs, and excessive feces, hair, and waste accumulated on grill-type floors and under the enclosures in the trailer housing dogs, which also smelled of ammonia and fecal matter. (9 C.F.R.§§ 2.100(a), 3.11(a)).

iii. September 9, 2003. Respondents housed four Beagles, eight Cocker Spaniels, four Labrador Retrievers, and five Siberian Huskies in enclosures with excessive accumulations of both formed and loose excreta. (9 C.F.R. §§ 2.100(a), 3.11(a)).

iv. September 9, 2003. Three adult Yorkies and one adult Poodle and her five puppies (indoor enclosures) had wet hair coats as a result of respondents= failure to remove the animals from their enclosures prior to cleaning by hosing, flushing or otherwise. (9 C.F.R. §§ 2.100(a), 3.11(a)).

v. October 2, 2003. Seven adult dogs and nine puppies (garage) had wet hair coats as a result of respondents' failure to remove the animals from their enclosures prior to cleaning by hosing, flushing or otherwise. (9 C.F.R. §§ 2.100(a), 3.11(a)).

vi. October 2, 2003. Respondents failed to remove excessive fecal build-up from the wire stack enclosures in the garage. (9 C.F.R. §§ 2.100(a), 3.11(a)).

j. On June 4, 2004, June 6, 2003, August 26, 2003, September 9, 2003, and October 2, 2003, respondents failed to have enough employees to carry out the level of husbandry practices and care required in the Regulations and Standards. (9 C.F.R. §§ 2.100(a), 3.12.).

Conclusions of Law

1. The Secretary has jurisdiction over this matter.

2. On or about June 4, 2003, through on or about October 2, 2003, June 4, 2003, June 6, 2003, June 9, 2003, July 21, 2003, on or about July 3, 2003, through on or about September 2, 2003, on or about July 3, 2003, through on or about September 4, 2003, August 26, 2003, on or about August 26, 2003, through on or about September 6, 2003, September 9, 2003, on or about September 9, 2003, through on or about October 2, 2003, and October 2, 2003, respondents willfully violation section 2.40(a) and (b)(2) of the Regulations. (9 C.F.R. § 2.40(a),(b)(2)).

3. On June 4, 2003, June 6, 2003, June 9, 2003, July 21, 2003, on or about July 21, 2003, through on or about September 2, 2003, August 26, 2003, on or about August 26, 2003, through on or about September 4, 2003, on or about August 26, 2003, through on or about September 6, 2003, September 9, 2003, and on September 9, 2003, through on or about October 2, 2003, and October 2, 2003, respondents willfully violated section 2.40(b)(3) of the Regulations. (9 C.F.R. § 2.40(b)(3)).

4. On or about June 4, 2003, through on or about August 26, 2003, respondents willfully violated section 2.50(a) of the Regulations. (9 C.F.R. § 2.50(a)).

5. On September 9, 2003, respondents failed comply with section 2.75(a)(1) of the Regulations. (9 C.F.R. § 2.75(a)(1)).

6. On September 9, 2003, respondents failed to comply with section 2.275(a)(2) of the Regulations. (9 C.F.R. § 2.75(a)(2)).

7. Respondents willfully violated section 2.100(a) of the Regulations and Standards by failing to meet the minimum facilities and operating standards for dogs and cats (9 C.F.R. §§ 3.1-3.19), as follows:

a. On or about June 4, 2003, through on or about June 9, 2003, respondents failed comply with section 3.1(a) of the Standards. (9 C.F.R. §§ 2.100(a), 3.1(a)).

b. On June 4, 2003, and June 6, 2003, respondents failed to comply with section 3.1(f) of the Standards. (9 C.F.R. §§ 2.100(a), 3.1(f)).

c. On October 2, 2003, respondents failed to comply with section 3.2(a) of the Standards. (9 C.F.R. §§ 2.100(a), 3.2(a)).

d. On June 4, 2003, June 6, 2003, July 21, 2003, August 26, 2003,

and on or about September 9, 2003, through on or about October 2, 2003, respondents failed to comply with section 3.4(b)(3) of the Standards. (9 C.F.R. §§ 2.100(a), 3.4(b)(3)).

e. On June 6, 2003, respondents failed to comply with section 3.4(a)(ii) of the Standards. (9 C.F.R. §§ 2.100(a), 3.4(a)(ii)).

f. On June 6, 2003, June 9, 2003, July 21, 2003, on or about September 9, 2003, through on or about October 2, 2003, September 9, 2003, and October 2, 2003, respondents failed to comply with section 3.4(b) of the Standards. 9 C.F.R. §§ 2.100(a), 3.4(b).

g. On October 2, 2003, respondents failed to comply with section 3.4(b)(1) and (b)(4) of the Standards. (9 C.F.R. §§ 2.100(a), 3.4(b)(1),(4)).

h. On August 26, 2003, respondents failed to comply with section 3.6(c)(1)(i) of the Standards. (9 C.F.R. §§ 2.100(a), 3.6(c)(1)(i)).

i. On September 9, 2003 and October 2, 2003, respondents failed to comply with section 3.6(a)(2)(x) of the Standards. 9 C.F.R. §§ 2.100(a), 3.6(a)(2)(x).

j. On June 6, 2003, respondents failed to comply with section 3.9(b) of the Standards. 9 C.F.R. §§ 2.100(a), 3.9(b).

k. On June 4, 2003, June 6, 2003, and July 21, 2003, respondents failed to comply with section 3.10 of the Standards. (9 C.F.R. §§ 2.100(a), 3.10).

l. On June 4, 2003, June 6, 2003, September 9, 2003, and October 2, 2003, respondents failed to comply with section 3.11(a) of the Standards. (9 C.F.R.§§ 2.100(a), 3.11(a)).

m. On June 4, 2004, June 6, 2003, August 26, 2003, September 9, 2003, and October 2, 2003, respondents failed to comply with section 3.12 of the Standards. 9 C.F.R. §§ 2.100(a), 3.12.

Order

1. Respondents, their agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the Regulations and Standards.

2. Respondents Debra D. Teter and Melissa D. Adams are jointly

and severally assessed a civil penalty in the amount of $54,065. The civil penalty shall be paid by certified check or money order made payable to the Treasurer of the United States and sent to:

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

Respondents shall state on the certified check or money order that the payment is in reference to AWA Docket No. 05-0008.

3. Respondents' Animal Welfare Act license (Animal Welfare Act license number 43-A-3780) is 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.

FEDERAL CROP INSURANCE ACT

DEFAULT DECISION

In re: DARRELL J. MEIDINGER.
FCIA Docket No. 05-0003.
Decision and Order.
Filed March 21, 2005.

FCIA – Default.

Donald A. Brittenham, Jr., for Complainant.
Respondent, Pro se.
Decision and Order issued by Marc R. Hillson, Administrative Law Judge.

DECISION

Pursuant to section 1.136(c) of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary, the failure of Respondent, Darrell J. Meidinger, to file an answer within the time provided is deemed an admission of the allegations contained in the Complaint. Since the allegations in paragraphs I and II of the Complaint are deemed admitted, it is found that the Respondent has willfully and intentionally provided false or inaccurate information to the Federal Crop Insurance Corporation or to the insurer with respect to an insurance plan or policy under the Federal Crop Insurance Act (Act) (7 U.S.C. 1515(h)).

It is further found that, pursuant to section 515 of the Act (7 U.S.C. 1515), Respondent is disqualified from receiving any monetary or nonmonetary benefit provided under each of the following for a period of four years:

(i) The Federal Crop Insurance Act (7 U.S.C. 1501 *et seq.*).
(ii) The Agricultural Market Transition Act (7 U.S.C. 7201 *et seq.*), including the noninsured crop disaster assistance program under section 196 of that Act (7 U.S.C. 7333).

(iii) The Agricultural Act of 1949 (7 U.S.C. 1421 *et seq.*).
(iv) The Commodity Credit Corporation Charter Act (15 U.S.C. 714 *et seq.*).
(v)_ The Agricultural Adjustment Act of 1938 (7 U.S.C. 1281 *et seq.*).
(vi)_Title XII of the Food Security Act of 1985 (16 U.S.C. 3801 *et seq.*).
(vii)_The Consolidated Farm and Rural Development Act (7 U.S.C. 1921 *et seq.*).
(viii) Any law that provides assistance to a producer of an agricultural commodity affected by a crop loss or a decline in the prices of agricultural commodities;

Therefore, unless this decision is appealed as set out below, the period of ineligibility for all of the programs listed above shall commence on March 21st, 2005 and shall end on March 21st, 2009. As a disqualified individual, you will be reported to the U.S. General Services Administration (GSA) pursuant to 7 C.F.R. § 3017.505. GSA publishes a list of all persons who are determined ineligible in its Excluded Parties List System (EPLS).

It is further found that, pursuant to section 515 of the Act (7 U.S.C. 1515), a civil fine of $2,000 will be imposed upon the Respondent. This civil fine shall be made payable to the Federal Crop Insurance Corporation, Attn: Kathy Santora, Collection Examiner, Fiscal Operations Branch, 6501 Beacon Road, Kansas City, Missouri 64133.

This order shall be effective 35 days after this decision is served upon the Respondent unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145.

[This Decision and Order became final May 24, 2005.-Editor]

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FEDERAL MEAT INSPECTION ACT

DEFAULT DECISION

In re: KIRKLAND'S CUSTOM MEATS AND SLAUGHTER, INC.
PPIA Docket No. 05-0001.
FMIA Docket No. 05-0001.
Default Decision and Order.
Filed May 31, 2005.

FMIA – PPIA – Default.

Tracey Manoff, for Complainant.
Respondent, Pro Se.
Decision and Order filed by Chief Administrative Law Judge Marc.R. Hillson

This is an administrative proceeding to indefinitely withdraw inspection services from Kirkland's Custom Meats and Slaughter, Inc., pursuant to Sections 8 and 21 of the FMIA (21 U.S.C. §§ 608, 621) and Sections 7 and 18 of the PPIA (21 U.S.C. §§ 456, 467(b)) and in accordance with the Rules of Practice in 7 C.F.R.§§ 1.130 *et seq.* and Part 500 of Title 9 of the Code of Federal Regulations (9 C.F.R. Part 500).

This proceeding was instituted by a complaint filed on November 2, 2004 by the Administrator of the Food Safety and Inspection Service, United States Department of Agriculture. The complaint alleged the following:

I.

On June 9, 2004, the Food Safety and Inspection Service (FSIS), U.S. Department of Agriculture, issued to respondent a Notice of Suspension to suspend federal inspection services and withhold the marks of inspection at respondent's establishment for the following reasons:

(a) Respondent failed to operate and maintain its facility in a manner sufficient to prevent the creation of insanitary conditions and to ensure

that the products were not adulterated, as required by Part 416 of Title 9 of the Code of Federal Regulations (9 C.F.R. Part 416). Inspectors observed gross insanitary conditions throughout the facility and in the surrounding area, including but not limited to rodent droppings, live and dead insects, dried blood and product residue present on pans, trays, tubs and barrels, and holes in the walls, doors and ceilings of the facility.

(b) Respondent failed to maintain Sanitation Standard Operating Procedures (SSOPs) in accordance with Part 416 of Title 9 of the Code of Federal Regulations (9 C.F.R. Part 416).

(c) Respondent failed to maintain Hazard Analysis Critical Control Point (HACCP) plans in accordance with Part 417 of Title 9 of the Code of Federal Regulations (9 C.F.R. Part 417).

(d) Respondent failed to complete *E. coli* performance standards testing and failed to maintain performance standards records in violation of 9 C.F.R. § 310.25(a)(2)(v)(A) and 9 C.F.R. § 310.25(a)(4).

(e) Respondent's action in response to the Notice of Suspension failed to adequately address or correct the violations identified in the Notice.

II.

Since 2001, FSIS inspectors have documented numerous instances of non-compliance with USDA regulatory requirements at respondent's establishment as follows:

(a) On August 13, 2001, FSIS issued a Notice of Intended Enforcement (NOIE) Action letter to respondent for its repeated failure to separate federally-inspected and custom-exempt (i.e., not for sale) product in its facility and for having meat product adulterated by fecal matter. On August 22, 2001, respondent submitted a letter to FSIS outlining corrective actions implemented to correct the problems. On September 7, 2001, FSIS issued a Notice of Warning withdrawing the NOIE after verifying that respondent had effectively implemented the corrective actions.

(b) On August 19, 2002, FSIS issued an NOIE to respondent for its failure to meet regulatory requirements in 9 C.F.R. Parts 416 and 417. On August 28, 2002, respondent submitted a response to FSIS that included revised SSOP and HACCP plans for the facility. On November

20, 2002, FSIS issued a Letter of Information to respondent after verifying that respondent had implemented the corrective actions outlined in respondent's response, and did not pursue further regulatory action.

(c) On July 29, 2003, FSIS issued a 30 day reassessment letter to respondent, stating that respondent's SSOP and HACCP plans were inadequate and violated regulatory requirements of 9 C.F.R. Parts 416 and 417. On September 9, 2003, FSIS conducted a reassessment and respondent had implemented the corrective actions to meet the regulatory requirements of 9 C.F.R. Parts 416 and 417.

The respondent failed to file an answer to the complaint within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136 of the Rules of Practice (7 C.F.R. § 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. The failure to file an answer also constitutes a waiver of hearing pursuant to 7 C.F.R. § 1.139. Accordingly, the material allegations in the complaint are adopted and set forth herein as Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding pursuant to 7 C.F.R. § 1.139.

Findings of Fact

1. Kirkland's Custom Meats and Slaughter, Inc., respondent herein, is a corporation organized and existing under the laws of Florida, operating as a very small meat and poultry slaughter and processing facility located at 1101 Bullsbay Highway, Jacksonville, Florida 32220.

2. Respondent Kirkland's Custom Meats and Slaughter, Inc., has been granted inspection services under the FMIA and PPIA under Establishment number 11156/P-11156.

Conclusion

Respondent failed to maintain sanitary conditions or operate in a manner sufficient to prevent adulteration of meat and meat food products, as required by Title I of the Federal Meat Inspection Act

(FMIA) (21 U.S.C. § 601 *et seq*.) and poultry and poultry products, as required by the Poultry Products Inspection Act (PPIA) (21 U.S.C. 451 *et seq*.)and the regulations promulgated thereunder, and as alleged in sections I and II. By reasons of the facts contained in the Findings of Facts, respondent is unfit to engage in any business requiring inspection under the FMIA and PPIA.

Order

Inspection services to Kirkland's Custom Meats and Slaughter, Inc., under the FMIA and PPIA are hereby indefinitely withdrawn.

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PLANT QUARANTINE ACT

DEFAULT DECISIONS

In re: SHANTE MARIE NEWHOUSE.
P.Q. Docket No. 04-0012.
Decision and Order.
Filed March 11, 2005.

PQ - Default.

Tracey Manoff, for Complainant.
Respondent, Pro se.
Decision and Order issued by Peter M. Davenport, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the Plant Protection Act (7 U.S.C. §§ 7701 *et seq*.(Act) and the regulation promulgated thereunder (7 C.F.R. 319.15(a))(regulation), in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq*. and 380.1 *et seq*.

This proceeding was instituted by a complaint filed on May 25, 2004 by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged the following:

On or about March 13, 2002, Shante Marie Newhouse imported approximately six (6) pieces of sugarcane from Jamaica into the United States at Memphis, Tennessee, in violation of 7 C.F.R. § 319.15(a), because the importation of sugarcane is prohibited.

The respondent failed to file an answer to the complaint within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 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. The failure to file an answer also constitutes a waiver of hearing. 7 C.F.R. § 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. § 1.139.

Findings of Fact

1. Shante Marie Newhouse, respondent herein, is an individual whose mailing address is 4821 San Vincente Blvd., No. 1, Los Angeles, California 90019.

2. On or about March 13, 2002, the respondent imported approximately six (6) pieces of sugarcane from Jamaica into the United States at Memphis, Tennessee, in violation of 7 C.F.R. § 319.15(a), because the importation of sugarcane is prohibited.

Conclusion

By reasons of the facts contained in the Findings of Facts above, the respondent has violated 7 C.F.R. § 319.15(a). Therefore, the following Order is issued.

Order

The respondent is hereby assessed a penalty 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

Respondent shall indicate that payment is in reference to P.Q. Docket No. 04-0012.

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. § 1.145.

[This Decision and Order became final April 25, 2005.-Editor]

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In re: ALLIANCE AIRLINES.
P.Q. Docket No. 04-0009.
Decision and Order.
Filed May 2, 2005.

P.Q. - Default.

Krishna Ramaraju, Complainant.
Respondent, Pro se.
Decision and Order issued by Peter M. Davenport, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the notice and inspection requirements of the importation of certain types of restricted fruits and peppers from Jamaica into the United States (7 C.F.R. § 319.56 *et seq*.) hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq*. and 380.1 *et seq*. This proceeding was instituted under the Plant Protection Act (7 U.S.C. §§ 7701-7772)(Act), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service (APHIS) on May 11, 2004, alleging that Alliance Airlines violated the Act and regulations promulgated under the Acts (7 C.F.R. § 319.56 *et seq*.).

The complaint sought civil penalties as authorized by section 424 of the Plant Protection Act (7 U.S.C. § 7734). This complaint specifically alleged that on or about March 25, 2001 Respondent imported, failed to provide advance notice of, and failed to assemble for inspection boxes of restricted callaloo and peppers.

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

Findings of Fact

1. Alliance Airlines, respondent herein, is a business whose mailing

address is 1950 NW 66th Avenue, Bldg. 708, Suite 226, Miami, FL 33126.

2. On or about March 25, 2001, Respondent imported approximately one hundred and nineteen (119) boxes of restricted Callaloo and eighteen (18) boxes of restricted peppers from Jamaica into the United States at Miami, Florida and failed to provide advance notice of their arrival to APHIS, in violation of 7 C.F.R. § 319.56-5(a).

3. On or about March 25, 2001, Respondent, at Miami, Florida, failed to assemble for inspection approximately one hundred and nineteen (119) boxes of restricted Callaloo and eighteen (18) boxes of restricted peppers from Jamaica in their notice of arrival, in violation of 7 C.F.R. § 319.56-6(b).

Conclusion

By reason of the Findings of Fact set forth above, Respondent has violated the Act and the regulations issued under the Act (7 C.F.R. § 319.56 *et seq*). Therefore, the following Order is issued.

Order

Respondent Alliance Airlines is assessed a civil penalty of twenty thousand dollars ($20,000). This civil penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondents shall indicate on the certified check or money order that payment is in reference to P.Q. Docket No. 04-0009.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145 of the Rules of Practice.

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In re: MELE TAUFA.
P.Q. Docket No. 05-0018.
Decision and Order.
Filed May 27, 2005.

P.Q. - Default.

Krishna Ramaraju, for Complainant.
Respondent, Pro se.
Decision and Order issued by Jill S. Clifton, Administrative Law Judge.

[1] This proceeding was instituted under the Plant Protection Act (7 U.S.C. § 7701 *et seq*.) (hereinafter frequently "the Act"), by a complaint filed on January 12, 2005, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture (hereinafter frequently "APHIS"), alleging that respondent Mele Taufa violated the Act and regulations promulgated under the Act.

[2] This is an administrative proceeding for the assessment of a civil penalty as authorized by 7 U.S.C. § 7734, for violations of the regulations governing the movement of fruits, vegetables, and flowers from Hawaii into the continental United States (7 C.F.R. § 318.13 *et seq*., specifically 7 C.F.R. §§ 318.13(b) and 318.13-2(a)); and the movement of plant pests (7 C.F.R. § 330.200) (hereinafter frequently "the regulations").

[3] On January 13, 2005, the Hearing Clerk sent to respondent Mele Taufa, by certified mail, return receipt requested, a copy of the complaint and a copy of the Rules of Practice, together with a cover letter (service letter). Respondent Mele Taufa was informed in the service letter that an answer to the complaint should be filed in accordance with the Rules of Practice within 20 days and that failure to answer any allegation in the complaint would constitute an admission of that allegation.

[4] Respondent Mele Taufa received the complaint, Rules of Practice, and service letter on January 28, 2005, and failed to respond. The Rules of Practice provide 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. 7 C.F.R. §1.136(c). Further, the failure to file an answer constitutes a waiver of hearing. 7 C.F.R. § 1.139.

[5] Accordingly, the material allegations in the complaint, which are admitted by respondent Mele Taufa's default, are adopted and set forth herein as Findings of Fact. This Decision and Order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139. *See* 7 C.F.R. §1.130 *et seq*.; *see also* 7 C.F.R. §380.1 *et seq*.

[6] APHIS filed a Motion for Adoption of Proposed Default Decision and Order on April 6, 2005, identifying APHIS's request for "a civil penalty of five hundred dollars ($500)". The Motion was sent to respondent Mele Taufa by the Hearing Clerk on April 7, 2005, by certified mail, return receipt requested, together with a cover letter.
[7] Respondent Mele Taufa received the Motion and cover letter identified in paragraph [6] on April 16, 2005. Respondent Mele Taufa failed to respond to APHIS's Motion. APHIS's Motion states, among other things, that respondent Mele Taufa's actions undermine the United States Department of Agriculture's efforts to prevent the introduction and/or spread of plant diseases and pests throughout the United States. The U.S. Department of Agriculture spends millions of dollars in efforts to control and eradicate these risks. Hawaii's unique ecosystem and environment contain plant pests and risks which are not present on the mainland and must be contained to avert serious plant pest and other plant health risks. In order to deter respondent and others similarly situated from committing violations of this nature in the future, Complainant (APHIS) believes that assessment of the requested civil penalty of five hundred dollars ($500) against respondent, is warranted and appropriate.

Findings Of Fact

[8] Respondent Mele Taufa is an individual with a mailing address of P.O. Box 10087, Hilo, Hawaii 96721.
[9] On or about March 27, 2003, at Hilo, Hawaii, respondent Mele Taufa offered to a common carrier, specifically FEDEX, approximately 18 Noni fruits, 4 pieces of bark, and 3 root cuttings for shipment from Hawaii to the continental United States, in violation of 7 C.F.R. §§ 318.13(b) and 318.13-2(a).
[10] On or about March 27, 2003, respondent Mele Taufa knowingly attempted to move interstate from Hawaii to Utah via FEDEX a package of plumeria, tuberose, and gardenias, which were all infested with thrips, a plant pest, in violation of 7 C.F.R. § 330.200.

Conclusions

[11] The Secretary of Agriculture has jurisdiction in this matter.
[12] On or about March 27, 2003, respondent Mele Taufa violated the Plant Protection Act (7 U.S.C. § 7701 *et seq.*), and regulations issued under the Act (7 C.F.R. § 318.13 *et seq.*, specifically 7 C.F.R. §§ 318.13(b) and 318.13-2(a); and 7 C.F.R. § 330.200).

[13] A civil penalty in the amount of five hundred dollars ($500) is appropriate, and the following Order is issued.

Order

[14] Respondent Mele Taufa is hereby assessed a civil penalty of five hundred dollars ($500), as authorized by 7 U.S.C. § 7734. Respondent shall pay the $500 by cashier's check or money order or certified check, made payable to the order of the "**Treasurer of the United States**" and forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondent shall indicate that payment is in reference to **P.Q. Docket No. 05-0018**.

[15] This Order shall be effective on the first day after this Decision and Order becomes final. This Decision and Order shall have the same force and effect as if entered after a full hearing and shall be final without further proceedings 35 days after service unless an appeal to the Judicial Officer is filed within 30 days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145, see attached Appendix A).

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

[This Decision and Order became final July 14, 2005.-Editor]

In re: HECTOR PINTO.
P.Q. Docket No. 05-0017.
Decision and Order.
Filed May 31, 2005.

PQ - Default.

Krishna Ramaraju, for Complainant.
Respondent, Pro se.
Decision and Order issued by Marc R. Hillson, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the importation requirements for certain types of restricted fruits from Chile into the United States (7 C.F.R. § 319.56 *et seq*.) hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq*. and 380.1 *et seq*. .

This proceeding was instituted under the Plant Protection Act (7 U.S.C. §§ 7701 *et seq*.) (Act), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service (APHIS) on January 12, 2005, alleging that respondent Hector Pinto violated the Act and regulations promulgated under the Act (7 C.F.R. § 319.56 *et seq*.).

The complaint sought civil penalties as authorized by the Act (7 U.S.C. § 7734) . This complaint specifically alleged that on or about June 7, 2003, at Miami International Airport, Respondent imported into the United States approximately three kilograms of cucurbit fruits and three granadilla fruits from Chile into the United States, in violation of 7 C.F.R. §§ 319.56(b).

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

Findings of Fact

1. Hector Pinto, hereinafter referred to as respondent, is an individual with a mailing address of 342 East 4th Street, Clifton, New Jersey 07015.

2. On or about June 7, 2003, the respondent imported approximately three (3) kilograms of cucurbit fruits and three (3) granadilla fruits into the United States from Chile at Miami International Airport, in violation of 7 C.F.R. § 319.56.

Conclusion

By reason of the Findings of Fact set forth above, the respondent(s) has violated the Act and the regulations issued under the Act (7 C.F.R.

§ 319.56 *et seq*). Therefore, the following Order is issued.

Order

Respondent Hector Pinto is assessed a civil penalty of five hundred dollars ($500). This civil penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondents shall indicate on the certified check or money order that payment is in reference to P.Q. Docket No. 05-0017.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145 of the Rules of Practice.

[This Decision and Order became final July 8, 2005-Editor]

In re: ANA ASO.
P.Q. Docket No. 05-0016.
Decision and Order.
Filed June 2, 2005.

PQ - Default.

Krishna Ramaraju, for Complainant.
Respondent, Pro se.
Decision and Order issued by Peter M. Davenport, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the movement of fruits from Hawaii into the Continental United States (7 C.F.R. 318.13 *et seq*.) hereinafter referred to as the regulations, in accordance with the

Rules of Practice in 7 C.F.R. §§ 1.130 *et seq.* and 7 C.F.R. §§ 380.1 *et seq.*.

This proceeding was instituted under the Plant Protection Act (7 U.S.C. § §7701 *et seq.*)(Act), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service (APHIS) on January 12, 2005, alleging that respondent Ana Aso violated the Act and regulations promulgated under the Acts (7 C.F.R. § 318.13 *et seq.*).

The complaint sought civil penalties as authorized by 7 U.S.C. § 7734. This complaint specifically alleged that on or about July 7, 2003, at Lahaina, Hawaii, the respondent offered to a common carrier, specifically United Parcel Service (UPS), approximately 6 mangoes, 75 lychees, and 3 cooked breadfruits for shipment from Hawaii to the continental United States, in violation of 7 C.F.R. § § 318.13(b) and 318.13-2(a).

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

Findings of Fact

1. Ana Aso, hereinafter referred to as respondent, is an individual with a mailing address of 5152-D Kipulu Place, Lahaina, Hawaii 96761.

2. On or about July 7, 2003, at Lahaina, Hawaii, the respondent offered to a common carrier, specifically United Parcel Service (UPS), approximately 6 mangoes, 75 lychees, and 3 cooked breadfruits for shipment from Hawaii to the continental United States, in violation of 7 C.F.R. §§ 318.13(b) and 318.13-2(a).

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Act and the regulations issued under the Act (7 C.F.R. § 318.13 *et seq*). Therefore, the following Order is issued.

Order

Respondent Ana Aso is assessed a civil penalty of five hundred dollars ($500). This civil penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondents shall indicate on the certified check or money order that payment is in reference to P.Q. Docket No. 05-0016.
This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145 of the Rules of Practice.

[This Decision and Order became final August 15, 2005.-Editor]

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CONSENT DECISIONS

(Not published herein - Editor)

AGRICULTURAL MARKETING AGREEMENT ACT

Schoenfield Melon Farms and Ted Schoenfield. AMA WRPA Docket No. 03-004. 3-23-05.

ANIMAL QUARANTINE ACT

Susan Koch. A.Q. Docket No. 05-0006. 2/10/05.

Suvit Asawapornsnit d/b/a Vegasrace.com. A.Q. Docket No. 05-0001. 3/31/05.

Margi Ruth Foster. A.Q. Docket No. 05-0007. 4/4/05.

Rose Beyene Celin. A.Q. Docket No. 05-0008. 6/22/05.

ANIMAL WELFARE ACT

Rachel Snider. AWA Docket No. 03-0022. 1/7/05.

George E. Kollar and Sandra K. Kollar d/b/a Mother Nature's Children. AWA Docket No. 04-0009. 1/13/05.

Dennis Hill, an individual, d/b/a White Tiger Foundation; and Willow Hill Center for Rare & Endangered Species, LLC, an Indiana domestic limited liability company, d/b/a Hill's Exotics. AWA Docket No. 04-0012. 1/27/05.

Chester C. Baird, a/k/a C.C. Baird, an individual, Jeanette Baird, an individual, Patsy Baird, an individual, and Patricia Baird, an individual, d/b/a Pat's Pine Tree Farms, and Martin Creek Kennels. AWA Docket No. 04-0013. 1/28/05.

The Johns Hopkins University, a private educational institution. AWA Docket No. 04-0008. 2/1/05.

Betty Gray. AWA Docket No. 05-0007. 3/21/05.

Beechdale Animal Supplies, Inc. AWA Docket No. 05-0017. 6/1/05.

FEDERAL MEAT INSPECTION ACT

Rebhan R.& W Meat Company, Inc., Jeffrey G. Rebhan, and Edwin Rebhan. FMIA Docket No. 05-0004. 6/17/05.

Michael D. Pyle and Nor-AM Cold Storage, Inc., d/b/a Provisions Packing. FMIA Docket No. 05-0006. 6/28/05.

HORSE PROTECTION ACT

Ronald Beltz, an individual; and Christopher Jerome Zahnd, an indvidual. HPA Docket No. 02-0001. 1/18/05.

Michael R. Floyd and Jada R. Flyod. HPA Docket No. 00-0014. 1/28/05.

Randall W. Dixon, Gloria Dixon, and Red Eagle Farms, a/k/a Red Eagle Farm. HPA Docket Nos. 01-0007 and 01-0009. 6/15/05.

PLANT QUARANTINE ACT

Itzhak Lahiany and Orico International Export and Import, Inc. P.Q. Docket No. 05-0003.

Richard Wu. d/b/a Hip Wing Trading Company. P.Q. Docket No. 05-0004. 2/9/05.

Richard Andreski and Chilam Trading Associates, Inc. P.Q. Docket No. 05-0007. 3/3/05.

Swift Transportation Company, Inc. P.Q. Docket No. 03-0017. 3/9/05.

Wal-Mart Stores, Inc. P.Q. Docket No. 03-0017. 3/15/05.

Tony Tabujara. P.Q. Docket No. 05-0019. 3/31/05.

Carl L. Medeiros. P.Q. Docket No. 05-0014. 4/11/05.

Agencia Navemar de Puerto Rico, Inc. P.Q. Docket No. 04-0013. 4/18/05.

Stephen Ludlum d/b/a The Orchid Factory Dot Com, Inc. P.Q. Docket No. 04-0001. 5/9/05.

Gertrude Nelson. P.Q. Docket No. 05-0021. 5/13/05.

St. Johns Shipping Company, Inc. P.Q. Docket No. 03-0015. 6/3/05.

Michele Czara. P.Q. Docket No. 05-0008. 6/6/05.

POULTRY PRODUCTS INSPECTION ACT

House of Raeford Farms of Louisiana, L.L.C. PPIA Docket No. 05-0002. 5/4/05.

Rebhan R.& W Meat Company, Inc., Jeffrey G. Rebhan, and Edwin Rebhan. PPIA Docket No. 05-0005. 6/17/05.

AGRICULTURE DECISIONS

Volume 64

January - June 2005
Part Two (P & S)
Pages 855 - 925

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

AGRICULTURE DECISIONS

Agriculture Decisions is an official publication by the Secretary of Agriculture consisting of decisions and orders issued in adjudicatory administrative proceedings conducted for the Department under various statutes and regulations. Selected court decisions concerning the Department's regulatory programs are also included. The Department is required to publish its rules and regulations in the *Federal Register* and, therefore, they are not included in *Agriculture Decisions.*

Beginning in 1989, *Agriculture Decisions* is comprised of three Parts, each of which is published every six months. Part One is organized alphabetically by statute and contains all decisions and orders other than those pertaining to the Packers and Stockyards Act and the Perishable Agricultural Commodities Act, which are contained in Parts Two and Three, respectively.

The published decisions and orders may be cited by giving the volume number, page number and year, e.g., 1 Agric. Dec. 472 (1942). It is unnecessary to cite a decision's docket number, e.g., AWA Docket No. 99-0022, and the use of such references generally indicates that the decision has not been published in *Agriculture Decisions.*

Consent decisions entered subsequent to December 31, 1986, are no longer published in *Agriculture Decisions.* However, a list of consent decisions is included in the printed edition. Since Volume 62, the full text of consent decisions is posted on the USDA/OALJ website (See url below). Consent decisions are on file in portable document format (pdf) format and may be inspected upon request made to the Hearing Clerk, Office of Administrative Law Judges (ALJ).

Beginning in Volume 63, all **Initial Decisions** decided in the calendar year by the Administrative Law Judge(s) will arranged by the controlling statute and will be published chronologically along with appeals (if any) of those ALJ decisions issued by the Judicial Officer.

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 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.

A compilation of past volumes on Compact Disk (CD) of *Agriculture Decisions* will be available for sale at the US Government Printing Office On-line Bookstore at http://bookstore.gpo.gov/ .

Direct all inquiries regarding this publication to: Editor, Agriculture Decisions, Office of Administrative Law Judges, U.S. Department of Agriculture, Room 1057 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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PACKERS AND STOCKYARDS ACT

COURT DECISION

PACKERS AND STOCKYARDS ACT

DEPARTMENTAL DECISIONS

PACKERS AND STOCKYARDS ACT

MISCELLANEOUS ORDERS

PACKERS AND STOCKYARDS ACT

DEFAULT DECISIONS

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PACKERS AND STOCKYARDS ACT

COURT DECISION

EXCEL CORPORATION v. USDA.
No. 04-9540.
Filed February 15, 2005.

(Cite as: 397 F.3d 1285).

P&S – Grading – Sanction – Civil penalty – Appropriate cease and desist order – Expiration date for cease and desist orders – Purpose of Packers and Stockyards Act – Impeding Competition – Standard of review – Substantial evidence, agency's action supported by – Intent, a showing of wrongful, not necessary.

The court upheld the Judicial Officer's (JO) determination that the formula used to estimate lean percent was a form of "grading" within the meaning of 9 C.F.R.§ 201.99 of the regulations and that Excel violated the regulations in that it failed to inform the sellers (hog producers) that the formula had changed prior to making purchases of their hogs. Proof by Grain Inspection, Packers and Stockyards Administration (GIPSA) that the producers actually suffered a loss was unnecessary to support the JO's decision.

United States Court of Appeals,
Tenth Circuit.

Petitioner Excel Corporation seeks review of a decision and order issued by respondent United States Department of Agriculture (USDA) finding that Excel violated § 202(a) of the Packers and Stockyards Act (P & S Act), 7 U.S.C. § 192(a), and an implementing regulation, 9 C.F.R. § 201.99(a), by failing to disclose to hog producers a change in Excel's formula for computing the "lean weight" of hog carcasses. Excel also challenges the decision and order to the extent it directs Excel to cease and desist from engaging in certain related practices. Exercising jurisdiction pursuant to 28 U.S.C. § 2342(2), we grant Excel's petition for review for the sole purpose of modifying the cease and desist language of the decision and order. As so modified, the decision and order is enforced.

I.

Factual background

Excel, a corporation based in Wichita, Kansas, is estimated to be the fourth or fifth largest hog slaughterer in the United States. ROA, Vol. V, Doc. 155 at 13, 82. Excel purchases hogs from numerous hog producers using one of two methods. First, Excel purchases some hogs on a "spot" market basis, meaning that it negotiates a specific price for a specific lot of hogs. *Id.* at 13. Second, Excel purchases other hogs through short-and long-term contracts with hog producers, pursuant to which the producers agree to sell a given number of hogs to Excel for a set base price. *Id.*

Most of the hogs purchased by Excel fall within its "carcass merit" program. *Id.* Under the carcass merit program, hog producers deliver hogs to Excel's buying stations where the hogs are placed into a holding pen, tattooed for identification, given a lot number, weighed, and inspected. *Id.* at 13-14. The hogs are then transported to one of Excel's three slaughtering facilities (located in Illinois, Iowa, and Missouri). There, the hogs are "killed, bled, eviscerated, de-haired, washed, and inspected...." *Id.* at 14. Afterwards, the carcasses are evaluated for their "estimated percentage of lean (red) meat." *Id.* Because hogs with a high percent of lean meat have a higher market value than hogs with a low percent of lean meat, Excel "applies th[ese] percentage figure[s] 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." *Id.*

Some of the producers who supply hogs to Excel also sell to other packers. *Id.* at 20. Generally speaking, these producers sell "trial lots" to various packers, including Excel, to determine where they can obtain the best price. *Id.* Because USDA no longer has in place an official grading system for hogs, *Id.* at 16, "[a]ll packers appear to base the prices they pay for hogs on base price, lean percent, and a matrix...." *Id.* at 20. However, no industry standard exists for estimating lean percent and it is generally impractical for slaughterers to dissect and examine each carcass for fat and lean meat percentages. *Id.* at 14. Thus, slaughterers use a variety of less accurate, but more practical, methods of estimating lean percent. *Id.* The result is that each packer "has a slightly different grading program," i.e., "[t]hey use slightly different

means of getting to the same point for the end value." *Id.* at 20.

Excel had used the "Fat-O-Meat'er" method for estimating lean percent for approximately ten years. *Id.* at 14. "The Fat-O-Meat'er," which was developed in Denmark from a study of European hogs, "is a hand-held device with a probe that is inserted in the carcass." *Id.* "A light measures the difference between the loin-eye and back fat depth." *Id.* "A regression formula or equation embedded in the Fat-O-Meat'er, commonly referred to as the 'Danish formula'.., then uses this measurement to estimate the lean percent of the carcass." *Id.* at 14-15. The device has been approved for use by the USDA and is used by approximately thirty-two packers in the United States. *Id.* at 15. It is unclear, however, how many of these packers rely solely on the Danish formula to estimate lean percent. *Id.*

After Excel determined the lean percent and weight of each carcass, those figures were applied to Excel's "Lean Value Matrix" to determine the "meat PX factor." Aplee. Br. at 12. The matrix generated a higher "meat PX factor" for standard-sized carcasses (163 to 206 pounds) with a higher lean percent. Conversely, the matrix produced a lower "meat PX factor" for non-standard-sized carcasses (greater than 206 pounds or less than 163 pounds) and for carcasses with a lower lean percent. *Id.* To determine the exact price to be paid for a particular carcass, Excel multiplied the "meat base" (i.e., the price per hundred weight quoted to the producer) by the "meat PX factor." *Id.*

The producers from whom Excel purchased hogs on a carcass merit basis were aware that Excel used the Fat-O-Meat'er to estimate lean percent and that the lean percentage figure was used by Excel to determine the price paid for each carcass. Generally speaking, however, Excel did not inform producers of the details of the formula utilized for estimating lean percent.

In 1997, Excel decided to switch from the Danish formula for estimating lean percent to "a formula developed by Purdue University and promoted by the National Pork Producers Council," i.e. "the Purdue formula." *Id.* at 17. "The Purdue formula uses hot carcass weight as a variable with the Danish formula to estimate lean percent...." *Id.* In contrast to the Danish formula, which was estimated to be 72-73 percent accurate, the Purdue formula was estimated to be approximately 90

percent accurate. *Id.*

At the time it adopted the Purdue formula, Excel knew that the "change could affect the price it paid for hogs," and thus "considered the" change's "economic effect on hog producers...." *Id.* Excel "concluded, based on a study of 1.5 million hogs, that there would be only a 'minimal impact' on hog producers...." *Id.* at 17-18. In turn, Excel "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 process methods and technology it used, was not a factor that interested hog producers or formed a basis for whether they sold hogs to" Excel. *Id.* at 18. "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...." *Id.*

Although Excel concluded that none of its written contracts with hog producers required it to provide notification of the formula change, Excel nevertheless notified Tyson Foods, the main supplier of hogs for Excel's Missouri facility, of the formula change. *Id.* at 19. Tyson objected to the change. *Id.* In turn, Excel agreed not to use the Purdue formula to estimate the lean percent of Tyson's hogs. *Id.*

Excel implemented the formula change at its Iowa and Illinois slaughtering facilities in October 1997, and at its Missouri slaughtering facility (for all non-Tyson hogs) in April 1998. *Id.* at 20. Following implementation of the formula change, some hog producers noticed a difference in the prices they were receiving from Excel for hogs. *Id.* at 21. Some hog producers began asking managers at Excel's slaughtering facilities about the matter. *Id.* In response, Excel told these producers about the formula change. *Id.*

In April 1998, the Grain Inspection, Packers and Stockyards Administration (GIPSA), a division of the USDA, "initiated what appears to have been a routine investigation of [Excel's] use of the Fat-O-Meat'er." *Id.* at 22. During the course of this audit, GIPSA "found the prices that hog producers should have been paid using the Danish formula were not those that appeared on the kill sheets." *Id.* at 23. Excel then informed GIPSA that it had changed the formula for estimating lean percent. *Id.* As a result of the 1998 audit, GIPSA decided that Excel'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 the P & S Act and one of its implementing regulations. *Id.* at 25. Excel was informed of the alleged violation in June 1998. *Id.* In July 1998, Excel "sent a letter to hog producers notifying them that the formula had changed...." *Id.* Excel "also adjusted the matrix so that hog producers received the same price under the Purdue formula as they would have received had [Excel] used the Danish formula." *Id.*

Procedural background

On April 9, 1999, the Deputy Administrator of GIPSA instituted a disciplinary administrative proceeding against Excel by filing a complaint and notice of hearing. The complaint alleged that, between October 23, 1997, and June 1, 1998, Excel violated § 202(a) of the P & S Act, 7 U.S.C. § 192(a), and § 201.99 of the Act's implementing regulations, 9 C.F.R. § 201.99, by failing to make known to hog producers a change in the formula used by Excel to estimate lean percent in hogs that it purchased, which in turn changed the price paid by Excel for hogs. The complaint further alleged that, as a result of the change in formula, Excel paid hog producers approximately $1,839,000 less for approximately 19,942 lots of hogs than it would have paid if it had not changed the formula.[1]

USDA's Chief Administrative Law Judge (ALJ) conducted hearings on July 18-21, July 25-28, September 23-27, 2000, and March 27-29, 2001. On February 7, 2002, the Chief ALJ issued a Decision and Order finding that, as alleged in the complaint, Excel failed to notify hog producers of its changed formula for estimating lean percent and that such failure violated § 202(a) of the P & S Act, 7 U.S.C. § 192(a), and § 201.99 of the implementing regulations, 9 C.F.R. § 201.99. The Chief ALJ ordered Excel to cease and desist from failing to notify livestock sellers of any change in the formula used to estimate lean percent and further ordered Excel to submit to arbitration with the hog producers

[1]When Excel responded that it had refunded to producers $3,093,581.00 (including 5.85% interest) as the difference between the price it paid under the Purdue formula and the Danish formula, the complaint was amended to allege an underpayment to producers of $635,345.52. *Id.* at 26.

with whom they had not yet resolved the matter and who received less money for hogs sold to Excel between October 1997 and July 1998 under the revised formula than they would have received under the old formula. The Chief ALJ refused GIPSA's request, however, to impose a monetary sanction against Excel.

Excel and GIPSA each sought review of the Chief ALJ's decision by the Secretary of the USDA. On January 30, 2003, the Judicial Officer (JO) issued a decision and order on behalf of the USDA addressing the challenges to the Chief ALJ's order. The JO affirmed the decision that Excel violated the P & S Act and the implementing regulation by failing to make known to all hog producers its change in the formula used to estimate lean percent in hogs. The JO dismissed the arbitration requirement and modified the cease and desist order. The JO agreed with the Chief ALJ that a monetary sanction was not appropriate.

Both sides unsuccessfully sought reconsideration of the JO's decision and order. Excel has since filed a petition for review with this court.

II.
Standard of review

Our jurisdiction to review a final order issued by the USDA in a disciplinary action brought under the P & S Act arises under 28 U.S.C. § 2342(2). We review such final orders under the Administrative Procedure Act's ("APA") arbitrary and capricious standard. *See JSG Trading Corp. v. USDA,* 176 F.3d 536, 541 (D.C.Cir.1999). "That is, we will uphold the JO's decision unless we find it to be arbitrary, capricious, an abuse of discretion, not in accordance with law, or unsupported by substantial evidence." *Id.* (citing 5 U.S.C. § 706(2)(A), (E)).

Excel's violations of the P & S Act

Before addressing Excel's specific arguments on appeal, we begin by briefly outlining the statute and regulation that the JO determined Excel had violated. Section 202 of the P & S Act, 7 U.S.C. § 192, entitled "Unlawful practices enumerated," provides in pertinent part as follows:

> It shall be unlawful for any packer or swine contractor 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....

7 U.S.C. § 192(a).

In turn, the USDA has promulgated regulations implementing the provisions of the P & S Act. Specifically, 9 C.F.R. § 201.99, entitled "Purchase of livestock by packers on a carcass grade, carcass weight, or carcass grade and weight basis," provides, in pertinent part, as follows:

> (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) *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) and (e) (italics added).

Applying the statute and the regulation to the established facts, the JO concluded that a violation of both the regulation and the statute had occurred. In particular, the JO noted that "[t]he record [wa]s clear that all parties considered the Fat-O-Meat'er to be a form of grading." ROA, Vol. V, Doc. 155 at 41. In turn, the JO concluded that "[t]he formula [Excel] used to estimate lean percent was also a part of the 'grading' within the meaning of section 201.99 of the Regulations ... as it was an element of [Excel's] carcass evaluation process." *Id.* The JO further concluded that, because "[s]ection 201.99 of the Regulations ... explicitly provides that packers purchasing livestock on a carcass merit basis must make known to the seller the grading to be

used prior to purchase," Excel violated that provision by failing to inform hog producers of its change in formula for determining lean percent. *Id.* In addition, the JO concluded that the violation had a direct impact on the hog producers who sold hogs to Excel. According to the JO, "the purpose of section 201.99 of the Regulations ... is to provide some basic level of similarity to allow sellers to evaluate different purchase offers," *Id.* at 42 (internal quotations omitted), and Excel deprived hog producers of this opportunity by failing to disclose its change in formula. More specifically, the JO stated: "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 [Excel's] price under its changed formula." *Id.* Ultimately, the JO concluded that Excel "violated section 202(a) of the [P & S] Act and section 201.99(a) of the Regulations ... 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." *Id.* at 83.

Was the JO's decision supported by "substantial evidence"?

In its appeal, Excel contends the "JO erred when he ruled that Excel violated the law by changing the lean percent equation without prior notice" because "the USDA never met its burden to demonstrate that there was substantial evidence for this finding." Aplt. Br. at 15. In support of this contention, Excel argues that (1) "the JO never cited to a single court case or prior agency decision that provides any precedential support," (2) "the JO did not and could not rely on any expert testimony because GIPSA provided none," and (3) "GIPSA failed to introduce any survey of hog producers that producers believed that Excel had committed an unfair or deceptive practice or that these producers cared that Excel had changed the lean percent equation without disclosing the change to producers." *Id.*

By raising these arguments, Excel is clearly attempting to reframe the nature of the JO's decision. Generally speaking, it is true that an agency's decision must be supported by "substantial evidence." *Trimmer v. United States Dept. of Labor,* 174 F.3d 1098, 1102 (10th

Cir.1999). Here, however, the JO expressly noted in his decision and order that "[t]he salient facts [of the case] [we]re not in dispute." DO at 27. In particular, the JO noted that "all parties considered the Fat-O-Meat'er to be a form of grading," *Id.* at 41, and "[t]he parties [we]re in agreement that [Excel] 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." *Id.* Thus, the JO's decision ultimately was based on whether those established facts constituted a violation of § 201.99 (and, in turn, § 202(a) of the P & S Act). In other words, the JO's decision was based on his interpretation of § 201.99 and his application of that interpretation to the uncontroverted facts.

The absence of any true factual disputes is further highlighted by carefully examining Excel's specific arguments. As noted, Excel first complains that "the JO never cited to a single court case or prior agency decision that provides any precedential support" for his decision. Aplt. Br. at 15. Obviously, however, prior court cases or agency decisions are not "evidence" that would support or refute the JO's decision. Second, Excel complains that "the JO did not and could not rely on any expert testimony because GIPSA provided none...." *Id.* It is unclear, however, why any such expert testimony was necessary. To the contrary, the resolution of the USDA's complaint against Excel required the JO only to apply the provisions of § 201.99 to the uncontroverted facts developed during the evidentiary hearing. Lastly, Excel complains that "GIPSA failed to introduce any survey of hog producers that producers believed that Excel had committed an unfair or deceptive practice or that these producers cared that Excel had changed the lean percent equation without disclosing the change to producers." Again, no such evidence was necessary to support the JO's conclusion. Indeed, the JO rejected this identical argument in his decision and order:

> Finally, I find [Excel's] argument that, when hog producers learned about the formula change, they did not care that the change had been made or that [Excel] failed to inform them about the formula change, irrelevant to the issue of whether [Excel] violated the Packers and Stockyards Act. [Excel] cites no

> authority supporting its contention that the feelings of hog producers have a bearing on whether [Excel] engaged in an unfair or deceptive practice under section 202(a) of the Packers and Stockyards Act.., and I cannot find authority which supports [Excel's] contention. The determination as to whether [Excel] violated section 202(a) of the Packers and Stockyards Act ... 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 [Excel's] actions. Moreover, the record does not support [Excel's] assertion that hog producers did not care about [Excel's] change in the formula to estimate lean percent or [Excel's] failure to inform them about the formula change....

DO at 65-66.

For these reasons, we conclude there is no merit to Excel's assertion that the JO's decision was not supported by substantial evidence.

Did Excel violate the P & S Act?

In its opening appellate brief, Excel asserts a host of arguments concerning why, in its view, it did not violate the P & S Act by "[c]hang[ing] an [e]quation [u]sed to [e]stimate [l]ean [p]ercent...." Aplt. Br. at ii. In particular, Excel argues that (1) no prior decisions existed holding that an undisclosed equation change was violative of the P & S Act, (2) USDA does not have carte blanche authority to prohibit whatever practices it wants to stop, (3) practices are not violative where they are required by the exigencies of the business and are justified by business standards, (4) none of its contracts with hog producers required it to notify producers before implementing an equation change, (5) hog producers did not care about the equation change, (6) its failure to disclose the formula change did not impede competition or hog producers' choices, and (7) there was no evidence it acted with wrongful intent.

At the outset, it is clear that Excel's arguments do not relate to whether Excel violated § 201.99(a) of the regulations implementing the P & S Act. As discussed in greater detail below, the JO concluded that

Excel violated § 201.99(a) by failing to disclose to hog producers the change in formula. In other words, contrary to Excel's arguments, the conduct at issue that violated the regulation was Excel's failure to disclose its change in formula to producers, and not the mere change in formula itself. Further, the JO's focus was on the requirements of the implementing regulation. After first concluding Excel violated that regulation, the JO in turn necessarily concluded that Excel also violated the P & S Act. Thus, the critical focus in this case is on the language of the regulation and its applicability to Excel's conduct.

In any event, it is apparent that none of the specific arguments asserted by Excel have merit. First, Excel has cited no authority, and we have found none, holding that the USDA is precluded from finding a violation in this case simply because it has not previously found a similar violation in the past. Indeed, such a rule would be nonsensical, for it would effectively preclude the USDA from applying the P & S Act and its implementing regulations to new techniques and tools utilized by slaughterers for grading livestock carcasses. Second, although the USDA does not have "carte blanche authority" to prohibit whatever practices it wants to stop, it is clear that Congress granted the USDA authority to implement and enforce the P & S Act. And, as noted, the critical issue in this case is whether Excel's failure to disclose its formula change to hog producers violated the USDA's implementing regulation. Third, and relatedly, it is clear that Congress and the USDA are the arbiters of what practices will impede competition. Thus, contrary to Excel's assertion, the fact that a particular act is "required by the exigencies of the business," or is not violative of a contractual obligation, has no impact on whether that act is violative of the P & S Act and the implementing regulations. Indeed, in the instant case, the USDA concluded that Excel's failure to disclose its formula change was violative of § 201.99(a) of the implementing regulations, even though Excel did not have a contractual obligation to disclose that change to hog producers and was otherwise justified in changing its formula to better estimate the lean percent of hog carcasses.

Fourth, Excel is incorrect when it suggests that hog producers did not care about the equation change. Indeed, the JO specifically found that some hog producers did care about the equation change, and that finding appears to be adequately supported by the record on appeal. DO at

65-66. In any event, nothing in the P & S Act or the implementing regulations provides that a violation thereof hinges on the opinions of the persons affected by the practice at issue. Although Excel cites to *Ferguson v. United States Department of Agriculture,* 911 F.2d 1273, 1281-82 (9th Cir.1990), in support of its assertion that customers' opinions are critical, a review of *Ferguson* undercuts Excel's arguments. To begin with, *Ferguson* involved a different type of violation (incorrect invoicing), and thus a different provision of the P & S Act (7 U.S.C. § 213(a)), than is at issue here. Further, although the court in *Ferguson* did consider the testimony of customers, that testimony had no effect on the conclusion that a violation of the P & S Act had occurred; rather, the customer testimony was considered solely for purposes of determining whether the sanction imposed was proper.[2] *Id.* at 1282- 83.

Fifth, Excel contends its actions did not impede competition or hog producers' choices. The JO, however, specifically concluded otherwise:

> Hog producers can compare prices and choose to continue to sell to [Excel] or sell to [Excel's] competitors. However, [Excel] impeded that choice when it made an unannounced change in the formula. [Excel] 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 [Excel's] price under its changed formula. [Excel's] failure to notify hog producers of the change in the formula to estimate lean percent impeded competition. As [GIPSA] states, the purpose of section 201.99 of the Regulations ... "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 of the change would therefore have been whatever higher market price they might have been able to

[2]In a related point, Excel complains that the Chief ALJ precluded Excel from calling six producer witnesses (the Chief ALJ apparently ruled that only four of Excel's producer witnesses could testify, and that the remaining six would merely provide cumulative testimony). This is clearly a red herring that has no impact on the propriety of the JO's decision.

> obtain from [Excel's] competitors. Therefore, I find [Excel's] violation of section 201.99(a) of the Regulations ... grave.

DO at 57.

Although Excel attempts to undercut these conclusions (e.g., by arguing that other packers did not inform hog produces about their equations to estimate lean percent), a review of the record on appeal demonstrates that they are reasonable inferences drawn from the evidence presented to the JO.

Lastly, Excel is simply wrong in asserting that, "to show an impediment to competition, GIPSA would have had to show Excel acted with wrongful intent." Aplt. Br. at 32. Nothing in the language of § 192(a) of the P & S Act or § 201.99(a) of the regulations requires a showing of wrongful intent. To the contrary, the focus is solely on the acts committed or omitted.

Did the JO err in interpreting 9 C.F.R. § 201.99(a)?

Excel next directly challenges the JO's interpretation of § 201.99(a). Specifically, Excel contends that, contrary to the conclusion reached by the JO, its failure to notify hog producers of the change in formula did not violate § 201.99(a). According to Excel, the "regulation does not mention: (1) lean percent; (2) equations; or (3) a change to either of them." Aplt. Br. at 34. Indeed, Excel contends that the key phrase in the regulation, i.e., "grading to be used," is ambiguous and thus it is unclear whether or not the actual formula employed by Excel in determining lean percent fell within the scope of this phrase. To support its assertion of ambiguity, Excel contends that, prior to the complaint being filed against it, the USDA never consistently or clearly interpreted § 201.99(a) in a manner that would have given Excel notice that it had to disclose to hog producers the change in formula. Excel also contends the JO failed to offer a sound explanation of the interplay between § 201.99(a) and § 201.99(e). Lastly, Excel contends that USDA has effectively sought "to rewrite the regulation in this proceeding to fit conduct that is simply not covered." Aplt. Br. at 44.

In determining whether the USDA (through the JO) committed any errors of law in interpreting § 201.99, we owe "substantial deference" to

the USDA's interpretation of that regulation. *Thomas Jefferson Univ. v. Shalala,* 512 U.S. 504, 512, 114 S.Ct. 2381, 129 L.Ed.2d 405 (1994). That is because the USDA has been charged by Congress with administering the P & S Act, *see* 7 U.S.C. § 228 (outlining the authority of the Secretary of the USDA with regard to the P & S Act), and § 201.99 is one of the regulations intended by the USDA to implement the P & S Act. *See generally Mainstream Marketing Serv., Inc. v. FTC,* 358 F.3d 1228, 1236 (10th Cir.2004) (noting "that the courts owe deference to a federal agency's interpretation of a statute it administers"). Our "task is not to decide which among several competing interpretations best serves the regulatory purpose." *Thomas Jefferson,* 512 U.S. at 512, 114 S.Ct. 2381. "Rather, the agency's interpretation must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Id.* (internal quotations omitted). "In other words," we "must defer to the Secretary's interpretation unless an alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation." *Id.* (internal quotations omitted).

The JO in this case interpreted § 201.99(a) in the following manner. First, the JO concluded that "[s]ection 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." DO at 67. Second, the JO concluded that "[t]he regulation [i.e., § 201.99(a)] explicitly provides that those details include the 'grading to be used.' " *Id.* Citing Merriam Webster's Collegiate Dictionary, the JO concluded that the term "grade" "[g]enerally ... refers to quality and [the term] 'grading' is an action or process of sorting (hogs) into categories according to quality." *Id.* at 67 and n. 28. Applying that definition to the circumstances before him, the JO concluded that "a formula to estimate lean percent is part of the grading process." *Id.* at 68. Thus, the JO concluded that "[t]he Fat-O-Meat'er and the formula and the change in the formula [we]re all 'grading to be used' within the meaning of" § 201.99(a). *Id.* at 82. In sum, the JO concluded that § 201.99(a) requires a packer such as Excel, prior to the purchase of a hog carcass, to make known to the seller the formula used in estimating the lean percent of the carcass and to make known any changes in that formula.

Excel asserts, and we agree, that the key phrase in § 201.99(a), i.e., "grading to be used," is ambiguous. In his decision and order, the JO

noted the word "grading" is defined in the dictionary to mean "[t]he action or process of sorting ... into grades according to quality." Oxford English Dictionary Online (2004). In turn, the word "grade" is defined, in pertinent part, as "[a] degree of comparative quality or value," "[a] class of things, constituted by having the same quality or value." *Id.* Thus, the phrase "grading to be used," as employed in § 201.99(a), clearly appears to refer to the process a particular packer will employ for sorting livestock carcasses into grades or classes according to quality. Nevertheless, the phrase is ambiguous in that it could reasonably be construed in one of at least two ways under the circumstances presented here: (1) to require Excel merely to inform hog producers that it grades carcasses according to lean percent, or (2) to require Excel not only inform hog producers that it grades carcasses according to lean percent, but also to inform hog producers that it uses a particular mathematic formula, programmed into the Fat-O-Meat'er, to estimate lean percent, and to inform hog producers when and if it implements a change in that formula.[3]

Importantly, we must "defer to both formal and informal agency interpretations of an ambiguous regulation unless those interpretations are 'plainly erroneous or inconsistent with the regulation.' " *Soltane v. U.S. Dept. of Justice,* 381 F.3d 143, 148 (3d Cir.2004) (quoting *Bowles v. Seminole Rock & Sand Co.,* 325 U.S. 410, 414, 65 S.Ct. 1215, 89 L.Ed. 1700 (1945)); *see Auer v. Robbins,* 519 U.S. 452, 461, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997) (holding that an agency's interpretation of its own regulation is entitled to deference). Here, the JO concluded that "[t]he Fat-O-Meat'er and the formula and the change in the formula [we]re all 'grading to be used' within the meaning of" § 201.99(a).[4] DO

[3]The phrase "grading to be used" could also arguably be interpreted to require Excel to either (a) reveal only that it uses a mathematic formula programmed into the Fat-O-Meat'er for purposes of estimating lean percent, or (b) reveal the precise details of that mathematic formula, as well as all the details of its matrix.

[4]The uncontroverted facts of this case readily establish that, because the USDA had no official grades in place for hog carcasses, Excel adopted and used its own grading (continued...)

at 82. In our view, this conclusion is neither plainly erroneous nor inconsistent with the language of the regulation. Indeed, interpreting the phrase "grading to be used" to require revelation of the specific formula utilized to estimate lean percent appears to us to be entirely reasonable. Thus, we are bound to uphold the JO's interpretation.

Excel complains that the JO failed to rationally explain the interplay between §§ 201.99(a) and (e). As previously noted, § 201.99(e) provides, in pertinent part: "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." In Excel's view, the JO's interpretation of § 201.99(a) renders superfluous the language of § 201.99(e). We find it unnecessary to address Excel's arguments on this point, however, because there is no indication in the record on appeal that Excel presented these arguments to the JO. Thus, we consider the arguments waived. *See United States v. L.A. Tucker Truck Lines,* 344 U.S. 33, 37, 73 S.Ct. 67, 97 L.Ed. 54 (1952) ("Simple fairness ... requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.").

Lastly, Excel argues that the USDA, through the JO, has effectively rewritten § 201.99(a) to encompass conduct that is otherwise not encompassed by its plain language. We disagree. As discussed above, the phrase "grading to be used," as employed in § 201.99(a), can reasonably be interpreted in at least two ways. Simply because the JO adopted one of those interpretations does not mean that the JO effectively rewrote the regulation. In other words, the JO's interpretation

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[4](...continued)
system for hog carcasses which focused primarily on lean percent. The uncontroverted facts further establish that Excel's calculation of lean percent was based on a mathematic formula programmed into the Fat-O-Meat'er. More specifically, the uncontroverted facts indicate that Excel physically employed the Fat-O-Meat'er and its embedded mathematic formula to estimate the lean percent of each hog carcass, and that the lean percent estimate, along with the carcass's overall weight, effectively resulted in a grade on Excel's matrix.

cannot be considered to be so far afield of the regulation's text as to "create *de facto* a new regulation." *Christensen v. Harris County,* 529 U.S. 576, 588, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000).

Propriety of the JO's Cease and Desist Order

Based upon his finding that Excel violated the P & S Act and the implementing regulation, the JO included the following cease and desist order in his decision and 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.

ROA, Vol. V, Doc. 155 at 83.

On appeal, Excel challenges the cease and desist order, arguing it (a) was imposed without fair notice, (b) should expire after no longer than three years, (c) is vague, overbroad and otherwise improper, and (d) places Excel at a competitive disadvantage. For the reasons discussed below, we reject all but Excel's assertion that the cease and desist order was overly broad.

a) Fair notice

Broadly speaking, "the requirement of notice" is "[e]ngrained in our concept of due process...." *Lambert v. People of State of California,* 355 U.S. 225, 228, 78 S.Ct. 240, 2 L.Ed.2d 228 (1957). "Notice is required

before property interests are disturbed" and "before penalties are assessed." *Id.* In short, "[n]otice is required in a myriad of situations where a penalty or forfeiture might be suffered for mere failure to act." *Id.* In the context of agency proceedings, an agency "may fail to give sufficient fair notice to justify a penalty if the regulation [at issue] is so ambiguous that a regulated party cannot be expected to arrive at the correct interpretation using standard tools of legal interpretation, must therefore look to the agency for guidance, and the agency failed to articulate its interpretation before imposing a penalty." *United States v. Lachman,* 387 F.3d 42, 57 (1st Cir.2004).

Here, however, there is no indication in the record, and indeed no assertion by Excel, that the JO's cease and desist order infringed upon any of Excel's protected liberty or property interests. In other words, there is no basis for concluding that the JO's cease and desist order amounts to a penalty. *Cf. Exxel/Atmos, Inc. v. NLRB,* 28 F.3d 1243, 1248 (D.C.Cir.1994) ("Cease and desist orders are remedial; they require only that the employer 'conform his conduct to the norms set forth in the Act.' "); *Carpenter Sprinkler Corp. v. NLRB,* 605 F.2d 60, 67 (2d Cir.1979) (noting that cease and desist order was "clearly remedial" rather than punitive); *Benrus Watch Co. v. FTC,* 352 F.2d 313, 322 (8th Cir.1965) ("Cease and desist orders are not punitive...."). Thus, we reject Excel's "fair notice" arguments.

b) Duration of cease and desist order

Excel argues that the cease and desist order, however it is written, should expire after no longer than three years pursuant to 28 U.S.C. § 530D(a)(1)(C)(ii).[5] The JO addressed this precise argument in his order

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[5]The statute cited by Excel, entitled "Report on enforcement of laws," provides in pertinent part as follows:
(a) Report.--
(1) In general.--The Attorney General shall submit to the Congress a report of any instance in which the Attorney General or any officer of the Department of Justice--
* * *
(C) approves ... the settlement or compromise ... of any claim, suit, or other action--
(continued...)

rejecting Excel's petition for reconsideration. We agree with the JO that the statute cited by Excel does not apply here because the parties did not settle or compromise this proceeding. Rather, the record makes clear that the proceeding was resolved by the JO only after the parties fully litigated the issues.

c) Vague and overbroad

Excel argues that the cease and desist order is unduly vague and overbroad. In particular, Excel notes that the cease and desist order covers its purchase of all "livestock," rather than just hogs, and requires disclosure of all "factors that affects [its] estimation of lean percent, including, but not limited to, any change in the formula used to estimate lean percent." Aplt. Br. at 52. According to Excel, this language goes beyond the violation found by the JO and beyond the requirements of § 201.99(a) as interpreted by the JO. Thus, Excel argues, there is "no way [it] can possibly know what is required" by the cease and desist order. *Id.* at 53.

Generally speaking, we must uphold an agency's cease and desist order so long as "the remedy selected" bears a "reasonable relation to the unlawful practices found to exist." *FTC v. Colgate-Palmolive Co.,* 380 U.S. 374, 394- 95, 85 S.Ct. 1035, 13 L.Ed.2d 904 (1965); *see generally NLRB v. Express Publ'g Co.,* 312 U.S. 426, 435, 61 S.Ct. 693, 85 L.Ed. 930 (1941) (noting that a federal court may "restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future, unless enjoined, may fairly be anticipated from the defendant's conduct in the past."). We may, however, "narrow [an agency's] orders ... by deleting those portions for which a reasonable relationship to the offending

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[5](...continued)
* * *
(ii) by the United States (including any agency or instrumentality thereof) pursuant to an agreement, consent decree, or order ... that provides injunctive or other nonmonetary relief that exceeds, or is likely to exceed, 3 years in duration....
28 U.S.C. § 530D(a)(1)(C)(ii).

conduct is lacking." *ITT Continental Baking Co. v. FTC,* 532 F.2d 207, 220-21 (2d Cir.1976) (modifying cease and desist order issued by Federal Trade Commission); *see Encyclopedia Britannica, Inc. v. FTC,* 605 F.2d 964, 970 (7th Cir.1979) (same).

Here, we agree with Excel that portions of the cease and desist order fail to bear a reasonable relationship to the conduct which the JO found had violated the regulation and statute at issue. As noted, the primary violative conduct identified by the JO was Excel's failure, in connection with its purchase of hogs, to disclose to sellers the change in the formula used to estimate lean percent. The cease and desist order, however, unreasonably exceeds the scope of this violation in three respects. First, the cease and desist order broadly refers to "purchases of livestock," even though it is uncontroverted that Excel's violation was limited to the purchase of hogs. Second, the cease and desist order prohibits Excel from "[f]ailing to make known" not only "any change in the formula used to estimate lean percent," but virtually all "*the factors* that affect [its] estimation of lean percent...." Third, the cease and desist order broadly prohibits Excel from "[f]ailing 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." Although this language generally tracks the requirements of 9 C.F.R. § 201.99(a), there is simply no evidence in this case that Excel failed to comply with those requirements, other than with respect to the formula used in the Fat-O-Meat'er for estimating lean percent and the change in that formula. In sum, we conclude the burdens imposed on Excel by these three aspects of the JO's cease and desist order are not justified by the violation the JO found.

To narrow the cease and desist order to reflect and address the violation found by the JO, (1) the reference to "livestock" in the opening sentence of the order is changed to "hogs," (2) the language of paragraph (a) is changed to refer solely to "any change in the formula used to estimate lean percent," and (3) paragraph (b) is deleted entirely. As modified, the cease and desist order will now read as follows:

Respondent, its agents and employees, directly or indirectly

> through any corporate or other device, in connection with its purchases of hogs on a carcass merit basis, shall cease and desist from failing to make known to sellers, or their duly authorized agents, prior to purchasing livestock, any change in the formula used to estimate lean percent.

d) Competitive disadvantage

Finally, Excel argues that the cease and desist order places it at a competitive disadvantage because a violation of the order will subject it and its employees, but not its competitors, to criminal prosecution. Aplt. Br. at 46. Excel further argues that this "threat of criminal sanctions could lead to Excel employees leaving Excel to work for packers who are not subject to such penalties." *Id.* Ultimately, Excel argues, these factors could "impact [its] decision to stay in the pork business." *Id.* at 47.

Having modified the cease and desist order to tailor it to the specific violation found by the JO, we conclude there is no merit to Excel's arguments. Simply put, the requirements imposed by the modified cease and desist order are narrow and clear. Moreover, by reason of the USDA's action against Excel, Excel's competitors are on notice that they are also subject to the same regulatory requirements. Thus, we fail to see how compliance with the modified cease and desist order could reasonably place Excel at a competitive disadvantage.

The petition for review is GRANTED for the sole purpose of modifying the Judicial Officer's decision and order in accordance with this opinion. As so modified, the decision and order is enforced.

PACKERS AND STOCKYARDS ACT

DEPARTMENTAL DECISION

In re: WILLIAM CHANDLER d/b/a BILL CHANDLER CATTLE.
P. & S. Docket No. D-03-0020.
Decision and Order.
Filed January 3, 2005.

P&S – Payments to sellers, late – Funds, insufficient bank – Willful violation.

Decision and Order filed by Administrative Law Judge Victor J. Palmer.

Preliminary Statement

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq*.; the "Act") initiated by a complaint filed on September 2, 2003, by the Deputy Administrator, Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration. The complaint alleges that Respondent, a registered livestock dealer, committed numerous violations of the Act and the regulations issued pursuant thereto (9 C.F.R. § 201.1 *et seq*. and 9 C.F.R. § 203.1 *et seq*.; the "regulations").

Specifically, the complaint alleges that during the period June 30, 2001 through September 30, 2001, Respondent operated while insolvent in that Respondent's current liabilities exceeded his current assets, and thereby willfully violated the Act (7 U.S.C. §204 and §213(a)). The complaint additionally alleges that, during the period June 25, 2001, through August 6, 2001, Respondent purchased livestock from 13 sellers in the amount of $378,638.69 and paid them with checks that were returned unpaid by the bank because of insufficient funds, in further willful violation of the Act (7 U.S.C. §213(a)). The complaint also alleges that Respondent failed to pay on time these 13 sellers from whom Respondent purchased livestock on September 10, 2001, for $235,526.78, in willful violation of the Act and the regulations (7 U.S.C. §§ 213(a), 228b and 9 C.F.R. § 201.43(b)). Finally, the complaint alleges that Respondent also willfully violated the Act by failing to keep

such records as fully and correctly disclosed all transactions involved in his business because he did not maintain necessary documentation showing his costs of purchasing, feeding and caring for cattle he purchased and preconditioned for Supreme Cattle Feeders, LLC, Boise, Idaho (7 U.S.C. § 221). The complaint alleged that previous administrative orders and warning letters had been issued against Respondent. Complainant requested the suspension of Respondent's registration and/or the imposition of a civil penalty. Respondent filed an answer, generally denying liability.

An oral hearing was held and transcribed on May 11 and 12, 2004, in Tallahassee, Florida. The hearing transcript shall be referred to as "Tr." followed by the page reference. Complainant was represented by Andrew Y. Stanton, Esquire, Office of the General Counsel, United States Department of Agriculture, Washington, D.C. Respondent was represented by Bruce P. Anderson, Esquire, Broad and Cassel, Destin, Florida. At the hearing, five witnesses testified for Complainant. No witnesses testified on behalf of Respondent. Documentary evidence was received from both Complainant (CX 1-5, 7-22, 24-26) and Respondent (RX 3-13). Pertinent statutory provisions and regulations are set forth in an Addendum following the Order.

Upon consideration of the record evidence and the arguments of the parties, I have concluded that an Order should be entered requiring Respondent to cease and desist from engaging in business while insolvent, issuing insufficient checks for livestock purchases and failing to pay the full amount for livestock purchases within the time period required by the Act and the Regulations. Respondent is also being suspended for a period of six (6) years from being a registrant under the Act.

Findings of Fact

1. Respondent, William Chandler d/b/a Bill Chandler Cattle, is an individual whose business mailing address is 5791 County Line Road, Pelham, Georgia 31779. See Complaint, page 1, paragraph I (a)); Answer, page 1, paragraph I (a)); CX 1, pages 2, 7.

2. Respondent was at all times material herein engaged in the business of a dealer, buying and selling livestock for his own account and the accounts of others, and registered with the Secretary of

Agriculture as a dealer to buy or sell livestock in commerce for his own account and the accounts of others and a market agency, to buy on commission. See Complaint, page 1, paragraph I (b)); Answer, page 1, paragraph I (b); CX 1, pages 2, 7. At all times material herein, Respondent was bonded in the amount of $50,000.00 (Tr. at 27). Respondent filed for chapter 11 bankruptcy in the United States Bankruptcy Court for the Middle District of Georgia, Thomasville Division, Case No. 02-10715-JTL (RX 7) (Tr. at 193).

3. On February 11, 1982, a Consent Decision was issued in an administrative disciplinary proceeding Complainant filed against Respondent (*In re*: *William "Bill" Chandler d/b/a Chandler Cattle Company and conducting business through C&N Cattle Corporation*, P.& S. Docket No. 5976). In the Consent Decision, Respondent agreed to cease and desist from engaging in business for which bonding is required under the Act and the regulations without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations; issuing checks or drafts in payment for livestock purchased without having and maintaining sufficient funds to pay such checks available in the bank account from which such checks or drafts are to be paid; and failing to pay, when due, the full purchase price of livestock. CX 2, pages 18-20.

4. On November 22, 1996, a Consent Decision was issued in an administrative disciplinary proceeding Complainant had filed against Respondent and others (*In re: Southeast Livestock Order Buyers, Inc., Jefferson County Stockyards, Inc., Jacquelyn A. Chandler and William Chandler*, P. & S. Docket No. D-96-0028). In the Consent Decision, Respondent and the others agreed to cease and desist from failing to reimburse, when due, their clearor with funds received from the sale of the livestock for which the clearor had made payment. In addition, Respondent's registration was suspended for 180 days. CX 2, pages 11-15.

5. On November 9, 1999, Complainant sent a certified letter to Respondent, which was signed for by "J. Chandler",[1] that advised Respondent he was failing to comply with section 201.49 of the regulations (9 C.F.R. § 201.49) by failing to maintain his records of

[1] Respondent's wife's name is Jacqueline Chandler (Tr. at 138).

scale tickets as required by the regulations. Complainant also advised Respondent the he was failing to comply with section 409(a) of the Act (7 U.S.C. § 228b) and section 201.43(b)(2)(i) of the regulations (9 C.F.R. § 201.43(b)(2)(i)) by failing to pay when due for livestock purchases. CX 2, pages 4-6.

6. On May 23, 2001, Complainant sent a certified letter to Respondent, which Respondent received, advising Respondent that he was failing to comply with sections 409(a) and (c) of the Act (7 U.S.C. §§ 228b(a) and (c)) regarding the requirement of making timely payment for livestock purchases. Respondent was instructed to take immediate steps to come into compliance. CX 2, pages 1-3.

7. On approximately July 9, 2001, Complainant's Atlanta, Georgia Regional office received a telephone call from Respondent, who advised that he had been notified that his bank had returned approximately 15 checks drawn on Respondent's checking account for insufficient funds (Tr. at 20-21). At that point, Nilsa Ramos Taylor, a Resident Agent employed by Complainant, was assigned to conduct an investigation of Respondent concerning the 15 returned checks mentioned by Respondent and to explore any other possible payment problems Respondent may be having (Tr. at 21-22). James Hood, a marketing specialist employed by Complainant, was assigned to conduct the investigation with Ms. Ramos Taylor. Mr. Ramos Taylor was the lead investigator and was involved in every activity engaged in by Mr. Hood (Tr. at 22-23).

8. Ms. Ramos Taylor and Mr. Hood arrived at Respondent's place of business to conduct their investigation on July 11, 2001 (Tr. at 37). Respondent's controller, Gene Rice, provided them with all of Respondent's records concerning possible insufficient funds checks and payment problems (Tr. at 38-39). These records included purchase invoices, copies of checks, check registers and other documents (Tr. at 39). Ms. Ramos Taylor and Mr. Hood returned to Respondent's place of business on July 30, 2001, to obtain additional records regarding the possible insufficient funds checks and payment problems (Tr. at 40).

9. Respondent's records reviewed by Ms. Ramos Taylor and Mr. Hood, as well as some information obtained from livestock sellers, indicated that during the period June 25 through September 10, 2001, Respondent made 15 purchases of livestock from 14 sellers (CX 7-22).

10. With respect to 14 purchases from 13 of the sellers referred to in Finding of Fact 9 (excluding one seller, Jack and Earl O'Dell), Respondent issued 14 checks in purported payment for the livestock, which were returned by the bank upon which they were drawn due to insufficient funds in Respondent's account (CX 7-21, (Tr. at 54-78).

11. With respect to 12 of the 13 sellers referred to in Finding of Fact 10 (excluding one seller, James Whiten Livestock, Inc.), Respondent eventually issued replacement checks for 12 purchases and wired funds for one purchase, in full payment to these 12 sellers. The period of time between Respondent's original purchase and the issuance date of the replacement checks and the wiring of funds ranged from 14 days for Ocala Livestock Market (CX 8) to 38 days for Okeechobee Livestock Market, Inc. (CX 20). The original livestock amount for these purchases, $321,217.17, was paid but not in the timely manner required by the Act.

12. James Whiten Livestock, Inc., who sold livestock to Respondent on June 27, 2001, in the amount of $49,470.50, received only a $5,000 cashier's check issued on August 8, 2001 (CX 21, page 4) and a February 2, 2002, check for $33,372.90 resulting from a bond claim which James Whiten Livestock, Inc. filed against Respondent (CX 21, page 5) (Tr. at 78). The $38,372.90 that was paid to James Whiten Livestock, Inc. was paid long after payment was due under the Act. No further payments were received by James Whiten Livestock, Inc., and as of May 10, 2004, $11,097.60 remained unpa*Id.* Tr. at 63.

13. On September 10, 2001, Jack and Earl O'Dell sold 468 head of livestock to Respondent pursuant to a contract they had entered into several months earlier (Tr. at 159). The livestock was in two lots, one containing 220 head, for the amount of $117,624.34 (CX 22, page 1) (Tr. at 161), and one containing 248 head, for the amount of $117,908.44 (CX 22, pages 2-3) (Tr. at 161), for a total of $235,526.78. On May 31, 2001, Respondent had paid $17,500 for a down payment (RX 10) (Tr. at 160). After deducting Respondent's down payment and a dollar per head, or $468, for the beef check-off, Respondent owed $217,558.08 (Tr. at 164). On September 10, 2001, Respondent gave Jack O'Dell two checks, one for $217,558.08 and another for $21,755.00 (Tr. at 159 and 187). Jack O'Dell testified that Respondent asked him to hold off cashing the big check for three months and cash the little one as advance interest on what would be a three month loan.

Jack O'Dell testified that he told Respondent he was not interested but that Respondent persisted and asked him to take the two checks home and discuss the matter with his brother. Jack O'Dell then testified "Bill, I will take it home and I will call you tomorrow, but the answer will be the same as today" (Tr. at 159-160). The next day, O'Dell deposited the check for $217,558.08 for the livestock, but Respondent stopped payment on the check (CX 22, pages 8-11) (Tr. at 168). On October 2, 2002, and November 2, 2002, Respondent issued checks to Jack and Earl O'Dell pursuant to bankruptcy court proceedings, for $2,874.67 each, or $5,749.34 (RX 4, 5). The $5,749.34 was paid long after full payment was due under the Act and $211,808.74 remains unpa*Id.*[2]

14. In the course of a lawsuit filed by Jack O'Dell and Earl O'Dell against Respondent in the United States Bankruptcy Court for the Middle District of Georgia, Thomasville Division, Case No.: 02-10715-JTL, Adversary Proceeding File No.: 02-1018, Respondent filed an Answer on July 3, 2002, in which he admitted that he owed the Plaintiffs $217,558.08 and that the transaction was a sale (CX 25, 26). On August 28, 2002, an order was issued by the United States Bankruptcy Court for the Middle District of Georgia (RX 7) in which Jack and Earl O'Dell were given judgment against Respondent in the amount of $217,558.78 and Respondent was ordered to make monthly payments of $2,874.67 over a seven year period. Respondent made two such payments (RX 4, 5).

15. On July 30, 2001, Ms. Karen D. Johnson, an auditor employed by Complainant's Atlanta Regional Office, arrived at Respondent's place of business (Tr. at 44). Ms. Johnson's purpose was to determine whether Respondent was solvent (Tr. at 209). Ms. Johnson did not begin her investigation until Complainant's Atlanta Regional Office received a balance sheet from Respondent, that showed Respondent was insolvent as of July 13, 2001, as in that he had total current assets of $2,398,595.14 and total current liabilities of $3,155,709.74 (RX 20) (Tr. 210). In conducting her investigation, Ms. Johnson was assisted by Ms. Ramos Taylor, who analyzed Respondent's bank reconciliations (Tr. at

[2] Jack and Earl O'Dell also received a check for approximately $6,000 for interest, pursuant to a Bankruptcy Court ruling (Tr. at 174).

214) and Mr. Hood, who examined Respondent's accounts receivable (*Id.*). Ms. Johnson supervised the work done by Ms. Ramos Taylor and Mr. Hood (*Id.*). Ms. Johnson was provided with Respondent's financial records by Respondent's controller, Mr. Rice (Tr. at 214-15).

16. Ms. Johnson returned to Respondent's place of business on August 27, 2001, to obtain additional financial information (Tr. at 218-219). Ms. Johnson was accompanied by Mr. Hood, who was under Ms. Johnson's supervision (Tr. at 219). Ms. Johnson was provided with documents by Mr. Rice and Linda Solana, a certified public accountant who was working for Respondent (Tr. at 220). Ms. Solana gave Ms. Johnson a worksheet so Ms. Johnson could determine Respondent's inventory (CX 24, pages 8-10) (Tr. at 220). Ms. Johnson noted that six lots of cattle set forth in Ms. Solana's worksheet (CX 24, pages 8-10), were described as "missing", consisting of lots 5051, 5055, 5059, 5101, 5103, 5110 (Tr. at 221). When Ms. Johnson requested documentation for the six lots of cattle (Tr. at 221), Ms. Solana and Mr. Rice directed Ms. Johnson to speak to Respondent about them (Tr. at 221-222). Ms. Johnson asked Respondent for documentation supporting these lots and Respondent stated that he did not have any documentation (Tr. at 225). However, the six lots of cattle were jointly owned by Respondent and Supreme Cattle Feeders, LLC; and Supreme Cattle Feeders performed the recordkeeping for the cattle (Tr. at 399-404).

17. While examining Respondent's financial records, Ms. Johnson requested that Mr. Rice provide a June 30, 2001, balance sheet (Tr. at 222). In response to this request, Mr. Rice, on August 30, 2001, provided Ms. Johnson with Respondent's June 30, 2001, balance sheet (CX 24, pages 3-7) (Tr. at 222). Respondent's June 30, 2001, balance sheet showed the lot numbers of the "missing" cattle under current liabilities as "Supreme Cattle Feeders Payable". Respondent's June 30, 2001, balance sheet also showed Respondent's total current assets as $4,158,438.71 and Respondent's total current liabilities as $6,779,032.37.

18. During Ms. Johnson's investigation, Respondent informed her that he was insolvent and that he would sign a document stating that he was insolvent as of June 30, 2001 (Tr. at 226).

19. After Ms. Johnson concluded her investigation of Respondent, she prepared a balance sheet for Respondent, as of June 30, 2001, based largely on documentation she had obtained from Respondent. Ms.

Johnson determined that Respondent's total current assets were $4,892,752.29 and Respondent's total current liabilities were $7,485,097.13 (CX 3) (Tr. at 227).

20. Respondent prepared a balance sheet as of September 30, 2001 (RX 2). Respondent's balance sheet showed total current assets of $155,594.60 and total current liabilities of $2,645,054.61

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CONCLUSIONS

1. Respondent's financial condition did not meet the requirements of the Act, in that Respondent was insolvent as of June 30, 2001, and September 30, 2001.

Complainant presented extensive evidence, through the testimony of Karen D. Johnson, Auditor with Complainant's Atlanta Regional Office (Tr. at 205-447) and the submission of numerous documents (CX 3, 4, 5 and 24, pages 1, 3-13), which show that, as of June 30, 2001, and September 30, 2001, Respondent was insolvent and that his total current liabilities vastly exceeded his current assets. Respondent presented no witnesses to rebut Ms. Johnson's testimony. It is apparent from the evidence that Respondent's financial condition did not comply with the requirements of the Act.

The Act, at 7 U.S.C. § 204, provides that, if the Secretary of Agriculture finds that:

> any registrant is insolvent . . . he may issue an order suspending such registrant for a reasonable specified period.

According to section 203.10 of the Statements of General Policy (9 C.F.R. § 203.10) the principal test of insolvency is to determine whether a person's current liabilities exceed his current assets.

The Secretary's test for insolvency was upheld in *Blackfoot Livestock Commission Company v. Department of Agriculture, Packers and Stockyards Administration*, 810 F.2d 916 at 921 (9th Cir. 1987), where the court stated:

> The Act prohibits operating a stockyard while insolvent. 7 U.S.C. § 204; *Bowman v. United States Department of Agriculture*, 363 F.2d 81 (5th Cir. 1966). Insolvency is defined as current

> liabilities exceeding current assets. *Bowman*, 363 F.2d at 84-85. The Secretary defines current assets and current liabilities by regulation. 9 C.F.R. § 203.10(b)(1)(1982)(assets); 9 C.F.R. § 203.10(b)(2)(1982) (liabilities).

Also *See In re*: *Syracuse Sales Co.* (Decision as to John Knopp), 52 Agric. Dec. 1511 (1993), appeal dismissed, No. 94- 9505 (10th Cir., Apr. 29, 1994).

As is reflected by the balance sheet prepared by Ms. Johnson for Respondent for June 30, 2001, Respondent's total current assets were $4,892,752.29 and Respondent's total current liabilities were $7,485,097.13 (CX 3) (Tr. at 227), for an excess of total current liabilities over total current assets of $2,592,344.84.

Although Respondent's counsel extensively questioned Ms. Johnson during the hearing and took issue with her conclusions, Respondent has presented neither testimony nor documentation contradicting Ms. Johnson's investigative findings. Respondent's own balance sheet for June 30, 2001, provided to Ms. Johnson by Respondent's controller, Gene Rice, on August 30, 2001, (CX 24, pages 3-7) (Tr. at 222), shows that Respondent's total current assets were $4,158,438.71 and Respondent's total current liabilities were $6,779,032.37, for an excess of total current liabilities over total current assets of $2,620,593.66. Further, during the course of the investigation, Respondent admitted to Ms. Johnson that he was insolvent and offered to sign a document stating that he was insolvent as of June 30, 2001 (Tr. at 226).

Respondent was still insolvent on September 30, 2001. The balance sheet which Respondent prepared for that date (RX 2) shows Respondent's total current assets were $155,594.60 and his total current liabilities were $2,745,054.61, for an excess of total current liabilities over total current assets of $2,589,460.01.

Unquestionably, Respondent was insolvent on June 30, 2001, and on September 30, 2001. Respondent therefore was in violation of the requirements of the Act.

2. Respondent operated while insolvent, in willful violation of the Act.

During the period June 30, 2001, through September 30, 2001, while Respondent was insolvent, he conducted business subject to the Act. As shown by the testimony and documentary evidence provided by Nilsa

Ramos Taylor, a Resident Agent employed by Complainant, on August 6, 2001, Respondent purchased108 head of livestock from Okeechobee Livestock Market, Inc., Okeechobee, Florida, for $40,018.40 (CX 7, 20), (Tr. at 55). Further, as Jack O'Dell, a livestock producer located in Wildwood, Florida, testified, Jack and Earl O'Dell sold 468 head of livestock to Respondent, which were delivered on September 10, 2001 (CX 22) (Tr. at 158-166). Respondent presented no witnesses to attempt to rebut the testimony of Ms. Ramos Taylor and Mr. O'Dell.

Operating as a market agency or dealer subject to the Act while insolvent is an unfair and deceptive practice, in willful violation of section 312(a) of the Act (7 U.S.C. § 213(a)). *See In re: Syracuse Sales Co.* (Decision as to John Knopp), *supra* at 1522; *In re: Jeff Palmer d/b/a Palmer Cattle Company*, 50 Agric. Dec. 1762, 1771-72 (1991).

Further, it has been held in numerous decisions that a violation is willful for administrative law purposes if a respondent intentionally does an act which is prohibited, irrespective of evil motive or reliance on erroneous advice, or acts with careless disregard of statutory requirements[3]. *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182 (1973); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir.1980), *cert. denied*, 450 U.S. 997 (1981); *Silverman v. CFTC*, 549 F.2d 28, 31 (7th Cir.1977); *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir.1961). When Respondent bought livestock from Okeechobee Livestock Market, Inc. on August 6, 2001, and from Jack and Earl O'Dell on September 10, 2001, Respondent knew or should have known that he was insolvent. This is evident by the fact that Respondent prepared and sent to Complainant a balance sheet as of July 13, 2001, which showed Respondent to be insolvent, since his total current assets were $2,398,595.14 while his total current liabilities were $3,155,709.74 (RX 20) (Tr. 210).

Therefore, Respondent willfully violated section 312(a) of the Act by operating while he was insolvent.

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[3] Except for cases in the 4th and 10th Circuits, where the respondent's actions must have been either intentional or grossly negligent. *Capital Produce Co. v. United States*, 930 F.2d 1077, 1079 81 (4th Cir. 1991); *Capitol Packing Co. v. United States*, 350 F.2d 67, 78 79 (10th Cir. 1965).

3. Respondent willfully violated sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b) by issuing 14 insufficient funds checks to 13 livestock sellers and failing to pay the full amount of the purchase price for livestock, within the time period required by the Act.

a. Respondent's issuance of insufficient funds checks.

Respondent issued 14 checks to 13 livestock sellers during the period June 26, 2001, through August 6, 2001, in purported payment for livestock purchases, which were returned by the bank upon drawn because Respondent did not have sufficient funds to pay the checks (CX 7-21) (Tr. at 54-78). Respondent argues on brief, that when he issued the checks he was unaware that his bank was holding back a deposit he had made of $242,605.46.

However, this defense is not acceptable. As stated in *In re: George Durflinger*, 58 *Agric. Dec*. 940, 942 (1999):

> It is Respondent's responsibility to ensure that there are sufficient funds in the applicable account as long as there are checks outstanding on that account.

Even if a respondent has mistakenly relied upon an over-draft protection arrangement with his bank, this does not excuse the issuance of insufficient funds checks. As stated in *In re: Ozark County Cattle Company, Inc.*, 49 Agric. Dec. 336, 351 (1990), quoting from *In re Richard N. Garver*, 45 Agric. Dec. 1090, 1094-1095 (1986) *aff'd*, *Garver v. United States*, 846 F.2d 1029 (6th Cir. 1988):

> Respondent . . . argues that his relationship with the bank and the over-draft protection the bank extended to him demonstrate that he did not willfully engage in the practices in violation of the Act. However, the unilateral termination by the bank of the respondent's overdraft protection demonstrates precisely why such arrangement cannot insulate a livestock buyer from accountability under the Act. It gives no protection to the sellers of livestock. Respondent's awareness or state of mind at the time the bad checks were issued is of no consequence.
>
> A line of credit or over-draft protection does not provide respondent's creditors the financial security required by the Act and regulations. Despite Mr. Garver's longstanding and friendly relationship with his bank, his bank lawfully and unilaterally

> terminated his over-draft protection without notice. Similarly, over-draft protection would be of no value if respondent's bank were to fail.

Respondent's issuance of 14 checks dishonored for insufficient funds constitutes an unfair and deceptive practice and the willful violation of sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b). *See In re: George Durflinger*, supra; *In re: Tiemann*, 47 Agric. Dec. 1573, 1579-1580 (1988); *In re Richard N. Garver*, *supra*.

b. Respondent failed to pay the full amount of the purchase price for livestock within the time period required by the Act.

As shown by the evidence presented through the testimony of Ms. Ramos Taylor and Mr. O'Dell (CX 22, 25, 26) (Tr. at 157-182), Respondent failed to pay the full amount of the purchase price for livestock within the time period required by the Act and currently owes approximately $222,906.34 to livestock sellers. Respondent chose to present no witnesses to attempt to rebut Complainant's evidence.

Section 409 of the Act states that:

> "[e]ach packer, market agency, or dealer purchasing livestock shall, before the close of the next business day following the purchase of livestock and transfer of possession thereof, deliver to the seller or his duly authorized representative the full amount of the purchase price."

When asked when payment for livestock is due, Ms. Ramos Taylor testified that the date on the invoice is considered the date of purchase, and payment is due by the close of the next business day (Tr. at 119-120). Ms. Ramos Taylor stated that sometimes, when livestock is purchased, markets will keep the livestock until the buyer picks them up (Tr. at 119). Creig Stephens, Resident Agent Supervisor with Complainant's Atlanta Regional Office, who worked at his family's auction market all his life and has investigated numerous auction markets during his career with Complainant (Tr. at 451), testified that when livestock is purchased at a market, the purchaser sometimes requests the market to hold the livestock on the purchaser's behalf (Tr. at 453) but, when that happens, the purchaser is responsible for paying

any yardage and fees incurred by the market in caring for the purchased livestock (Tr. at 453-454). This is because title to the livestock passes to the buyer when the animal is purchased in the ring (Tr. at 455). *See In re: Embry Livestock Co., Inc., et al*, 48 Agric. Dec. 972, 989 (1989) ("Embry Livestock paid for and took title to the hogs it purchased, and bore the risk of loss on those hogs from the time the hogs came off the stockyard's scales"). Similarly, in this case, title passed from the sellers to Respondent when Respondent purchased the livestock. Once title passed, Respondent became the owner of the livestock and was required to pay for the livestock by the close of the next business day, and not 14 to 38 days after the date of purchase as Respondent did in this case.

Respondent issued 14 insufficient funds checks for 14 livestock purchases from 13 sellers (CX 7-21, (Tr. at 54-78). Respondent eventually issued replacement checks for 12 of the purchases and wired replacement funds for one purchase. However, the period of time between Respondent's purchases and the issuance dates of the 12 replacement checks and the wiring of replacement funds ranged from 14 days for replacement checks issued to Ocala Livestock Market (CX 8) to 38 days for the wiring of replacement funds to Okeechobee Livestock Market, Inc. (CX 20). Even though these 12 sellers eventually received full payment for their purchases, the payment took place long after the close of the next business day after purchase and transfer of possession that was the time when payment was due under the Act.

With respect to one seller who received an insufficient funds check from Respondent, James Whiten Livestock, Inc., Respondent did not issue a replacement check in full payment for his purchase. Respondent had purchased livestock from James Whiten Livestock, Inc. in the amount of $49,470.50 on June 27, 2001 (CX 21, page 1). The only payments received by James Whiten Livestock, Inc., for the livestock were a $5,000 cashier's check issued on August 8, 2001 (CX 21, page 4) and a February 2, 2002, check for $33,372.90 resulting from a bond claim which James Whiten Livestock, Inc. had filed against Respondent (CX 21, page 5) (Tr. at 78). The $38,372.90 that was paid to James Whiten Livestock, Inc. was paid long after payment was due under the Act. No further payments were received by James Whiten Livestock, Inc. and as of May 10, 2004, $11,097.60 remained unpaid. (Tr. at 63)

In addition to the 13 sellers to whom Respondent issued insufficient funds checks, Respondent also purchased from Jack and Earl O'Dell,

Wildwood, Florida, a total of 468 head of livestock, delivered to Respondent on September 10, 2001, based on a contract several months earlier (Tr. at 159). Mr. Jack O'Dell gave testimony at the hearing concerning this transaction (Tr. at 157-203). The livestock was purchased in two lots. One lot contained 220 head purchased for $117,624.34 (CX 22, page 1) (Tr. at 161). The second lot contained 248 head purchased for $117,908.44 (CX 22, pages 2-3) (Tr. at 161). The combined purchase price for the two lots of livestock was $235,526.78. On May 31, 2001, Respondent gave Jack and Earl O'Dell $17,500 as a down payment for the livestock (RX 10) (Tr. at 160). Upon delivery of both lots totaling 468 head of livestock on September 10, 2001, Respondent gave Jack O'Dell two checks, one for $217,558.08 and another for $21,755. Respondent asked Mr. O'Dell to cash the smaller check and hold off for three months before cashing the larger one which the parties agreed constituted the remaining amount owed after deducting Respondent's down payment and a dollar per head, or $468, for the beef check-off (Tr. at 164). However, Respondent stopped payment on the check (CX 22, pages 8-11) (Tr. at 168).Mr. O'Dell testified that he rejected Respondent's proposal that he accept the smaller check as an interest payment for advancing Respondent a three month loan. The next day Mr. O'Dell deposited the larger check and Respondent stopped payment on it. The O'Dell's had no obligation to forbear from being paid in full when the checks were given and Respondent had no right to stop payment. Later, pursuant to bankruptcy proceedings, Respondent issued two checks to Jack and Earl O'Dell for $2,874.67 each, or $5,749.34, on October 2, 2002, and November 2, 2004 (RX 4, 5), long after payment was due under the Act, leaving $211,808.74 unpaid. As of the date of the hearing, Respondent had not made any additional payments (Tr. at 176). Mr. O'Dell testified (Tr. at 176) that, as a result of not receiving full payment for the 468 head of livestock, he was almost forced to go out of business (Tr. at 176).

Respondent's counsel argues that Mr. O'Dell accepted the loan arrangement. However, the only evidence Respondent provided to support this was a note from Mr. O'Dell to Respondent on November 6, 2002, concerning a proposal by Mr. O'Dell to withdraw a criminal complaint he had filed against Respondent if Respondent would make payments on the amount owed (RX 3). In the note, Mr. O'Dell makes

reference to the "end of the loan". Mr. O'Dell explained that he used the word "loan" based on instructions from his attorney but that the transaction was a sale, not a loan (Tr. at 200-203).

This transaction involved the sale of 468 head of livestock and there is documentary evidence showing that Respondent acknowledged his failure to pay Jack and Earl O'Dell for the livestock. The record contains a complaint filed by Jack O'Dell and Earl O'Dell against Respondent in the United States Bankruptcy Court for the Middle District of Georgia, Thomasville Division, Case No.: 02-10715-JTL, Adversary Proceeding File No. 02-1018, in which the O'Dells claimed $217,558.08 owed them for their livestock. (CX 25). Respondent's Answer to the complaint admitted that there had been a sale of cattle and that he owed the Plaintiffs $217,558.08 (CX 26). On August 28, 2002, the Bankruptcy Court ordered Respondent to pay Jack and Earl O'Dell the $217,558.78 he owed them for the cattle by making monthly payments of $2,874.67 over a seven year period (RX 7). Respondent has made two payments under the Order in October and November 2002 (RX 4, 5), leaving an indebtedness of $211,808.74. Moreover, even though Respondent agues on brief that this transaction involved a loan, he never took the witness stand to give supporting testimony. The evidence is overwhelming that Jack and Earl O'Dell sold 468 head of livestock to Respondent and are still owed $211,808.74.

Failing to pay the full amount of the purchase price for livestock within the time required by the Act is a very serious violation and constitutes an unfair and deceptive practice, in willful violation of the Act (7 U.S.C. §§ 213(a), 228b). Respondent's actions were willful, because he knew or should have known that he did not have sufficient funds in the account upon which the checks were drawn and he also knew or should have known when he purchased livestock that he could not make full and prompt payment in accordance with the requirements of the Act. *In re*: *George Durflinger*, *supra*; *In re*: *Richard N. Garver, supra*; *In re*: *George County Stockyard, Inc*., 45 Agric. Dec. 2342, 2350 (1986); *In re*: *Farmers & Ranchers Livestock Auction, Inc., supra; In re Donald Hageman*, 43 Agric. Dec. 531 (1983).

Based on the overwhelming evidence in the record, Respondent failed to pay the full amount of the purchase price for livestock within the time period required by the Act in the amounts of $321,217.17 for 13 purchases from 12 sellers, $49,470.50 for a purchase from James

Whiten Livestock, Inc., and $217,558.78 for a purchase from Jack and Earl O'Dell, for a total of $588,246.45. Further, Respondent still owes James Whiten Livestock $11,097.60 and Jack and Earl O'Dell $211,808.74, for a total of $222,906.34. Respondent's failures to pay the full amount of the purchase price for livestock within the time period required by the Act are willful violations of the Act (7 U.S.C. §§ 213(a), 228b).

4. Respondent has not failed to keep records required by the Act respecting "missing cattle" jointly owned with Supreme Cattle Feeders.

Section 401 of the Act (7 U.S.C. § 221) requires a registrant to "keep such accounts, records, and memoranda as fully and correctly disclose all transactions involved in his business." The failure to keep such records violates section 401 of the Act. *See In re Shield Livestock Co., Inc.*, 49 Agric. Dec. 455, 470-471 (1990). However, the so-called "missing cattle" for which Respondent did not have records were owned by Respondent jointly with Supreme Cattle Feeders, LLC, Boise, Idaho and recordkeeping respecting these cattle that they owned 50-50, was performed by Supreme Cattle. Supreme Cattle did supply Complainant with the records it sought and no recordkeeping violation by Respondent is therefore found.

5. Sanction.

Complainant supplied testimony respecting its recommended sanction through the testimony of Branard England, auditor with Complainant's Washington, D.C. office. Mr. England testified (Tr. at 501-503), that in light of Respondent's numerous severe violations of the Act and history of noncompliance with the Act, an order should be issued containing the following provisions: (a) that Respondent cease and desist from operating while insolvent, issuing insufficient funds checks, failing to pay when due for livestock and failing to pay for livestock; (b) that Respondent keep records that fully and correctly disclose all transactions involved in his business, including records reflecting his purchases of livestock and his expenses for feeding and

caring for livestock; and (c) that Respondent's registration be suspended for 10 years and thereafter until Respondent demonstrates solvency. With respect to the suspension, Complainant recommends that, upon application to Packers and Stockyards Programs, a supplemental order may be issued as follows: (1) terminating the suspension at any time after two years upon demonstration to the satisfaction of Packers and Stockyards Programs of circumstances warranting modification of the order, which circumstances would include full payment of all livestock sellers or shippers and proof that Respondent is no longer insolvent; and (2) modifying the suspension to permit Respondent's salaried employment by another registrant or packer after two years upon demonstration of circumstances warranting modification of the order, which circumstances would include Respondent's adoption and compliance with a payment plan to fully pay all unpaid sellers, the selection of a proposed employer who is properly registered and bonded and has not been placed on notice or been the respondent in a disciplinary action for violations of the Packers and Stockyards Act during the previous five years, and a proposed employment arrangement that is not an attempt to circumvent the order.

Respondent's violations in operating while insolvent, issuing checks drawn on accounts having insufficient funds, failing to pay for cattle purchases within the time required and leaving a total of $222,906.34 still unpaid are indeed very serious violations of the Act.

The fact that Respondent operated while he was insolvent subjected cattle sellers to the very real risk of being paid late or not being paid at all. In fact this is exactly what happened. Respondent failed to pay the full amount of the purchase price for livestock within the time period required by the Act in the amounts of $321,217.17 for 13 purchases from 12 sellers, $49,470.50 for a purchase from James Whiten Livestock, Inc, and $217,558.78 for a purchase from Jack and Earl O'Dell, for a total of $588,246.45. Moreover, Respondent still owes James Whiten Livestock $11,097.60 and Jack and Earl O'Dell $211,808.74, for a total of $222,906.34.

Respondent's issuance of insufficient funds checks and his failure to pay the full amount of the purchase price for livestock within the time period required by the Act are actions that must be construed as willful violations of the Act.

Mr. England testified that Complainant ordinarily seeks a five year

suspension of registration for payment violations of the kind found in this case (Tr. at 503). A longer suspension was requested due to Respondent's past history of similar violations (Tr. at 503-504).

Complainant introduced two prior consent orders to demonstrate the need for an increased period of suspension. In each consent order, Respondent neither admitted nor denied having violated the Act. No adverse inference of guilt may therefore be drawn from the consent orders nor may the allegations of wrongdoing that underlay the orders constitute the basis for enhanced sanctions. *Spencer Livestock Commission v. Department of Agriculture*, 841 F.2d 1451, 1458 (9th Cir. 1988). On the other hand, the fact that the consent orders were violated may be used to determine what kind of sanction is needed to deter Respondent from conduct prohibited by the Act. *Spencer, supra*.

Respondent consented to two orders. On February 11, 1982, (*In re: William "Bill" Chandler d/b/a Chandler Cattle Company and conducting business through C&W Cattle Corporation*, P. & S. Docket No. 5976), Respondent agreed to cease and desist from, among other things, issuing checks or drafts in payment for livestock purchased without having and maintaining sufficient funds to pay such checks available in the bank account from which such checks or drafts are to be paid, and failing to pay, when due, the full purchase price of livestock (CX 2, pages 18-20). His present violations violate that consent order. On November 22, 1996, Respondent entered into a second consent order (*In re: Southeast Livestock Order Buyers, Inc., Jefferson County Stockyards, Inc., Jacquelyn A. Chandler and William Chandler* P. & S. Docket No. D-96-0028)) (CX 2, pages 11-15) in which Respondent and the other parties agreed to cease and desist from failing to reimburse, when due, their clearor with funds received by the parties from the sale of the livestock for which the clearor had made payment and Respondent's registration was suspended for 180 days. Respondent's present violations do not involve a clearor and therefore he has not violated that consent order.

Complainant also sent notices to Respondent advising Respondent that he appeared to be violating the Act. On November 9, 1999, Complainant sent a certified letter to Respondent, which was signed for by "J. Chandler", who is most probably Jacqueline Chandler, Respondent's wife (Tr. at 138), advising Respondent that, among other

purported violations, he was failing to comply with the Act (7 U.S.C. § 228b) and the regulations (9 C.F.R. § 201.43(b)(2)(i)) respecting timely payment for livestock purchases. On May 23, 2001, Respondent received a certified letter advising him that he was failing to comply with the Act's requirement to pay on time for livestock purchases (CX 2, pages 1-3). In sum, Respondent has violated a prior consent order and has been given ample prior instructions on the Act's timely payment requirements and his legal obligations to comply with them as a registrant.

I agree with Complainant that appropriate cease and desist provisions should be made part of the Order issued against Respondent. I am not, however, including a provision imposing recordkeeping requirements since I have not found such a violation by Respondent. I also agree with Complainant that a suspension of Respondent's registration for more than the usual sanction of five years is warranted in this case in light of the gravity of the offenses, the size of the business involved and the need to effectively deter Respondent from future violations. However, ten years would be too long even with the provision that P& S may conditionally allow Respondent to be employed by another registrant. Instead I am imposing a six year suspension of Respondent's registration under the Act. Extending the suspension to a six year period of time recognizes the aggravating factors in this case without going so far as to empower Complainant to be able to effectively preclude Respondent from ever again operating his own business as the proposed ten year suspension would do. The purpose of an administrative sanction is not to punish one who may have violated governmental regulations; the purpose is instead to take such steps as are necessary to deter the Respondent from future conduct prohibited by the Act. *See Spencer, supra*, at 1458.

Accordingly, the following ORDER is being issued.

Order

Respondent, William Chandler d/b/a Bill Chandler Cattle, his agents and employees, directly or through any corporate or other device, in connection with his activities subject to the Act, shall cease and desist from:

1. Engaging in business subject to the Act while insolvent, i.e. while current liabilities exceed current assets
2. Issuing insufficient funds checks in payment for livestock purchases; and
3. Failing to pay the full amount of the purchase price for livestock within the time period required by the Act.

Respondent is suspended as a registrant under the Act for a period of six (6) years and thereafter until he has demonstrated that he is no longer insolvent. Provided, however, that upon application to Packers and Stockyards Programs, a supplemental order may be issued terminating the suspension at any time after two (2) years, upon demonstration of circumstances warranting modification of the order. Provided, further, that this order may be modified upon application to Packers and Stockyards Programs to permit Respondent's salaried employment by another registrant or packer after the expiration of two (2) years of this suspension term and upon demonstration of circumstances warranting modification of the order.

This Decision and Order shall become effective and final thirty-one (31) days after receipt thereof by Respondent unless either party shall appeal the Decision within thirty (30) days after receiving it in accordance with 7 CFR 1.145.

* * *

ADDENDUM

Pertinent Provisions of the Packers and Stockyards Act
7 U.S.C. § 204

> ….whenever, after due notice and hearing, the Secretary finds any registrant is insolvent or has violated any provisions of this chapter, he may issue an order suspending such registrant for a reasonable specified period. Such order of suspension shall take effect within not less than five days, unless suspended or modified or set aside by the Secretary or a court of competent jurisdiction….

7 U.S.C. § 213(a)

It shall be unlawful for any stockyard owner, market agency, or dealer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with determining whether persons should be authorized to operate at the stockyards, or with the receiving, marketing, buying or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing or handling of livestock

7 U.S.C. § 221

Every packer, any swine contractor, and any live poultry dealer, stockyard owner, market agency, and dealer shall keep such accounts, records, and memoranda as fully and correctly disclose all transactions involved in his business, including the true ownership of such business by stockholding or otherwise. Whenever the Secretary finds that the accounts, records, and memoranda of any such person do not fully and correctly disclose all transactions involved in his business, the Secretary may prescribe the manner and form in which such accounts, records, and memoranda shall be kept, and thereafter any such person who fails to keep such accounts, records, and memoranda in the manner and form prescribed or approved by the Secretary shall upon conviction be fined not more than $5,000, or imprisoned not more than three years, or both.

7 U.S.C. § 228(b)

(a) Each packer, market agency, or dealer purchasing livestock shall, before the close of the next business day following the purchase of livestock and transfer of possession thereof, deliver to the seller or his duly authorized representative the full amount of the purchase price: *Provided*, That each packer, market agency, or dealer purchasing livestock for slaughter shall, before the close of the next business day following purchase of livestock and transfer of possession thereof, actually deliver at the point of transfer of possession to the seller or his duly authorized

representative a check or shall wire transfer funds to the seller's account for the full amount of the purchase price; or, in the case of a purchase on a carcass or "grade and yield" basis, the purchaser shall make payment by check at the point of transfer of possession or shall wire transfer funds to the seller's account for the full amount of the purchase price not later than the close of the first business day following determination of the purchase price: *Provided further*, That if the seller or his duly authorized representative is no present to receive payment at the point of transfer of possession, as herein provided, the packer, market agency or dealer shall wire transfer funds or place a check in the United States mail for the full amount of the purchase price, properly addressed to the seller, within the time limits specified in this subsection, such action being deemed compliance with the requirement for prompt payment.

(b) Notwithstanding the provisions of subsection (a) of this section and subject to such terms and conditions as the Secretary may prescribe, the parties to the purchase and sale of livestock may expressly agree in writing, before such purchase or sale, to effect payment in a manner other than that required in subsection (a). Any such agreement shall be disclosed in the records of any market agency or dealer selling the livestock, and in the purchaser's records and on the accounts or other documents issued by the purchaser relating to the transaction.

(c) Any delay or attempt to delay by a market agency, dealer, or packer purchasing livestock, the collection of funds as herein provided, or otherwise for the purpose of or resulting in extending the normal period of payment for such livestock shall be considered an "unfair practice" in violation of this Act. Nothing in this section shall be deemed to limit the meaning of the term "unfair practice" as used in this Act.

Pertinent Regulatory Provisions

9 C.F.R. § 201.43(b)

Prompt payment for livestock and live poultry - terms and conditions.

(1) No packer, market agency, or dealer shall purchase livestock for which payment is made by a draft which is not a check, unless the seller expressly agrees in writing before the transaction that payment may be made by such a draft. (In cases of packers whose average annual purchases exceed $500,000, and market agencies and dealers acting as agents for such packers, see also 201.200).

(2)(i) No packer, market agency, or dealer purchasing livestock for cash and not on credit, whether for slaughter or not for slaughter, shall mail a check in payment for the livestock unless the check is placed in an envelope with proper first class postage prepaid and properly addressed to the seller or such person as he may direct, in a post office, letter box, or other receptacle regularly used for the deposit of mail for delivery, from which such envelope is scheduled to be collected (A) before the close of the next business day following the purchase of livestock and transfer of possession thereof, or (B) in the case of a purchase on a "carcass" or "grade and yield" basis, before the close of the first business day following determination of the purchase price.

(ii) No packer, market agency, or dealer purchasing livestock for slaughter, shall mail a check in payment for the livestock unless (A) the check is made available for actual delivery and the seller or his duly authorized representative is not present to receive payment, at the point of transfer of possession of such livestock, on or before the close of the next business day following the purchase of the livestock and transfer of possession thereof, or, in the case of a purchase on a "carcass" or "grade and yield" basis, on or before the close of the first business day following determination of the purchase price; or unless (B) the seller expressly agrees in writing before the transaction that payment may be made by such mailing of a check.

(3) Any agreement referred to in paragraphs (b)(1)or(2) of this section shall be disclosed in the records of any market agency or dealer selling such livestock, and in the records of the packer, market agency, or dealer purchasing such livestock, and retained by such person for such time as is required by any law, or by written notice served on such person by the Administrator, but

not less than two calendar years from the date of expiration thereof.

(4) No packer, live poultry dealer, market agency, or livestock dealer shall as a condition to its purchase of livestock or poultry, impose, demand, compel or dictate the terms or manner of payment, or attempt to obtain a payment agreement from a seller through any threat of retaliation or other form of intimidation.

Pertinent Statements of General Policy

Section 203.10 (9 C.F.R. § 203.10):

Statement with respect to insolvency; definition of current assets and current liabilities.

(a) Under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. 181 *et seq*.), the principal test of insolvency is to determine whether a person's current liabilities exceed his current assets. This current ratio test of insolvency under the Act has been reviewed and affirmed by a United States Court of Appeals. *Bowman v. United States Department of Agriculture*, 363 F. 2d 81 (5th Cir. 1966).

(b) For the purposes of the administration of the Packers and Stockyards Act, 1921, the following terms shall be construed, respectively, to mean:

(1) Current assets means cash and other assets or resources commonly identified as those which are reasonably expected to be realized in cash or sold or consumed during the normal operating cycle of the business, which is considered to be one year.

(2) Current liabilities means obligations whose liquidation is reasonably expected to require the use of existing resources principally classifiable as current assets or the creation of other current liabilities during the one year operating cycle of the business.

(c) The term current assets generally includes: (1) Cash in bank or on hand; (2) sums due a market agency from a custodial account for shippers' proceeds; (3) accounts receivable, if

collectable; (4) notes receivable and portions of long-term notes receivable within one year from date of balance sheet, if collectable; (5) inventories of livestock acquired for purposes of resale or for purposes of market support; (6) feed inventories and other inventories which are intended to be sold or consumed in the normal operating cycle of the business; (7) accounts due from employees, if collectable; (8) accounts due from officers of a corporation, if collectable; (9) accounts due from affiliates and subsidiaries of corporations if the financial position of such subsidiaries and affiliates justifies such classification; (10) marketable securities representing cash available for current operations and not otherwise pledged as security; (11) accrued interest receivable; and (12) prepaid expenses.

(d) The term current assets generally excludes: (1) Cash and claims to cash which are restricted as to withdrawal, such as custodial funds for shippers' proceeds and current proceeds receivable from the sale of livestock sold on a commission basis; (2) investments in securities (whether marketable or not) or advances which have been made for the purposes of control, affiliation, or other continuing business advantage; (3) receivables which are not expected to be collected within 12 months; (4) cash surrender value of life insurance policies; (5) land and other natural resources; and (6) depreciable assets.

(e) The term current liabilities generally includes: (1) Bank overdrafts (per books); (2) amounts due a custodial account for shippers' proceeds; (3) accounts payable within one year from date of balance sheet; (4) notes payable or portions thereof due and payable within one year from date of balance sheet; (5) accruals such as taxes, wages, social security, unemployment compensation, etc., due and payable as of the date of the balance sheet; and (6) all other liabilities whose regular and ordinary liquidation is expected to occur within one year

* * *.

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In re: LITTLE JOE LIVESTOCK MEATS, INC., AND JOSEPH PAGLIUSO, JR.
P & S Docket No. D-04-0005.
Decision and Order.
Filed January 3, 2005.

P&S – Insufficient funds – Failure to pay when due – Untimely settlement.

Ruben Rudolph, for Complainant.
Unrepresented Respondent, (not present).
Decision and Order by Administrative Law Judge Peter M. Davenport.

DECISION AND ORDER

This is the third action was brought by the Grain Inspection Packers and Stockyards Administration (GIPSA) against the Respondents for violations of the provisions of the Packers and Stockyards Act of 1921, as amended and supplemented (7 U.S.C. § 181, *et seq*.) hereinafter referred to as the "Act" and the Regulations issued pursuant to the Act. [1] The Respondents have generally denied the allegations of the Complaint and a hearing was held in New York City, New York on November 8, 2005. The Complainant was represented by Ruben Rudolph, Esquire, Office of the General Counsel, United States department of Agriculture, Washington, D.C.

The Complaint alleges that between May 24, 2000 and January 8, 2001, the corporate Respondent, Little Joe Livestock Meats, Inc. and Respondent Joseph Pagliuso, Jr., its President and sole shareholder willfully violated sections 312(a) and 409 of the Act (7 U.S.C. §213(a) and 7 U.S.C. § 228b) by issuing checks in payment for livestock without having sufficient funds on deposit and available in the account upon which to pay such checks when presented, and by failing to pay, when due, the full purchase price of the purchased livestock. The Respondents are also alleged to have violated section 401 of the Act (7 U.S.C. § 221) by failing to maintain adequate records that fully and correctly disclose all transactions involved in its business.

7 U.S.C. § 213(a) provides:

[1] CX 4 and CX 5.

> It shall be unlawful for any stockyard owner, market agency, or dealer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with determining whether persons should be authorized to operate at the stockyards, or with the receiving, marketing, buying, or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing or handling of livestock.

7 U.S.C. § 228b requires payment of the full purchase price of livestock before the close of the next business day:

> Each packer, market agency, or dealer purchasing livestock shall, before the close of the next business day following the purchase of livestock and transfer of possession thereof, deliver to the seller or his duly authorized representative the full amount of the purchase price.....

The record keeping requirements for licensees involved in the business of purchase and sale of livestock are contained in 7 U.S.C. § 221:

> Every packer, any live poultry dealer, stockyard owner, market agency, and dealer shall keep such accounts, records, and memoranda as fully and correctly disclose all transactions involved in his business....

The Respondents failed to appear at the hearing, either in person or by counsel,[2] and although a default decision could have been entered,

[2] The Respondents' Answer was submitted by Paul Aloi, an attorney who entered his appearance as counsel for the Respondents. After filing the Answer, he raised the possibility of settlement with government counsel. Thereafter, he failed to return telephone calls from the Administrative Law Judge's Secretary concerning his availability for participation in a Pre Hearing Conference or from government counsel concerning either settlement or dates for a hearing, he failed to comply with the Order concerning the filing of witness and exhibit lists with the Hearing Clerk and available dates with the Administrative Law Judge and Hearing Clerk, (Docket Entry No. 10, Notice of Exchange Dates entered July 18, 2005, modified by Docket Entry No. 13, Order entered on August 17, 2005), he failed to provide a witness or exhibit list or

(continued...)

the Complainant elected to introduce the testimony of witnesses and produced documentary evidence which amply support the general allegations of both issuing checks which were returned unpaid by the bank upon which they were drawn as a result of insufficient funds being on deposit and failing to pay for cattle in a timely manner as alleged in the Complaint.[3] The transcript of the November 8, 2005 hearing (hereafter "Tr.") was filed on November 23, 2005. The Respondents were advised of their opportunity to inspect the transcript or to secure a copy from the Hearing Reporter, as well as being given an opportunity to respond to a Proposed Decision submitted by the Complainant; however no response has been received. A brief summary of the evidence introduced at the hearing follows.

The Complainant called Cindy J. Bertoli, a Resident Agent with the Packers and Stockyards Program, (hereinafter "P & SP") who testified concerning her investigation of the Respondents. Agent Bertoli testified that the investigation was initiated after her office received information that the Respondents had issued a number of checks which had been returned for insufficient funds. (Tr. at 12). She identified Exhibits CX 1-6 as information obtained from the records maintained by P & SP and the Respondents pertaining to Little Joe's Livestock Meats, Inc. (hereinafter "Little Joe") and Joseph Pagliuso, Jr. (hereinafter

[2](...continued)
copies of any exhibits to government counsel and only in the late afternoon on the day before the hearing (after the Administrative Law Judge had departed for New York) without filing a Motion for a Continuance or Postponement of the hearing advised the Administrative Law Judge's office of his inability to appear based upon oral surgery which apparently had been performed on November 3, 2005. Under these circumstances, the hearing was conducted as scheduled without postponement. Even though no Order was entered granting a continuance or postponement of the hearing, neither of the Respondents nor anyone else appeared on their behalf.

[3] As will be discussed, the documentary evidence does not fully support all of the allegations of the Complaint as there is some disparity in the proof as to the dates that NSF checks were issued; however, the general nature of the violations was clearly established. The evidence actually demonstrates that there were more instances of NSF checks being issued than were alleged.

"Pagliuso").[4] As part of her investigation, she went to Pagliuso's business office and requested information concerning his cattle transactions. Pagliuso was able to provide the Cattle Transactions Logbook mandated by the State of New York and some of the requested information, but was unable to produce all of the records requested. Agent Bertoli was referred to Pagliuso's accountant who provided additional records but again not all of the information which had been requested. She then proceeded to contact the livestock exchanges where the Respondents had transacted business, Finger Lakes Livestock Exchange, Inc. (hereinafter "Finger Lakes") and the two locations of Empire Livestock Marketing, LLC. (Bath, New York and Pavilion, New York) (hereinafter "Empire"). (Tr. at 12-17).

At Finger Lakes, Agent Bertoli interviewed the office manager, Barbara Parker. (Tr. at 15). Ms. Parker produced additional records which were pertinent to the Respondents' transactions and explained the handwritten notations which had been made on the records. (Tr. at 15-16). Agent Bertoli also went to the locations of Empire and interviewed Robin Cross, the senior accountant and the two office managers at the two locations who provided records concerning their transactions with the Respondents and explained the notations on their records. (Tr. at 16-17). After obtaining the additional records from Finger Lakes and Empire, Agent Bertoli prepared two summaries, Exhibit CX 7, which summarized the instances of issuing Not Sufficient Funds ("NSF") checks for the purchases of cattle and Exhibit CX 14 which summarizes

[4] Included in those records were CX 1 which was described as the PS & P Business Report which was downloaded from the P & SP records database and a copy of the original Application for Registration for Little Joe's Livestock Meats, Inc. dated June 17, 1972 which reflected that Joseph Pagliuso, Jr. owned 100% of the stock of the corporation. CX 2 consists of copies of annual reports filed by the Respondent corporation for the year ended December 31, 1996, 2001, 2002 and 2004. (Tr. at 20). CX 3 included a copy of information downloaded from the New York State Department of State, identifying the entity information on file with the New York Department of State and copies of the stock certificates reflecting ownership of the corporation by Joseph Pagliuso, Jr. obtained from Mr. Pagliuso and his accountant. (Tr. at 23-24). CX 4 and 5 are copies of the prior Consent Decisions entered on May 15, 1987 and November 14, 1996. (Tr. at 22). CX 6 is a copy of the certified letter dated October 6, 1997 sent to the Respondents following a visit to them on September 10, 1997 to determine compliance with the Consent Decision and to determine whether the Respondents were eligible to request the modification of the suspension imposed by the Consent Decision dated November 14, 1996. (Tr. at 27).

the instances of failure to pay for the purchases of cattle in a timely manner. (Tr. at 28, 69-70). Exhibits CX 8-13 contain copies of the documents supporting the summary in Exhibit CX 7, including copies of the deposit slips reflecting a deposit of check(s) from the Respondents, copies of the bank statements reflecting charge backs of the amounts of the checks with the handwritten notations referencing that the charge backs were those written by the Respondents as well as copies of the NSF checks themselves bearing the bank stamps reflecting that the checks had been returned for insufficient funds.

In Paragraph II (a) of the Complaint, the Complainant identified purchases made on five dates for which the Respondents issued checks in payment for livestock purchases which were returned unpaid by the Respondents' bank. At the hearing, the Complainant entered into evidence copies of five checks issued by Respondents (CX 11, pgs 5, 8; CX 12 pgs 2, 7: CX 13 pg 2) and the corresponding bank statements from the parties that deposited those checks (CX 11; CX 12; CX 13) demonstrating that Respondents' checks were dishonored by the bank upon which they were drawn. During her investigation, Agent Bertoli was able to locate physical copies of five dishonored checks issued by the Respondents in payment for cattle; however, the bank records of the Finger Lakes indicate that Respondents' payments for livestock were dishonored for insufficient funds many additional times. (Tr. at 32-43, 50-62, 64-67; CX 11; CX 12; CX 13).

The proof adduced at the hearing differs slightly from the allegations contained in the complaint to the extent that the evidence reflects a single aggregate check in the amount of $3,612.99 written for the transactions for the purchase of livestock on May 24, 2000, May 31, 2000 and June 7, 2000. (CX 8, 9, 10). There is no evidence as to the date when the first check purporting to pay for these purchases might have been written or whether other checks were written for these three transactions; however, the evidence does reflect $3,612.99 being deposited by Finger Lakes as early as June 15, 2000 and Finger Lakes being advised by their bank that $3,612.99 was charged back against their account as being returned unpaid on June 23, 2000 due to

insufficient funds in the Respondents' account.[5] Agent Bertoli testified that based upon information provided by Finger Lakes, the payment in the amount of $3,612.99 was for the three transactions dated May 24, 2000, May 31, 2000 and June 7, 2000, (Tr. at 33-34), and that amount is the sum of the three invoices.

Similarly, the evidence reflects Check Number 4696 dated July 5, 2000 in the amount of $3,014.16 for a purchase of livestock made by the Respondents on June 28, 2000. (CX 12-2).[6] Last, Check Number 4911 dated October 24, 2000 in the amount of $2,295.88 was issued by the Respondents in payment of a purchase of livestock made on October 18, 2000. It was deposited on October 24, 2000 by Finger Lakes (Exhibit CX 13-2) and Finger Lakes was advised of its charge back on November 8, 2000. (Exhibits CX 13-3 and 13-4).[7] The evidence additionally reflected multiple other instances of NSF checks being issued by the Respondents for purchases of livestock; however, as they are not alleged in the Complaint, Complainant has requested no findings as to those transactions.

Agent Bertoli then turned to the documents supporting the allegations concerning the failure of the Respondents to pay, when due, the full purchase price of the livestock they purchased. As previously noted, Exhibit CX 14 is a summary of those ten transactions where livestock were not paid for in a timely manner. For each such transaction, she identified the sales invoice(s) and the corresponding documents

[5] The evidence reflects that Finger Lakes attempted to deposit $3,612.99 eleven times by the notation on Exhibits CX 11-2 and 11A-2 before being satisfied on November 29, 2000. Of the eleven deposits, the documentary evidence reflects ten charge backs of $3,612.99. (Exhibits CX 11-3, 11-4, 11-6, 11-7, 11-9, 11-10, 11-11, 11-12 and 12-17, 11-13 and 11-14). Although the check deposited on June 15, 2000 was not introduced into evidence, two later checks in that amount dated July 5, 2000 and July 26, 2000 (Check Numbers 4695 and 4812) bearing the stamps denoting being returned for NSF were admitted. (Exhibits CX 11-5 and 11-8).

[6] The documentary evidence reflects that Finger Lakes deposited $3,014.16 on July 6, 2000 (Exhibit CX 12-3) and again on July 17, 2000 (Exhibit CX 12-5) and was advised of charge backs being made by their bank on their account for the checks being returned on July 12, 2000 (Exhibit CX 11-6) and again on July 20, 2000. (Exhibit CX 11-7). The check (Exhibit CX 12-2 and 18-2) bears the NSF stamp.

[7] The check bearing the NSF stamp was admitted as Exhibit 13-2.

demonstrating how and when the purchase price was ultimately pa*Id.* (Exhibits CX 15-24).

The foregoing evidence, with the pattern of NSF checks and untimely settlement of the obligations for the purchase of livestock amply demonstrate that the Respondents abjectly failed to maintain anything even remotely resembling minimally adequate records that fully and correctly disclose all transactions involved in its business.

The following Findings of Fact and Conclusions of Law are made:

Findings of Fact

1. The Respondent, Little Joe Livestock Meats, Inc., is a corporation organized and existing under the laws of the state of New York and has a mailing address of 6808 Slocum Road, Ontario, New York 14519. (CX 1).

2, Little Joe Livestock Meats, Inc. has been registered with the Secretary of Agriculture since December 15, 1972 to buy and sell livestock for its own account as a dealer of livestock in commerce and at all times material to the Complaint that has been filed was engaged in the business of buying and selling for its own account as a dealer of livestock in commerce. (CX 1).

3. The Respondent, Joseph Pagliuso, Jr., is an individual whose business mailing address is identical to that of Little Joe Livestock Meat, Inc. at 6808 Slocum Road, Ontario, New York 14519. (CX 1; CX 2).

4. Joseph Pagliuso, Jr. is the President, Manager and the sole shareholder of Little Joe Livestock Meat, Inc. and is solely responsible for the day to day management, direction and control of the corporation. (Tr. at 20; CX 1; CX 2; CX 3; CX 5).

5. Little Joe and Pagliuso have been disciplined for violations of the Act on two prior occasions and on each such prior occasion entered into a Consent Decision, the first being entered on May 15, 1987 and the second on November 14, 1996.[8]

6. On or about the dates indicated below, Little Joe issued checks to

[8] On the first occasion, the Respondents were suspended for a twenty-one day period. On the second, they were suspended for a period of five years. (CX 4 and CX 5).

Finger Lakes in the amounts set forth below in payment of livestock purchased on the dates indicated, which checks were returned to Finger Lakes unpaid due to insufficient funds in the Respondents' account:

a. A check in the amount of $3,612.99 dated on or about June 15, 2000 for the payment of livestock purchased on May 24, 2000, May 31, 2000 and June 7, 2000 with replacement checks dated July 5, 2000 and July 26, 2000 in the same amount, all of which were returned unpaid to Finger Lakes (a total of at least 10 times) due to insufficient funds in the Respondents' account. (CX 7; CX 8; CX 9; CX 10; CX 11).

b. A check in the amount of $3,014.16 dated July 5, 2000 for the payment of livestock purchased on June 28, 2000 which was returned unpaid to Finger Lakes on July 6, 2000 and July 17, 2000 due to insufficient funds in the Respondents' account. (CX 12).

c. A check in the amount of $2,295.88 dated October 24, 2000 for the payment of livestock purchased on October 18, 2000 which was returned unpaid to Finger Lakes on November 8, 2000 due to insufficient funds in the Respondents' account. (CX 13).

7. On or about the dates and in the transactions listed below, the Respondents failed to pay when due the full purchase price of such livestock:

Purchase Date	Seller	No. Head	Invoice Amount	Date Due	Date Paid	Days Late
05-24-00	Finger Lakes	5	$1,384.49	05-25-00	11-29-00	189
05-11-00	Finger Lakes	1	306.80	06-01-00	11-29-00	182
06-07-00	Finger Lakes	6	1,921.70	06-08-00	11-29-00	174
06-28-00	Finger Lakes	8	3,014.16	06-29-00	09-27-00	91
10-18-00	Finger Lakes	9	2,295.88	10-19-00	01-10-01	83
11-09-00	Empire	5	2,072.12	11-10-00	11-16-00	6
11-27-00	Empire	7	2,469.80	11-28-00	12-11-00	13
11-30-00	Empire	11	2,986.68	12-01-00	12-07-00	6
12-07-00	Empire	2	595.60	12-08-00	12-21-00	13
01-08-01	Empire	13	2,724.58	01-09-01	01-15-01	6

(CX 11A; CX 14; CX 15; CX 17; CX 18; CX 19; CX 20; CX 21; CX 22; CX 23; CX 24).

8. From May 24, 2000 through January 8, 2001, Respondents failed

to maintain adequate records that fully and correctly disclosed all transactions in its business, specifically, failed create invoices for all of its purchases, failed to maintain records of cash transactions and failed to maintain records of returned checks and subsequent payment of such checks. (Tr. at 12-14, 19).

Conclusions of Law

1. Respondent Joseph Pagliuso, Jr. is the *alter ego* of the Respondent Little Joe Livestock Meats, Inc.

2. Respondents willfully violated sections 312 (a) and 409 of the Act (7 U.S.C. § 213(a) and 228(b) by issuing checks in payment for livestock without sufficient funds on deposit and available in the account upon which such checks were drawn to pay such checks when presented, and by failing to pay, when due, the full price of such livestock.

3. Respondents willfully violated section 312 (a) of the Act (7 U.S.C. § 213(a)) by failing to maintain adequate records that fully and correctly disclose all transactions involved in its business, as required by section 401 of the Act. (7 U.S.C. § 221).

Order

1. Respondent Little Joe and Respondent Joseph Pagliuso, Jr., their agents and employees, directly or indirectly through any corporate or other device, in connection with their operations subject to the Act, shall cease and desist from:

a. Issuing checks in payment for livestock without sufficient funds on deposit and available in the account upon which such checks are drawn to pay such checks when presented;

b. Failing to pay, when due, the full purchase price of livestock.

2. Respondents shall maintain adequate records of account as fully and correctly disclose all transactions involved in its business. Specifically, the Respondents shall create invoices for all transactions; shall maintain records of all cash transactions; shall maintain records of its checking and other bank account information to determine when funds for outstanding checks have been presented and disbursed and the debts paid such that Respondents fully and correctly disclose all

transactions involved in its business.

3. In accordance with section 312 (b) of the Act (7 U.S.C. § 213(b)), Respondents are jointly and severally assessed a civil penalty of Six Thousand Six Hundred Dollars ($6,600.00).

The provisions of this **ORDER** shall become effective on the sixth (6th) day after service of the same upon the Respondents.

Copies of this Decision and Order shall be served upon the Parties by the Hearing Clerk's Office.

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PACKERS AND STOCKYARDS ACT

MISCELLANEOUS ORDERS

In re: WAYNE W. COBLENTZ, d/b/a COBLENTZ & SONS LIVESTOCK.
P. & S. Docket No. D-01-0013.
Order Lifting Stay Order.
Filed March 22, 2005.

Charles E. Spicknall, for Complainant.
Bruce H. Wilson, Akron, OH, for Respondent.
Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

On May 30, 2002, I issued a Decision and Order concluding Wayne W. Coblentz, d/b/a Coblentz & Sons Livestock [hereinafter Respondent], violated the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §§ 181-229).[1]

On July 23, 2002, Respondent requested a stay of the Order in *In re Wayne W. Coblentz*, 61 Agric. Dec. 330 (2002), pending the outcome of proceedings for judicial review, and on July 29, 2002, I granted Respondent's request for a stay.[2]

On December 18, 2003, the United States Court of Appeals for the Sixth Circuit affirmed *In re Wayne W. Coblentz*, 61 Agric. Dec. 330 (2002).[3] On December 21, 2004, the Deputy Administrator, Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture [hereinafter Complainant], filed a motion to lift the July 29, 2002, Stay Order on the

[1] *In re Wayne W. Coblentz*, 61 Agric. Dec. 330 (2002).

[2] *In re Wayne W. Coblentz*, 61 Agric. Dec. 786 (2002) (Stay Order).

[3] *Coblentz v. United States Dep't of Agric.*, 89 Fed. Appx. 484, 2003 WL 23156647 (6th Cir. 2003).

ground that proceedings for judicial review have been concluded.[4] On March 14, 2005, Respondent filed a response to Complainant's Motion to Lift Stay.[5] On March 16, 2005, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a ruling on Complainant's Motion to Lift Stay.

CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent states in an affidavit accompanying his response to Complainant's Motion to Lift Stay that for at least 150 days from December 18, 2003, until the present, he has not bought or sold livestock in commerce either as a dealer for his own account or as a market agency buying livestock on a commission basis. Based on these facts, Respondent requests that I credit him with having served 150 days of the 5-year suspension as a registrant under the Packers and Stockyards Act imposed in *In re Wayne W. Coblentz*, 61 Agric. Dec. 330, 345 (2002).

A stay order issued by the Judicial Officer pending the outcome of judicial review is not automatically lifted upon the conclusion of judicial review. Instead, action must be taken to lift a stay order.[6] Moreover, the July 29, 2002, Stay Order specifically states "[t]his Stay Order shall remain in effect until it is lifted by the Judicial Officer or vacated by a court of competent jurisdiction."[7] The July 29, 2002, Stay Order has not previously been lifted by the Judicial Officer and has not been vacated by a court of competent jurisdiction. Therefore, I deny Respondent's request that I credit him with having served 150 days of the 5-year suspension as a registrant under the Packers and Stockyards Act imposed in *In re Wayne W. Coblentz*, 61 Agric. Dec. 330, 345 (2002).

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[4]Complainant's Motion to Lift Stay.

[5]Respondent's Reply to Complainant's 'Motion to Lift Stay'.

[6]*In re Darrall S. McCulloch*, 63 Agric. Dec. 265, 266-67 (2004) (Order Lifting Stay as to Phillip Trimble); *In re Cecil Jordan*, 56 Agric. Dec. 758, 760 (1997) (Order on Recons. of Order Lifting Stay Order); *In re Jackie McConnell*, 55 Agric. Dec. 336, 339 (1996) (Order Modifying Order Lifting Stay Order).

[7]*In re Wayne W. Coblentz*, 61 Agric. Dec. 786, 787 (2002) (Stay Order).

I issued the July 29, 2002, Stay Order to postpone the effective date of the Order issued in *In re Wayne W. Coblentz*, 61 Agric. Dec. 330 (2002), pending the outcome of proceedings for judicial review. Proceedings for judicial review are concluded and the time for filing further requests for judicial review has expired.

For the foregoing reasons, Complainant's Motion to Lift Stay is granted; the July 29, 2002, Stay Order is lifted; and the Order issued in *In re Wayne W. Coblentz*, 61 Agric. Dec. 330 (2002), is effective, as set forth in the following Order.

ORDER

Paragraph I

Respondent, his agents and employees, directly or through any corporate or other device, in connection with his activities subject to the Packers and Stockyards Act, shall cease and desist from:

1. Issuing checks in payment for livestock purchases without maintaining sufficient funds on deposit and available in the account upon which 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 cease and desist provisions of this Order shall become effective on the day after service of this Order on Respondent.

Paragraph II

Respondent is suspended as a registrant under the Packers and Stockyards Act for a period of 5 years; *Provided, however*, That, upon application to the Packers and Stockyards Programs, a supplemental order may be issued terminating the suspension of Respondent as a registrant under the Packers and Stockyards Act at any time after the expiration of the initial 150 days of the 5-year period of suspension upon demonstration by Respondent that the livestock sellers identified in the Complaint have been paid in full; *And provided further*, That this Order may be modified upon application to the Packers and Stockyards Programs to permit Respondent's salaried employment by another

registrant or a packer after the expiration of the initial 150 days of the 5-year period of suspension and upon demonstration of circumstances warranting modification of the Order, such as a reasonable and current schedule of restitution.

The registration-suspension provisions of this Order shall become effective on the 60th day after service of this Order on Respondent.

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In re: WAYNE W. COBLENTZ, d/b/a COBLENTZ & SONS LIVESTOCK.
P. & S. Docket No. D-01-0013.
Ruling Denying Respondent's Motion for Stay Pending Review.
Filed June 21, 2005.

Charles E. Spicknall, for Complainant.
Bruce H. Wilson, Akron, Ohio, for Respondent.
Ruling issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

I issued a Decision and Order concluding Wayne W. Coblentz, d/b/a Coblentz & Sons Livestock [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].[1] Respondent requested a stay of the Order in *In re Wayne W. Coblentz*, 61 Agric. Dec. 330 (2002), pending the outcome of proceedings for judicial review, and on July 29, 2002, I granted Respondent's request.[2]

The United States Court of Appeals for the Sixth Circuit affirmed *In re Wayne W. Coblentz*, 61 Agric. Dec. 330 (2002),[3] and the Deputy Administrator, Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration, United States Department of

[1]*In re Wayne W. Coblentz*, 61 Agric. Dec. 330 (202).

[2]*In re Wayne W. Coblentz*, 61 Agric. Dec. 786 (2002) (Stay Order).

[3]*Coblentz v. United States Dep't of Agric.*, 89 Fed. Appx. 484, 2003 WL 23156647 (6th Cir. 2003).

Agriculture [hereinafter Complainant], filed a motion to lift the July 29, 2002, Stay Order on the ground that proceedings for judicial review had been concluded.[4] On March 14, 2005, Respondent filed a response opposing Complainant's Motion to Lift Stay.[5] On March 22, 2005, I granted Complainant's Motion to Lift Stay.[6]

On May 27, 2005, Respondent filed a motion for stay pending judicial review of the March 22, 2005, Order Lifting Stay Order.[7] On June 9, 2005, Complainant filed an opposition to Respondent's Motion for Stay Pending Review, and on June 21, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Respondent's Motion for Stay Pending Review.

CONCLUSION BY THE JUDICIAL OFFICER

The Administrative Procedure Act provides if justice so requires, an agency may postpone the effective date of an order, as follows:

> **§ 705. Relief pending review**
>
> When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

5 U.S.C. § 705.

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[4]Motion to Lift Stay.

[5]Respondent's Reply to Complainant's 'Motion to Lift Stay'.

[6]*In re Wayne W. Coblentz*, 64 Agric. Dec. 911(2005) (Order Lifting Stay Order).

[7]Motion for Stay Pending Review.

Respondent has exhausted avenues for judicial review of this administrative proceeding. I have fully considered and addressed Respondent's request that I credit him with having served 150 days of the 5-year suspension as a registrant under the Packers and Stockyards Act imposed in *In re Wayne W. Coblentz*, 61 Agric. Dec. 330, 345 (2002).[8] Under these circumstances, I do not find that justice requires that I disturb the March 22, 2005, Order Lifting Stay Order.

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

RULING

Respondent's Motion for Stay Pending Review, filed May 27, 2005, is denied.

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[8]See *In re Wayne W. Coblentz*, 64 Agric. Dec. 911, 912 - 13 (2005) (Order Lifting Stay Order).

PACKERS AND STOCKYARDS ACT

DEFAULT DECISIONS

In re: TOM "TOMMY" TUCKER.
P&S Docket No. D-03-0008.
Decision and Order.
Filed December 3, 2004.

P&S - Default.

Andrew Y. Stanton, for Complainant.
Respondent, Pro se.
Decision and Order issued by Marc R. Hillson, Administrative Law Judge.

This proceeding was instituted under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq*.) by a complaint filed by the Deputy Administrator, Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the Respondent willfully violated the Act and the regulations issued thereunder (9 C.F.R. § 201.1 *et seq*.). A copy of the complaint was served on Respondent by certified mail on April 8, 2003, 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"). Accompanying the complaint was a cover letter informing Respondent that an answer must be filed within twenty (20) days of service and that failure to file an answer would constitute an admission of all of the material allegations in the complaint and a waiver of the right to an oral hearing.

Respondent has failed to file an answer within the time period required by the Rules of Practice (7 C.F.R. § 1.136), and the material facts alleged in the complaint, which are admitted by Respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is entered pursuant to section 1.139 of the Rules of Practice. (7 C.F.R. § 1.139).

Findings of Fact

1. Tom "Tommy" Tucker, hereinafter referred to as Respondent, is an individual whose business mailing address is 2251 Jayhawk Road, Fort Scott, Kansas 66701.

2. Respondent is, and at all times material herein was:

(a) Engaged in the business of a market agency buying livestock on commission in commerce; and

(b) Registered with the Secretary of Agriculture as a market agency buying on commission, and as a dealer to buy and sell livestock in commerce for his own account.

3. Respondent was served with a letter of notice on April 14, 2000, informing him that the bond or its equivalent maintained by James A. Smith, in connection with Respondent's registration removed Respondent as a clearee. The notice further informed Respondent that in order for Respondent to continue his livestock operations subject to the Act, he must obtain an adequate bond or its equivalent. Notwithstanding such notice, Respondent has continued to engage in the business of a market agency buying on commission without maintaining an adequate bond or its equivalent.

Conclusions

By reason of the facts alleged in Finding of Fact 3, Respondent has willfully violated section 312(a) of the Act (7 U.S.C. § 213(a)), and sections 201.29 and 201.30 of the regulations (9 C.F.R. §§ 201.29 and 201.30).

Respondent did not file an answer within the time period prescribed by section 1.136 of the Rules of Practice (7 C.F.R. § 1.136), which constitutes an admission of all of the material allegations in the complaint. Complainant has moved for the issuance of a Decision Without Hearing by Reason of Default, pursuant to section 1.39 of the Rules of Practice (7 C.F.R. § 1.139). Accordingly, this decision is entered without hearing or further procedure.

Order

Respondent Tom "Tommy" Tucker, his agents and employees,

directly or indirectly through any corporate or other device, in connection with his operations subject to the Packers and Stockyards Act, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act until such time as he complies fully with the bonding requirements under the Act and the regulations. When Respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating the suspension.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), Respondent is hereby assessed a civil penalty in the amount of one thousand dollars ($1,000).

This decision and order shall become final and effective without further proceedings thirty-five (35) days after service on Respondent, if it is not appealed to the Judicial Officer by a party to the proceeding within thirty (30) days, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final February 4, 2005.-Editor]

In re: JOSHUA L. MARTIN d/b/a MARTINS LIVESTOCK.
P&S Docket No. D-03-0019.
Decision and Order.
Filed January 11, 2005.

P&S - Default

Ann Parnes, for Complainant.
Respondent, Pro se.
Decision and Order issued by Peter M. Davenport, Administrative Law Judge.

Preliminary Statement

This proceeding was instituted under the Packers and Stockyard Act (7 U.S.C. §181 *et. seq*.) by a complaint filed by the Deputy Administrator, Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the Respondent willfully violated the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §181 *et seq*.). The complaint and a copy of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.130 *et seq*.), hereinafter the Rules of Practice, were mailed to Respondent by certified mail on August 14, 2003, and were received on August 16, 2003.

Accompanying the complaint was a cover letter informing Respondent that an answer must be filed within twenty (20) days of service and that failure to file an answer would constitute an admission of all of the material allegations in the complaint and a waiver of the right to an oral hearing.

Respondent has failed to file an answer within the time period required by the Rules of Practice (7 C.F.R. §1.136), and the material facts alleged in the complaint, which are admitted by Respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, are issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. §1.139).

Findings of Fact

(1) Joshua L. Martin is an individual doing business as Martins Livestock, hereinafter referred to as Respondent. His business mailing address is 17223 Reiff Church Road, Hagerstown, Maryland 21740.

(2) The Respondent, at all times material herein, was engaged in the business of a dealer buying and selling livestock in commerce for his own account, and as a market agency buying livestock on a commission basis.

(3) The Respondent, at all times material herein, was registered with the Secretary of Agriculture as a dealer and as a market agency to buy livestock on a commission basis.

(4) Respondent purchased livestock, and in purported payment thereof, issued checks that were returned unpaid by the bank upon which

they were drawn because Respondent did not have sufficient funds available in the account upon the checks were drawn to pay the checks when presented.
that a stop payment was issued.
Footnote 4: Respondent sold livestock at Four States on July 31, 2002, and the proceeds from this sale were applied to Respondent's outstanding balance.

[See following table – Editor]

(5) Respondent failed to remit, when due, the full price of the livestock that Respondent purchased.

(6) Respondent failed to remit the full price of livestock that Respondent purchased. A total of $85,401.70 for livestock purchases remains unpaid.

Order

By reason of the facts set forth in Findings of Fact 4, 5 and 6, Respondent has willfully violated sections 312(a) and 409 of the Act (7 U.S.C. §§ 213,228(b)).

Joshua L. Martin, his agents and employees, directly or through any corporate or other device, in connection with his activities subject to the Packers and Stockyards Act, shall cease and desist from:

1. Issuing checks in payment for livestock purchases without maintaining sufficient funds on deposit and available in the account upon which such checks were drawn to pay such checks when presented;
2. Failing to remit, when due, the full purchase price of livestock; and
3. Failing to remit the full purchase price of livestock.

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 150 days upon demonstration of circumstances warranting modification of the order. Further, this order may be modified upon application to Packers and Stockyards Programs to permit Respondent's salaried employment

by another registrant or a packer after the expiration of the 150 day period of suspension, upon demonstration of circumstances warranting modification of the order.

This decision and order shall become final and effective without further proceedings thirty-five (35) days after service on Respondents, if it is not appealed to the Judicial Officer by a party to the proceeding within thirty (30) days, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Copies of this decision shall be served upon the parties.

[This Decision and Order became final February 14, 2005.-Editor]

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Seller	Purchase Date	Date Due Per §409	Invoice Amount	Check No.	Check Date	Check Amount	Date Returned NSF	Balance Due
Lynchburg Livestock Market, Inc.	7/01/02	7/02/02	$51,593.29	11585	7/01/02	$51,593.29	7/8/02	(Note 1)
Pmt. from sale 7/8/02						(10,569.85)		(Note 2)
Pmt. from sale 7/8/02						(10,569.88)		(Note 2)
Wire Transfer 8/02/02						(2,000.00)		$28,453.56
Four States' Livestock Sales	7/18/02	7/19/02	$18,971.61	11622	7/23/02	$18,971.61	N/A	(Note 3)
				11633	7/31/02	15,341.37	8/01/02	
Pmt. from sale 7/31/02						(3,630.24)		(Note 4)
								$15,341.37
Four States' Livestock Sales	7/24/02	7/25/02	$21,439.37	11635	7/31/02	$21,439.37	8/01/02	$21,439.37
Westminster Livestock Auction	7/23/02	7/24/02	$13,517.40	11634	7/31/02	$13,517.40	8/01/02	$13,517.40

Seller	Purchase Date	Date Due Per §409	Invoice Amount	Check No.	Check Date	Check Amount	Date Returned NSF	Balance Due
Rockridge 4-H Livestock Advisory Committee	7/24/02	7/26/02	$8,785.25					
			1,115.70					
		Total	9,900.95		Check	Issued		
		Less		No				
		Cash & other	($3,250.95)					
		Cattle	$6,650.00					$6,650.00

Footnote 1: Respondent issued check number 11585 in payment for livestock. This check was returned NSF.
Footnote 2: Respondent sold livestock at Lynchburg on July 8, 2002 and the proceeds from this sale were applied toRespondent's outstanding balance.
Footnote 3: Payment was stopped on this check, however, Respondent was unable to provide proof

CONSENT DECISIONS

(Not published herein - Editor)

PACKERS AND STOCKYARDS ACT

William Chandler d/b/a Bill Chandler Cattle. P&S Docket No. D-03-0020. 1/3/05.

Richard Armstrong, d/b/a Richard Armstrong Cattle Co. P&S Docket No. D-03-0018. 1/12/05.

Leo E. Buchheit. P&S Docket No. D-04-0008. 3/11/05.

Lakeview Packing Company, Inc. and Jacob T. Turnage. P&S Docket No. D-05-0006. 4/20/05.

Tim Cherry. P&S Docket No. D-04-0013. 5/5/05.

Donald W. Hallmark and Donald R. Hallmark, d/b/a Hallmark Meat Packing Company. P&S Docket No. D-05-0008. 5/25/05.

Hughey P. (Bobby) Weyandt, III, d/b/a Morrison's Cove Livestock Auction. P&S Docket No. D-05-0012. 6/8/05.

Dennis V. Chavez, Dennis V. Chavez, L.L.C., and Southwest Livestock Auction, L.L.C. P&S Docket No. D-04-0010. 6/28/05.

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AGRICULTURE DECISIONS

Volume 64

January - June 2005
Part Three (PACA)
Pages 926 - 1220

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

AGRICULTURE DECISIONS

Agriculture Decisions is an official publication by the Secretary of Agriculture consisting of decisions and orders issued in adjudicatory administrative proceedings conducted for the Department under various statutes and regulations. Selected court decisions concerning the Department's regulatory programs are also included. The Department is required to publish its rules and regulations in the *Federal Register* and, therefore, they are not included in *Agriculture Decisions.*

Beginning in 1989, *Agriculture Decisions* is comprised of three Parts, each of which is published every six months. Part One is organized alphabetically by statute and contains all decisions and orders other than those pertaining to the Packers and Stockyards Act and the Perishable Agricultural Commodities Act, which are contained in Parts Two and Three, respectively.

The published decisions and orders may be cited by giving the volume number, page number and year, e.g., 1 Agric. Dec. 472 (1942). It is unnecessary to cite a decision's docket number, e.g., AWA Docket No. 99-0022, and the use of such references generally indicates that the decision has not been published in *Agriculture Decisions.*

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PERISHABLE AGRICULTURAL COMMODITIES ACT

COURT DECISION

PERISHABLE AGRICULTURAL COMMODITIES ACT

DEPARTMENTAL DECISIONS

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PERISHABLE AGRICULTURAL COMMODITIES ACT

COURT DECISION

BENJAMIN SUDANO, BRIAN SUDANO v. USDA.
Case No. 04-1872.
Filed May 13, 2005.

(Cite as: 131 Fed. Appx. 404).

PACA – Payment, failure to make, prompt – Responsibly connected – Ownership, greater than 10% – Actively involved.

Court held the JO correctly found that the Sudanos failed to prove that they were not "responsibly connected" once the 10% ownership threshold was reached.

United States Court of Appeals,
Fourth Circuit.

Before WILKINS, Chief Judge, WIDENER, Circuit Judge, and Robert E. PAYNE, United States District Judge for the Eastern District of Virginia, sitting by designation.

PER CURIAM:

Benjamin Sudano and Brian Sudano seek review of a decision of the United States Department of Agriculture, finding that they were "responsibly connected"[1] to Lexington Produce Co. during the period the company was found to be in violation of the Perishable Agricultural Commodities Act, as amended, 7 U.S.C. §§ 499a-499s (the Act). On review, the Sudanos assert that they were not "responsibly connected" with Lexington Produce Co. between May 1999 and January 2000, the period during which Lexington Produce Co. violated 7 U.S.C. § 499b(4), § 2(4) of the Act, for failing to make "full payment promptly" of $915,115.25 of payments owed to multiple produce suppliers of perishable agricultural commodities.

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[1]"Responsibly connected" is defined as "affiliated or connected with a commission merchant, dealer, or broker as (A) 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." 7 U.S.C. § 499a(b)(9).

We have jurisdiction to entertain this petition because it is from a final order of the Secretary of Agriculture. *See*28 U.S.C. § 2342.

In a thorough and detailed opinion, the Secretary of Agriculture found that the Sudanos were "responsibly connected" with Lexington Produce Co. between May 1999 and January 2000. *In re Benjamin Sudano,* PACA-APP Docket No. 02-0001 (May 21, 2004). In accordance with that decision, we are of opinion and hold that Benjamin Sudano and Brian Sudano were "responsibly connected" with Lexington Produce Co. during the period in question.

We note that the Secretary held administrative hearings on four occasions in three cities, at which hearings oral testimony and documentary evidence were taken. During the period in question, May, 1999--January, 2000, Benjamin Sudano and Brian Sudano owned 100 percent of the outstanding stock of Lexington Produce Co., 50% each; Benjamin Sudano was the vice president and secretary of Lexington Produce Co., Brian Sudano was the president and treasurer; and both defendants also worked in the business upward of 10 to 13 hours every day of the week, including weekends. During the period May-November, 1999, the Sudanos, together with one John Alascio, controlled the business; and for the November, 1999--January, 2000 period, the Sudanos alone controlled the business.

Based on these facts and other findings of the Secretary, the Secretary correctly found that the defendants failed to prove under 7 U.S.C. § 499a(b)(9), by a preponderance of the evidence, that they were not "responsibly connected" with their company. Being of opinion the order of the Secretary under review is supported by substantial evidence and is free from reversible error, we accordingly deny the petition for review on the opinion of the Secretary of Agriculture. PACA-APP Docket No. 02-0001, filed May 21, 2004.

The petition for review is accordingly,

DENIED.

DEPARTMENTAL DECISIONS

In re: GLENN MEALMAN.
PACA Docket No. APP-03-0013.
Decision and Order.
Filed: February 8, 2005.

PACA – Director, role as corporate – Nominal involvement, when not – Disparate treatment, when not – Prosecutorial discretion, broad.

Andrew Stanton, for Complainant.
James P. Tierney, for Respondent.
Decision and Order by Chief Administrative Law Judge Marc R. Hillson.

DECISION

In this decision, I find that Petitioner Glenn Mealman was not responsibly connected to Furr's Supermarkets, Inc. I find that even though he was a director of Furr's for the period of time during which violations had been committed, his position as director was nominal.

Procedural History

On October 23, 2002, Petitioner was notified by letter from Bruce W. Summers, Assistant Chief, Trade Practices Section, PACA Branch, Fruit and Vegetable Programs, that an initial determination had been made that Petitioner was "responsibly connected" to Furr's Supermarkets, Inc., as that term is defined in 7 U.S.C. § 499a(b)9. The PACA Chief made that determination based on records showing him to be a member of the Board of Director of Furr's from November 1, 1997 through February 23, 2001. Following Petitioner's December 26, 2002, letter disputing his responsibly connected status, James Frazier, the Chief of the PACA Branch issued a final determination on April 3, 2003, that Petitioner was responsibly connected to Furr's. On October 29, 2003, Petitioner filed a petition for review of the PACA Chief's determination.

In the meantime, on September 12, 2002, USDA also filed a

complaint against Furr's alleging that it had committed "willful, flagrant and repeated" violations of 2(4) of the PACA (7 U.S.C. § 499b(4)). The basis for the complaint was Furr's failure to pay Quality Fruit a total of over $174,000 for the sale and delivery of perishable agricultural commodities between September 1998 and February 2001. On February 6, 2003, after Furr's filed an answer to the complaint but did not deny that it had failed to pay Quality Fruit, former Chief Judge James Hunt entered a Decision Without Hearing Based on Admissions against Furr's, pursuant to Rule 139 of the Rules of Procedure. At a telephone conference with former Judge Leslie Holt, counsel for Petitioner suggested that he should be allowed to present evidence on the underlying violations, since Furr's failure to contest these violations (they were in bankruptcy) should not deprive Petitioner from asserting that there was no underlying PACA violation—a necessary prerequisite to any responsibly connected liability. Judge Holt set a briefing schedule for the parties on this issue. The matter was subsequently assigned to me on April 7, 2004. At an April 15, 2004 telephone conference, I stated that I would follow the ruling I had recently made in another matter (*In re. Brackett & Oliver/Atlanta Egg & Produce Co., Inc*., copy attached)[*] where I held that due process considerations necessitated that a party charged with being responsibly connected to a company which had defaulted in a related disciplinary proceeding be allowed to show that the underlying violations did not occur.

Prior to the hearing, I also refused to sign a subpoena requested by Petitioner for records relating to three other individuals who were apparently affiliated with Furr's in various capacities but who were not the subject of an ongoing responsibly connected proceeding.

On June 8, 2004, I conducted a hearing in this case in Kansas City, Missouri. James P. Tierney represented Petitioner and Andrew Y. Stanton represented Respondent. [1] The parties subsequently filed

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[*] *See Brackett & Oliver, et al*. elsewhere in this volume – Editor

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[1] Petitioner testified on his own behalf and Respondent called two witnesses. I received into evidence Petitioner's Exhibits 1 through 9 (these exhibits are cited as (continued...)

initial and reply briefs, and proposed findings of fact and conclusions of law.

Factual Background

Glenn Mealman worked for Fleming Companies, Inc. (Fleming) in a variety of capacities for 39 years, beginning with his graduation from college in 1957. Tr. 47. By the time he left the company in 1996, he had worked as a merchandiser, manager, and eventually executive vice-president for Fleming's mid-America region. Tr. 47-48. Since he was only 63 when he retired, and his full retirement benefits did not kick in until he turned 65, he had a financial arrangement with Fleming to consult for and assist the company in various capacities. Tr. 49-50, 54-55, 65. Once he turned 65, he was paid by Fleming at an hourly rate to serve on the Furr's board. Tr. 68.

Fleming was a substantial investor in Furr's. Tr. 70-71. As such, Fleming was entitled to two seats on Furr's Board of Directors. Tr.21. In August 1998, Fleming asked Mealman to serve as a Director on Furr's board on Fleming's behalf. Tr. 21-22. All fees and expenses associated with this appointment were paid by Fleming. Tr. 34. Mealman had no ownership interest in Furr's, and no role in the day-to-day management of the company. Tr. 27. He had no check writing authority, had no role in the purchase of produce, and no role regarding payment of creditors. Tr. 26. As a director representing Fleming, Mealman attended Furr's board meetings. As a board member, he was required to serve on at least one committee, and so he served on the Real Estate Committee. Tr. 23. This committee met only once or twice during Mealman's tenure, and served essentially as a "rubber-stamp" to sites already approved by Furr's. Tr. 23-24. Mealman visited one site during his tenure. *Id.* Mealman also nominated an individual to be a board member, but only when he was requested to do so because he was told that someone on the selection committee should not be making a nomination. Tr. 32-33, PX1.

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[1](...continued)
"PEx") and rejected Petitioner's Exhibits 10-13. I also admitted Respondent's (REx) Exhibits 1 through 4. The official agency records that were the basis of the Agency's action are RC1 through 6.

Mealman remained on the Board even after Fleming ceased having an ownership interest in Furr's in June 2000. Tr. 36-37, 72. However, he attended no further meetings of the Furr's board prior to Furr's filing for bankruptcy in February 2001. Tr. 38-39. Mealman had no participatory role in either Furr's decision to file for bankruptcy, nor in any subsequent actions of Furr's. Tr. 41.

The PACA action against Furr's was primarily based on its failure to pay a single creditor—Quality Fruit. When Furr's was proceeding through bankruptcy, apparently Quality Fruit was the only creditor who failed to file a claim with the bankruptcy court. There is no evidence in this record as to why Quality Fruit did not pursue a claim against Furr's.

Statutory and Regulatory Background

The Perishable Agricultural Commodities Act governs the conduct of transactions in interstate commerce involving perishable agricultural commodities. Among other things, it defines and seeks to sanction unfair conduct in the conduct of transactions involving perishables. Section 499b provides:

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

> under section 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.

7 U.S.C. § 499a(b)4.

In addition to penalizing the violating merchant, who in this case would be Furr's, the Act also imposes severe sanctions against any person "responsibly connected" to an establishment that has had its license revoked or suspended. 7 U.S.C. §499h(b). The Act prohibits any licensee under the Act from employing any person who was responsibly connected with any person whose license "has been revoked or is currently suspended" for as long as two years, and then only upon approval of the Secretary. *Id.*

> (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.

7 U.S.C. § 499a(b)9.

Findings of Fact

1. Glenn Mealman, Petitioner in this matter, served as a member of the Board of Directors of Furr's Supermarkets, Inc. from 1998 until March, 2002.

2. Mealman occupied one of the two seats that his long-term employer, Fleming Companies, Inc., were entitled to fill as a result of their significant ownership interest in Furr's. Mealman had no ownership or employment interest in Furr's, and was never paid anything by Furr's. Between the time of his initial appointment to the Board, and Furr's termination of their ownership interest in June 2000, Fleming paid Mealman for his work on the Board, and also paid his expenses. Tr. 34. While Mealman did not resign from the Board at the time that Fleming's ownership interest terminated, he never attended another Board meeting. Tr. 38.

3. Mealman attended numerous board meetings between 1998 and 2000. As each board member had to serve on at least one committee, he served on the real estate committee. He viewed one potential site as part of his duties for this committee. Tr. 23-24. Also, at the request of another board member, he nominated a pre-selected individual to the board. Tr. 32, PX1.

4. Mealman attended meetings where sales trends and finances were discussed. Individual accounts payable or the failure to pay suppliers were never discussed at meetings attended by Mealman. PX1, PX3, RC5, Tr. 24-25.

5. Mealman was never involved in Furr's day-to-day business activities, had no check writing or document issuing authority, had no role in deciding what bills were to be paid, did not have particularized knowledge of Furr's financial difficulties, and had no knowledge of, nor relationship with, the company's creditors. Tr. 26-27.

6. Quality Fruits, a supplier to Furr's, was not paid in a timely fashion by Furr's, in violation of the PACA. As a result of this failure to pay Quality Fruits, a Decision Without Hearing Based on Admission was issued against Furr's on February 6, 2003. RX3, PX9, RC4.

7. Mealman did not know Furr's was considering bankruptcy until the company actually filed for bankruptcy. Tr. 41. He had no role in

the decision to file for bankruptcy, nor did he have any knowledge of individual accounts that were not paid.

Discussion

I reaffirm my earlier rulings that (1) Petitioner can challenge the underlying violation against Furr's which led to Respondent's charges that Petitioner is responsibly connected to a merchant which violated the PACA where such claim has not been litigated before the Agency, and (2) that Petitioner is not entitled to information or to present testimony concerning other individuals who were not pursued by Respondent. I also reject Petitioner's contention that Respondent cannot issue a responsibly connected determination until there has been a final decision in the related disciplinary proceeding. In my principal finding, I find that Petitioner was not responsibly connected to Furr's and that he was only nominally a director of that company. I discuss the basis for these findings in my Conclusions of Law.

Conclusions of Law

1. An individual charged with being a responsibly connected party has the right to challenge the underlying violation even where the party charged with committing the underlying violation fails to challenge the allegations of the original complaint. While the issue is largely moot in this case, since Petitioner did not produce any evidence indicating that Furr's did not fail to pay Quality Fruits as required by the PACA, Respondent continued to raise an objection to my ruling at the hearing, and has urged me in its opening brief, at pp. 13-15, to reconsider my initial ruling.

I continue to disagree with Respondent's contention that an individual may be deprived of his right to challenge the factual underpinnings of a disciplinary violation of PACA, where he has had no opportunity or authority to participate in that process. The approach urged by Respondent would result in the establishment of one of the facts necessary to prove responsibly connected status—the existence of a violation committed by the merchant—without any opportunity to participate in a proceeding to have that fact adjudicated. Yet both the Act and the Rules of Procedure recognize the very close

relationship between disciplinary proceedings and responsibly connected proceedings. In 1996, the Rules were changed to require consolidation of disciplinary and responsibly connected cases where they arise from the individuals' relationship with the company during the time in question. 7 C.F.R. 1.137(b); 61 Fed. Reg. 11501-4 (March 21, 1996).

I find Respondent's reliance on *In re Danny L. Brand d/b/a Danny's Food Service,* 53 *Agric. Dec.* 1628, *aff'd* 66 F. 3d 342 (11th Cir. 1995) unpersuasive. In that case, the Judicial Officer found that res judicata applied because the parties to the case "and their privies" were bound by the final decision of the court. Petitioner was not a party to the disciplinary proceeding relied upon in this case, nor did he have any opportunity to participate, and I have seen no evidence that he was in privity to Furr's in any event. Not allowing the Petitioner to challenge the existence of the underlying violation in any forum, which is effectively the urging of Respondent here, is inconsistent with the Act, the Rules of Procedure and due process.

2. The USDA's decision not to proceed against other individuals as responsibly connected is immaterial to this case. Petitioner vigorously argues that I should have allowed him to subpoena documents and present evidence with respect to Respondent's treatment of other individuals who allegedly had connections with Furr's but who were not pursued, or whose pursuit was abandoned, by Respondent, as responsibly connected parties. Petitioner has couched its argument as one of constitutional disparate treatment, contending that the USDA applied different standards to Petitioner than to one David Morrow, a contemporary of Petitioner on the Furr's board. At the hearing, I allowed Petitioner's counsel to make a proffer on this issue, after I refused to allow him to question Josephine Jenkins of USDA on this subject.

The principal issue I have before me in this case, which I will discuss in more detail below, is whether Petitioner is responsibly connected to Furr's, assuming Furr's in fact violated the PACA. Whether the government could have sanctioned other individuals as responsibly connected is simply irrelevant to Petitioner's status. It would be most onerous, and inconsistent with the Act if, in order to

support a responsibly connected case against an individual, the government had to distinguish that individual from every other shareholder of over 10% of stock, board member, partner or officer. Even if Morrow was responsibly connected to Furr's and was not the subject of government sanction, that would not let Petitioner off the hook if he were otherwise liable. As Respondent has contended on this issue, the Chief of the PACA Branch is entitled to exercise prosecutorial discretion, which may not be challenged in this proceeding. The issue has been squarely dealt with in USDA case law.

It is axiomatic in administrative law that the agency has prosecutorial discretion to pursue those violators where it can make its case . . . violators are not excused because violations in similar circumstances were not prosecuted, or the violator was not sanctioned in the same fashion as other violators. *In re. Tipco, Inc*., 50 *Agric. Dec.* 871, 900 (1991), *aff'd per curiam*, 953 F. 2d 639 (4th Cir. 1992), cert. den. 113 Sup. Ct. 84 (1992). The legitimate exercise of prosecutorial discretion does not constitute disparate treatment nor can it be construed as an arbitrary and capricious action.

3. The USDA's timing in pursuing a responsibly connected case against Petitioner before the underlying disciplinary action was resolved is proper. Petitioner also contends that USDA exceeded its statutory authority by prematurely determining that Petitioner was responsibly connected to a PACA violator. Petitioner argues that an individual cannot even be cited as responsibly connected until there is a determination, after notice and opportunity for hearing, that a disciplinary violation has been committed.

Even if an individual arguably cannot be finally adjudicated as responsibly connected and suffer the consequent employment sanctions without an underlying disciplinary violation against the entity to which the individual was responsibly connected, Petitioner is incorrect in asserting that a responsibly connected proceeding cannot even be commenced until the underlying disciplinary violation is resolved. Indeed, the Rules of Procedure specifically contemplate that, where both a disciplinary and responsibly connected proceedings for a licensee are pending, they be joined for hearing.

> (b) Joinder. The Judge shall consolidate for hearing with any proceeding alleging a violation of the Perishable Agricultural Commodities Act, 7 U.S.C. 499a et seq., any petitions for review of determination of status by the Chief, PACA Branch, that individuals are responsibly connected, within the meaning of 7 U.S.C. 499a(9), to the licensee during the period of the alleged violations. In any case in which there is no pending proceeding alleging a violation of the Perishable Agricultural Commodities Act, 7 U.S.C. 499a et seq., but there have been filed more than one petition for review of determination of responsible connection to the same licensee, such petitions for review shall be consolidated for hearing.

7 C.F.R. §1.137(b).

To require the disciplinary proceeding to come to a full resolution, including possible appeals to federal court, without allowing the responsibly connected cases to proceed would be waste of resources, especially given the close relationship between these two types of actions, and could add years to the process.

4. Furr's violated PACA by its failure to timely pay Quality Fruits for multiple loads of produce. While I allowed Petitioner to challenge the underlying violation alleged to have been committed by Furr's, there is no evidence in the record that Furr's did not in fact commit the violation charged by the PACA Chief. It is undisputed that Quality Fruits did not pursue its claim against Furr's in bankruptcy court when it had the opportunity to do so, and so the findings of former Chief Judge Hunt's Decision Without Hearing Based on Admissions of February 6, 2003 apply to this proceeding. RX3.

5. Petitioner was not responsibly connected to Furr's. While Petitioner was one of the director's of Furr's during the time Furr's committed its PACA violations, Petitioner has met his two-step burden of showing by a preponderance of the evidence that he (1) was not actively involved in the activities resulting in a violation of this chapter, and (2) was only nominally a director of a violating licensee or entity subject to license.

(a) Petitioner was not actively involved in the activities resulting in a violation of this chapter. There is no serious dispute that Petitioner was not directly involved in the activities relating to Furr's failure to pay Quality Fruit for produce. No evidence was introduced by Respondent as to this issue, and Petitioner testified without contradiction that he never participated in Furr's purchases of perishable agricultural commodities, that he never was involved in any aspect of Furr's day-to-day business activities, that he never saw any departmental breakdowns on fruit and vegetable payables, and that fruit and vegetable purchases were never discussed at board meetings. Tr. 24-26. He not only had no knowledge of whether particular companies were being paid by Furr's, but also had no idea who Quality Fruits was until the commencement of this proceeding. Tr. 27-28. He did not know about Furr's bankruptcy until after it had been filed, and had no role in the bankruptcy proceedings or in the discharge of obligations in the course of those proceedings. Further, he had no check writing or purchasing authority, and would have had no authority to discharge the debt, even if he knew about it.

Respondent, however, contends that Petitioner was "actively involved" within the meaning of the Act. The principal explication of the standard for whether a person is actively involved is stated in *In re Michael Norinsberg*, 58 *Agric. Dec.* 604, 610-11(1999)(Decision and Order on Remand). The Judicial Officer stated that " 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." Respondent contends that because Petitioner participated in corporate decision making, voting for or against budget resolutions, he should be found to have exercised "judgment, discretion or control" as per the *Norinsberg* holding. As Petitioner points out though, the board of directors did not have before themselves decisions as to which creditors to pay, but only had jurisdiction over matters brought to the board's attention by Furr's management. There is no evidence in this record of any issues concerning the buying or selling of produce, or the payment or failure to pay for produce, that was ever brought to the attention of the board

during the period of Petitioner's service. Tr. 25-28. And it is a considerable stretch to contend, as does Respondent, that the fact that the board considered a refinancing plan intended to restructure Furr's debt, and to liquidate the shares of Fleming in Furr's, constitutes "active involvement" in a decision not to timely pay Quality Fruits. Further, Furr's indebtedness to Quality Fruits had occurred 20 months before the board even considered this refinancing plan, so the violative acts occurred long before any board "involvement" in the decisions regarding financial restructuring. In *Maldonado v. USDA,* 154 F. 3d 1086 (9th Cir. 1998), the court held that the president of the company was not "actively involved"—even though he was authorized to co-sign checks, because he had not been involved in the particular sale which lead to the violation and did not make the decision as to which bills were paid. Petitioner here was far more removed from the transactions in question than was the officer in *Maldonado*.

Similarly, the Judicial Officer in *In re Lawrence D. Salins*, 57 *Agric. Dec.* 1474 (1998), found several factors to be significant in his decision that Salins was "actively involved," including his day-to-day participation in the company, his "long-term, substantial involvement" in weekly staff management meetings, his participation in deciding which individual bills were to be paid, and his frequent participation in managerial decision making activities, including the providing of "financial information to assist in the decision making process." *Id.*, at 1490. None of these factors are present here.

Unless Respondent contends that a member of the board of a violating corporation is automatically deemed "actively involved" in any transaction that occurs during his time of service on the board—a position plainly not supported by the statute or the case law—there is no basis for me to find Petitioner "actively involved" in the activities leading to the violation that Furr's committed with respect to Quality Fruit.

(b) Petitioner was only nominally a director of a violating licensee or entity subject to license. Once again, Petitioner bears the burden of demonstrating, by the preponderance of the evidence, that he was only a "nominal" member of the Furr's board, in order to defeat the proposed finding that he was responsibly connected to Furr's.

Petitioner has demonstrated that he served on the board at the request of Fleming, his employer of over 39 years, as one of their two representatives on the board. Fleming was entitled to two representatives out of the ten-person board as a consequence of their significant ownership of Furr's stock. The Petitioner himself had no ownership in Furr's, was being paid by Fleming on a "retainer" type of salary for the period between the time he "retired" from Fleming at age 63 and his reaching the age of 65, at which time he was entitled to full retirement benefits and was paid on an hourly basis by Fleming for his service on the Furr's board. Petitioner had absolutely no connection with Furr's other than to serve as Fleming's chosen representative on Furr's board.

Respondent has offered a number of reasons to support its contention that Petitioner was responsibly connected to Furr's. Prominent among these reasons are that Petitioner was educated was an "experienced and knowledgeable businessman", Tr. 137, that he was on the real estate committee, that he "did participate in at least one meeting," [*Id].*, and that he was present at an October 13, 1999 meeting "at which important financial records were discussed."[*Id].*, at 135. These reasons do not elevate Petitioner's role above that of a nominal member of the board. It is undisputed that he only served on the board as a representative of Fleming,[2] and that only Fleming paid him for his time, travel and other expenses. There is not a shred of evidence that he ever acted in any capacity other than as a representative of Fleming. While he did serve on the real estate committee, the testimony is undisputed that he did so because he had to be on at least one committee as a board member, and that the position was essentially that of a "rubber-stamp." While he once "participated" in a meeting, Petitioner testified without rebuttal that it was only because he was asked to nominate an individual who had already been preselected to be the new CEO. Tr. 32. If anything, these activities confirm the nominal nature of Petitioner's participation.

Likewise, the uncontradicted fact that Petitioner was an

[2] While he intended to remain on the board after Fleming liquidated its investment at Furr's, he did not participate in any additional meetings, nor get paid anything, from that time until the company was in bankruptcy.

"experienced and knowledgeable businessman" does not somehow transform his role on the Furr's board to other than nominal. He clearly served not in his own right but as the designee of Fleming. In *Minotto v. USD*A, 711 F. 2d 406, 711 F, 2d 406 (D.C.Cir. 1983), the Court overturned a finding that a board member was responsibly connected, ruling that a director must have an "actual, significant nexus with the violating company,"*Id.*, at 409, and should be in a position where he "knew or should have known of the Company's misdeeds." *Id.*, at 408. While one of the factors relied on in both *Minotto* and *Maldonado* was the lack of business training and experience of the cited parties, the fact is there is no evidence that Petitioner knew or should have known that Furr's had not paid Quality Fruits—it was never discussed at a board meeting—and no evidence that he would have had any authority to even inquire into the status of individual unpaid accounts. The unrebutted testimony of Petitioner and the Board's minutes illustrate that individual accounts payable were never reviewed at any board meetings. Likewise unrebutted is his testimony that he had no power or ability to counteract the actions of Furr's board members or employees. Tr. 25, 28, Ex., P-1—P-4.

In *Salins, supra*, the Judicial Officer discussed seven factors affecting whether a person was serving in a nominal capacity under the Act. In *Salins*, the petitioner had access to corporate records, including access to detailed monthly financial statements, accounts payable, accounts receivable, etc. Likewise, Salins had particularized knowledge of the company's financial difficulties, and a "sophisticated level of information" inconsistent with nominal status. Salins had a direct relationship with unpaid creditors inconsistent with that of someone in a nominal role. He actively participated in corporate decision-making. He had check-writing responsibilities, and "could be considered the only indispensable officer" of the company. He signed numerous corporate documents, including PACA licenses, answers to reparation complaints, etc. And his receipt of significant salary and bonuses was inconsistent with that expected to be paid to someone serving in a nominal capacity. *Id.*, at 1492-95.

Mealman, on the other hand, appears to be the prototypical nominal board member. He clearly served at the behest of Fleming. There is no indication that he had access to any Furr's records, he had

no particularized knowledge of the company's financial condition until it was brought up at a board meeting, had no knowledge and played no role in the company's decision to file for bankruptcy, had no knowledge of or relations with individual creditors of the company, had no significant participation in the corporate decision process other than to rubber-stamp actions at board meetings, had no check writing responsibilities, signed no corporate documents, and received no salary or other benefits from Furr's. It is difficult to imagine a board member serving in a more nominal capacity than that served by Mealman.

Conclusion and Order

Petitioner has shown by a preponderance of the evidence that he was not responsibly connected to Furr's Supermarkets, Inc. Petitioner was not actively involved in the activities resulting in a violation of this chapter and was only a nominal member of the Furr's Board of Directors. Mealman's Petition for Review is granted.

The provisions of this order shall become effective on the first day after this decision becomes final. Unless appealed pursuant to the Rules of Practice at 7 C.F.R. § 1.145(a), this decision becomes final without further proceedings 35 days after service as provided in the Rules of Practice, 7 C.F.R. 1.142(c)(4).

Copies of this decision shall be served upon the parties.

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In re: CHARLES R. BRACKETT AND TOM D. OLIVER.
PACA Docket No. APP-03-0004.
Decision and Order.
Filed: March 16, 2005.

PACA – Responsibly connected – Intervenor, not authorized to file as – Trustee in bankruptcy failed to file –Employee, failed to oversee principal.

Andrew Stanton, for Complainant.

M. Greene, for Respondent.
Decision and Order by chief Administrative Law Judge Marc R. Hillson.

DECISION

In this decision, I find that Petitioners Charles R. Brackett and Tom D. Oliver are each responsibly connected to Atlanta Egg & Produce Co., Inc., a company that has committed disciplinary violations under the Perishable Agricultural Commodities Act (PACA). I find that both petitioners were actively involved in the activities resulting in the violations by Atlanta Egg, and that neither petitioner was a nominal partner, officer, director or shareholder of Atlanta Egg.

Procedural History

On October 29, 2002, letters from Bruce W. Summers, Assistant Chief, Trade Practices Section, PACA Branch, Fruit and Vegetable Programs, separately notified both petitioners that an initial determination had been made that they were "responsibly connected" to Atlanta Egg & Produce Co., Inc., as that term is defined in 7 U.S.C. § 499a(b)9. With respect to Petitioner Brackett, the determination was based on records showing he was president, a member of the board of directors, and a 33.3 percent shareholder of Atlanta Egg from February 1995 through February 2001; with respect to Petitioner Oliver, the determination was based on records showing him to be secretary, treasurer, a member of the board of directors, and a 33.3 percent shareholder during the same time period. On November 26, 2002, Petitioners filed a joint letter disputing their responsibly connected status and urged that the Department reconsider its preliminary finding. On February 12, 2003, James Frazier, Chief of the PACA Branch, Fruit and Vegetable Programs, issued separate letters to each Petitioner, stating in each case that it was his determination that each Petitioner was responsibly connected to Atlanta Egg, and informing them of their right to file a petition for review. Petitioners filed such a petition on March 12, 2003.

In the meantime, USDA filed a disciplinary complaint under the PACA against Atlanta Egg on October 23, 2002. At that time, Atlanta

Egg was in bankruptcy proceedings and a bankruptcy trustee was managing its assets. Atlanta Egg did not file an answer to the complaint, and the Agency filed a Motion for Decision Without Hearing by Reason of Default. While that motion was pending, Petitioners filed a Motion to Intervene in the Atlanta Egg proceeding, so that they could raise defenses to the alleged disciplinary violations. Since USDA case law unequivocally denies any non-party the right to intervene in disciplinary cases, I denied the Motion to Intervene on December 4, 2003, and signed the Decision against Atlanta Egg that same day. In the same series of rulings, however, I held that due process considerations supported allowing Petitioners to challenge the existence or severity of the Atlanta Egg violations in their "responsibly connected" case.

On June 30, 2004, I conducted a hearing in this case in Atlanta, Georgia.[1] Andrew M. Greene represented Petitioners and Andrew Y. Stanton represented Respondent. The parties subsequently filed briefs.

Factual Background

Petitioner Charles R. Brackett graduated from the University of Georgia in 1974 with a degree in poultry science. Tr. 15. Since that time he has been employed in the poultry and egg industry in a variety of capacities. Tr. 15-17. His current position is live production manager of Hillandale Farms, Lake City Florida. Tr. 17.

Petitioner Tom D. Oliver, after receiving a political science degree from Mercer University and serving in the military, has also been in the poultry and egg business for over 30 years. Tr. 161-2, 175-6. He has worked in his family business, Chestnut Mountain Egg Farm, Chestnut, Georgia, since 1971 and is currently president. Tr. 162.

Brackett and Oliver, along with Oliver's late brother-in-law Perry Hammock, purchased Atlanta Egg from Harry Raptis in early 1994.

[1] At the hearing, I heard testimony from both Petitioners, and from Judy Lao and Josephine Jenkins of the PACA Branch. I received into evidence Petitioners' Exhibits 1 through 66, and Respondent's Exhibits 1 through 84, 86 and 87. Also in evidence are the certified copies of the Agency's records for each Petitioner. BCRX refers to Petitioner Brackett's certified record, while OCRX refers to the certified record of Petitioner Oliver.

Tr. 17-19. Brackett supplied $4,900 of the $10,000 purchase price and received 49% of the stock; Oliver and Hammock each supplied $2,550 and each received 25.5% of the stock. Tr. 22, 60. Brackett was named the president of Atlanta Egg, Oliver the treasurer, and Hammock the secretary, and all three were also members of the board of directors. Tr. 23-24, 32, 162, 164.

Brackett desired to hire his former wife's son, Greg Hutson, to manage the company, even though he was only 23 and had no experience in running a business. Tr. 62. At the time they purchased Atlanta Egg, located at the farmers market in Forest Park, Georgia, it was principally a business engaged in the purchasing and selling of eggs, two areas in which both Petitioners had considerable background and expertise. Tr. 18. Oliver testified that he saw it "as a place to distribute some of our eggs," Tr. 178, referring to eggs produced at Chestnut Mountain Egg Farm. By the time Atlanta Egg ceased doing business, only 20% of its business involved eggs, with the remainder in produce. Tr. 34.

Because of Hutson's inexperience, he was closely supervised at first, although he was allowed to take more responsibility for the conduct of the business as time passed. Tr. 62-63. The principal method of supervision was by telephone—with daily contact at first, gradually diminishing to perhaps four calls per week between Brackett and Hutson by 2000. Tr. 66. In addition to communicating with Hutson, Petitioners spoke with each other about the status of the business approximately twice per month. Tr. 67. When Petitioner Oliver was in Atlanta—about every six weeks or so—he would drop by for a visit, and to have lunch with Hutson. Tr. 165-66.

With Hutson running the daily business, Atlanta Egg increased in size from four to 13 employees. Tr. 22, 33. In 1998, Petitioners each received a $10,000 distribution from the business. Tr. 61. After the death of Hammock in 1998, the stock was redistributed so that Hutson became a stockholder as well. Tr. 24, 163, BCRX 7, pp. 5-6, OCRX 7, pp. 5-6. Petitioners and Hutson each now owned a third of the stock in Atlanta Egg, while Hutson was made vice-president and a director of the company, with Oliver adding the position of secretary to his previously held position of treasurer. *Id.* With the company apparently having a profit of around $100,000 in early 2000, Hutson

received a $30,000 distribution, but Petitioners elected to leave any distribution they were entitled to in the business. Tr. 48.

In 1996, Petitioners decided to allow Atlanta Egg's insurance to lapse, deciding that they could not justify the expensive cost of the insurance in light of the exposure they had with their inventory. Tr. 72. In May 2000, Atlanta Egg's inventory and records were destroyed by fire, leading to severe short-term cash flow problems. Tr. 30-31, 69. As a result of these problems, each Petitioner discussed their situation with several of their suppliers. Tr. 70-72, 184.

Beginning in August 2001, a series of problems were discovered that led to the closing of Atlanta Egg. On one of Oliver's visits, Oliver arrived at Atlanta Egg and found that Hutson was not present and things were in disarray. Tr. 35-36, 167-69. Oliver called Brackett to discuss the situation and shortly thereafter they met with Hutson in Atlanta, after which things appeared to improve. Tr. 36. Then in December 2001 Brackett dropped by Atlanta Egg and once again found the business closed "to the extent that another employee had to break in to open the business that morning." *Id.* Shortly after that, a similar scenario occurred, at which point Petitioners decided it was time to fire Hutson, which they finally did in January 2002. They then looked at Atlanta Egg's books and discovered that the business had apparently been "severely mismanaged for quite a number of months," Tr. 40, that Hutson had apparently stolen from the company, and that "any thinking person could review the records in front of him and realize that business couldn't continue." *Id.* Petitioners then decided to close the business and file for bankruptcy.

Both petitioners attended what appear to be annual meetings of the Atlanta Egg board, as well as at least two special meetings. Tr. 32, 182, BCRX 8, pp. 5-14, 17-22, OCRX 8, pp. 1-16. At the February 2002 meeting, petitioners took the action of removing Hutson from his positions at Atlanta Egg. BCRX 8, p. 22.

As president, Brackett had the authority to supervise, direct and control Atlanta Egg, including presiding at shareholders meetings, signing stock certificates, signing checks, hiring and firing employees, etc. He signed the stock certificates, was authorized to sign checks, issued the weekly payroll checks, paid for invoices, paid Atlanta Egg's PACA license fees, and signed the initial application for a PACA license. Tr. 24-26, 57-58, PX 62, BCRX 7, p. 23. He communicated

with Hutson on a regular basis, received information concerning purchases and sales of produce and eggs, and regularly reviewed a variety of financial documents. Tr. 66-67, 69. When Atlanta Egg filed for bankruptcy, Brackett signed the petition. BCRX 9, pp. 2-4, 7.

As treasurer, Oliver had custody of corporate funds, including receiving, disbursing and depositing such funds, and was responsible for maintaining Atlanta Egg's accounts, etc. PX 62, pp. 15-16. Oliver was also authorized to sign checks and occasionally did so. Tr. 164-5. He met with Atlanta Egg's accountant at the end of each year, provided the accountant the necessary information for tax filing regarding receivables, payables and inventory, and signed the annual tax returns on behalf of the company. Tr. 185-6. He was also responsible for maintaining Atlanta Egg's insurance coverage, and fully participated in the decision, along with Brackett, to let the insurance lapse. Tr. 32, 71, 171-2.

There is no dispute concerning the failure of Atlanta Egg to make full payment promptly to 80 sellers of 683 perishable agriculture commodities in the amount of over $923,000[2] from February 2001 through March 2002. No answer to USDA's disciplinary complaint against Atlanta Egg was ever filed either by petitioners or the trustees in bankruptcy. On December 4, 2003, I denied Brackett and Oliver's Motion to Intervene in the disciplinary hearing, holding that the Petitioners had no right to intervene in disciplinary cases. On that day I signed a default decision against Atlanta Egg, finding that it had committed willful, flagrant and repeated violations of section 2(4) of the PACA. However, over the objection of counsel for Respondent, I stated that in the interest of assuring due process to Brackett and Oliver, I would allow Petitioners to attack the violation findings against Atlanta Egg. However, at the June 30 hearing, no such evidence was presented.

Statutory and Regulatory Background

[2] There is some dispute as to whether the amount owed to several of the creditors should be reduced. *See* discussion, *infra*.

The Perishable Agricultural Commodities Act governs the conduct of transactions in interstate commerce involving perishable agricultural commodities. Among other things, it defines and seeks to sanction unfair conduct in transactions involving perishables. Section 499b provides:

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

7 U.S.C. § 499a(b)4.

In addition to penalizing the violating merchant, which in this case would be Atlanta Egg, the Act also imposes severe sanctions against any person "responsibly connected" to an establishment that has had its license revoked or suspended. 7 U.S.C. §499h(b). The Act prohibits any licensee under the Act from employing any person who was responsibly connected with any person whose license "has been revoked or is currently suspended" for as long as two years, and then

only upon approval of the Secretary. *Id.*

(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.

7 U.S.C. § 499a(b)9.

Findings of Fact

1. Charles R. Brackett, one of the petitioners in this matter, was part of a group who purchased Atlanta Egg & Produce Co., Inc. in early 1994. Since that time he has served as president and a board member of Atlanta Egg. While he originally owned 49% of the stock of Atlanta Egg, he owned 1/3 of the company's stock during the period from February 2001 through March 2002. He is a college graduate who has been involved in the poultry and egg business since 1974.

2. Tom D. Oliver, one of the petitioners in this matter, was also part of the group who purchased Atlanta Egg. He was first treasurer and a board member of the company, as well as a 25.5% stockholder, but with the death of Harry Raptis he also became secretary and a 1/3 stockholder in the company. He maintained this role and ownership level during the period from February 2001 through March 2002. He is a college graduate who has been in the poultry and egg business since completing his military service over 30 years ago.

3. Both Brackett and Oliver actively participated in the management of Atlanta Egg. They hired Greg Hutson to perform the day-to-day management of Atlanta Egg, but supervised him fairly closely at first. They made major corporate decisions, including the decision to let their insurance lapse, to contact creditors and work with a bank to keep the business going after a major fire, to remove Hutson from the company, and to file for bankruptcy.

4. As president, Petitioner Brackett had significant authority, including hiring and firing, signing of checks, reviewing financial documents, applying for and renewing Atlanta Egg's PACA license, signing a variety of corporate documents including stock certificates, and presiding over shareholders meetings. He participated in corporate decision-making and was actively involved in Atlanta Egg.

5. As secretary and treasurer, Petitioner Oliver had significant authority, and participated in significant corporate decision-making, including the decision to let Atlanta Egg's insurance lapse, to fire Hutson, and to file for bankruptcy. As treasurer, he had the authority to sign checks, was responsible for the company's finances, provided the information for, and signed, Atlanta Egg's tax returns, and had custody of corporate funds. As secretary, he signed the minutes of numerous corporate meetings, and co-signed the stock share certificates with Petitioner Oliver.

6. Atlanta Egg, during the period from February 2001 through March 2002, failed to make full payment promptly to 80 sellers of 683 perishable agriculture commodities in the amount of over $923,000.

Discussion

As a preliminary matter, I reaffirm my earlier ruling that Petitioners can, in a limited fashion, challenge the underlying violations against Atlanta Egg, which led to Respondent's charges that Petitioners are responsibly connected to a merchant that violated the PACA, and where such claim has not been litigated before the Agency. I also reject Petitioners' arguments that (1) Respondent's investigations were faulty, (2) that the bankruptcy stay should have

applied to the Atlanta Egg proceeding, (3) that Respondent's failure to turn over a variety of documents denied Petitioners due process, and that (4) USDA exceeded its statutory authority, and violated both Petitioners' constitutional due process rights and the APA, by prematurely determining that Petitioners were responsibly connected to a PACA violator. Finally, I conclude that the evidence overwhelmingly supports a finding that both Petitioners were responsibly connected to Atlanta Egg. I discuss the basis for these findings in my Conclusions of Law.

Conclusions of Law

1. An individual charged with being a responsibly connected party has the right to challenge the underlying violation even where the party charged with committing the underlying violation fails to challenge the allegations of the original complaint. While the issue is largely moot in this case, since Petitioners did not produce any evidence indicating that Atlanta Egg did paid the 80 creditors in a timely manner and in full, as required by the PACA, Respondent continued to raise an objection to my ruling at the hearing, Tr. 10, and has urged me in its opening brief, at 19, to reconsider my initial ruling.

I continue to disagree with Respondent's contention that an individual may be deprived of his right to challenge the factual underpinnings of a disciplinary violation of PACA, where he has had no opportunity or authority to participate in that process. As I have recently ruled, the approach urged by Respondent would result in the establishment of one of the facts necessary to prove responsibly connected status—the existence of a violation committed by the merchant—without any opportunity to participate in a proceeding to have that fact adjudicated. *In re. Glenn Mealman*, 64 *Agric. Dec.* ___(slip. Op. 7-9) (Feb. 8, 2005). Yet both the Act and the Rules of Procedure recognize the very close relationship between disciplinary proceedings and responsibly connected proceedings. In 1996, the Rules were changed to require consolidation of disciplinary and responsibly connected cases where they arise from the individuals' relationship with the company during the time in question. 7 C.F.R. 1.137(b); 61 Fed. Reg. 11501-4 (March 21, 1996).

I find Respondent's reliance on *In re Danny L. Brand d/b/a Danny's Food Service*, 53 *Agric. Dec.* 1628, aff'd 66 F. 3d 342 (11th Cir. 1995) unpersuasive. In that case, the Judicial Officer found that res judicata applied because the parties to the case "and their privies" were bound by the final decision of the court. Petitioners technically were not parties to the disciplinary proceeding, as that was instituted after Atlanta Egg was in the hands of a bankruptcy trustee, and Petitioners contended that they had no opportunity to participate in that proceeding. Indeed, I upheld Respondent's objection to allowing Petitioners to intervene in the disciplinary proceeding. Not allowing the Petitioners to challenge the existence of the underlying violation in any forum, which is effectively the urging of Respondent here, is inconsistent with the Act, the Rules of Procedure, and due process.

2. Petitioners' challenges regarding the conduct of the investigation, and the impact of the bankruptcy proceedings against Atlanta Egg, and the alleged failure to turn over "key" documents, are without merit. While I allowed Petitioners to challenge the factual underpinnings of the disciplinary violation against Atlanta Egg, no specific evidence was presented indicating that Atlanta Egg did not commit any of the violations that were the subject of the default decision. Petitioners contend that the investigation conducted by the PACA Branch was faulty, but focuses its criticism on alleged uncertainties in the exact amounts that Atlanta Egg owed, and not on the uncontested findings that 80 creditors were owed many hundreds of thousands of dollars. Since Judy Lao, a marketing specialist with PACA, testified without challenge that her findings as to the number of violations and the amounts due and unpaid were based on Atlanta Egg's own records--records specifically pointed out to her by Petitioner Brackett, I find there is overwhelming evidence supporting the claims against Atlanta Egg. Tr. 86-88, 106, 109. Likewise, the contention that Ms. Lao's telephone verification, in the days before the hearing, that Atlanta Egg still owed substantial amounts to its nine biggest creditors, was hearsay and inaccurate ignores the fact that she was merely confirming what she was told by Atlanta Egg representatives—that substantial funds were owed and it was not likely that they would be paid. Further, such a follow-up was consistent with the need to determine whether Atlanta Egg was paying

their creditors slowly or not at all, as spelled out by the Judicial Officer in *In re. Scamcorp*, 57 *Agric. Dec.* 527 (1998).

With respect to the bankruptcy filing, Petitioners' contention that the bankruptcy stay provisions apply to PACA disciplinary and responsibly connected proceedings is not in accord with either USDA or federal court rulings. *E.g., In re Ruma Fruit and Produce Co., Inc.*, 55 *Agric. Dec.* 642 (1996). The instant proceeding represents "the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power . . . ," 11 U.S.C. § 362(b)(4), and as such is not subject to the bankruptcy stay. Both the disciplinary action taken against Atlanta Egg and the responsibly connected proceeding against Petitioners fit within this exception to the stay. Indeed, section 525(a) of the Bankruptcy Code, 11 U.S.C. § 525(a), specifically exempts PACA license revocations from the general exception preventing the government from denying, revoking, suspending or refusing to renew a license.

Allegations concerning Respondent's failure to produce certain "key" documents requested under the Freedom of Information Act (FOIA) likewise do not constitute a violation of due process. Petitioners had the option to appeal FOIA delays or denials under the rules of that statute. While it is somewhat puzzling that these documents were not disclosed, particularly in light of my ruling that I would allow Petitioners' to present evidence challenging the disciplinary violations, it is understandable that the PACA Branch would treat the underlying documents for the disciplinary hearing as not part of the record of the responsibly connected proceedings. It is even more puzzling to me why Petitioners did not seek such documents via a subpoena duces tecum in the instant proceeding.

In any event, these documents would have not aided Petitioners in meeting their burden of proof. The evidence was overwhelming and largely undisputed that Atlanta Egg had committed numerous significant violations of the PACA's prompt payment provisions. The fact that eight reparation complaints triggered the investigation of Atlanta Egg is of no relevance to their committing the violations as charged, particularly where the violations were generally admitted by Petitioners and supported by the findings of the investigation.

The failure to turn over an outline of documents drafted by a former employee is likewise not an error. Josephine Jenkins simply testified that a former employee drafted an outline of the documents that were submitted for the PACA Branch Chief's review. Tr. 139-40. There is nothing to refute the Agency's contention that the responsibly connected determination was made in reliance on any documents other than those included in the certified record provided for each petitioner. The Agency has based its decision solely on the documents in the certified record, so the cases cited by Petitioners to the effect that an agency must disclose the evidence it relied on in making its decision are simply inapposite.

3. The USDA's timing in pursuing a responsibly connected case against Petitioners before the underlying disciplinary action was resolved is proper. Petitioners also contend that USDA exceeded its statutory authority, and denied them due process rights, under the constitution and the Administrative Procedure Act, by prematurely determining that Petitioners were responsibly connected to a PACA violator. Petitioners argue that an individual cannot even be cited as responsibly connected until there is a determination, after notice and opportunity for hearing, that a disciplinary violation has been committed, and that Respondent's approach is a "cart-before-the horse approach to the administrative process." Pet. Br. at 6.

Even if an individual arguably cannot be finally adjudicated as responsibly connected and suffer the consequent employment sanctions without an underlying disciplinary violation against the entity to which the individual was responsibly connected, Petitioners are incorrect in asserting that a responsibly connected proceeding cannot even be commenced until the underlying disciplinary violation is resolved. Indeed, the Rules of Procedure specifically contemplate that, where both a disciplinary and responsibly connected proceeding for a licensee are pending, they be joined for hearing.

> (b) Joinder. The Judge shall consolidate for hearing with any proceeding alleging a violation of the Perishable Agricultural Commodities Act, 7 U.S.C. 499a et seq., any petitions for review of determination of status by the Chief, PACA Branch, that individuals are responsibly connected, within the meaning

> of 7 U.S.C. §499a(9), to the licensee during the period of the alleged violations. In any case in which there is no pending proceeding alleging a violation of the Perishable Agricultural Commodities Act, 7 U.S.C. §499a et seq., but there have been filed more than one petition for review of determination of responsible connection to the same licensee, such petitions for review shall be consolidated for hearing.

7 C.F.R. §1.137(b).

To require the disciplinary proceeding to come to a full resolution, including possible appeals to federal court, without allowing the responsibly connected cases to proceed would be waste of resources, especially given the close relationship between these two types of actions, and could add years to the process of resolving these cases.

4. Atlanta Egg violated PACA by its failure to pay 80 creditors for 683 lots of perishable agricultural commodities in the amount of over $923,000. While Petitioners have questioned whether the total unpaid amount owed by Atlanta Egg might be slightly overstated, there is no evidence in this record that would show that Atlanta Egg did not commit the violations alleged by the PACA Chief. Thus, it is undisputed that Atlanta Egg failed to pay 80 creditors for 683 lots of perishable agricultural commodities. Although Petitioners have contended that the amount of money still owed in the eight reparation cases may have been less than originally alleged, there is no dispute that substantial payments are owed to each of those eight creditors, and there has been no challenge to the allegations concerning the remaining 72 creditors. Thus, the findings in my December 4, 2003 Decision Without Hearing By Reason of Default apply to this proceeding.

5. Petitioners Charles R. Brackett and Tom D. Oliver were each responsibly connected to Atlanta Egg. Neither Petitioner has met his two-step burden of showing by a preponderance of the evidence that he (1) was not actively involved in the activities resulting in a violation of this chapter, and (2) was only nominally a director, officer and 1/3 shareholder of a violating licensee or entity subject to license.

(a) Both Brackett and Oliver were actively involved in the activities resulting in a violation of this chapter. Although Petitioners may not have been aware of or participated in the specific transactions that were the subject of Atlanta Egg's violations, by virtue of their major role in the company they must be deemed to have been actively involved in the activities resulting in the violations. By virtue of their significant role in the founding of Atlanta Egg, by their participation in all manner of significant corporate decision making including the hiring of Hutson, the decision to allow Hutson to expand the egg business into one that was largely produce, the decision to let the company's insurance expire, the decision to file for bankruptcy, by their significant ownership interest and performance of significant corporate functions, the Petitioners easily meet the standard for "actively involved" set out in the statute and in the case law.

The principal explication of the standard for whether a person is actively involved is stated in *In re Michael Norinsberg*, 58 *Agric. Dec.* 604, 610-11(1999)(Decision and Order on Remand). The Judicial Officer stated that "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." The Judicial Officer in *In re Lawrence D. Salins*, 57 *Agric. Dec.* 1474 (1998), stated that in determining whether an individual is actively involved, the adjudicator must look beyond whether a petitioner was directly involved in the purchase of the produce that was not timely paid for. Rather, he found several factors to be significant in his decision that Salins was "actively involved," including his day-to-day participation in the company, his "long-term, substantial involvement" in weekly staff management meetings, his participation in deciding which individual bills were to be paid, and his frequent participation in managerial decision making activities, including the providing of "financial information to assist in the decision making process." *Id.*, at 1490. Unlike the situation in *Mealman, supra*, it is apparent that in this case Petitioners were closely and heavily involved in the corporate decision making process, as was Salins, and so are actively involved.

Thus, Petitioner Brackett was a co-founder of Atlanta Egg, and was president, director and a 1/3 shareholder in the corporation during the time the violations were committed. He was intimately involved in the decision to hire Hutson, who is the son of his ex-wife, and was fully aware that Atlanta Egg was expanding into the produce business, rather than being just involved in the egg business as was his original intention when he co-founded the company. As president, Brackett exercised many of the powers set out in Atlanta Egg's corporate by-laws, including presiding over board meetings, signing the share certificates, and signing checks. He was directly involved in both the hiring and firing of Hutson, and had full hiring and firing authority at all times. He signed Atlanta Egg's initial application for a PACA license, as well as the checks for payment of PACA license fees, and reviewed the company's monthly bank statements. He, along with Oliver, made the decision to file for bankruptcy. He was personally involved in many decisions that led to the company's bankruptcy, including determining the level of supervision of Hutson, participating in the decision not to insure the company's property, participating in a variety of post-fire activities with creditors and the securing of a bank loan to insure that Atlanta Egg's business would continue, and allowing Hutson to continue to run the business long after serious problems were discovered. Under *Norinsberg* and *Salins*, Petitioner Brackett was unquestionably involved in corporate decision-making and thus was "actively involved" with Atlanta Egg.

Under the same analysis, Petitioner Oliver was likewise "actively involved" with Atlanta Egg. He was a co-founder of the company, and was secretary, treasurer, director and a 1/3 shareholder in the company at the time the violations were committed. His duties as treasurer included being responsible for the financial aspects of Atlanta Egg's business, and he was directly involved in disbursement of funds, and was authorized to sign checks on behalf of the company and occasionally did so. He reviewed financial matters at least annually with the company's accountant, provided the accountant with the documents necessary to prepare the tax return, and signed the returns on behalf of the company. He jointly made the decision not to purchase insurance, which clearly contributed to the company's financial problems after the fire, and was involved in securing the

post-fire bank loan and in some of the discussions with company creditors. Further, he was the officer who first discovered the significant problems with Hutson's management of Atlanta Egg, which he discussed with Brackett. Even though Hutson's conduct should have indicated significant problems were occurring in the business, Oliver did not see fit to examine the company's books, nor did he and Brackett see fit to terminate Hutson until months passed. He was involved in all manner of corporate decision making for Atlanta Egg and as such he was "actively involved" with the company.

(b) **Neither Brackett's nor Oliver's positions as major shareholders, corporate officers, and directors of Atlanta Egg were served in a nominal capacity.** Petitioners must defeat both prongs of the two-prong statutory test to satisfy their burden of proof that they were not responsibly connected to Atlanta Egg. Although I have already found that they did not satisfy their burden that they were not "actively involved," I will examine the claim that their roles as owners, officers and directors were "nominal" in the interest of judicial economy. Even if my findings that Petitioners were "actively involved" with Atlanta Egg were to be reversed, Petitioners bear the burden of demonstrating, by the preponderance of the evidence, that they were only "nominal" 1/3 owners, officers and board members of Atlanta Egg in order to defeat the PACA Branch's findings that they were responsibly connected to Atlanta Egg. Petitioners do not come close to meeting this burden.

To briefly reiterate, any director, officer, and owner of over 10 per cent of the stock of a company that commits a disciplinary violation leading to suspension or revocation of their PACA license must show, not only that they were not "actively involved" as discussed above, but that they were only acting in a nominal capacity with respect to each of these roles. In *Minotto v. USDA,* 711 F. 2d 406 (D.C.Cir. 1983), the Court overturned a finding that a board member was responsibly connected, ruling that a director must have an "actual, significant nexus with the violating company,"*Id.*, at 409, and should be in a position where he "knew or should have known of the Company's misdeeds." *Id.*, at 408. Here, the record overwhelmingly demonstrates that each petitioner had a significant nexus with Atlanta Egg from its inception, and particularly during the time leading up to

and throughout the period the company was violating the PACA. Petitioners decided to hire Hutson, not to carry insurance, to decrease the supervision over Hutson, to allow Hutson to greatly expand the scope of their business, to not remove Hutson once they found out he was not properly performing his job, to not closely review the books as soon as they began to suspect things were going wrong, and to finally fire Hutson and go into bankruptcy. This is more than sufficient to constitute a significant nexus.

Moreover, the Judicial Officer and the courts have held that ownership of over 20% of a company's stock is sufficient in itself to rebut a contention that an individual is serving in a nominal position, *In re. Joseph T. Kocot*, 57 *Agric. Dec.* 1517, 1544-45 (1998), and is sufficient "to make a person accountable for not controlling delinquent management." *Siegel v. Lyng*, 851 F. 2d 412, 417 (1988). Here, Petitioners had (and eventually exercised) the authority to both hire and fire the individual allegedly responsible for causing the disciplinary violations--actions not consistent with serving in a nominal position. The fact that Petitioners chose not to exercise their authority in a timelier manner does not mean that they did not have the authority.

The Judicial Officer has also looked at the educational and business background of those alleged by the PACA Branch to be responsibly connected, as a factor in determining whether they are only serving in a nominal position. Both Petitioners here are well educated, each with decades of business experience. While their experience has been more in the area of the egg and poultry business, they each have years of experience in running a business. Brackett graduated college with a degree in poultry science in 1974 and has worked in the poultry and egg business since that time, including 18 years at Crystal Farms, where he became the firm's national sales manager, eight years as president of New Morn Farms, and his current position as live production manager at Hillandale Farms. Oliver also is a college graduate who has worked at his family's Chestnut Mountain Egg Farm, of which he is now president, since returning from military service in 1971. He was and is the "financial man" for Chestnut Mountain Egg Farm. Tr. 176-77. While this factor is not dispositive in itself, it stands in sharp contrast to the education and

training of the petitioners in *Norinsberg, supra*, or in *Maldonado v. USDA*, 154 F. 3d 1086 (9th Cir. 1998).

In *Salins, supra*, the Judicial Officer discussed seven factors affecting whether a person was serving in a nominal capacity under the Act. (1) In *Salins*, the petitioner had access to corporate records, including access to detailed monthly financial statements, accounts payable, accounts receivable, etc. Both petitioners here have had full access to all financial documents, and were in a position to review accounts if they had so desired. (2) Salins had particularized knowledge of the company's financial difficulties, and a "sophisticated level of information" inconsistent with nominal status. Here, Petitioners knew well before the company filed for bankruptcy that the company was in a financially difficult position, and their own actions helped contribute to this situation. Further, they were each in a position to review financial documents whenever they desired, and failed to investigate or take any drastic action when it should have been clear to them that Hutson was putting the company in a precarious position by not showing up for work. (3) Salins had a direct relationship with unpaid creditors inconsistent with that of someone in a nominal role. Here, Petitioners directly met with some creditors when the company was in a crisis after the fire, and clearly had the ability to determine whom their creditors were and what their status was at any time. (4) Salins actively participated in corporate decision-making. As discussed, *supra*, both Brackett and Oliver were actively involved in all manner of corporate decision making. (5) Salins had check-writing responsibilities. Both Brackett and Oliver were authorized to sign checks, although Brackett signed them on a more regular basis. (6) Salins signed numerous corporate documents, including PACA licenses, answers to reparation complaints, etc. Brackett signed Atlanta Egg's stock certificates, PACA license applications, the bankruptcy petition and numerous other corporate documents. Oliver signed the minutes of board meetings, stock certificates and the company's annual tax returns. (7) The final factor cited by the Judicial Officer was whether substantial compensation was received. Here, both petitioners had expectations of financial gain. They each received $10,000 in 1998, and each declined $30,000 payments in 2002, deciding instead to reinvest those funds in the company. Since their original investments in the company totaled

approximately $7,500, the $20,000 in actual payments and $60,000 in declined payments are not insignificant. Nor is such profit taking and reinvesting consistent with serving in a nominal capacity. *Id.*, at 1492-95.

CONCLUSION AND ORDER

Petitioners have failed to show, by a preponderance of the evidence, that they were not responsibly connected to Atlanta Egg & Produce Co., Inc. at a time when Atlanta Egg committed willful, flagrant and repeated violations of section 2 (4) of PACA for failing to make full payment promptly for produce purchases. Each petitioner was actively involved in the activities resulting in a violation of this chapter. Neither petitioner served in a nominal capacity by virtue of their activities as 1/3 owners, officers, and directors of Atlanta Egg.

Wherefore, I find that Charles R. Brackett and Tom. D. Oliver are each responsibly connected to Atlanta Egg.

The provisions of this order shall become effective on the first day after this decision becomes final. Unless appealed pursuant to the Rules of Practice at 7 C.F.R. § 1.145(a), this decision becomes final without further proceedings 35 days after service as provided in the Rules of Practice, 7 C.F.R. 1.142(c)(4).

Copies of this decision shall be served upon the parties.

G & T TERMINAL PACKAGING COMPANY, INC. AND TRAY-WRAP, INC.
PACA Docket No. D-03-0026.
Decision and Order.
Filed March 28, 2005. [1]

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[1]This decision is being issued pursuant to the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary. 7 C.F.R. §1.142.

PACA – Bribery – Extortion – Informant, RICO Act, via plea bargain.

Ruben Rudolph and Clara Kim, for Complainant.
Linda Strumpf, for Respondent.
Decision and Order by Administrative Law Judge William Moran.

In this administrative disciplinary proceeding under the Perishable Agricultural Commodities Act, ("PACA"), 7 U.S.C. § 499a *et seq*. and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary of Agriculture, 7 C.F.R.§ 1.130 *et seq*. the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, ("USDA") alleges that the Respondents, G & T Terminal Packaging Company, Inc. ("G & T") and Tray-Wrap, Inc. ("Tray-Wrap"), "willfully, flagrantly, and repeatedly violated Section 2(4) of the PACA, 7 U.S.C. § 499b(4), by failing, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with transactions involving perishable agricultural commodities purchased, received and accepted in interstate or foreign commerce." Complaint at 4. If it is determined that the Respondents so violated Section 2(4) of the PACA, the USDA seeks an order revoking the licenses of the Respondents. A hearing was held in New York City from October 25, 2004 through November 1, 2004 before the undersigned federal administrative law judge, ("Court"). For the reasons which follow the Court finds that the USDA has failed to establish the alleged violations of Section 2(4) of the PACA and accordingly the case is DISMISSED.

I. THE COMPLAINT

The particulars of the Complaint allege that the Respondents, acting through, in the case of G & T, its president, director and 100% stockholder, Anthony Spinale, made illegal payments to a USDA inspector in connection with four federal inspections of perishable agricultural commodities which G & T purchased in interstate commerce. The illegal payments are alleged to have occurred on July 15, 1999, twice on July 26, 1999 and again on August 13, 1999. On each of those occasions the Complaint relates that Mr. Spinale paid

$100 (one hundred dollars) to an Agriculture inspector. In the case of Tray-Wrap, the Complaint alleges that Tray-Wrap, acting through the same Anthony Spinale, in his capacity as either employee or agent, made illegal payments to a USDA inspector in connection with six federal inspections of perishable agricultural commodities which Tray-Wrap purchased in interstate commerce. The illegal payments are alleged to have occurred on March 24th and March 26th 1999, April 23, 1999, May 20, 1999, and June 16th and June 23, 1999. The Complaint alleges that on each of those dates Mr. Spinale paid $100 (one hundred dollars) to an Agriculture inspector.

The Complaint also relates, in Paragraph IV, at pages 3 and 4, that on October 21, 1999, the same Mr. Anthony Spinale was indicted by the United States Attorney for the Southern District of New York. The indictment included the same facts alleged in this Complaint and the essential charge that Mr. Spinale made cash payments to a USDA inspector. The Complaint then relates that on August 21, 2001, a judgment was entered in the U.S. District Court for the Southern District of New York in which Mr. Spinale pled guilty to a single count of bribery of a public official. The consequence of this plea will be discussed herein.

II. FINDINGS OF FACT [2]

[2]The findings of fact, as set forth in this section of the Court's decision, are based on the record evidence, both testimonial and documentary, and include credibility findings. The Court fully considered the post-hearing briefs and response briefs filed by the parties. If a particular argument from those briefs is not expressly discussed herein as such, it either means that the Court deemed it unnecessary to do so, in light of the matters discussed in the decision or that the Court determined that it was otherwise unnecessary to expressly address it. It should also be noted that the Respondents filed an objection to the late delivery of the USDA's Response Brief to Respondents' Counsel's office. Respondents' Counsel did not receive its copy of the USDA Response Brief until two days after it had been submitted to the Court. As the Court did receive the USDA Response Brief on the date due, there is no basis to conclude that the USDA had an opportunity to review Respondents' Response Brief before filing its own Response Brief. Therefore, as the Court ruled in a conference call with the parties on March 22, 2005, it would not grant Respondents' request that the USDA Response Brief

(continued...)

William J. Cashin, (Cashin), the Complainant's first witness at the hearing, was a produce inspector for the USDA, starting in 1979. Most of his duties were performed at the Hunts Point market. Tr. I 66 (10/25/04)[3]. His job involved visiting wholesaler locations and performing inspections based on USDA standards and documenting his observations. The inspection document is referred to as an "inspection certificate."[4] Tr. I 67. The purpose of the inspection is

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(...continued)
not be considered. Accordingly, all the post-hearing briefs filed by the parties were considered by the Court.

[3]The hearing began on 10/25/04 and lasted six days. The transcript however does not list the pages sequentially for the entire hearing. Rather, for each day, the transcript begins with page one. Therefore, except for the first reference to a given day, which will include the date, rather than repeating the date for each reference, this decision will refer to each day of hearing with a sequential Roman Numeral followed by a page number. For example, references to testimony for the first day, 10/25/ 04, will be noted as follows: "Tr. I," followed by the applicable page number and, accordingly, the last day's transcript references will appear as: "Tr. VI," followed by the applicable page number. The Court asked the parties to submit transcript errors to it and they did so. However, USDA did not appear to appreciate the fundamental premise that transcript errors refers to *errors* made by the Court Reporter because several of its "Proposed Corrections" involve amending the transcript to have it read as USDA would have liked it to appear and in those instances the transcript is not in error. For example, at Tr. I 35 USDA proposed that the words "On April .." be deleted. The problem is USDA counsel said those words and therefore there was no transcript error. For that reason, each of the objections raised by Counsel for Respondents are sustained by the Court. In contrast, where errors noted by USDA were typographical *errors*, the Court, as well as Respondents' Counsel have no issue with such corrections and those typographical errors are incorporated by reference. *See* Complainant's Proposed Corrections to the Transcript, an undated five page document received by USDA OALJ/OHC on January 7, 2005 and Respondents' Response to "Complainant's Proposed Corrections to the Transcript, which is also undated but received by the Court on February 22, 2005, and which is also incorporated by reference. Accordingly, while typographical and/or spelling errors are accepted, efforts to edit what the witnesses, the attorneys or the Court stated in the transcript may not be revised.

[4]The inspection certificate is also known as the FV-300. Tr. I 132. It is the "formalization of all of the information [the USDA inspector] gather[s] into the document ..." Tr. I 72. After noting essential information such as the name of the firm,
(continued...)

to provide a picture, in words, of what the produce looked like. There are two basic types of defects: quality and condition. Tr. I 71. Quality defects are defects that existed when the product was packed or when grown and so they do not change. For example a product may be 'misshapen' which is a quality defect. In contrast, condition defects do change. Examples of condition defects are decay or rot. Tr. I 71. Inspections for produce[5] are not mandatory. Instead, wholesalers call the USDA and request an inspection. A fee is charged for these inspections. Tr. I 68.

Cashin began inspecting produce at G & T in 1979 when he was a trainee. He stated that G &T and Tray-Wrap were day operations. [6] By 1983 or 1984 he was regularly inspecting G &T and Tray-Wrap. [7] Tr. I 72. As time went on, around the mid-1980's to about 1990, he was inspecting G &T and Tray-Wrap "almost every day." Tr. I 73. Cashin's contact at both facilities was Mr. Spinale. Cashin did not know what Mr. Spinale's position was with either of these concerns, although he assumed he was their owner and buyer. Tr. I 74. In any event, it was Mr. Spinale who requested the inspections and the person who would point out the products he wanted inspected. As Cashin put

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(...continued)
the commodity being inspected, date and time of the inspection request, the inspector looks at the product and "run[s] samples." Cashin would examine specimens and determine simple percentages, calculated by weight or by count. Upon noting defects he would arithmetically determine the percentage of defects found. Tr. I 70.

[5]There are different types of inspections. Some products, (i.e. commodities) have "grades," that is USDA grade standards. Quality, which is also referred to as "grade," and condition are evaluated too. Some products don't have grade standards; they are rated by condition only. Tr I-67. A grade standard for produce refers to the standard established by Congress for particular products. For example, for a particular product to be listed as U.S. #1, it would have to meet certain established requirements. Tr. I 71.

[6]Generally Hunts Point opens for business around 10 p.m. Tr. I 202. G & T and Tray- Wrap, by contrast, were daytime operations. Tr. I 202.

[7]G & T and Tray-Wrap were both located at Hunts Point and both those names appeared together on the office door there. Tr. I - 76.

it, "[h]e was the person who would say 'Well, I looked at this and I saw these problems here, there." Tr. I 75.

Cashin stated that Mr. Spinale gave him money in connection with Cashin's inspections at G &T and Tray-Wrap. He added that those payments were not for the fee that the USDA charges to do those inspections because those fees were collected through a bill sent to those companies. Tr. I 77. Cashin stated that the money Mr. Spinale gave him "was for helping him on the various inspections." Tr. I 79. Originally, the amount he would receive was $100.00 *per visit* but after G & T and Tray-Wrap relocated to Hunts Point, the amount was $100.00 per inspection. Tr. I 79 - 80. These payments began "when [Cashin] first started [doing inspections] on [his] own, [which was] around ... 1983 or 1984." Tr. I 80. These payments continued until Cashin left, having been arrested for his corrupt practices in 1999. Tr. I 80. Typically, after Cashin had completed his inspections, Mr. Spinale would motion for him to come over to a remote part of the warehouse and then hand him money, adding only "Here, hold on to that" when he would do so. Tr. I 80, 93. Cashin said he knew that he would receive money every time he visited Mr. Spinale. He acknowledged getting paid whether the inspection graded as U.S. Number one or not. Tr. I 81. To the question whether there was "some sort of understanding that [he] had with Mr. Spinale," Cashin stated: "Originally, it was an understanding that [Cashin] was helping him, and then later on, [Spinale] was just still paying.
I don't - - that I don't know."[8] Tr. I 81.

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[8]Cashin was surprisingly vague when asked about his conversation with Mr. Spinale regarding their understanding. He could not recall what Mr. Spinale said to him in the alleged conversation, nor specifically what he said to Mr. Spinale. Tr. I 146. Cashin asserted this conversation occurred "about 1983." Nor could he remember how long he had been dealing with Mr. Spinale prior to the momentous conversation. Tr. I 147. The Court observes and finds that Cashin's words, that he was "helping" Mr. Spinale is not the equivalent of asserting that he altered, that is, downgraded, a produce inspection from its true condition. Nor, the Court observes, has USDA demonstrated a single instance when Mr. Spinale was involved in a produce inspection which downgraded produce and made it appear in poorer condition than it really was. Perhaps the best summation from its star witness, Cashin, regarding the purpose of the payments

(continued...)

Explaining the background of this arrangement's origination, Cashin stated he was first trained in his job by Bob Snolec [ph]. This occurred around 1979 or 1980. Cashin told Snolec he (Cashin) "was taking money in the market from some of the wholesalers ..." Snolec revealed he already knew this about Cashin, as some of the wholesalers had told him. As Cashin related it, Snolec then told Cashin "'Tony is okay. He's a good man. ... Work with him, help him out, and he'll take care of you,' which meant that he would give me money, of course." Tr. I 82. Cashin also told Mr. Spinale "...I'll be coming here a lot, I think and, you know, I'll help you like Bob helped you." Cashin defined "help" as increasing the number of containers reported on the certificate to closely reflect what was actually manifested. This was due to the fact that some of the packages may already have been sold by the time the inspector arrived.[9] Thus, the certificate would overstate, and thus not accurately reflect the amount of product that the inspector viewed[10] during the inspection. Tr. I - 87. "Help" also included "to increase on the certificate, under the defects, the percentages of condition - - usually the condition defects to closely - - to go over the good delivery standards. The 'good delivery' standards are a parallel set of standards within the produce industry,

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(...continued)
was his acknowledgment, "I don't know." Tr. I 81

[9]Cashin amplified this explanation stating, as an illustration, that if a manifest reflected 1,100 items but the wholesaler had sold a few hundred of the items, the wholesalers would want the certificate to reflect 1,100 items, not 900. Thus, if 10% decay were found, the wholesaler could tell the shipper the 10% decay applied to 1,100 items. In this way, the wholesaler would get a credit on the whole shipment of 1,100, not just on 900 items. Tr. I 87.

[10]As alluded to, this doesn't completely tell the story. Due to delays in inspections and the fragile nature of produce, it was common for merchants to sell off some of a load while awaiting an inspection. There is no evidence in the record to suggest anything other than that this was a widespread and unofficially sanctioned practice in this USDA office.

along with the USDA standards[11]." The last way "help" was provided was in the temperatures recorded on the USDA certificate. Cashin explained that produce is shipped at fairly cold temperatures but that once the shipping container is opened, the temperatures will rise. If the temperature goes above the industry accepted level, then the blame for product deterioration is shifted from the carrier to the receiver or wholesaler. Thus, receivers or wholesalers do not want a certificate to reflect a temperature above the industry accepted level. Tr. I- 84. Cashin stated that if the certificate reflected a higher percentage of condition defects affecting good delivery standards, then the wholesalers could renegotiate the prices with the shippers and in some cases get money back if more deterioration in the product was reflected in the certificate. Tr. I - 85.

Although Cashin stated that the money he received from Mr. Spinale influenced his inspection findings, the specifics he offered were hardly damning. Cashin stated Mr. Spinale would say to him: "Look at these potatoes[12] over here. They have a lot of problems." Cashin would then look at a few bags and then the two would talk "[a]nd *if the load had problems* and we came up together or separately with a - - with some problem, usually together, then I would write it

[11]Cashin added that these good delivery standards were set a bit higher than the USDA standards. He believed this was done to provide some room between the USDA standards and the actual arrival. Although he "never did understand what it was all about," he thought wholesalers wanted the numbers reported on the USDA certificate to be just above the "good delivery standards" so the wholesalers could re-negotiate the prices with the shippers. Tr.I -84.

It is of particular importance to note here that Cashin *never* directly asserted that he increased the percentage of defects *for any specific load of produce that he inspected for Mr. Spinale.*

[12]Cashin testified that potatoes, along with other types of produce, were traded on the futures commodity exchanges. When he started as a USDA inspector potatoes were traded on the Mercantile Board, but this business practice was discontinued shortly after Cashin was no longer a trainee. The potatoes would arrive at the New York Food Auction where, in order to be eligible for sale, they had to be evaluated as U.S. Number 1. Tr. I, 118. Cashin also agreed that Mr. Spinale had loads from the Mercantile Exchange. In fact, Cashin stated that USDA Regional people would come to the exchange when potato loads were being inspected "*to make sure they passed.*" For obvious reasons, Cashin agreed that such a practice would be in violation of the certification on the Inspection Certificate. Tr. I 121.

as such." Tr. I 88. (italics added). Cashin stated that Mr. Spinale would pay him "cash to *inspect* produce ... *every time* [he] went there." Tr. I 88.

Cashin admitted that he had a role in the investigation that led to the criminal indictment of Mr. Spinale. Tr. I 88, 89. On March 23, 1999 Cashin was arrested and charged with bribery and conspiracy to commit bribery. Tr. I 89. He decided to cooperate with the FBI and the Department of Justice. They requested him to wear a 'wire' (i.e. a secret recording device) under his USDA outfit. He used this to record his conversations with the wholesalers when he went to work at the Hunts Point market. He would then hand over the tapes and any money received from the wholesalers at the end of each day and review his day's activities. Later on, in May 1999, he was fitted with a video tape device.[13] Tr. I 89, 90. Cashin's surreptitious assistance to the authorities continued until August 1999. Thus, he was at Hunts Point with a video camera from about the second week of May through the middle of August. Yet, despite three months of this activity, no recordings were introduced at the hearing of his interactions with Mr. Spinale.[14]

When directed to CX 1, at pages 3, 4, Cashin asserted the document was an "FBI 302." Tr. I 96. Cashin stated that the FBI agents prepared these but that he had input into their content. He recounted that he met with the FBI agents on days he received money from wholesalers and he would review his day with the agents. The agents would take notes during these reviews. After that Cashin "*guess*[*ed* that] they went back to their office, and they drew up the 302 document." Tr. I 97 (emphasis added). When asked about CX1-

[13]This device was concealed in a canvas bucket that he carried to the inspections. The bucket contained various booklets and tools he would employ during inspections. The federal authorities fitted a camera in the bottom of the bucket. As with his recordings, Cashin would turn in his videos on a near daily basis. Tr. I 91. It is of note that no audio or videotapings were presented in this administrative proceeding.

[14]Nor were any recordings introduced of Cashin's interactions with anyone in this matter.

4, which referred to "SOURCE," Cashin asserted that this referred to him. Tr. I 97, 98. As an evidentiary matter, the Court will explain herein the significant legal problems with the claims of Cashin regarding the 302s.

The Court observes and finds that there were enormous infirmities, as a matter of proof, that Cashin was the 'source' referred to in the document. For example, when directed to pages 3 and 4 of CX 1, which are the 302s associated with that exhibit, it was noted by the Court that Cashin's name does not appear. Cashin had no answer to the observation that his name is nowhere identified as the 'source.' Although Cashin did note that the 302s listed Hunts Point market and Tray-Wrap, he admitted he was *not* the only inspector that inspected Tray-Wrap during that period of time. Tr. I 101. Therefore, from the face of those documents there is no way to discern that Cashin is the source referred to in those pages. While the inspection certificate refers to an inspection at Tray-Wrap at 1:30 p.m. on March 24, 1999, the 302 does not mention a time, nor does page 3 of CX-1 appear to be in sequence with page 4 of that exhibit, as page 4 starts with "(3)," but the preceding page does not list a (1) or a (2). Tray-Wrap's name does not appear on page 3 of CX-1 either. Large sections of these pages, particularly CX-1 at page 3, were in a redacted form. While the exhibit was, by stipulation, admitted, this does not overcome its probative infirmities.[15] Clearly, the USDA Counsel needed to have an FBI witness testify as to these matters, but they did not do so, either in their case on direct nor, though specific opportunity existed to do so, in any rebuttal evidence. This is, after all, a legal proceeding and while in a casual setting one might "deduce" each of these answers, such a practice does not satisfy the government's proof obligations in a hearing. The document is offensive in other respects as well. For

[15]USDA counsel's reliance on the stipulation to the admissibility of the 302s represents naivete or ignorance of the effect of the stipulation. True, the parties agreed that the 302s were authentic 302s and they represent what they state they are, but that does not mean that their admissibility proves more than the terms of the stipulation. USDA counsel failed to perceive the difference between, on the one hand, admissibility and, on the other hand, the *weight* to be afforded to the documents. As noted, the deficiencies in the 302s are explained herein.

example, it characterizes the $100 payment as a "bribe." Of course, this goes to the heart of the Respondents' contentions regarding exactly what was transpiring here, as the Respondents' position is that, effectively, Mr. Spinale was being "held-up" by these corrupt, convicted USDA inspectors. Confirming the problems with this exhibit, when the USDA attorney attempted to rehabilitate Cashin, by asking if the inspection certificate (CX1, at page 5) was an accurate representation of Cashin's inspection at Tray-Wrap on March 24, 1999, Cashin responded: "I don't remember." Tr. I 104. Further, Cashin first saw CX1, pages 4 & 5, only when he prepared for the criminal trial. Therefore, his review of the document was in a time frame several years after 1999. Tr. I 105. Cashin acknowledged that the FBI *never* provided him with a typed copy of this report nor did it ever ask him to look it over for accuracy, either shortly after it was created or, for that matter, ever. Cashin agreed that, other than surmise, he had no independent basis for knowing that he was the only individual working for the FBI and no independent basis for knowing that the report is referring to him when it refers to a visit to Tray-Wrap on March 24, 1999. Tr. I 106. Accordingly, for all these reasons, no probative weight can be afforded to pages CX1 at 4 and 5 of this exhibit. Other deficiencies with the 302s existed and these will be discussed *infra*.

Cashin also asserted that he was the source for the *other* 302s in the record.[16] Tr. I 98. However, the Court finds that the fatal infirmities described with the 302s in CX 1 were present for each of the 302s. Cashin claimed that the incidents related in the form 302 appearing in CX 1 were an accurate reflection of the events that took place at that time. Tr. I 98, 99. Regarding this exhibit, Cashin stated that, on March 24, 1999, he inspected a load of tomatoes for Tray-Wrap and that Mr. Spinale gave him $100.00 in cash. Tr. I 99 and CX 1-5, Inspection Certificate # K-678086-0. The USDA inspection fee was

[16]A 302 is associated with each of the dates cited in the Complaint. The problems identified by the Court with the 302 associated with CX 1 are endemic to the 302s for each of the government exhibits, CX 1 through CX 9.

$66.00 and Cashin related that the fee was apart from the $100 he received from Mr. Spinale. Tr. I 100.

Cashin was next directed to CX 2. As mentioned, it is accurate to state that the same infirmities identified above with respect to CX 1 existed for CX 2 as well. Cashin, in response to questions from USDA counsel, noted similarities between the information contained in pages 3 and 4 of CX 2 (i.e. the 302s) and page 5 of that exhibit (the inspection certificate bearing his signature). Tr. I 108. However, when asked by counsel for USDA whether the cash Mr. Spinale paid him in connection with the inspection reflected on Inspection Certificate K-678091-0 "influence[d him] in *any way*," he responded: "*I don't remember*." (emphasis added) Tr. I 108.

In apparent recognition of the problem he had before him, Counsel for USDA did not spend long with CX 2 and when he moved to CX 3, he tried to adjust to this dilemma by asking Cashin "[w]hat transpired, *according to the 302*, on that day?" (emphasis added). *Reading* from the 302 report, and decidedly *not* relying on his own memory, Cashin reported that he went to Tray-Wrap, inspected a load of tomatoes, and was paid $100 by Mr. Spinale. But when asked if the $100 influenced his inspection, Cashin again could only state: "*No, I don't remember*." (emphasis added) Tr. I 109. It bears repeating that, as with CX 1 and 2, the same fatal evidentiary deficiencies were present for CX 3.

Still, on direct examination, Cashin maintained that the money from Mr. Spinale did influence his inspection results. He claimed that usually this influence was reflected in the percentage of defects found. He asserted that Mr. Spinale would be "very specific and tell [Cashin] what he wanted written down or just made worse than what I actually found. Sometimes he would want it written exactly [as Cashin had] found." Tr. I 109-110. However, it is significant that when he was directed to the *particular inspection* under discussion in his testimony, he was asked if he could recall "which way he asked [him] for help?" Cashin's response was: "*No, I can not*." (emphasis added). Tr. I 110. The Court notes again that this is a legal proceeding. Thus, Mr. Cashin's *general assertions* that Mr. Spinale attempted to influence the percentage of defects found in inspections may be of interest to

non-lawyers but they do not speak to the specific allegations in this Complaint, which is after all what this proceeding is all about. The Complaint alleges *specific* "Bribes" on *specific* dates and that is what the government is obligated to prove by a preponderance of the evidence. Therefore, even apart from his lack of credibility, Cashin's general anecdotes about other, unidentified, inspections and Mr. Spinale's alleged attempt to influence such inspections do not advance the USDA's case an inch.

The evidentiary problems noted above continued as Cashin proceeded with his testimony for the other exhibits. When directed to CX 4, he related that he visited Tray-Wrap on May 20, 1999 and upon inspecting a load of tomatoes, Mr. Spinale paid him $100.00. Tr. I 110. Similarly, when asked about CX 5, he stated that on June 16, 1999, he inspected a load of tomatoes at Tray-Wrap and was paid $100 by Mr. Spinale. However, Cashin was merely reading from the 302s; independently he remembered nothing. Counsel for USDA, despite the evidentiary problems noted above with each of the FBI 302 reports, continued to indirectly reference those reports as he moved through the direct examination of Cashin. *See* Tr. I 111. Still, the 302 problems continued to plague the government's case. For example, while Cashin in referring to his June 16, 1999 inspection at Tray-Wrap recited from the 302 of receiving $100 from Mr. Spinale, the 302 states on one page that $200 was received, but the next page refers to $100. *See* CX 5, pages 4 and 5, Tr. I 111,112. Again, it bears emphasizing that it was clear from his testimony that Cashin had no independent recollection of this event or any of the others. When asked to explain the discrepancy in the amounts, the best Cashin could do was to again recite what was listed in the 302. Tr. I 112, 113. *In fact, when asked specifically if he had any independent recollection, Cashin admitted he did not.* Tr. I 113. Significantly, Cashin affirmed that the first time he had ever viewed that document, or any of the other 302s, was "a couple of *years* later" after they had been prepared. Tr. I 113 (emphasis added).

As the government plowed through its exhibits, none of the exhibits escaped the deficiencies noted above. When it moved to CX

6, involving a June 23, 1999 inspection of tomatoes at Tray-Wrap and three loads of potatoes, Cashin stated that he received $400 from Mr. Spinale. But, as with the others, Cashin was simply reading from the 302s to support his testimony. For obvious reasons, the inspection certificate, which is the only document Cashin himself prepared, makes no reference to alleged payments.[17] Thus, as with each of these exhibits, Cashin was merely reciting, robotically, the information contained on the largely redacted 302s, which 302s he had never viewed until *years* after their creation. Understandably, the government spent ever decreasing time in its direct examination of these exhibits. For example, when examining Cashin with regard to CX 7, only a half-page of transcript was involved with that five-page exhibit.

Without intending to belabor the point, but for the sake of completeness, the Court notes that Cashin's testimony for CX 8 was also based solely on the 302s. When asked by government counsel where he was getting the information for his testimony, Cashin stated it was from: "Page four ... [the] first page after the redaction." Tr. I 118. Thus, it is accurate to state that, in terms of the various 302s in the record, the use of Cashin's testimony about these documents was of no greater value than would have been provided if it had been derived from the testimony of a stranger plucked randomly from a city street and brought in to read the content of those 302s.

To cite yet another example, when Cashin claimed that, when viewing the load of potatoes, Mr. Spinale wanted that inspection to be consistent with previous inspections of that load, when asked, on direct, how he knew the loads had been previously inspected, he answered: "It said so in the 302." Tr. I 119. Making matters worse, and further diminishing his testimony, Cashin then retreated from his assertion that the load had been previously inspected. He then lamely stated that he needed glasses and that, upon *rereading* the 302, he

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[17]For informational purposes, it is noted that CX 7-5's reference to BNFE 18602 refers to the number on the Burlington Northern Food Express railroad car. Tr. I 117.

stated that the loads were similar, not previously inspected.[18] Regarding CX 9, which relates, at least in part, to the one count that Mr. Spinale pled guilty, Cashin stated that he went to G & T on August 13, 1999 and that Mr. Spinale gave him "some going away money ... $100 cash for the inspection." Tr. I 125. Cashin made it clear that his testimony regarding this assertion came from the 302, specifically identifying CX 9 at page 15. Tr. I 125. When pointedly asked by the Court if he had an independent recollection that he received $100 for an inspection on August 9, 1999,[19] Cashin admitted it was true he had no such recollection.[20] Tr. I 126. Cashin, referring to CX 9 at page 16, did identify his inspection certificate for a load of potatoes at G &T, which reflected an August 13, 1999 inspection date. Cashin noted that handwritten notes on the certificate reflected paragraphs relating to freezing, that the railcar had been previously inspected and a restriction explaining the limits of the inspection. Tr. I 128.

USDA Counsel asked Cashin, regarding CX 1 through CX 9 if his inspection certificates were "accurate representations of the commodities as [he] saw them on those days?" Cashin stated they were not in that "[b]ecause [Mr. Spinale] paid me bribe money, some of them *could've been* altered to his benefit." Tr. I 129 (emphasis added). Apparently referring to CX 9, Cashin stated that any one of the three factors (the number of containers, the percentages above the

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[18]Cashin stated that, among the corrupt inspectors, for consistency it was their practice when the same shipper sent the same commodities in multiple shipments in sequential days, the inspectors would consult the previous days' inspections so that their results would not conflict.

[19]While the Court did, mistakenly, state "August 9, 1999," Cashin was testifying abut his August 13, 1999 inspection. The Court's misstatement of the date is understandable and only serves to underscore the problems with these 302s. This is because this 302 starts off with an August 13, 1999 date but then proceeds to list the date on subsequent pages as August 8, 1999. *See* CX 9, at 13, 14, 15.

[20]The best Cashin could independently recall was that he received "thank-you money" from Mr. Spinale around the time he left the USDA inspection service. He could not state the amount he assertedly received. Tr. I 126, 127.

good delivery standard, or the alteration of temperatures) *could have* been changed. Tr. I 129. In this regard, one thinks of John Adams remark: "Facts are stubborn things; and whatever may be our *wishes*, our inclinations, or the dictates of our passions, they cannot alter the state of facts and evidence." *Bartlett's Familiar Quotations*, Sixteenth Edition, 1992, 337-15. (emphasis added). In short, Cashin's "*could haves*" do not satisfy the burden of proof.

Significantly, Cashin himself discounted the worth of his own testimony. When directed to the inspections reflected in CX 1 through CX 9 and asked if those reflected the only payments Mr. Spinale ever gave him, he answered: "Other than the thank-you money when I left, over the years, I remember him giving me Christmas money on occasion. *I don't remember much*." Tr. I 130. (emphasis added).

In an attempt to repair the response, USDA Counsel then asked "...over the year, was he paying you for various inspections as well?" To this, Cashin replied: "Yes, he was."[21] Tr. I 130. Cashin's direct examination ended with his self-serving assertion that he never *told* Mr. Spinale that he would not help him if he did not pay money for the inspections and that he never suggested or led him to believe that he would not help him if Spinale did not pay him. In fact, that recounting overstates his response because Cashin was only responding to those questions from the USDA and could only muster for them the unelaborative answer of a simple "no" to them. Tr. I 131.

It is also important to note that Cashin, in responding to questions about CX 1 through CX 9, while asserting that some, <u>*unspecified*</u> Inspection Certificates were inaccurate in terms of reflecting the true condition of the products he inspected, also conceded that some *were accurate*. As an example, he referred to the certificate he wrote on

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[21]Even this attempt to rehabilitate made no headway. Remembering that this Complaint charges specific dates of alleged bribes, as the question from USDA counsel was a completely general question it did nothing to address those specific dates. Further, Cashin's response skirted the central contention of the Respondents that they were paying the corrupt inspectors because they had to in order to get timely and accurate inspections.

August 13, 1999, as reflected in CX 9, at page 16, noting that this would reflect an accurate report because the product would be inspected subsequently by the railroad's own inspectors. As Cashin put it, "I don't believe that this inspection [CX 9, page 16] has been altered, because the railroad's going to come behind me and inspect it." Tr. I 134. But Cashin's example of an accurate inspection hardly helps the USDA's case.[22]

More significantly, when referring to all of the certificates, CX 1 through CX 9, which certificates, being the basis for the Complaint, form the heart of the government's case, *Cashin agreed it was fair to state that he could not state which of those certificates were accurate from those that were inaccurate*. Thus, for any particular exhibit, Cashin had no idea at the time of his testimony in this proceeding if he was looking at one of the "accurate" ones or an alleged inaccurate one. Tr. I 134,138. Restated, he conceded that he had no independent recollection of the events and was relying *solely* on the 302 reports. Tr. I 137. *Accordingly, he conceded that any of them could have been altered but any of them may not have been altered as well!* Tr. I 139,140. *Those reports, it should be recalled, were never reviewed by Cashin for accuracy at any time near when they were made and, in fact, he never laid eyes on the reports until years after their creation.*

As a further example, Cashin also agreed that, as the inspection reflected for CX 5 at 6, this was an inspection for condition only, and no grade defects were listed on the certificate. He conceded that if grade defects had been listed on that certificate, (CX 5 at 6), it possibly would have helped Tray-Wrap because the "checked sum" for the total number of defects found would have been higher. Thus, if grade defects had been included, Tray-Wrap would have been able to claim a bigger allowance from the shipper. Cashin also agreed with counsel for the Respondents that, while he stated that increasing the number of containers reported as present in a load was a means to help a wholesaler because it would allow the wholesaler to claim a bigger allowance, his inspection, as reflected in exhibit CX 1, at page 5, did

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[22]It is also worth noting that by Cashin's own testimony, this single count to which Mr. Spinale pled guilty (i.e. CX 9) was an accurate inspection certificate.

not follow that approach as Cashin's certificate reports that he inspected only ¼ (one quarter) of that load.[23] Tr. I 145. Beyond that, Cashin conceded that he never knew if G &T or Tray-Wrap ever received an allowance from a shipper in connection with any inspection certificate he issued. Nor could he recall ever hearing that such an allowance had been received. Tr. I 198.

Further, Cashin characterized Mr. Spinale's knowledge about potatoes and tomatoes as "extensive," agreeing that Mr. Spinale *was an expert* regarding those products. Tr. I 147, 148. Elaborating, Cashin stated that this expertise of Mr. Spinale extended to identifying defects, bad conditions or problems with those products, as well as to their *marketability*.[24] Cashin also agreed that Mr. Spinale was knowledgeable as to the various types of defects in potatoes[25] and would be able to recognize them. Tr. I 153. In fact, Cashin allowed that Mr. Spinale *knew more than most inspectors about potatoes* and

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[23]Exhibit CX 5, at page 5 reflects the number of containers as 400 cartons.

[24]It is noteworthy that Cashin *volunteered* the last characterization about the scope of Mr. Spinale's expertise, by adding that it included the subject of the *marketability of potatoes and tomatoes.* The question posed had only asked about Mr. Spinale's expertise regarding defects or bad conditions, yet Cashin felt this distinct aspect of expertise needed to be included. In fact, while Cashin maintained that Mr. Spinale was not an expert in terms of *writing* USDA inspection reports, he admitted that Mr. Spinale had "very good knowledge" regarding "what percentages were allowed and what percentages weren't allowed [by] the USDA as far as potatoes and tomatoes... ." Tr. I 149.

[25]Potatoes can have defects and, because of tolerances, still be classified as USDA number one. These allowable defects permit 5% external grade defects, 5% internal defects and "a restricted 1% tolerance for soft rot, but the total internal/external defects can not exceed 8%. Tr. I 158,160. Thus, for example, if external grade defects exceed 5%, then the load would be out of grade one. By comparison, tomatoes can have quality problems involving their shape or scarring. Insect damage can also be an issue. Tr I 160. Like potatoes, there are percentage limits for problems. Cashin was uncertain, but it was his recollection that tomatoes had a 10% total defects allowable. This was composed of 5% for serious damage and 5% for softness and decay. Thus if softness and decay totaled 6%, the tomatoes would be out of grade. Cashin also believed that a consignee has the right to reject a load form the shipper if the product is out of grade. Tr. I 161.

knew how to distinguish grade defects from other defects.[26] Tr. I 153, 155. In terms of evaluating the quality of a load of potatoes, Cashin agreed that Mr. Spinale's judgment could be counted on by an inspector. Tr. I 157. Cashin also agreed that many times he wrote up accurate inspections for Mr. Spinale. Tr. I 195, 196.

Cashin also conceded that he first starting taking cash payments at "some time in 1980," which was *less than a year* after he started as an

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[26]Cashin testified that the USDA information binder addressing problems that can exist with potatoes was large. Potato defects can include soft rot, black leg and freezing; such defects are scored on sight. Other defects, such as lenticels, which are small white or dark specks on the surface of the potato, are scored on the percentage of the surface which is affected by the defect. Still other defects, such as *fusarium tuber rot* are scored on the basis of the amount of the potato that would be considered 'waste' upon cutting it up. By contrast a misshapen potato reflects a quality factor. *However, despite the large guideline notebook, Cashin emphasized that "all inspections ... [are] a rather subjective process."* Tr. I 150,152. Cashin also agreed that, because the process is very subjective, two inspectors could look at the same load and reach different conclusions about the load. Thus, two inspectors, viewing produce under identical conditions could honestly arrive at different conclusions. Tr. II,10/26/04, 95, 96. In fact, such inspectors could arrive at *significantly different ratings.* Tr. II 96, 97. Further, Cashin conceded that if he were to view a load of potatoes and found 8% grade defects, he would not be permitted to write up his inspection listing 8% defects in the load, because USDA policy did not allow that. Tr. I 188,189. The procedure called for an inspector to call the USDA office in such a situation. This existed because in such circumstances the USDA would want to determine if the load in question had been previously inspected at the shipping point. If it had been previously inspected at the point of its shipping origin that would create an appeal situation. Tr. I 189,190. The import of Cashin's testimony was that he would have to continue to take samples in an instance where there had been a previous inspection by the state so that, at the end of the day, the samples would arrive at an allowable grade and thus be consistent with that earlier inspection. *See* Tr. I 190, 192. Thus, Cashin agreed that if he came across a load of potatoes with 8% grade defects, the Officer in Charge would instruct him to continue taking samples until the percentage of defects fell to under 5%. Tr. I 194. Consequently, Cashin agreed that, although his inspection would ultimately reflect 5% defects, *it would not be accurate*, as he had found, in fact, a higher percentage of defects, but was following the instructions from his supervisor. Tr. I 194.

inspector.[27] Tr. I 162. It is upon the credibility of this nineteen-year veteran cash-taking inspector that the USDA rests its entire case against a man who, prior to these charges, had a spotless record.[28] Cashin admitted that during the entire nineteen years he was employed as an agriculture inspector, other USDA inspectors working at Hunts Point took cash payments as well. Tr. I 161,162. Cashin stated that during the period of taking cash payments he met with other cash-taking inspectors. Tr. I 165. Working together, at times the crooked inspectors would pick up cash payments at the Hunts Point merchants'

[27]Cashin testified that his illegal activity began in 1980 when inspecting a load of leaf lettuce for another produce company. That load involved a "dump certificate," which is a separate certificate declaring that the produce was so poor that it was not sellable. These dump certificates are not used anymore because it involved the USDA evaluating that a load had no commercial value, a conclusion it now avoids expressing. When he arrived for the inspection the produce wholesaler asked him to inflate the number of boxes of bad lettuce. Cashin did so and later received a cash payment for cooperating. Tr. I 163, 164. While the produce wholesaler instructed him to "stop by and see [him] later," Cashin knew he would be receiving money for his corrupt action. Tr. I 164.

[28]To avoid any miscommunication, when the Court states that Mr. Spinale had a prior spotless record, one should not claim that the guilty plea stains that history, as it stemmed from the same alleged events identified in the administrative complaint.

houses for other inspectors who formed the corrupt network. [29] Tr. I-165.

Regarding the day of his arrest, March 23, 1999, Cashin admitted that he was frightened when the FBI arrested him, charging him with bribery and conspiracy to commit bribery.[30] Tr. I -175. He was informed that, if convicted, he would face jail time.[31] Tr. I -176.

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[29]Cashin qualified this response, stating that this arrangement between the inspectors to pick up each others cash payments, *did not apply to his dealings with G & T or Tray-Wrap*. Tr. I 166. Elaborating on the arrangement between the inspectors to pick up each others cash payments, Cashin stated that, in the early 1980s, USDA inspector Dan Auserry [ph] approached him regarding payments from Hunts Point wholesaler Post and Taback. Auserry told Cashin that Post & Taback wanted to "work with him" but that Auserry would have to be the middle man, and in that role would pick up payments intended for Cashin. Cashin described Auserry as "the leader of the group." Tr. I 174. The same arrangement was established for Fruitco Corporation, another Hunts Point wholesaler. As Cashin explained it, Fruitco wanted "to make product move faster ... [and so he] want[ed] to work with [the corrupt inspectors]." Tr. I 170. Other houses were involved as well. For Ruger and Brothers Produce, USDA inspector Malivette was the pick-up man. Tr. I 172. For Wholesaler Paul Steinburg, inspector Eddie Esposito took the cash payments. Tr. I 172. Cashin elaborated that by getting the product to move faster, he meant a "higher turnaround [rate] of the product in the ... wholesaler['s] store. Tr. I 171. The corrupt inspectors would settle their accounts with each other by meeting at Post and Taback's offices. They also made sure, for conformity, that their reports were consistent with one another. Tr. I 173. Cashin conceded that his activity with the other corrupt inspectors "became more like a business..." Tr. I 174. Cashin's understanding was that this would make it possible for the wholesaler "to get a better allowance in order to make the various loads of produce sell faster and better." Tr. I 171. Inspector Michael Tsamis, one of the arrested inspectors, who was nicknamed "the Greek," was the point man to receive Fruitco payments. Tr. I -170.

[30]Later, after deciding to cooperate, the conspiracy charge was dropped. Tr. I-176.

[31]Cashin claimed that he could not "remember" the amount of jail time he was at risk to serve, nor could he remember if the FBI agents referred to the possibility of a maximum sentence. Tr. I -177. This response was simply not credible. Never having been convicted before, Cashin certainly would have remembered critical details such as the possible length of any prison sentence. He also claimed, again with no credibility, that he could not remember if the FBI talked about that he could receive the maximum sentence because he had been taking money for so many years. Tr. I -177. Yet he remembered less critical information such as the name of the special agent for the USDA Office of Inspector General (because the FBI asked that those names not be

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Speaking to the details of his cash payments from Mr. Spinale, he stated that Mr. Spinale would call him over and tell him that he wanted to show him something at some remote part of the warehouse. At the time of handing the cash, Mr. Spinale would say to Cashin: "Here" or "Hold onto to this" or words to that effect. Tr. I -195. Cashin stated that Mr. Spinale never stated what the money was for when handing the cash to him. Tr. I -195. When asked specifically if he ever asked Mr. Spinale for money, Cashin stated: "no." The Court finds this claim, both when asserted by Cashin and upon the testimony received from other witnesses in this proceeding as a whole, to lack credibility. Tr. I 195. The Court is of the view that Cashin was not forthright in his responses when asked if he ever asked or demanded money from Mr. Spinale, before or after doing an inspection. The Court observed a hesitation before Cashin's response and it noted that he looked downward before answering these questions. Tr. II 181.

Cashin agreed that there had been occasions when he inspected potatoes at G &T and produce at Tray-Wrap where he issued a certificate reflecting that the produce was U.S. Number One[32] and that

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(...continued)
identified, the parties agreed to refer to this individual as "Mr. G.") and the specific name of another special agent who participated in his arrest. Tr. I 178. Cashin himself later demonstrated his initial response was not credible, as he then recalled that twenty years was the maximum sentence. *Id.* Further, when shown the transcript of his deposition, which occurred not long before this proceeding, Cashin then stated his recollection had been refreshed and that he was informed at the time of his arrest that would likely face the maximum sentence. Tr. I 185, 186. Thus Cashin did remember being deposed on September 23, 2004 in the case of *Anthony Spinale, G & T Packaging v. USA et. al.*, Docket Number 03CD1704. Tr. I 178. At that deposition he was represented by an Assistant U.S. Attorney. The Court agrees with the Respondents' observation that Cashin, scared at the prospect of a lengthy time in prison, was anxious to save himself from that fate and would have done anything to please his captors. To suggest that Cashin had his principles and would not fabricate assertions does not deserve the dignity of a comment.

[32] A U.S. number one inspection for potatoes would be a certificate reflecting that the load met the requirements for the grade. Such a certificate would meet the requirements of the contract between the shipper and the consignee. In such a
(continued...)

Mr. Spinale did not ask him to change that grade determination. Tr. I 197. As Cashin agreed that Mr. Spinale was an expert in the produce he dealt with, he conceded that Mr. Spinale would have known in advance of his calling for an inspection that the produce was U.S. Number One grade. Tr. I 197, 198. The Court finds that, in addition to other evidence supporting the conclusion, this evidence supports Respondents' contention that Mr. Spinale called for inspections in order to get a prompt and accurate inspection.

When directed to Complainant's Exhibit 8, at page 4, reflecting a 302 report, Cashin agreed that the report stated that Mr. Spinale told the "SOURCE that the two loads of potatoes were not yet ready to be inspected."[33] As with all of his testimony regarding the 302s, Cashin drew a complete blank about any of the assertions related in those documents. In his words, "*I don't remember. I'd have to go totally by the 302*." Tr. I 203 (emphasis added). Referring to the same Exhibit 8, but this time to his inspection certificate, Cashin stated that the produce was inspected at the team track in Hunts Point market and that they were inspected in the car.[34] Tr. I 204.

Cashin stated that he would not go to any produce house unless he had first received a request for an inspection there. Tr. I 201,202. The Court, based upon the testimony of other witnesses and Cashin's

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(...continued)
circumstance the wholesaler or consignee would not be eligible to receive any allowance because the produce met the grade.
Tr. I 196, 197.

[33]Cashin stated this could mean that the load had not physically arrived at the wholesaler's location yet or that packages had not yet been unloaded so that they could be inspected. Tr. I 200.

[34]Accordingly, as to this particular inspection, which referenced in the 302 that the produce was not ready to be inspected, Cashin agreed that one of the reasons he advanced – that the goods were not present – did not obtain in the instance related for Complainant's Exhibit 8. Tr. I 204. Thus, Cashin assumed that the only reason the goods were not ready to be inspected was that Mr. Spinale had not taken boxes out of the car for inspection. Tr. I 205.

significant need for money to support his 'adult entertainer' friends, finds that Cashin's claim in this regard to be without credibility.

Cashin, upon being referred to Complainant's Exhibit 9[35], at page 16, stated that this was a re-inspection. Tr. I 205, 206. Cashin did not know why Mr. Spinale would request a re-inspection. Tr. I 209. The first inspection, again *based solely on* Cashin *reading* the assertion in the 302 associated with his certificate, was performed by inspector Eddie Esposito. Cashin stated that Esposito was another one of the indicted inspectors. Cashin knew him to be one of those who took cash payments. Tr. I 209. Cashin stated that it was common for him to have received a copy of the earlier inspection. Tr. I 206. Even if he did not have a copy of the results of the first inspection, Cashin would learn the results of that inspection[36], including details such as the percentage of decay found and like findings. Tr. I 208. Cashin agreed that this inspection would have been accurate because the railroad[37] had inspected it and because it involved freezing. Tr. I 209, 210.

Directed back to Complainant's Exhibit 8, which involved an inspection performed on July 26, 1999, Cashin stated that it exceeded the allowable 1 % soft rot, as it had 3 %. The other problems reflected in the inspection were condition defects. Each of those defects count toward the "checksum" which reflects the total of all defects found. In this case that sum was 36%. By comparison, the allowable limit is 8%, with subcategory limits of 5% internal and 5% external. Accordingly, this inspection reflected that the produce was 28% beyond the allowable limit. Tr. I 212, 213.

Each of the lots were inspected for condition only. The 1,855 lot, lot 'A', had 3 % soft rot and 29 % total defects. Thus, for the latter

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[35]Exhibit 9 is of particular importance because, bearing the same date, it is also the ninth count of Mr. Spinale's indictment, which represents the only count to which he pled guilty.

[36]Cashin stated that the details of the earlier inspection could come from the wholesaler, through a copy of the inspection or through his supervisor reading the results to him. Tr. I 208.

[37]Although Cashin stated that the railroad could inspect any load of theirs, generally they did so only if there was a claim involved. Tr. I 210.

category it was 21% over the grade limit. The 430 carton lot (lot 'B'), had 31 % total defects (i.e. 23 % over the limit) and 3 % over the soft rot limit while the 115 carton lot (lot "C") had 7 % soft rot, but no other condition defects. This inspection was not to assess quality defects; it only inspected condition, but Cashin conceded that he would characterize the product as "bad." Tr. I 213 - 215, 218. Assessment of grade defects, had they been requested as part of the inspection, would have made the percentage of problems larger. Tr. I 215. Cashin agreed that at least in theory the wholesaler could reject the shipment simply because it was out of grade, but he added that the particular contract with the shipper controls. He stated that the USDA standards may not be not identical to industry tolerances . Tr. I 216. For example, 'decay tolerance' can be up to double that allowed by the USDA. Tr. I 216. While Cashin did not know if railroad inspectors looked at the loads reflected in Complainant's Exhibit 8, pages 6 and 7, he agreed it was possible and that he would be concerned if his inspection was inaccurate and contradicted by a railroad inspection.

Respondents' Counsel referred Cashin to Complainant's Exhibit 2 at page 5. Cashin, asked how much out of grade the inspection of tomatoes was, as reflected in that exhibit, stated that as the U.S. standard is 5% and this inspection reflected 21% were soft and decayed, the product was 16% out of grade. Tr. II 6. No grade defects were taken for that inspection, as the inspection was for "condition"[38] only. Tr. II 7. Referring to Complainant's Exhibit 3, Cashin stated that the report reflected that under the USDA standard, the tomatoes were 10 % out of grade, which is double the allowed amount of 5%. This inspection, like the one reflected in Complainant's Exhibit 2, was for condition only. As with CX 2, Cashin agreed that if there had been grade defects with the tomatoes, that would have made the inspection report worse. Tr. II 8. Looking

[38]The Transcript actually reads "*commission only*" but the inspector obviously stated "*condition only*," as reflected in his testimony regarding Exhibit 3, which appears on the same page and connects the type of inspection reflected in Exhibit 2 with the inspection done in Exhibit 3.

at Complainant's Exhibit 4, Cashin noted that the inspection reflected 24% total defects, whereas the allowable amount of defects was either 12 or 14 %.[39] II -8. Thus, the tomatoes were clearly out of grade. *Id.* The same response was elicited for Complainant's Exhibit 5, as Cashin noted that the inspection reflected 20% total defects for the tomatoes, which included 14% decay. The 14% decay meant that the product was 6 to 8% out of grade. Tr. II 9, 10. This inspection too listed only condition defects, not grade defects. Again, Cashin acknowledged that if there had been grade defects, such presence would have made the inspection worse. Tr. II 10.

When Cashin was directed to Complainant's Exhibit 6, at page 5, he noted that it *was* a grade *and* condition inspection. It reflected a total of 45% defects, meaning that it was either 33 or 35 percent out of grade. Obviously this meant, as Cashin conceded, this inspection reflected very significant problems for that lot. Tr. II 11.

Respondents' Counsel showed Cashin Respondents' Exhibit 7 M, containing pages A through W, and pertaining to inspection certificate number K 7673650, which he identified as a copy of a USDA potato inspection that he performed on June 23, 1999 at Chain Trucking.[40] The potatoes were in a railcar. Tr. II 15. Cashin found the load had 13% soft rot and a total of 24 percent defects. As the USDA allows only 1% soft rot, this load was out of grade by 12%. Tr. II 15. This inspection was performed on the same day as the inspection Cashin performed for Tray-Wrap as identified in Complainant's Exhibit 6 at page 5. Tr. II 14.

Turning to Respondents' Exhibit 8 C, identified as showing inspection certificate number K 767366-8, Cashin stated it reflected a potato inspection he performed on June 23, 1999. The inspection certificate lists that it was originally unloaded for SPFE468012. As identified from the original copy of that inspection, it lists Chain

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[39]Cashin could not recall the exact percentage of allowable defects.

[40]Cashin deduced that Chain Trucking was G & T's company because those trucks were present at its location, both at Hunts Point and its earlier location, and because he thought its name was listed on the door at Row B along with G &T's and Tray-Wrap's name. Tr. II 91,92. However, Cashin could only assume that Mr. Spinale owned Chain Trucking. Tr. II 92.

Trucking on it. Chain Trucking is in the same office as G &T and Tray Wrap. When Cashin met with Chain Trucking, he dealt with Mr. Spinale. Tr.II 18, 20. Cashin agreed this inspection was performed on the same day, and at the same location, virtually one inspection right after another, as the inspections reflected in Complainant's Exhibit 6, at page 5 and Respondents' Exhibit 7 M.. Tr. II 21, 22. This inspection, K 767366-8, consisted of two separate lots. The first lot had 18% total defects with 6% soft rot. Again, as only 1% soft rot is allowed, the lot was 5 % over the allowable limit. For total defects, USDA allows up to 8% total defects, but he found 18% total defects. Tr. II 22.

The second lot had 12% total defects and 5% soft rot, meaning that the total defects exceeded the limit by 4% and the amount of allowable soft rot by 4%. Cashin concluded that both inspections reflected that these were bad lots.[41] Tr. II 23.

Cashin next identified Respondents' Exhibit 9 C as a copy of an inspection report he issued for the applicant Chain Trucking, performed on June 23, 1999 at 12:45 p.m., and bearing inspection certificate number K 767364. Tr. II 29, 30. Cashin's inspection revealed 11% soft rot, a number 10% over the allowable amount. It also reflected 26 % total defects, which is 14% over the USDA allowable amount. Tr. II 30.

Referring to all of these inspections listed above, Cashin agreed that all of them were more than 2 or 3 percentage points out of grade and in fact that they were a lot more out of grade than that. Tr. II 31, 32. Put another way, Cashin admitted that all the inspections

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[41] Although lead counsel for USDA objected to these exhibits, preferring the hearing to be limited to the particular inspections cited in the Complaint *and no other inspections*, Counsel for the Respondent asserted that they were part of the criminal indictment. Tr. II 24. Lead Counsel for USDA at first contended these inspections were not part of the criminal indictment of Mr. Spinale but quickly retracted that claim. Tr. II 23, 25. Respondents' Counsel's argument was that these inspections were a part of the 13 inspections in that indictment and have relevance by the fact that they reflected produce that was out of grade as well as by the fact they were all done on the same day and time. The Court agreed that the exhibits were relevant.

reflected "bad loads."[42] Tr. II 32. Yet, despite agreeing that the inspections were significantly out of grade, Cashin conceded that he previously testified that he was reluctant to issue inspections that were out of grade by more than a few percentage points, because he was afraid that to do so would make "the inspections too obvious and cause[] an appeal[43] and a lot of problems ..." Tr. II 32.

Based on the record testimony, the Court finds that the corrupt inspectors, in order to protect themselves and their scheme, would not alter the true condition of produce inspected beyond the few percentage points needed to cause the produce to fail to meet grade. Cashin agreed that there were times when he would enter a railcar, or a trailer, and observe markings on the interior of the railcar or trailer wall. Tr. II 32. Such markings - made with a crayon or marking pen - recorded a number which was circled with a date underneath it. Tr. II 33. The number corresponded to a particular USDA inspection station, as each station had its own number. For example, the Newark, New Jersey number was 37. Cashin explained that anytime he performed an inspection when the load was still in the trailer, he was to place such a marking in it. In this way, a subsequent inspector could trace, by knowing the number and the date, information about

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[42]To make it explicit, the Court finds that for each of the 9 counts, the loads inspected were far out of grade: CX1: 33% total defects; CX 2: 16% out of grade; CX 3: 10% out of grade; CX4: 24% defects; CX5: 6 to 8% out of grade; CX 6: 33 to 35% out of grade; CX 7:12% out of grade; CX 8: 21 to 28% out of grade; and CX 9: 14% out of grade. This, together with the totality of the other evidence in this record, supports the Court's conclusion, as discussed herein, that each of the inspections certificates in this Complaint reflected accurate descriptions of the state of the produce inspected.

[43]Cashin noted that any financially interested party in a load of produce can request an appeal inspection, which amounts to a second look at the load. The procedures require that at least half of the original load must still be present for there to be an appeal inspection. The load must also be identifiable. For example, regarding Complainant's Exhibit 6, at page 5, the Lot ID is identified as 40-GL. In conducting an appeal inspection, in 1999, two inspectors would appear, one of whom would be a supervisor. The amount of samples examined in an appeal would be about twice that of the original inspection. An appeals sheet is created from this second inspection and the results are then sent to Washington D.C., where a decision is made based upon the appeals sheet findings. Tr.II 44, 45, 46. An appeal inspection is differentiated from a reinspection. If, for example, less than half of the load remains, then the inspection is deemed to be only a "reinspection," not an appeal inspection. Tr. II 46.

the load. Consequently, an inspector could tell by this information if he was examining the same load that another inspector had examined. Tr. II 35. If he found such a marking, Cashin would call his office immediately. The office would inform him if the load had been previously inspected. With this information, Cashin would know whether there was any real need[44] to do a second inspection or if the second inspection was an appeal situation. Tr. II 36, 37. Cashin admitted that the unofficial purpose of the call to the USDA office was to make sure the second inspection did not contradict the first inspection.[45] Tr. II 116, 117. While the supervisors at his office could never officially command such an outcome, Cashin understood that his superiors wanted the inspections results to be in agreement. Tr. II 117. Cashin admitted that, at times, he would issue a false inspection in order to have the two inspections be in agreement. Tr. II 118.

Upon being re-directed to Complainant's Exhibit 6, at page 5, (referring to inspection certificate K 767363-5, dated June 23, 1999), Cashin agreed again that the inspection reflected that the load was significantly out-of-grade, as he considered the product to be "very bad." Tr. II 40, 41. Cashin also admitted that in that instance he would have some, limited,[46] concern that his inspection reflect an

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[44]At times, upon advising the person requesting an inspection that there had been an earlier inspection, the inspector would be told that no further inspection was needed. At other times, an appeal inspection was sought. On other occasions, an applicant may want an entire new inspection, apart from any appeal issue. In such situations the entire load would be unloaded. Tr. II 36, 37. According to Cashin, all of this, including noting markings in a trailer and calling the USDA office, was part of the procedure he was to follow. *Id.*

[45]While he hedged at first in this response, calling its use a "control," ultimately Cashin conceded that, unofficially, its real purpose *was* to make sure the inspections did not contradict one another. Tr. II 38, 39.

[46]Cashin believed this risk of an appeal contradicting his inspection findings would be lessened because Tray-Wrap was a "re-packer." As such, it would take larger boxes of produce and re-pack them into smaller containers. The effect of this was that the inspected load would disappear quickly as it was redistributed by Tray-Wrap, in smaller

(continued...)

accurate assessment of the product because of the risk of an appeal from the shipper. Tr. II 42, 43. While he asserted that Tray-Wrap could re-pack a load and get it distributed quickly, he had no knowledge that the load identified in Complainant's Exhibit 6, at page 5, was a load that in fact moved quickly. Tr. II 47. The tomatoes involved in that inspection were size five by six and larger. While Cashin had observed Tray-Wrap re-pack tomatoes, he could not recall ever seeing that size tomato, five by six or larger, ever being re-packed. Tr. II 48, 49, 50.

Notably, Cashin admitted that, on occasion, he would go to G & T and Tray-Wrap and ask them if they had any produce to look at. Tr. II 51. *This is another example of Cashin's complete lack of credibility. While his demeanor, his nineteen year record of admitted corruption, the testimony of other witnesses and other factors all support the Court's finding that Cashin was not worth believing, he even contradicted himself on this significant point, as the day before he had claimed under oath that would not visit a merchant unless there was an outstanding request for an inspection. See Transcript* I at 201-202. He recalled occasions of visiting when the market was closed for a holiday but the USDA was open. While he presented this conduct as innocent activity because there wasn't much to do on such market holiday closings, he conceded that, as the USDA was open on those days, Mr. Spinale would have been able to call the USDA office and request an inspection had he wanted one performed.[47] Tr. II 51,

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(...continued)
containers, to stores. With the load apt to be gone quickly, the risk of contradictory findings was diminished. Thus an appeal would be meaningless if the load was gone before it could be accomplished. Tr. II 42, 43. Cashin stated he had never heard that once an inspection finds that the product is out-of-grade the consignee has to hold the load for 24 hours to enable the shipper an opportunity to make an appeal. Tr. II 43, 44. Again, the point is that Cashin had zero knowledge as to whether this or any of the loads in this litigation were in fact dispersed quickly.

[47]As noted above, Cashin was inconsistent on this issue. Later when Cashin was asked if there were other times when he visited Mr. Spinale's location and asked if there was an inspection he could do, under oath he could only claim "not that I remember," the Court, in viewing the witness' demeanor and, apart from that, in evaluating the
(continued...)

52. This admission makes it clear that Cashin was involved in what amounted to a hold-up of at least some wholesalers, like Mr. Spinale. With no inspection requested, and therefore no plausible assertion for the USDA to argue that Mr. Spinale was scheming to have produce evaluated to be less than its true condition, Cashin was clearly working his shakedown of wholesalers.

When asked about the amount of a product that was to be inspected, Cashin stated that the rule of thumb was to inspect 1%. Tr. II 53. In inspecting a truck load of tomatoes, which typically would contain 1600 boxes, about an hour or two would be required to complete such an inspection, depending on the number of defects found. Tr. II 54.

In the period from 1980 through 1999, and prior to the date of his arrest, Cashin would be assigned to do between four to twelve inspections per day. Tr. II 54, 55. His workday averaged ten to eleven hours. Cashin conceded there were not a sufficient number of inspectors at Hunts Point to accomplish the number of requested inspections. Tr. II 56. Consequently, inspections would lag from one to three days behind. Tr. II 56. Cashin stated that the USDA office received a "tremendous amount" of calls about these inspection delays and that the wholesalers were told the office was "overwhelmed ...[and] couldn't get to it." Tr. II 57. This was significant concession as the products inspected, as everyone knows, are perishable. On the basis of this admission from Cashin, and other witnesses, of the significant and chronic delays in inspections, the Court finds that these delays created an atmosphere which enabled the corrupt inspectors to make demands on the Hunts Point wholesalers who wanted timely inspections of their product. While Cashin asserted that *some* wholesalers, in attempting to deal with the problem of delayed inspections, would call for inspections even when a load had not yet arrived at their place of business, *he conceded that G & T and Tray-Wrap never did that*. Tr. II 58.

(...continued)
credibility of the response itself, determined that Cashin was not truthful in that response either. Tr. II 52.

Cashin also acknowledged that in his years as a USDA inspector he did "cut corners" in performing his inspections. This practice of "shortcuts" was done by Cashin and, to the best of his knowledge, by all the USDA inspectors, whether the wholesaler was paying cash to the inspectors or if it was one of the "nonpaying [wholesaler] houses" that was not. Tr. II 59, 60. One way Cashin cut corners was to examine less than the required number of samples but, as he put it, "if a wholesaler was paying me" he simply didn't draw as many samples because he was being paid and the wholesaler and the inspector had agreed on the numbers. Tr. II 59. Cashin stated that as they could not "officially" tell the inspectors to cut corners, "unofficially" the supervisors at USDA encouraged the inspectors to take such shortcuts. They did this by encouraging the inspectors to work "as fast and as accurate as possible," but it was understood that they were expected to take shortcuts. Tr. II 60, 61.

While the Court accepts that Cashin's supervisors indirectly conveyed that he and other inspectors take shortcuts, the Court expressly finds that, particularly when posed with questions that ran contrary to his perceived interests, Cashin was not a credible witness. Thus on matters of critical determinations to this case, the Court finds that Mr. Cashin was not believable. For example, when questioned whether he ever asked Mr. Spinale for a loan, although he said "no," the Court, viewing him as he responded, concluded that Cashin was not telling the truth.[48] Tr. II 62. When asked, in the very next question, whether he had ever asked Mr. Spinale for a "contribution" to "any kind of project that [Cashin] was involved with," Cashin responded, "Not directly, no." Tr. II 63. Explaining, Cashin asserted that Mr. Spinale "didn't like railroads" and "was always having some sort of problems with the railroads." Yet, Cashin who was involved with a railroad museum, got Mr. Spinale to make a "donation" for the museum. Tr. II 63. Cashin denied that he asked Mr. Spinale for a

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[48]Later, in testifying about one of his fellow corrupt inspectors, Eddie Esposito, and Mr. Esposito's need for money, Cashin admitted that he told Esposito that borrowing money from Mr. Spinale "would be one option." Tr. II 68. Thus, Cashin was aware that Mr. Spinale was a source for loans. This is yet another example of Cashin's lack of credibility; denying that he ever asked Mr. Spinale for a loan, yet telling Esposito that Mr. Spinale was a loan source.

$10,000 donation, and stated that Mr. Spinale actually contributed "around a hundred dollars" for the museum. Tr. II 63. Yet, Cashin, apparently distinguishing that 'contribution,' still claimed that he never asked Mr. Spinale for money. Tr. II 94.

While continuing to deny that he ever asked Mr. Spinale for a loan, Cashin admitted that he knew that one of his fellow corrupt USDA inspectors, Eddie Esposito, had borrowed money from Mr. Spinale. Cashin stated that he did not know if the amount Mr. Esposito borrowed from Mr. Spinale was $20,000, but he was aware that Esposito had "a personal problem." Tr. II 66.[49]

Cashin was then directed to Respondents' Exhibit 40 Q, which involved a potato inspection he performed at Hunts Point on December 17, 1998 for Chain Trucking[50] and bearing Inspection Certificate number K673463-6. As reflected on the Inspection Certificate, it involved two lots of potatoes, both of which were out-of-grade due to soft rot. Tr. II 72. Cashin agreed that the next occasion for him to conduct an inspection, following the December 17, 1998 inspection was not until over three months later, on March 25, 1999, the day after he was arrested. Tr. II 72, 73. Complainant's Ex. 1 at page 5, Inspection Certificate K-678086-0. Cashin admitted that when he made his March 25, 1999 post-arrest inspection he was wearing a "wire," that is, a hidden recording device, for the government. Tr. II 74.

Cashin agreed that he knew Mazie Faraci to be the office manager at G & T/ Tray-Wrap, which was located in Row B at Hunts Point. The main office, where Ms. Faraci worked, was more than a half-mile from G & T and Tray-Wrap's other office at the same Hunts Point market. Tr. II 75, 76. In contrast, G & T and Tray-Wrap's re-packing work took place at Row D at Hunts Point. Tr. II 78. Cashin would visit Ms. Faraci from time to time when he needed information to complete his inspection certificates, such as trailer or railroad car

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[49]Cashin stated that he and Esposito had adjacent desks in the open office space at their former USDA offices. Tr. II 67.

[50]Chain Trucking is listed as the party that asked for the inspection but it was performed at the G & T, Tray-Wrap warehouse. Tr. II 72.

numbers or shipper's addresses. Inspections rarely occurred at Ms. Faraci's Row B location[51] and Cashin stated that he never talked with her about the inspections. Cashin also stated that he never received any cash payments from Ms. Faraci, nor were any such payments ever discussed. Tr. II 77.

Significantly, and as noted earlier, when asked if he could "point to any specific inspection report where [he could] definitively say that [he] altered the inspection report at G & T or Tray-Wrap," Cashin replied, "No, I cannot." Tr. II 82. Cashin also conceded that there were many times when he agreed with Mr. Spinale's evaluation of the load being inspected. Tr. II 82.

Counsel for Respondents asked Cashin if it would be fair to characterize the cash payments made by Mr. Spinale to Cashin as a tip, as opposed to a payment intended to alter the inspection. However, Cashin evaded an answer by professing he did not know the difference between a tip and a bribe. Further, after Cashin stated that Mr. Spinale would be very specific about a load, telling him the condition or temperatures he wanted to be reflected in the inspection certificate, he could not provide a straight answer as to whether the information Mr. Spinale wanted in the inspection was in fact correct. Instead, while simultaneously agreeing that Mr. Spinale's information could have been correct, he could offer only that he could not remember whether the information was in fact correct. Tr. II 83, 84. The Court, dissatisfied with this apparent lapse in Cashin's ability to recall such fundamental information, inquired further:

> The Court: So, Mr. Cashin, are you stating that there were no instances in your dealings with Mr. Spinale when in fact you concluded that he was correct, or you just have no recollection at all?
>
> Mr. Cashin: There were times he was correct, and there were times where he was very specific in the numbers -- for example, he would come up to me -- this is just an example -- and say,

[51]On the rare occasions when Cashin made an inspection at Ms. Faraci's Row B location, he would work alone, conducting the inspection without a representative from G & T or Tray-Wrap being present. Tr. II 78.

> see this car of potatoes out here? He would say it had - - you know, put down five to six percent soft-rot. The car was late. You know, it would go through and maybe the car wasn't late. He would just say just put down five, six or seven percent soft-rot.

Tr. II 84.

When asked if ever had the opportunity to look behind Mr. Spinale's assertion of the produce condition, Cashin stated that he would get "an idea of what the potatoes looked like" by going through a few samples. In those instances he maintained that "the potatoes did not indeed have five or six percent soft-rot, that they had other little problems, but not soft-rot." Tr. II 85. However, in the face of that assertion, Cashin was unable to point to *any* specific inspection where this occurred.[52] Tr. II 85. Further, Cashin acknowledged again that Mr. Spinale is an expert on the subject of the condition of tomatoes and potatoes and that his evaluation of the product was correct.[53] Tr. II 87.

In response to a question from Respondents' Counsel, inquiring about Complainant's Exhibit 5, at page 6, (Inspection Certificate 767032), Cashin conceded that grade defects, had they been included in the inspection report, would have made the inspection results worse

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[52]In fact, when Cashin attempted to rehabilitate himself on this point, he first claimed that with regard to the inspections named in the Complaint, while he could not point to a single potato inspection where Mr. Spinale directed him to write down information that was contrary to his own observations, he claimed that such an event occurred with the tomato inspection reflected in Complainant's Exhibit 5, at pages 5 and 6. *However, he immediately conceded that this assertion rested solely upon his reading the accompanying 302 statement included within Exhibit 5 and was not based on any independent recollection of the events*. Tr. II 86. This Court has already set forth the serious, evidentiary infirmities with the 302 reports associated with the Counts in the Complaint. Fatally, Cashin could not independently recall *any* of the critical information associated with the Counts in this Complaint. *See*, as one of many examples, Tr. II 90. Thus, as to the specific allegations in the Complaint Cashin's testimony was completely valueless to the USDA case.

[53]Nor was the *accuracy* of Mr. Spinale's assessment diminished by Cashin's contention that Mr. Spinale's numbers and scoring were not always consistent with the USDA particular dictates.

and consequently would have afforded Mr. Spinale the ability to claim a larger allowance.[54] Tr. II 88.

It is noteworthy that Cashin conceded that he had no actual knowledge that either G & T or Tray-Wrap had renegotiated the price of *any* of the shipments for which he claimed, as the "designated *reader*" of the 302s, that he had altered the inspection results. Tr. II 92. Nor, for *any* of the inspections for which Cashin claimed to have altered the results, did he have anything to reflect the correct state of the shipment. Tr. II 93. Further, while one would expect that for something as momentous as the first conversation concerning this alleged bribe scheme, one would remember the details, or at least some details of such an event, Cashin maintained that he could not remember *anything* other than mentioning "helping" Mr. Spinale. Tr. II 93. This is simply not credible.

Cashin admitted that when he was arrested on March 23, 1999, he was shown video tapes of his taking bribes. Tr. II 98. In contrast, the government had no parallel evidence showing Mr. Spinale's involvement in such actions. Rather, the video involved Cashin taking money from Southeast Produce, in connection with loads of produce for the Wangs. Tr. II 98. Cashin admitted that he altered inspections for them, and in so doing, issued false inspections, receiving money in return for his actions. Tr. II 98. Further Cashin admitted that he agreed to cooperate with the United States Department of Justice so that he would not have to go to jail.[55] Tr. II 99. Cashin well understood the terms of his bargain with the government that would enable him to avoid any jail time, despite an admitted two decade practice of getting money from produce wholesalers. To avoid jail he had to give "substantial assistance to the government," which he

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[54]Cashin asserted there would be no need to add grade defects because the load already had 14 percent decay, which reflected an excess decay of 9 percent beyond the allowable amount. Tr. II 88.

[55]To reach his goal of avoiding any jail time for his decades of bribe taking, Cashin conceded that he had to get a "5k" letter from the government. To that end, he signed an agreement with the government, which agreement refers to the "5k" letter. Unlike his fellow corrupt inspectors and despite nineteen years of shaking down wholesalers, Cashin realized his goal, and did no jail time. He is employed full-time presently. Tr. II 184.

understood to mean giving "*the government all the help that they asked for*." Tr. II 100 (emphasis added). Cashin agreed that he did just that.[56] Tr. II 100, 101. His goal was achieved, as he did not serve *any* jail time. Tr. II 101, 102. Further, despite the years and years of taking money, Cashin paid *no fine at all*. Tr. II 102. In significant contrast, Cashin admitted that *all* of the other eight corrupt inspectors did jail time. Tr. II 102. Instead, his sentence was only for "time served," an inaccurately employed euphemism, because the "time served" was for his testifying at "all the different hearings and trials from ... the year 2000 ... until ... 2003." Tr. II 101. It is also noteworthy that, while Cashin testified, in connection with his efforts to avoid serving any jail time, to having a secret recording device on him from March 1999 through August of that year, he had *the right to turn the recording device on and off as he wished*. Tr. II 108.

Cashin, asked to explain what is meant by a "consignment load," defined it as a load of produce sent from the shipper to a wholesaler, at an agreed date, with the load to be sold at the best price attainable. The wholesaler then remits a percentage of the sale back to the shipper. Tr. II 109.

Respondents' Counsel questioned Cashin as to why a wholesaler ever needed to request an inspection in that circumstance since the wholesaler's remittance to the shipper is based on the amount of the sale. Cashin's understanding was that the inspection's purpose was to determine the selling price or worth of the produce to the public, *but not to obtain a better price from the shipper*. Tr. II 110. Although Cashin then stated that the inspection results would allow the wholesaler to renegotiate the price of the produce, he could not explain the logic to this, given his testimony that the consignment price is based on the amount received by the wholesaler upon the sale of the produce. Tr. II 110, 111. Thus, Cashin effectively admitted the obvious - - a wholesaler has no reason to seek a fraudulent inspection

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[56]Cashin stated that, for each USDA hearing, he spent about four hours getting "prepped." Tr. II 105. Although he had lost track as to the number of USDA hearings in which he had testified, he thought this proceeding was his fifth such appearance. In addition, he testified in each of the criminal trials. Tr. II 106.

in instances when the actual sale price is determinative of a load's value.

Directed to Complainant's Exhibit 1, at page 5, and pertaining to Inspection Certificate K- 678086-0, Cashin read the certification accompanying that inspection and for which his signature attested it to be an accurate inspection. That certification provided that he had in fact inspected samples of the produce and that the quality and/or condition, as shown by those samples, were as stated in his inspection. In fact, however, when asked if his signed certification accurately reflected the quality and/or condition of the produce, Cashin confessed: "Sometimes [it] did and sometimes [it] didn't." Tr. II 113. Cashin also read into the record the "Warning" which appears to the left of the left of the inspector's signature and accompanies each inspection certificate. It provides: "Warning. Any person who knowingly shall falsify, make, issue, alter, forge or counterfeit this certificate or participate in such actions, is subject to a fine of not more than $1,000 or imprisonment for not more than one year, or both." *See*, *for example*, Government Ex. CX 1, at 5. Tr. II 113. Thus, Cashin, responding to whether he issued false certificates during those nineteen years, answered: "Yes, I did." Tr. II 114. Yet, for all those years of dishonesty at Hunts Point, Cashin's only price was to sing the appropriate songs for the government, or as he put it, to give "the government all the help that they asked for."

In fact, Cashin admitted that one of the variations of his decades-long false inspection certificates, involved issuing a false inspection where the amount of grade defects was *understated*. In this regard Cashin admitted that he was under instructions not to issue an inspection where the grade defects were greater than 5%.[57] Thus, Cashin agreed that understating or diminishing the extent of the problems with a given load was also a false inspection. Tr. II 114, 116. Obviously, this class of false inspections could only operate to hurt wholesalers because the inspection would claim that the produce was in better shape than its actual condition. Cashin also reaffirmed that his instructions were to continue taking samples until the initial

[57]Cashin reaffirmed in his second day of testimony, the assertion he made during his first day that he had to call the USDA office if a load had over 5% defects and that in those instances he had to bring the evaluation of the load down to 5%. Tr. II 115.

out-of-grade findings as to quality defects ultimately reflected findings that the load was within grade.[58] Tr. II 120.

While he agreed that he had been on friendly terms with Mr. Spinale, Cashin was elusive when asked if he had ever complained to Mr. Spinale about his USDA employment, acknowledging only: "I might have. I don't remember."[59] Tr. II 126. Yet he admitted that he was growing tired of his USDA job. He contended that this stemmed from his dissatisfaction with the way in which the office was managed by Mike Wells and Mary Ann Stranch.[60] Tr. II 127.

Cashin estimated that "anywhere from sixty to seventy-five percent" of the wholesalers at Hunts Point were paying the USDA inspectors. Tr. II 128. Yet, it was his understanding that less than twenty percent of those were indicted. Tr. II 128, 129. Cashin identified the eight corrupt inspectors who were indicted as: David Ball, Paul Cutler, Edmond Esposito, Glenn Jones, Elias Malervey, Michael Strusiak, Michael Simous, and Thomas Vincent.[61] Tr. II 135, 136. Cashin stated that this does not represent all of the inspectors who took money but only those who were indicted. Cashin maintained that Mary Ann Stranch, Mr. Luminaci, Dan Arcery, Bob Schmalick *and others* took cash. Tr. II, 136, 137. While apparently excluding himself, Cashin stated that several of the corrupt inspectors had personal problems. For example, he stated that USDA inspector Eddie Esposito had money troubles, that USDA inspector Michael

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[58]While Counsel for USDA eventually got Cashin to agree that taking more samples would produce a more accurate sample, Cashin explained that for a seasoned inspector, such as himself, there is a saturation point and more samples simply will not impact the assessment of the load. Tr. II 160.

[59]This is still another example of Cashin's "amnesia" when it came to matters in which his credibility was involved.

[60]It is an astounding and a revealing insight into this individual that Cashin, an admitted twenty year veteran of taking money from wholesalers at Hunts Point, did not feel constrained from criticizing how others conducted themselves at USDA.

[61]The listed corrupt inspectors reflect the court reporter's phonetic effort at the spelling of these inspectors' names.

Simous had a drug (cocaine) problem and a gambling problem. Inspector David Ball drank a lot and used marijuana. Tr. II 137, 138, 140.

When the subject turned to his problems, Cashin was again evasive on the subject of his financial needs. When asked if he had any "extraordinary financial needs," he could not agree to such a label, but acknowledged that he had "extra financial needs" in the form of a nightclub stripper who was, to say the least, expensive to maintain. Tr. II 141. Cashin would see her *daily*. He informed that whenever she was *at work* (i.e. disrobing) he would "spend a lot of money." While not too expensive from his perspective, he nevertheless stated that his visits to his girlfriend's work site would cost "about $150 to $180" per visit. Tr. II 143. Shopping excursions with his "girlfriend" ran a bit more for Cashin as this would involve "a couple of thousand dollars in clothing and other *necessities*."[62] Tr. II, 144. (emphasis added). Still, he insisted that while she was expensive, she was not extraordinarily so. Tr. II, 143. When asked if his girlfriend cost him over $40,000 per year, Cashin, evasive again, could only offer that he had "never added it up." Tr. II, 146. Clearly these expenses could not be shouldered solely on Cashin's official salary of $43,000, nor were his expenses limited to his girlfriend. For example, Cashin stated that he purchased a new Chevrolet Tahoe truck that, by his testimony, cost $35,000. Tr. II, 145. Nor were Cashin's extraordinary expenses limited to expensive vehicles and his "girlfriend." He also has a sister for whom he is responsible for her support, but he claimed that, prior to 1999, he had no idea what that support cost. Tr. II, 148.

While Cashin, upon redirect, reaffirmed that he received "cash bribes," it is interesting that he described this as cash *for performing*

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[62]Cashin acknowledged that his "girlfriend" had a breast augmentation operation but he denied that he paid for the procedure, asserting "[s]he had the money herself." As was Cashin's custom, he narrowly answered the question about paying for the operation. Tr. II 149. While he was asked if he paid "for an operation *or a trip* for [his] girlfriend," he only answered about the operation. The next question persisted with the issue by asking if he paid "for a trip that she had to take in order to get the operation?" In this response, while still claiming that the girlfriend had the money, Cashin equivocated in his answer by twice using the guarded phrase of "as I remember it" to qualify his answer. Tr. II 149. This is yet another example in support of the Court's conclusion that Mr. Cashin was not a credible witness.

inspections. Tr. II, 152. It is also of note that while Cashin recalled that some wholesalers would ask for specific inspectors and that some of them remarked that they were glad that he was the inspector sent for requested inspections, he could *not* remember associating such a remark with Mr. Spinale, stating: "I don't remember. I don't think so." Tr. II 155.

Directed to USDA Exhibit 9, CX- 9, at page 15, Cashin agreed that he remembered receiving "thank you" money, as reflected in the 302 at page 15. Cashin stated that the "substance of the conversation ... was something along the lines of, well, here take this. I want to say thank you for all the work you did for me or something along those lines." Tr. II 156. However, Cashin could not recall the amount of money received on that occasion, only that he received "thank you" money. Tr. II, 170. However, the Court notes that, even accepting this claim as true, the statement is consistent with Mr. Spinale's position that the money was not to obtain an inaccurate inspection but rather to obtain a timely one.

Cashin reiterated that he could not recall what Mr. Spinale said to him during their initial conversation in the 1980's and that, as to the substance of that initial conversation, he could only recall the substance of what he allegedly said to Mr. Spinale. According to Cashin he told Mr. Spinale in a "business-like and friendly tone" that he was aware of the close working relationship that former inspector Bob Schmalick [ph] had with Mr. Spinale and that he would try to help "along the same lines and along the same ways." Tr. II 158. The Court observes that this retelling also can be construed as consistent with Respondents' contention. The Court noted the unusualness of Cashin's absence of recollection with regard to something as critical as the first conversation of substance with a paying customer. Tr. II 159. It simply is not credible that Cashin would not recall the details of the initiation of his payment scheme with particular wholesalers. Yet he claimed that, regarding the start of his arrangement with Mr. Spinale, he could not remember if he approached Mr. Spinale nor

whether he brought up the subject with Mr. Spinale.[63] Tr. II, 167. Cashin maintained this stance even though he acknowledged that he brought up to Mr. Spinale that he had spoken with Bob Schmalick. Tr. II 168. *Again, the Court reminds that this proceeding does not involve general assertions about Mr. Spinale's alleged actions regarding PACA inspections. Rather, as a legal proceeding, the government has, as it must, charged the Respondents with bribes given to a particular agriculture inspector arising out of PACA inspections on specific dates*. In addition to the aforementioned deficiencies, it is interesting to note that at no point in his testimony did Cashin ever relate that he directly had a conversation regarding altering a report to inaccurately reflect the condition of the goods.

Consistent with Cashin's understanding that his superiors did not want a conflict between his assessment and a previous inspection, he stated that in such circumstances another inspector would have to come out and join him in completing the inspection and that such a situation would take up "a great deal of the workday." Tr. II 161. In this regard it is worth noting that Cashin recalled such an incident involving a railroad car of potatoes at G & T, that it involved three USDA officials reviewing the conflict between the earlier inspection and the inspection at Hunts Point, and, most importantly, that the outcome was *in G & T's favor*, overruling the earlier inspection made at the shipping point in Idaho. Tr. II 162, 180. The inspection had been requested by Mr. Spinale. Tr. II 179, 180.

As alluded to earlier, further questioning Cashin's credibility is the fact that he gave a deposition on September 23, 2004, which was a few weeks before this hearing. This again goes to the issue of his believability as he seemed to have had a memory loss only a few weeks later. In this regard the USDA attorney tried, as an attempt at rehabilitation of the witness, to have Cashin agree that the testimony he gave at the deposition was accurate as to dates and times as asked

[63]It must also be observed that no matter how many times Cashin was asked about the circumstances in which he received payments from Mr. Spinale, the most damning thing he could claim was the completely equivocal remark to "hold onto this" when a payment was made. Tr. II 165.

in connection with the 302s. With regard to the 302s he testified about at that time, Cashin stated that he believed his deposition testimony was accurate as to dates and times. Tr. II 163. However, the Court again notes that this vague testimony did not focus on any of the particular dates or particular 302s in the record, but rather lumped them all together.

Other aspects of Cashin's testimony unwittingly reveals the true state of his, and the other corrupt inspectors, operation. On redirect Cashin was asked again about USDA inspector Cutler's remark about the "power of the pencil."[64] Cashin elaborated that the tone of Cutler's remark clued him into the conclusion that Cutler "was *shaking people down* for money, too ..." Tr. II 164. That Cashin used the phrase "*shaking people down*" reveals that it was the inspectors who were driving the operation, and, at least in the case of Mr. Spinale, the wholesaler was the victim. While, in attempting to recover from this damaging statement, USDA Counsel got Cashin to agree that he never threatened to make trouble for wholesalers if they didn't pay him and that Mr. Spinale never told him he "didn't like paying [Cashin] ... money," nor did he threaten to stop paying Cashin, all that reveals is that Cashin was smart enough to be subtle in his criminal activity and that Mr. Spinale had enough sense to realize that challenging the corrupt inspectors would cause his business to suffer. Tr. II 164.

As the Complainant's second witness, USDA witness Basil W. Coale has been the Assistant Regional Director, for the Manassas, Virginia USDA office, PACA Branch and he was the individual who conducted the disciplinary investigations of G & T and Tray-Wrap. Tr. II 193, 197. The investigations were initiated following the criminal indictment of Mr. Spinale. Tr. II 198. Coale, in his eighteen year career with USDA, has been involved with hundreds of disciplinary investigations and conducted dozens of them. Tr. II 196.

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[64]Although Cashin claimed he either never heard or wasn't present to hear fellow corrupt inspectors brag about their ability to force merchants to give them money, he did recall the equivocal remark, made more than once by corrupt inspector Paul Cutler, about "the power in the pencil." Tr. II 133, 134.

Mr. Coale defined a PACA license as the license issued when a firm operating subject to the act applies for such a license and pays the appropriate fees.[65] Tr. II 198.

Coale stated that when he began his investigation of G & T and Tray-Wrap in the fall of 2001, he was given documents from Ms. Joan Collson, an auditor for the PACA program. Collson acted as the coordinator of the Hunts Point investigations and she provided Coale with the FBI form 302s. Coale stated that Collson received those documents from the Agriculture Inspector General *or* the compliance staff from the Agricultural and Marketing Services.[66] Tr. II 218.

USDA Counsel directed Mr. Coale to CX 1, pages 3 and 4, which the witness identified as copies of an FBI form 302. Coale stated that form 302s are used to memorialize FBI discussions with a source. For the 302s reflected in CX 1 he noted that these 302s had redactions. Tr. II 220. Coale stated that the redactions were attributable to either special agents' names and FBI file case numbers or to information

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[65]Mr. Coale was directed to Complainant's Exhibits 10A and 10, which he identified as the agency's license record for G & T. These exhibits reflect that G & T has been licensed under the PACA since 1964, and is currently licensed, through April 3, 2005. Tr. II 205. Coale, referring to these exhibits, noted that the original license was signed for by Mr. Spinale, which reflected that he owned 50% of G & T along with George Sayer, who also owned 50%. However, during the period of the alleged violations, from July through August 1999, the records reflect that Mr. Spinale owned 100% of the stock of G & T. Tr. II 206. On the basis of Complainant's Exhibit 10A, Coale stated that, presently, Mazie Faraci is the Secretary, Treasurer and Director of G &T, Anthony Spinale is the Corporate Director, and Mary Spinale is the President and 100% stockholder. Tr. II 207, 208, 209. Mr. Coale was also directed to Complainant's Exhibit 11, which reflects the USDA license record for Tray-Wrap. Tr. II, 212, This reflects that Tray-Wrap's first license application was submitted on April 29, 1970. Tr. II, 214. Mr. Spinale was listed as the company's sole stockholder. Tr. II, 214. Complainant's Exhibit 11A reflects Tray-Wrap's current PACA license, which remains effective through May 13, 2005. Tr. II 213. However, during the period of the alleged violations, Mazie Faraci is listed as the owner of Tray-Wrap. Tr. II, 215. CX 11, at page 19.

[66]Thus the record established by the government is unclear on this point. Either Coale couldn't remember which of the two Agricultural offices Collson told him they came from, or Collson herself didn't know and related to Coale that they came from one office or the other. It is up to the government to establish such facts, including the chain of custody of documents. This confusion adds yet another evidentiary problem to the many associated with the valueless 302s in this record.

relating to matters that did not involve the Respondents in this case.[67] Tr. II 220, 221. Coale was then directed to Complainant's Exhibit 21, which he identified as a letter from the Chief Division Counsel of the FBI's New York Division, "authenticating the FBI 302s that they sent to us." Tr. II 222. Counsel for USDA did not recognize the infirmities with their attempt to connect the 302s in this record to that letter. The letter itself, CX 21, makes *no* identifying association with the 302s associated with this case, nor is it even addressed to any individual at USDA. In fact, the letter bears no addressee.

CX 21 is a single page and the ***entire*** text of the letter reads:

> The enclosed documents are photographic copies of original FD-302s maintained by the Federal Bureau of Investigation. Redactions have been made where necessary.

Accordingly, there was absolutely no tie established between the nondescript cover letter, dated July 3, 2002 and the 302s in this record. Nor did any witness state that the 302s in this record are the same 302s that arrived with the cover letter.[68] The Court notes that as there were many cases brought against wholesalers operating at Hunts Point, it is significant that there is no indication that this brief and completely unilluminating cover letter relates to documents regarding Mr. Spinale, G & T or Tray-Wrap.

As part of his investigation Coale visited the Respondents' place of business in October 2001 and served copies of the investigative notice and subpoenas requesting documents upon Ms. Faraci.[69] Tr. II 223, 224. Coale stated that the notice requested documents that were

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[67]Coale stated that he knew this because he had seen the unredacted versions of these 302s. Tr. II 221.

[68]A similar problem does not exist for the USDA inspection certificates, although Mr. Coale stated that he also received these from Ms. Collson. This is because the inspection certificates are self-authenticating USDA documents and because they *do* contain information identifying the subject of the inspection. Thus, as to the 302s, Ms. Collson was a critical, but missing, witness to this case.

[69]Complainant introduced a drawing of a sketch Mr. Coale made of the Respondents' office layout.

material to the investigation, which he described as transaction documents related to the time of the alleged violations. Tr. II 225, 226. CX 12. The documents were served upon Ms. Faraci at 8:50 a.m. on October 24, 2001. The subpoenas list some nineteen categories of documents that G & T and Tray-Wrap were to provide in a little more an hour and a half. CX 12, at page 4, and 8. When the documents were not presented by early that afternoon, Mr. Coale presented Ms. Faraci with a demand letter, which set a new deadline for the production of documents at 9:00 a.m. the following day. CX 12, at pages 3 and 7, Tr. II 229, 230. When Coale returned the next day, Ms. Faraci presented him with a letter from the Respondents' attorney[70], the essence of which stated that the records sought by the USDA no longer existed. CX 12 A, Tr. II, 231, 232.

Coale agreed with Counsel for Mr. Spinale that all of the information he sought to be produced through his subpoena upon Tray Wrap and G & T was to be produced in an hour and ten minutes. Tr. III 60. CX 12. Coale also agreed that the information contained within CX 14 and 15 was subsequently obtained from G & T and Tray-Wrap about a week later and that, essentially he was provided with "any records that were less than two years old." Tr. III 61, 62. Further, Coale conceded that under the PACA rules and regulations one is only required to keep such business records for two years. Tr. III 63.

CX 14, consisting of 33 pages, are G & T corporate records provided by that Respondent and pertaining largely to the period from 1996 and 2000. Tr. II 236. They reflect that Mr. Spinale was the President of G & T, presided as the chairperson of the Board of Directors, and was the sole shareholder. Mazie Faraci appears as a co-director of G & T. Tr. II 237. When the same subject was examined for Tray-Wrap, as reflected in CX 15, Mazie Faraci's name appears as the sole shareholder, and as the President of that business. Tr.II, 239. Regarding Coale's testimony that Mr. Spinale is the director, Mary A. Spinale is the principle, and that Mazie Faraci is the secretary, treasurer and director, he agreed that this assertion was derived from

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[70]The letter was signed by Ms. Linda Strumpf, Esquire, who is the Respondents' trial counsel in this proceeding.

USDA records and was based upon the renewal application. CX 10, at pages 2 and 3. Tr. III, 56. Based on these records, Coale agreed that in 2002 there was a change in ownership in G & T. Tr. III, 58.

Coale was next directed to CX 16, which is a copy of the cover page and page 469 of the Red Book Credit Services publication from March 1999. ("Red Book"). Tr. III,[71] 10/27/04, 3, 4. Mr. Coale described it as a produce trade reference book. It includes financial rating information. For Tray-Wrap, Mr. Spinale is listed as the contact person. Coale was also asked by Respondents' Counsel about CX 16, and its excerpts from the Red Book Credit Services. Coale acknowledged that both the Blue Book and the Red Book are used as industry references in this regard. Tr. III, 68. Coale reiterated it as his understanding that the information in these books is self-reported, but admitted he had no direct knowledge of that claim. Tr. III, 69.

Coale was also questioned about the criminal indictment of Mr. Spinale, as reflected in CX 17. Coale stated that Mr. Spinale was indicted for bribery of a public official. Tr. III, 6. Reading from the exhibit, Coale stated that the total amount of the bribery alleged in the indictment was $1500. Tr. III, 8, 9. He was then directed to CX 18, a certified copy of the judgment in the case against Mr. Spinale. Within this exhibit, Coale noted that it reflects that Mr. Spinale pled guilty to Count 9, bribery of a public official. CX 18, page 1. Count 9 alleged that the bribery took place on August 13, 1999. Tr. III, 13. CX 18, page 1. Coale was then directed to CX 9, which duplicates the indictment pages noted above.[72] CX 9 also includes an "FBI 302" and Coale noted that the 302 referred to August 13, 1999 and that the Inspection Certificate included within this exhibit also bears that date. Tr. III, 14. CX 9, at page 13, 14, 15. Coale also read from the indictment that Count 9 refers to $300 as the amount of bribe money and that the 302 also refers to the same amount of money. Still, Coale had no explanation for the fact that the second and third pages of this

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[71]Day three of the hearing, October 27, 2004, is referred to as "Tr. III."

[72]The Court did express that the unredacted version would likely show that the August 9th date was a typographical error by virtue of date references in the unredacted version. Tr. III, 19.

302 listed the date *as August 9, 1999*, while the first page of this 302 lists *August 16, 1999*. Tr. III, 15, 16. Because of these inconsistencies, Counsel for USDA offered to present the unredacted version of the Form 302 in CX 9 as part of its effort to show that the 302 included with CX 9 is one document. Tr. III,18, 19. The Court noted, upon examining the unredacted version, that the only aspect which supported the USDA position that the pages were all part of the same 302 was that the paragraph numbers continue consecutively from one page of the 302 to the next.[73] Tr. III, 27. Thus, USDA counsel was unable to substantiate that these pages in fact were a unit.

Mr. Coale was also asked about CX 1, and he affirmed that he had previously seen the indictment and 302 included in that exhibit. Tr. III, 31. Mr. Coale noted that the indictment referred to an alleged $100 bribe on March 24, 1999 and that the inspection certificate included within this exhibit bears the same date. He also noted that the 302 references the name

Tray-Wrap. Tr. III, 32, 33. Mr. Coale made similar observations with regard to CX 2, where he noted that Count 2 of the indictment lists a $100 bribe amount associated with March 26, 1999 and that the inspection certificate lists the same date. Coale also noted that the 302 lists Mr. Spinale's name as well as Tray Wrap's. Tr. III, 33, 34. Both the 302 and the inspection certificate also refer to product inspected as tomatoes. Tr. III, 34. This process continued for CX 3, 4, 5, 6, 7, and 8. For CX 3, Coale noted that the inspection certificate and the 302 both referred to April 23 and both include reference to Tray-Wrap. Mr. Spinale's name appears in this 302, although it does not appear in the inspection certificate. The 302 lists that an inspection was done at approximately 11:30 a.m. while the inspection certificate lists 11:35 a.m. and both refer to the product inspected as tomatoes. Tr. III, 35, 36, and CX 3. For CX 4, the indictment refers to May 20,1999 and $100 bribery amount, while the 302 shares that date, and refers to an inspection of tomatoes at Tray-Wrap on that date at approximately the same time, and declares that Mr. Spinale paid a

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[73]Other aspects, such as continuity of names from one page of the 302 to another, were not present. Tr. III, 28.

$100 bribe.[74] The inspection certificate that is part of CX 4 shares the same date and approximate time. For CX 5, the indictment lists June 16, 1999 as the date on which a $100 bribe was made by Mr. Spinale, while the 302 included within this exhibit conflicts, as it relates that the bribe amount was $200. The dates in the 302 conflict as well, as June 15th and June 16th are listed dates of activity.

For CX 6, Coale noted the indictment recites a bribe payment of $400 on June 23, 1999 and that the 302 refers to the same date and amount and includes Mr. Spinale's name. Tr. III, 40. The inspection certificate also lists the same date and it involves a tomato inspection, which is the subject of the 302 as well, and both refer to Tray-Wrap. Tr. III, 41. USDA Exhibit 7 (CX 7) lists, in indictment Count 7, the alleged date of the offense as July 15, 1999 and the bribe amount as $100. The 302 included with this exhibit also lists the July 15th date, and refers to Mr. Spinale and an inspection of potatoes at G & T's facility and the inspection certificate shares the date and time listed in the 302 as well as the product inspected. For CX 8 the indictment lists July 26, 1999 and a bribery payment of $200. The 302 included with this exhibit lists the same date, indicates that potatoes were the commodity and includes Mr. Spinale's name.

USDA Counsel, referring Mr. Coale to CX 19, which is the transcript of Mr. Spinale's appearance and guilty plea before Magistrate Ronald L. Ellis on January 26, 2001, noted that Mr. Spinale stated that he "told [Cashin] the specific amount [he] wanted him to put in the inspection report. On the other dates in the indictment [he] paid Mr. Cashin $100 per inspection to influence the outcome of the report." [75] Asked about the 302s in the record, Coale reaffirmed that he received them from Ms. Collson, an auditor with the PACA Program, Office of the Chief, and that when he saw the

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[74]Of course the characterization of the exchange of money as a "bribe" in this or any of the problematic 302s in this record is a legal conclusion for the Court to make.

[75]As to Mr. Spinale's relationship to G & T and Tray-Wrap, USDA Counsel points to the remark made by Mr. Spinale's legal counsel in the criminal proceeding to the effect that if Mr. Spinale had to serve jail time those companies would go out of business. Tr. III 53.

302s they were in an unredacted state. Collson was not the person who created the 302s. Tr. III 88. Coale also saw the 302s as they were prepared for the hearing with the redactions added. Tr. III 73. Coale stated that Collson told him that she acquired the 302s from the FBI. Although Coale also believed that the FBI authenticated the 302s by virtue of the letter which is CX 21, that letter hardly achieves that objective. As discussed, CX 21 is merely a cover letter from the FBI bearing a date of July 3, 2002 and referring to enclosed copies of FD-302s; there is *no* indication *at all* as to case involved, nor the number of 302s enclosed. To be direct, CX 21 is a useless exhibit, with absolutely no probative value in this case. Coale conceded that he had no knowledge of what individual(s) produced the 302s and that none of them bore any signatures. Tr. III, 77. Coale also conceded that he has never met the person who signed the cover letter comprising CX 21. The most Coale could offer about the USDA's receipt of the 302s was that he *thought* they had been received by a Mr. Stanton, a USDA attorney with the Office of the General Counsel. Tr. III, 78. Coale also conceded that the 302s do not indicate who the "source" is. [76] Coale was also flummoxed regarding CX 9, pages 13, 14, and 15,[77] in that, while he contended they were consecutive pages from the same document, he could not explain why the dates did not match[78] for those pages. Reluctantly, Coale had to concede that he had no actual knowledge that those pages were all from the same

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[76]The fact that Coale claimed that Cashin told him that he, Cashin, was the source referred to in the 302s hardly proves the point. First, Cashin's memory was a vacuum as to all of the 302s. Beyond that, Cashin never saw the 302s until years later, nor was Cashin present when the 302s were prepared nor were they ever presented to him in order that he might review them for accuracy. As with Cashin, Coale never saw the 302s until years after they were prepared. Tr. III, 81, 82.

[77]Although Counsel for USDA offered to introduce a largely unredacted version for government exhibit CX 9, at pages 13, 4, and 15, it was agreed to return that largely unredacted version, thereby keeping the original CX 9 in the record. This was done because the parties, and the Court, agreed that the only difference between the versions, for the purpose of this hearing, is that the unredacted version shows an uninterrupted sequence in the paragraph numbers within those particular pages. Tr. III, 99.

[78]As noted, page 13 of CX 9 lists August 16, 1999, while the next two pages of that exhibit list August 9, 1999. CX 9, 13, 14, 15.

document. Tr. III, 83. *In fact, Coale agreed that he never had any discussions with any FBI agents regarding the 302s*. Tr. III, 96. Coale also conceded that his view that the Counts in the indictment correlated with the 302s in the Complainant's Exhibits was actually only a deduction he made based on the fact that the same dates listed in the counts in the indictment also appeared in the 302s which accompanied them. Tr. III, 90. 91.

In fact, when the Court specifically asked Coale whether it was:
fair to state that the statements [he] made about the correlation, [that] there's nothing unique about [his] personal knowledge about this case which enabled [him] to make those statements about the correlations between, for example, the 302s and the particular related inspection certificates, but rather – tell me if this is a fair characterization. What you did was what any person of reasonable intelligence could do, which is, to whit, you looked at the 302s, you looked at the dates of the particular counts that were involved and then you looked at the inspection certificate and you made certain common sense observations about some commonalities there, correct?" Mr. Coale answered succinctly, "Correct." Tr. III, 92, 93.

Coale also agreed with the Court's further observation:
And if we pulled someone in off the street who had reasonable intelligence and - - didn't have a college degree, but was literate, [he or she] could've made the same observations that you made about those correlations, right?
Coale again acknowledged, "Yes." Tr. III, 93.
Coale agreed that those concessions applied to all of the critical government exhibits, CX 1- 9, which exhibits parallel the indictment counts. Given these acknowledgments, Coale's description of Mr. Spinale's payments as "bribe payments" was derived solely from *his* translation of the "cash payments" language in the 302s, to *his* "shortened" replacement expression of "bribe." Tr. III, 95, 96.

Accordingly, on the basis of the information related above, the Court makes the following observations and findings concerning Mr. Coale's testimony. First, in providing "testimony" about the 302s, Mr. Coale functioned solely as a 'reader' identifying and knowing nothing more about any of these documents than an individual selected at random from the New York City telephone book. Further,

Mr. Spinale pled guilty to a single count, a fact USDA counsel seemed to blur during direct examination. Coale later acknowledged that Mr. Spinale pled guilty *only* to Count 9 and that the remaining counts were all dismissed. Tr. III, 54, 55. Thus, the USDA cannot bootstrap its case by transmogrifying a plea to a single count in a criminal proceeding into the multiple counts alleged in this administrative complaint. In addition, the phrase used in the plea, that cash was paid "to influence the outcome" is equivocal in that it does not necessitate a finding that the "influenced outcome" was an inaccurate outcome.

Beyond those observations, as pointed out by Counsel for Mr. Spinale, Coale's direct testimony omitted that *immediately* after Mr. Spinale admitted in his plea to telling Cashin the specific amount he wanted listed in the inspection report, he told the Magistrate:

Your Honor, I would like to state that I never intended to defraud the shippers who had sent me the produce. Tr. III, 55.

With the conclusion of the government's case, save the sanction testimony which it asserted was, by 'custom' in these proceedings presented at the close of the Respondents' evidence, it would not have been unreasonable for the Court to have entertained a motion for dismissal by reason of the government's failure to present a prima facie case. As such a motion was not made, the Respondents proceeded with their evidence.

The Respondents' first witness, Ms. Mazie Faraci, stated that she is employed by G & T and Tray-Wrap as the office manager and that this entails taking care of the records. Tr. III, 108. Ms. Faraci stated that she owns Tray-Wrap and is its President, owning 100 percent of its stock. She has been with G & T for forty years and with Tray-Wrap for thirty-five years, since 1964 and 1969, respectively. Tr. III, 109. Ms. Faraci stated that she was a stockholder from the time Tray-Wrap was first formed. Her working relationship with Mr. Spinale preceded these businesses, as it began in 1964. Tr. III, 110. Her business relationship with Mr. Spinale was that she provided the financing and took care of the books, while he did the buying, selling and packing of tomatoes. Her investment was $25,000 and, at the outset, she owned all of the Tray-Wrap stock. Tr. III, 111, 112. In this respect, Ms. Faraci believed that any assertion in the original

PACA license application in 1969 indicating that Mr. Spinale was the sole stockholder was at odds with the facts. Tr. III, 112.

Ms. Faraci distinguished her work location from Mr. Spinale's. She works at Hunts Point Market at Row B, address number 266, whereas Mr. Spinale works at Row D, address number 401. She estimated that the two addresses were about a mile apart. Tr. III, 114. The packing and shipping occurs at Mr. Spinale's work location. Tr. III, 113. Ms. Faraci stated that the name "Chain Trucking" does not appear on the door of her office location. Tr. III, 114. Ms. Faraci believed that Chain Trucking is owned by a nephew of Mr. Spinale, Vincent Mineo. Tr. III, 115. In the period from 1980 to 1999, Ms. Faraci stated that she had never been present during a USDA inspection. Tr. III, 115. Her contact during this time period with any USDA inspectors was rare, limited to a few times when an inspector dropped by for the name of a shipper or like information and she was not familiar with Cashin. Tr. III, 116. Nor did she ever have any conversations with Mr. Spinale regarding cash payments to any USDA inspectors. Tr. III, 116. Ms. Faraci also stated that she never approved cash payments by Mr. Spinale to USDA inspectors and that she first became aware of such actions when Mr. Spinale was arrested and indicted. Tr. III, 117. Ms. Faraci conceded that while she owned the business, she could not 'fire' Mr. Spinale, because she had no knowledge about the produce business. Her role was to provide the capital and maintain the records.[79] Tr. III, 122-123.

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[79]Given the Court's decision in this case, Respondents' alternative argument,(assuming that the Court were to have found Mr. Spinale engaged in bribery), that the USDA cannot hold the Respondents liable in any event because they did not know of Mr. Spinale's alleged activity and would never have approved of it, is moot. However, the Court must add that it does not subscribe to Respondents' Counsel's reading of *Post & Taback* to support that contention. The Department of Agriculture's Judicial Officer rejected the argument that as Post & Taback did not have actual knowledge of Alfisi's conduct with Cashin, those actions could not be deemed to be violations by the Respondent. In reaching the conclusion that the PACA licensee need not have actual knowledge of the violations, the Judicial Officer cited *H.C. MacClaren, Inc. v. U.S.D.A.*, 342 F.3d 584, (6th Cir. 2003) and *Koam Produce, Inc. v. DiMare Homestead, Inc.*, 329 F.3d 123, (2nd Cir. 2003) as authority for that conclusion. Thus, were the Court faced with this issue, it would have rejected Respondents' contention

(continued...)

Mr. Anthony Spinale testifying on behalf of the Respondents, stated that, at the time of the hearing, he did not consider himself employed by anyone. In 1999, however, he acknowledged being employed by G & T and that he was its president and owned its stock. Mr. Spinale did not, in the formal sense, complete high school. Tr. III 127. His formal education ended in the 7th or 8th grade. However, when he was in the military he took a test that ranked him as having the equivalent of a high school education, although he was uncertain as to the actual effect of that test. Tr. III 187. Mr. Spinale served with U.S. military in Korea. Tr. III 188. Mr. Spinale stated he formed G & T, a business involving packing potatoes, in 1964. Tr. III 132. He believed that Tray-Wrap, which was also his idea, was started in 1969. Tr. III 135 -136. Prior to starting Tray-Wrap, Ms. Faraci was an employee of Spinale and he chose to go into the tomato business with her. Tr. III 136. Spinale stated that the employees of G &T, Tray-Wrap, and another company, Mr. Sprout's, were all actually employed by G &T and certain expenses were then passed on to Tray-Wrap and Mr. Sprout. Tr. III 137. The same arrangement exists today. Tr. III 138. For example, as to Tray Wrap, a business that receives tomatoes and repackages them in smaller packages, G & T charges Tray-Wrap an amount above its actual labor costs by charging a per-package fee. Tr. III 138- 139. Mr. Spinale agreed that he ran everything regarding G & T. He would buy the product, sell it, see that it was re-packed properly, make sure that the product was of good quality, and he would determine if it needed a USDA inspection. Tr. III 140. In buying the product, generally he would work through brokers and order the potatoes he needed for any given week. Tr. III 140. He was also involved in the selling of the product, selling it to chain stores. Tr. III 141. Tray Wrap's repackaged tomatoes are sold to chain stores. Tr.III 148.

Mr. Spinale stated that he would order a USDA inspection if he felt the product was bad. Tr. III 151. He denied that he would order an inspection if he thought the product was U.S. Number One. Tr. III 151. His determination that a product was bad came from his years of

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(...continued)
regarding excusing employer liability for an employee's acts.

experience and involves his personal examination of the load in question. Tr .III 151. His operation moved from 230th Street to its present D 400, Hunts Point location, around 1991. Tr. III 152. He stated that the operation changed with that move, as he could no longer package the amount of potatoes that he was selling. Tr. III 152-153. He gave work to M & M Produce, another repacker, as a result of this problem. Tr. III 153. In contrast, Spinale packages all the tomatoes at the 400 Row D Hunts Point location. Tr. III 153.

Mr. Spinale stated that during the 1980s, before moving to Hunts Point, when he was located at the 230th Street location, there was a USDA inspector at the factory every day and a RPIA (Railroad Perishable Inspection Agency) inspector present. Tr. III 156, 157. He added that there was a USDA inspector at that location every day from the time he was 19 years old until 1988. Tr. III 157. There was so much to inspect, the USDA kept an inspector at that location all the time. Tr. III 158. At that time it was his practice to have all loads of produce inspected. Tr. III 157. Mr. Spinale stated that he never made any cash payments to any USDA inspectors while at the 230th Street location. Tr. III 160. The Court having observed Mr. Spinale in making that assertion and noting that no evidence to the contrary exists in this record, finds that the statement is true.

Although Cashin asserted that he spoke with Mr. Spinale in 1983, Mr. Spinale denied ever having any conversation with Cashin in 1983. Tr. III 160. Rather, Mr. Spinale believed he first met Cashin a year or so after he had moved to Hunts Point Market. Tr. III 160. He had no recollection of seeing Cashin at the 230th Street location nor did he recall an alleged incident in 1983 when a potato inspection was overruled when two other inspectors came to the site. Tr. III 161. Given Cashin's poor memory for more recent and far more critical events, the Court does not adopt Cashin's version.

Mr. Spinale stated that once he moved to Hunts Point in 1991, there was no full time inspector present all the time, as had been the case in the earlier location. Tr. III 163. At his Hunts Point location, Spinale's rail siding can only hold two cars which was less than the capacity at the earlier location. All the vendors at Hunts Point have a rail siding. Tr. III 163. However, Spinale stated he didn't use his siding on Row D. Instead loads go to "team track" first. Tr. III 163.

Team Track refers to tracks behind the market itself where the trains come in and the railroad separates the trains in order. Tr. III 164. Mr. Spinale would determine if a load needed inspection by having a truck partially unload the potatoes at Team Track. He would then look at them as they were coming off the truck or he would have his employees bring him some samples from the load and from those samples he would determine if an inspection was needed. Tr. III 164. Normally, he was the only one who decided if an inspection was warranted. Tr. III 164-165. By contrast, Mr. Spinale viewed tomato inspections to be easier because they arrived by truck and thus he would be able to view them right away. Tr. III 165.

Speaking to the 1990's, Mr. Spinale explained his practice regarding ordering a USDA inspection. Nearly all his requests would be made by him, using the telephone. Tr. III 168.

Mr. Spinale stated that when he would call for a USDA inspection to be conducted, that office would ask for the product involved, its size, and grade and whether the inspection was for grade or condition. Tr. III 170. His usual practice was to request an inspection for both grade and condition although at times he would not bother to have the inspection evaluate the grade. Tr. III 171. In those instances, his focus was on the condition of the produce. Tr. III 171. In those "condition" inspections, Mr. Spinale's intention was to make the shipper, that is the sender of the produce, aware that there were issues of decay and softness with the produce. Tr. III 171-172.

Mr. Spinale noted that a potato can change in its condition while in transit but that its grade would not change. Temperature, i.e. heat, or delay are reasons that can cause the condition to change. By contrast, a "grade defect" will not change due to transit. Such defects refer to appearance issues, such as a potato that is bent, crooked, has large cuts or is otherwise visually unappealing. Tr. III 173-174. The same observations are true for tomatoes as their condition can change during transit. Tr. III 174. Tomatoes come in different sizes: 6-7s, 6-6s, and 5-6s for example, with the 6-7s referring to the smallest. Tr. III 178. Spinale does not repack the 5-6s unless there is decay present. Some produce is sold directly from Hunts Point. Tr. III 179. This occurs from 266 Row B. Tr. III 179. By comparison, only a small percentage of potatoes are sold right from Hunts Point. Tr. III 180. Very little, only about 1%, of the potatoes are repacked by G & T.

Tr. III 180. Potatoes, like tomatoes, come in sizes: 120s, 100s, etc. down to 40s. Tr. III 180.

When asked about 1991, when he first moved his business to Hunts Point, Mr. Spinale stated that he had "quite a lot of problems" with USDA inspections at that time. Tr. III 189 -190, 201. He felt he could not receive a fair inspection as he found himself always disagreeing with the inspectors' evaluations. Tr. III 190. As an example, he would believe that a load of tomatoes was 60 percent number one, but the inspector would list them as 80% number one. Tr. III 191. He noted that under an "appeal inspection" he could get someone else down to look at a load when he did not agree with the inspector's evaluation. Tr. III 192. Mr. Spinale stated that when he first came to Hunts Point, he didn't have too many different inspectors come to his place of business. He felt that the people considered him "kind of difficult to work with." Tr. III 192. At any rate, in 1991 and 1992, Cashin and inspector Strusiak and possibly inspector Esposito would come to his place of business. Tr. III 193. USDA's Mike Wells would occasionally do an inspection too. Essentially at that time there were three or four regulars. Tr. III 193. Spinale considered himself to have a reputation for being difficult because he was very 'hands-on' and thus directly involved. He did not delegate much and so he would look directly at the produce in question. Tr. III 193-194. He believed he was therefore "a little bit more knowledgeable" than many would be. Inspectors knew that he was knowledgeable and that he would insist on an accurate evaluation. Tr. III 194. At that time, in 1991, Wells was the head of the department for USDA's Agricultural Marketing Service and Mary Ann Stranch was his assistant. Tr. III 195-197. When he requested an appeal inspection usually two other inspectors would arrive but Mr. Spinale stated that they always affirmed the original inspector's determination. Tr. III 195-196. As he viewed it, Mr. Spinale believed that USDA was displeased that it had to do appeal inspections. Tr. III 196. His opinion was based on the tone of voice of the USDA people. Tr. III 197. In his view USDA didn't want to have conflicts between the receiver and the shipper. They wanted things to run smoothly and an appeal inspection threatened to make things to upset things. Tr. III 196. As a consequence of the affirmations of the original inspections,

and his view that such reviews were not correct, Mr. Spinale was not pleased with the results of his appeals. Tr. III 198. In fact, as evidence of his displeasure, on occasion he would call for an informal review, which is the next step after an appeal inspection. Tr. III 199. This would involve higher-ups flying in from Washington, D.C. . Still, he would not win in those cases either as they would concur with the earlier inspections' conclusions. Tr. III 199.

Mr. Spinale related that sometimes it would take two days for an inspector to arrive after a request for an inspection was made. Tr. III 201. While awaiting the inspection some of the product would be sold, in the time that elapsed between the request and the actual inspection but in general he would try to save about half of a load for the inspector to see. Tr. III 202. Mr. Spinale stated that Tray-Wrap only ordered inspections when "there was something bad."

He also stated that he did complain about the delay in inspections and inaccurate inspections, to USDA's Mike Wells. In addition he called Washington Agriculture employee 'Don Parrity' [ph], about this issue. Tr. III 204, 206. Spinale related that Parrity tried to pacify him, telling him "we're having problems with the inspectors..." Tr. III 205.

By way of background to the issues in this proceeding, Mr. Spinale related that he knew a "Lou Guerra" [ph], a wholesaler at Hunts Point and that in the fall of 1991 he met with Mr. Guerra on the platform at 400 Row D. They had a long acquaintance, predating their Hunts Point location, and Mr. Spinale was complaining to Mr. Guerra about the difficulty of working with the Agriculture inspectors, stating that they were unqualified and did not provide a fair or timely inspection. Tr. III 208 - 209. To this complaint, Spinale related that Mr. Guerra made a gesture, rubbing together two fingers, and by that suggesting that money was required to solve the problems. Guerra then told Spinale that he would "send somebody to see [him] and he'll mention [Guerra's] name and [that Mr. Spinale would] know what [he had] to do." Tr. III 209- 211. Mr. Spinale then related that the next time he requested an inspection, Cashin showed up. Tr. III 211. When Cashin appeared, he told Spinale words to the effect that "Lou [Guerra] said that I should say hello to you." Tr. III 211, 214. After Cashin completed the inspection Spinale slipped him a $100. Tr. III 211.

This was done without Mr. Spinale saying a word to Cashin nor did Cashin say anything to him. Tr. III 211- 212.

Mr. Spinale also asserted that inspectors are required to look at 1% of a load but that he knew, from examining the inspectors worksheets, that this was not done. As an illustrative example, he observed that if he had 1600 boxes, the inspector's worksheet might only list 8 to 10 inspected, not the 16 required. Tr. III 216. This conclusion on his part also was based on the short amount of time it would take for the inspection to be completed. Tr. III 217. Using his example, Mr. Spinale believed that it would take an hour and a half to inspect 16 boxes. Tr. III 218.

Mr. Spinale stated that the inspectors who were part of what he described as a "soft extortion" scheme worked closely together. As one example, he related that on occasion Cashin would tell him that a particular inspector would come by and that "he's all right." However, when not advised about a particular inspector, Spinale would not give him money. When that occurred, the inspector would make remarks to the effect "what are you going to do with all your money?" or "why don't you spring for dinner?" Tr. III 226. In fact, the only inspector Spinale could recall that never took money was Ms. Stranch. Tr. III 226. Spinale added that he never gave money to Mike Wells, or to a woman inspector Hernandez, [sp] either. Tr. III 229.

Having described the system employed by these inspectors, Mr. Spinale maintained that he could not get a fair inspection from the other inspectors. Tr. III 230. In support of this contention he stated that, before he started making cash payments, he would point out to inspectors that their inspection results were "nowhere close," but all he would get for a response was the inspector responding, "Well look, that's what I found. I can't help that." Tr. III 230. Regarding the cash payments to inspectors, Mr. Spinale specifically denied that he ever asked any inspector to alter an inspection. Tr. III 230, 231. He also denied ever asking for "help on an inspection." Tr. III 231. Further, he denied ever asking a shipper for an allowance where the product actually met grade and he denied ever receiving an inspection that reflected a condition that was worse than the actual condition of

the produce.[80] Tr. III 231, 234. Both in assessing the credibility of Mr. Spinale's testimony regarding these critical issues and upon consideration of the record in this case as a whole, the Court finds that Mr. Spinale was credible as to these contentions.[81]

Again, consistent with the Court's findings noted above, the Court specifically asked Mr. Spinale questions, with Spinale looking directly at the Court and after he had been reminded that his answers were under oath. In that setting, Mr. Spinale denied ever asking a USDA inspector to alter an inspection, nor did he ever ask an inspector for "help" on an inspection, nor did he ever have an inspector downgrade an inspection so that it would not reflect the truth. Spinale added, directly facing the Court, "[w]hen these people came to me, all I wanted them to do was look at the product, give me a fair inspection. I never watched them when they were doing it, never said boo to them one way or another. If I had a complaint I would call the office and make a complaint. I wouldn't get involved with the inspector." Tr. III 235.

The Court also asked: "And so is it your testimony that you never had an objective, that is, a goal of trying to get an inspection appear to be - - appear to rate the product as worse than it really was, so that you could then go back to the shipper and get some sort of discount?"

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[80]Despite the required cash payments, Spinale believed that, even after he started giving them, he would at times still get an inaccurate inspection, in that the inspectors never wrote up grade defects as they were supposed to do it. Elaborating, he stated that an inspector would call his office and report that he found 9 to 10 percent grade defects, but that the office would instruct the inspector to keep inspecting the load with the end result being a report reflecting only 4 or 5 percent grade defects. The Court notes that in this respect Cashin's testimony and Mr. Spinale's are in accord.

[81]Interestingly, neither G & T nor Tray-Wrap are receiving USDA inspections presently. According to Mr. Spinale the USDA wanted him to sign a statement that he will not sue the United States, nor the USDA nor the inspectors or anybody that has anything to do with the USDA. Tr. VI 159. This demand, which the USDA did not contradict, seems odd from a government department which is asserting that Mr. Spinale was a wrongdoer. Such a stance could be construed as reflective of a concern that Mr. Spinale could have a legitimate basis for contending that he was the victim of soft extortion rather than a willing participant in a bribery scheme. The Court also notes that none of these assertions by Mr. Spinale were challenged by USDA during the hearing, though it had the opportunity for rebuttal evidence.

Mr. Spinale responded, convincingly: "I never did that." Tr. III 236. When asked if he was sure of this, he reiterated that he "never did that" and he added "I'm positive and I'll prove it." Tr. III 236. The Court determined, based on its credibility assessment and the evidence in this proceeding as a whole, that Mr. Spinale was truthful.

Mr. Spinale was asked by his counsel to focus upon Gov. Ex. 1, at page five, CX 1- 5, which is identical to Respondents' Exhibit 1 A, RX 1 A. Tr. III 244. The indictment lists the date for Count 1 as 3/24/99. Tr. III 242. Mr. Spinale said that Count, upon review of his records from 1999, refers to inspection certificate number K678086-0. Thus the inspection on that load pertains to Count 1 from the indictment. Tr. III 244. Unlike Cashin, Mr. Spinale was able to recall what happened in connection with that inspection: "Mr. Cashin came down to do this inspection and I hadn't seen Mr. Cashin in about three and a half months .... [a]nd he ... was doing this inspection, and I told him I only wanted 400 boxes looked at, and he went and he did the 400 boxes. And after he looked at the 400 boxes, he came back to me and he says, aren't you going to have the other ones looked at? And I says, why? I says, they look all right to me. He says no. He says they're not too good. So I went back to look at them again and I said hey, Bill, there's nothing wrong with those tomatoes. Those tomatoes are all right. And he wrote up this inspection, which incidentally was just done for condition. I didn't ask for grade, it would've been a worse inspection than this. But it was only 400 boxes. He wanted me to take an inspection on 1600 boxes."[82] Tr. III 245-246.

Mr. Spinale explained that he only wanted 400 of the 1600 be inspected because he believed that only 400 of them were bad. Tr. III 246. Further, he asked for an inspection only as to 'condition' because he believed that would be enough to obtain an allowance from the shipper. Thus he did not need the inspection to include an assessment of the grade of the tomatoes. Tr. III 246. Mr. Spinale,

[82]Mr. Spinale's recounting of this inspection, which was unrebutted by the USDA, and accepted as credible by the Court, does present a strong "odor" that Cashin, who was then a marionette for the government, was trying to set up Mr. Spinale.

directed to RX 1 C,[83] was asked if he received an allowance on that

[83]USDA's lead Counsel objected to R's Exhibits 1 B, 1 C, and 1 D, based on Respondents initial claim that the exhibits did not exist. USDA Counsel stated that its PACA investigator was told that the records no longer existed. USDA Counsel also related that these records had been subpoenaed and then added, "not providing records is a sanctionable offense - - violation of the PACA, and also not - - disobeying a subpoena of the USDA is also sanctionable to various extents, and it can be enforced, I believe, through the U.S. District Court if it comes to that. ... the fact that they did exist and they exist today, - - even today, shows that the Respondents have had nothing but contempt for our subpoena and for the investigation, having had impeded our investigation ... and ....Respondent should not be able to use any of these documents. And also because these documents exist, there will be further review as to other sanctionable - - other possible disciplinary actions stemming from the fact that these documents do still exist." Tr. III 248. (emphasis added). In ruling on the objection, USDA counsel affirmed, upon inquiry by the Court, that, despite counsel's outrage concerning the admission of these documents, in fact they had received them from counsel for the Respondent as part of the Court's prehearing exchange requirement and had them since March 2004, *some seven months prior to the hearing*. Tr. III 249 - 250. Further, despite the long period of time USDA had these documents in its possession, Counsel made no objection to the exhibits until the first day of the hearing, October 25, 2004. Tr. III 253. The Court also expressed disdain for the threat made by USDA that it may bring further actions against the Respondent in connection with this issue. Tr. III 251-252. This Court was troubled and felt that is was entirely inappropriate that lead counsel for USDA's arguments concerning an evidentiary matter was not limited to the merits of that admissibility issue by including within its argument "an implicit threat ... that this is more trouble that the government can ... bring on down the road." Tr. III 252. Speaking as an Officer of the Court, Counsel for the Respondent represented to the Court that in fact G & T did not have those records at the time they were subpoenaed. All of those records had been turned over to Mr. Spinale's *criminal* attorney after his arrest in 1999. Accordingly when Counsel for Respondent in this *administrative* proceeding, Ms.Strumpf, went to G & T, there were in fact no records. Tr. III 254. Respondent's counsel in this administrative proceeding personally viewed this to be the case. Tr. III 254- 255. The upshot of this was that Counsel for the Respondent did not receive the records until about June 2003. Tr. III 257. Having heard both sides on this issue, the Court found a clearly credible explanation for the delayed delivery of the documents, which delayed delivery absolutely caused no disadvantage to USDA Counsel in this administrative proceeding. Despite Respondents' Counsel's honest explanation, Lead Counsel of USDA did not withdraw his objection. This caused the Court to note again that while it had not and could not have made any decision about the case at that juncture, as the evidence was ongoing and the Court would need to resolve conflicts in testimony, it was concerned from the tenor of the USDA lead counsel's remarks, suggesting, in the Court's words "the idea that there's an implication that the hand [of government] will come down again if [the outcome of this case] doesn't turn

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shipment. However, before that response could be elicited, the remainder of the trial day was spent on the resolution of the USDA's objection to the admission of Respondent's Exhibits 1B, 1 C, and 1 D, as discussed in footnote number 83.

To accommodate the schedules of witnesses for the Respondents, Mr. Spinale's testimony was interrupted and did not resume until day five of the hearing. Upon resumption of his testimony Mr. Spinale was first asked about his initial meeting with Cashin and related that it began in the early 1990's, when his business moved to Hunts Point. Tr. V 143.[84] Subsequently, Counsel for Respondent asked Mr. Spinale about a meeting with Cashin in December 1998.

Mr. Spinale stated that Cashin came to him at that time and asked him for a loan, seeking $20,000. Mr. Spinale declined and Cashin reacted by getting "a little angry," and brought up that Mr. Spinale had loaned money to his "Italian friend." Tr. V 144. Mr. Spinale stated that he was aware that Cashin was involved with some "ladies" (i.e. the adult entertainers) he considered it a "waste of money."

Mr. Spinale was then directed to RX 40 Q, USDA inspection certificate K 673463-6, dated December 17, 1998. Tr. V 148. The inspection applicant was listed as Chain Trucking and Cashin was the inspector. This inspection took place at the time of Cashin's request for the loan from Mr. Spinale. Tr. V 150. Spinale was then directed to CX 1-5, inspection certificate number K 678086-0, dated March 24, 1999, another inspection performed by Cashin for Tray-Wrap. Spinale then stated that he never saw Cashin after the December 17, 1998 inspection until the March 24, 1999 inspection. Tr. V 151-152. Prior to the December 17th inspection, Cashin was a frequent visitor to Mr. Spinale's Hunts Point location. Tr. V 152. In general, when

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out to the government's liking in this case, that troubles me." Tr. III 260. It is inappropriate for the government, with its virtually limitless resources, to threaten continual litigation until it prevails against the Respondents.

[84]Mr. Spinale's testimony resumed on October 29, 2004. It began on October 27th but was interrupted to allow other witnesses for the Respondents to testify. Mr. Spinale's resumption of testimony is designated by "Tr. V"

Mr. Spinale would request an inspection he would see Cashin a couple of times a week, yet Cashin did not appear for any inspections during the period after December 17, 1998, until his reappearance some three months later on March 24, 1999, which was shortly after he was arrested. Tr. V 153.

Mr. Spinale was then redirected to the exhibits which USDA Counsel had objected to, RX 1 - A through D [85] and in particular RX 1- C. As discussed in the recent footnote above, the Court found no merit to USDA's objection and found the threat by USDA, which accompanied the objection, that it can bring new actions against Mr. Spinale until it achieves the litigation outcome it desires, to be patently offensive. Picking up with the subject matter that was about to be addressed when he last testified, Mr. Spinale identified RX 1C as a bill from a tomato shipper, Six L's Packing Company, and RX 1A as the inspection certificate (K 678086-0) relating to the same shipment as RX 1-C. Tr. V 155. Mr. Spinale stated that Tray-Wrap received an $800 allowance on the shipment, which dealt with 400 boxes of tomatoes. The inspection revealed that the tomatoes were out of grade by 26%. Tr. V 174. Asked why only 400 boxes were inspected, Mr. Spinale explained that there were different lots on this load but only the 400 lot had problems. For that reason, he only had the 400 lot inspected. Tr. V 156. Referring again to RX 1 A, which is a copy of inspection certificate K 678086-0, dated March 24, 1999, Mr. Spinale confirmed, and the certificate itself as well as the handwritten notation on that document support, that he requested an inspection of only 400 cartons. Tr. V 227. For the inspection reflected on RX 1A, Mr. Spinale identified Cashin as the inspector who arrived to conduct it.[86] Mr. Spinale asked Cashin where he had

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[85]Mr. Spinale agreed that this inspection was included in the charges in the indictment. Tr. V 159. Thus, RX 1A is the same document as CX 1 -5 and was the basis for Count 1 of the indictment and one of the ten incidents alleged in this PACA administrative action bearing the same date and inspection certificate number.

[86]Through the testimony of Mr. Spinale it was pointed out that he had no ability to request that a particular USDA inspector conduct a requested inspection, and consequently he would not know in advance which inspector would appear for a given inspection. Tr. V 158. This testimony, which was unrebutted, supports Respondents'

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been for three months, but he received only an unmemorable response. Upon showing Cashin the 400 tomatoes, Cashin initiated whether Mr. Spinale would want the other tomatoes inspected, claiming to Mr. Spinale that the other tomatoes were "pretty poor." However, when Mr. Spinale went back to look at the other tomatoes, he told Cashin to "forget about it ... those tomatoes are good." Tr. V 159. Respondents' Counsel asked Mr. Spinale about any cash payment to Cashin regarding the inspection reflected in RX 1A. While Mr. Spinale stated that he gave Cashin $100 for the inspection, he added that it was never for the purpose of having Cashin change or falsify the inspection. Tr. V 190. Mr. Spinale noted that he received an $800 allowance for that problem lot and that when allowances were sought he would work through the broker involved with the sale. Tr. V 165, 170 and RX 1C. Mr. Spinale addressing the insinuation that he would want Cashin write up the whole load as bad, stated that this inspection refutes that claim, as he asked only that 400 of the cartons be inspected. Tr.V 228. Accordingly Mr. Spinale believes this load is indicative that he acted honestly, as he only sought the limited inspection of 400 tomatoes even though the load consisted of 1600 tomatoes. Tr. V 175. The Court concurs that by forgoing the opportunity to inflate the degree of problems with the load, this evidence supports Mr. Spinale's position that he sought only fair, accurate and timely inspections. It is noteworthy that USDA Counsel *did not* recall Cashin to rebut Mr. Spinale's recounting of these events nor, for that matter, did USDA Counsel recall Cashin for any rebuttal testimony despite keeping him available for such purposes.

Mr. Spinale also confirmed his familiarity with the invitation from the Department of Agriculture for shippers to file claims against merchants connected with Operation Forbidden Fruit.[87] Yet, he stated Six L's never filed a claim against Tray Wrap. Tr. V 160. This is

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claim that Mr. Spinale called for inspections when he had legitimate grounds to question the quality of a shipment of produce.

[87]The FBI investigation of the corrupt USDA inspectors and their activities with some of the merchants at Hunts Point was dubbed "Operation Forbidden Fruit."

significant as many growers filed actions against wholesalers who had dealings with the corrupt USDA inspectors and such growers prevailed even where it could not be demonstrated that the particular inspections involved were inaccurate. *See: Koam Produce Inc.,* 213 F.Supp.2d 314 (S.D.N.Y. 2002) and *B.T. Produce Co. Inc.*, 2004 WL 2913252 (S.D.N.Y.).

Upon being directed to RX 2 A through 2 C, involving K 678091-0, a March 26, 1999 inspection, (CX 2-5), of a load of tomatoes received by Tray-Wrap, and also shipped by Six L's, Mr. Spinale stated that the inspection reflected 20 % soft rot with the tomatoes. Tr. V 161-162. He noted that meant the tomatoes were 15 % over the allowable limit. Tr. V 163, 173. Mr. Spinale then identified RX 2 B as the invoice from Six L's associated with that inspection. Tr. V 163. Yet, Mr. Spinale did *not* take an allowance on that shipment and paid the full invoice price. Tr. V 163- 164, 167. Mr. Spinale, speaking generally, but in a way that evidences his credibility, and his honesty as a merchant, explained that there were times when he could claim an allowance yet opted not to do so when the market was very strong for a particular product. Thus, there were occasions when, even though a particular load of tomatoes could have problems, the tomatoes could still be sold for a "considerable profit."[88] In such circumstances he would forego an inspection. Tr. V 172- 173. Further, the check from Tray-Wrap matches up with the invoice from Six L's and shows that Tray-Wrap in fact paid the full amount of the invoice. Tr. V 178. RX 2 C and RX 2B. As true for RX 1A, while Mr. Spinale gave Cashin $100 in connection with the inspection reflected in RX 2A, he never asked Cashin to change the inspection in any way. Tr. V 191, 193. Accordingly, despite the government claims, this is an example, and the Court so finds, of Trap-Wrap

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[88]Faced with this plain evidence of Mr. Spinale's honesty, the USDA had to create, through sheer speculation, the "benefit" the Respondents would receive. According to USDA, Mr. Spinale could use his forbearance to obtain better quality produce from the shipper in the future. USDA Reply Brief at 11. Of course, this is not the type of benefit that USDA premised this proceeding upon. That benefit was a wholesaler's use of an inspection that inaccurately reflected the goods to be worse than their real condition in order to renegotiate the price downward. Without the real benefit present, the USDA was relegated to concocting other "benefits" that the Respondents supposedly received.

paying the full invoice even though it could have justified an allowance.

Turning to RX 3 A through 3 G, pertaining to inspection certificate K 679811-0, (CX 3-5), Mr. Spinale confirmed that all of those exhibits relate to the same shipment. Tr.V 183. Mr. Spinale, noting RX 3D, stated that Steven Heyer is a tomato broker, who purchases tomatoes for Tray-Wrap. This particular load involved 1600 boxes of size 6-7 tomatoes, and as reflected in RX 3D, there was no charge for these tomatoes. Tr. V 184. RX 3D. Mr. Spinale explained that this came about when a plan by tomato growers backfired. The growers had insisted on a set price but the market would not support it. To deal with this the growers kept their "set price," but this was a fiction as they made every third load "free." Tr. V 185. RX 3F and 3G show that Tray-Wrap paid the freight for these tomatoes, but nothing for the tomatoes themselves. Tr. 186. This load is particularly instructive about what was actually going on in this case. This is because, regarding inspection certificate number K 679811-0, the question arises why would Mr. Spinale request an inspection of tomatoes that he received free of charge? The answer, which the Court finds to be credible and for which the Court closely observed Mr. Spinale's testimony, was explained by Mr. Spinale, who stated that "Cashin came in one day and ... said [he] need[ed] something to look at." Mr. Spinale, understanding that this was another hold up by Cashin, directed him to the RX 3 load and paid him "his usual gratuity." Tr. V 188, 194. Mr. Spinale didn't tell Cashin he had nothing for him to look at because he knew Cashin "was looking for some money." Tr. V 188. Of course, Mr. Spinale never showed the inspection to the shipper, as he rhetorically observed , "How could I get an allowance on a free load?" Tr. V 188. The Court also notes that the government had ample opportunity to go through the USDA records and find, for example, if it existed, that Mr. Spinale had called in for an inspection of this load prior to Mr. Cashin's appearance. The fact the government failed to introduce such obvious evidence and that it never recalled Cashin to rebut Mr. Spinale's recounting of the events,

demonstrates again the lack of substance to its charges against Mr. Spinale.[89]

Referring next to RX 4, A through G, (CX 4 - 5) pertaining to inspection certificate K 765769-5, dated May 20, 1999, relating to a load of tomatoes, Mr. Spinale confirmed that all of the exhibits within RX 4 pertained to the same shipment of tomatoes, from Mecca Farms. Tr. V 199. Mr. Spinale noted that the inspection certificate recorded that the product was out of grade by 60%, yet he did not request an allowance from the shipper because he did not need one. Tr. V 202. Mr. Spinale explained that Mecca Farms was one his better shippers and that in this instance, as he would not be losing money, there was no need to obtain an allowance. Accordingly, he paid full price. RX 4 B, C. Tr. V 203. When asked why an inspection was requested on the produce if he had no intention of seeking an allowance, he stated that he used the inspection as a way of demonstrating to the shipper that there were quality problems and hopefully the next delivery would bring in better tomatoes. Tr. V 204. Through the dark prism employed by USDA and even though there was no evidence to support the assertion, it suggested that Mr. Spinale even had a nefarious motive in doing this, alleging, again without any evidence to support the claim, that Mr. Spinale was doing this for future *favors*. In making such a claim the USDA appears not to recognize the distinction between evidence and rank speculation.

Mr. Spinale also stated that around the time of this May 1999 inspection he telephoned USDA's Mike Wells, who was in charge of the Hunts Point USDA office, to inform him that Cashin had been acting peculiarly in that he was shaky and nervous. Mr. Spinale's concern was that Cashin could be having "mental problems" but Wells dismissed the concern, telling Mr. Spinale that Cashin was simply a "moody guy." Tr. V 205. Despite the apparent ease of challenging this assertion, USDA, as it did with the entirety of the Respondents' evidence, made no offer of rebuttal.

Mr. Spinale was then directed to RX 5 pertaining to the load described in inspection certificate number K 767032-6, dated June 16,

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[89]Of course the Court recognizes that the charges are against Tray-Wrap and G & T since they hold the PACA licenses, but any real world analysis must acknowledge that this case really is about Mr. Spinale and his alleged conduct.

1999, (CX 5 - 6), and he identified RX 5 B as the bill from West Coast Tomato, Inc. for that load. Mr. Spinale stated that, at a minimum, the tomatoes, which had serious decay, were out of grade by 12 percent. Tr. V 210. The broker for this load, Steven Heyer, contacted Mr. Spinale concerning the problems. According to Mr. Spinale, Mr. Heyer didn't want to take the load because of the problems but the shipper asked for Mr. Spinale to take the load anyway. Tr. V 212. Because he had a good relationship with West Coast Tomato, Mr. Spinale accommodated the shipper. In this way the shipper would have a record to show his growers that there were problems and to justify that the return would be less than the farmers would have hoped to receive. Tr. V 212. In this instance, Mr. Spinale paid $4 per box plus the freight expense and the temperature report expense. West Coast Tomato never raised an objection against Mr. Spinale in connection with this load. Tr. V 217. At the time of this inspection, Mr. Spinale asserted that Mr. Cashin was a "nervous wreck" who was no longer capable of doing a competent inspection. Tr. V 218. Because of that, Spinale told him what to put in the inspection, all of which was a correct and accurate description of the load. Tr. V 218. In addition, Mr. Spinale learned through Steve Heyer that the FBI contacted Bob Spence, the shipper of this load, and Spence, (to the FBI's likely dismay) informed them that Mr. Spinale was correct – the tomatoes *were* bad when they left Florida. Tr. V 220. The Court notes that this is yet another example of the USDA leaving a significant assertion by the Respondents unrebutted, even though USDA had several resources to contradict the claim, if they believed Mr. Spinale's claim was untrue. These resources included the ability to call Mr. Spence and/or the FBI in the rebuttal phase. For obvious reasons, the Court adopts Mr. Spinale's testimony regarding the events surrounding this load and the poor condition of the tomatoes.

Next, Mr. Spinale testified with regard to his criminal indictment and guilty plea in this matter.[90] He read from the second page of the indictment, the first line of which states: "[Count] SIX [Date] 6/23/99 [Amount of Bribe] $400. "Mr. Spinale stated that Cashin did

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[90] See, for example, CX 1, or CX 17, which are but two of the many places in the Complainant's exhibits where the same pages from the indictment are repeated.

four inspections at his place of business on June 23, 1999.[91] He identified Inspection Certificate K 767363-5, dated June 23, 1999, as reflected in RX 6A, CX 6 -5, as the same inspection listed in the sixth count of the indictment and pertaining to the load described in that inspection certificate. Tr. V 230. Mr. Spinale confirmed that all of the exhibits within RX 6, that is A through F, pertained to that load and the Court finds that those exhibits show that to be the case. Tr. V 230. That load, he noted was outside of the acceptable limits by at least 35%. Mr. Spinale stated that there was an allowance for the problems with this load of $4,800 or $3 per box. Thus, Tray-Wrap paid 70% of the original invoice price. Tr. V 236. The end result was that, after the allowance, Tray-Wrap paid Pacific Tomato Growers $12,560 for the load.[92] Tr. V238. Mr. Spinale acknowledged that he gave Cashin $100 for the inspection reflected in RX 6 A. Tr. V 240. However, Mr. Spinale specifically denied that he discussed with Cashin how he wanted the inspection to read, nor did he ask him to alter the inspection, nor did he ask him to falsify his inspection, nor did he ask Cashin to write down anything that was not in fact present in the inspection. Tr. V 242. Viewing Mr. Spinale while he responded to those questions, the Court finds that Mr. Spinale was truthful in these responses and that the exhibits in RX 6 support his testimony as well.

Mr. Spinale was then asked about RX 47 A through S as well as RX 48 A through D. Tr. V 242, 243. Mr. Spinale then identified RX 47 as involving a complaint filed on behalf of Pacific Tomato by the

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[91]The USDA attempted to shutter the Court's consideration of the three other inspections performed by Cashin on the same date as CX 6, June 23, 1999. These other three inspections, as reflected in RX 7 M, RX 8 C, and RX 9 C, were part of the criminal indictment but were not included in the administrative complaint because PACA does not have jurisdiction over trucking companies. Tr. II 26. The Court overruled USDA's objection, noting that the documents were relevant to appreciating the full context of the charges brought against the Respondents. That USDA sought to have these excluded only served to highlight the fact that each inspection was proven, on the record evidence, as accurately representing the condition of the produce. *See* testimony of Harris Cutler *infra.*

[92]As discussed herein, the shipper never filed a complaint against Tray-Wrap concerning this load,

Florida Fruit and Vegetable Association. Tr. V 244. From Mr. Spinale's perspective this was all part of the encouragement by USDA for growers to file claims as a consequence of the Forbidden Fruit operation. Tr. V 245. Yet, as Mr. Spinale observed, the Florida Fruit and Vegetable Association complaint, though written in March 2000, did not include the June 23, 1999 inspection reflected in CX 6. Tr. V 247-248. Further, as highlighted by Mr. Spinale, the entire Florida Fruit and Vegetable Association complaint against Tray-Wrap was dismissed, as verified by RX 48 A, which is a letter written by the USDA, dated May 13, 2003.

Next, Mr. Spinale was directed to RX 7, A through W. Mr. Spinale identified RX 7A as the cover of the envelope used by Mazie Faraci for G & T and in which envelope she inserts the shipment papers related to the information on the cover. Tr. V 254- 255. The exhibits within RX 7 all relate to the same railcar, SPFE457290, and this information also appears on the cover sheet of the envelope. Tr. V 257- 259. RX 7 A. The same records of G & T reflect that the shipper was Gold Ribbon Potato Company and that 1240 100 lb sacks of small white potatoes were involved and that they were shipped on June 2, 1999, arrived on June 22nd and were unloaded the next day. Tr. V 259. Mr. Spinale stated that in 1999 it took railcars coming from California about eight or nine days to make their journey to New York. Obviously, this meant that these potatoes were quite late in arriving. When they did arrive Mr. Spinale called for an inspection and this is reflected in RX 7M, which bears inspection certificate number K 767365-0, and is dated June 23, 1999. Tr. V 260. Cashin was the inspector for this load. Tr. V 260, RX 7 M. The inspection notes that the "applicant states originally unloaded from SPFE457290." RX 7M. Mr. Spinale stated that the inspection was for condition only, not grade. He noted that the potatoes were 20 percent out of condition, that is the potatoes failed to meet grade by at least 20 %. Tr. V 262. Next Mr. Spinale identified RX 7 N, as Inspection Certificate number K 767704-0, which is also dated June 23, 1999, and which certificate bears both Cashin's signature and that of USDA's Marianne Stranch. The certificate notes that it is a "corrected" certificate, and that it supercedes inspection certificate number K 767365-0. It also states that the applicant stated the

potatoes were originally unloaded from SPFE457290. Mr. Spinale stated that the second certificate was issued, on the same day, because Cashin listed Chain Trucking on the first certificate, not G & T Packing as it should have been listed. Tr. V 266. Mr. Spinale then stated that, per RX 7 T, the potatoes were invoiced for $3 a sack. Tr. V 269. Mr. Spinale then identified RX 7 - O as a "Corrected Memo" from Ball Brokerage, indicating that there was a settlement pertaining to this load at $1 per sack, plus payment by G & T for the freight. Tr. V 270. Mr. Spinale, upon examining the other exhibits within Respondents' RX 7, noted that there was a railroad claim filed on Gold Ribbon Potato's behalf and that the potato company was paid $2481 in connection with that claim, with the result being that it was paid in full for the potatoes. Tr. V 271, RX 7- I.

When Mr. Spinale's testimony resumed the following day, he stated that a shipper by the name of Gonzalez began a reparation action against Tray-Wrap, but that it later withdrew the claim. Tr. VI 78.[93] This occurred because PACA *awarded Gonzalez money* but Tray-Wrap took the matter to court where it was disclosed that Tray-Wrap *never* purchased tomatoes from them, causing the matter to be withdrawn. Tr. VI 78. Based on the evidence in this record, a detached observer, with the Gonzalez matter as an example, could conclude that the remedy for the excesses of the corrupt USDA inspectors also brought about excesses in terms of some of the reparations USDA allowed.

The direct examination of Mr. Spinale then returned to June 23, 1999 and the four inspections Cashin performed at Respondents' place of business at that time. Tr.VI 79, RX 7, A through W. Mr. Spinale stated that the inspection reflected in RX 6 A, RX 8 C and RX 9 C were also inspections performed by Cashin on that date, June 23, 1999, and the exhibits confirm this to be the case. Tr. VI 81. At that date Mr. Spinale directed Cashin to the tomato inspection first, as he believed that was the easiest for him to perform. RX 6 A. Tr. VI 82 -83. From there Cashin went on to the potato inspections. Cashin, according to Mr. Spinale, came over to him and told him the potatoes

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[93]For continuity, this decision continues to discuss Mr. Spinale's testimony. This testimony resumed at Tr. VI at page 76, which represented the last day of the hearing.

were running at 50 to 60 percent problems. However Mr. Spinale disagreed with that assessment and told him not to write down such numbers. Cashin then asked Mr. Spinale to tell him what numbers to put down in his inspection and Mr. Spinale obliged, dictating the amounts for Cashin's inspections. Tr. VI 84. Mr. Spinale stated that he had concluded that Cashin was then incapable of writing a fair inspection and further that his dictated amounts were consistent with the true condition of the produce. Tr. VI 84. Counsel for USDA stipulated that RX 9 C and 9 D refer to the same inspection, both dealing with June 23, 1999 inspections. Tr. VI 94. Though repetitive, because it is important, it needs to be noted again that the USDA, though Cashin was available, did not present him for *any* rebuttal testimony. Accordingly, in addition to the Court's conclusion that Mr. Spinale testified credibly on these matters, it is also noted that there is *no* contradictory evidence in the record as to these events. Mr. Spinale described his payments to Cashin as soft extortion. He believed he had no choice but to pay Cashin or he wouldn't get a fair, fast or accurate inspection. Tr. VI 98 As the inspections involved produce, obviously it was important to have prompt inspections. The four inspections accounted for the $400 paid by Mr. Spinale, as it was $100 per inspection.

Mr. Spinale then identified RX 10 B, pertaining to inspection certificate K 768741-1, issued July 15, 1999. He then identified RX 10 H and 10 I, as inspection reports, K 662108-0 and 662107-2, done in Elba, New York on July 21, 1999, for "Markey's Produce," which is formally known as Markey's Wholesale. Mr. Spinale came into possession of these inspection reports from Harris Cutler when he inquired if Mr. Cutler had other potatoes shipped around the same date as the inspections he had ordered for G & T. Tr. VI 101-102. Next Mr. Spinale was shown RX 44 as an article that was placed in a newspaper. The article related that a USDA official suggested that shippers review their records for downward grades[94] of produce for

[94]This is another example demonstrating that the original thrust of the USDA action was directed towards those wholesalers who, acting with corrupt inspectors, engineered inspection certificates which falsely represented the condition of the produce inspected
(continued...)

inspections performed by the indicted inspectors and determine if the same lots had such problems noted when shipped to locations other than Hunts Point. Tr. VI 104. Mr. Spinale saw this suggestion by USDA as a good idea for him to apply as well and that was the idea that brought about the introduction of the Markey inspection certificates. The Court observes that Mr. Spinale's recognition of the USDA suggestion – that shippers look to other shipping destinations to see if similar problems were noted for the same lots – is not the conduct of a guilty man. Rather, the Court notes that such conduct is completely consistent with the conduct of a man innocent of the claim that he acted to have produce downgraded from its true condition. These inspections, as evidenced by RX 10 H and 10 I, which had nothing to do with the Respondents operations and were not conducted at Hunts Point, revealed 34% defects in one and 44% defects in the other. Further, they involved the same product and same shipper as the Spinale certificates.(i.e., Agri Empire's Jim Dandys) and were shipped around the same time. Tr. VI 106. Thus, this is another aspect distinguishing this case from that of *Koam*.

Next, Mr. Spinale was shown RX 11 B, involving inspection certificate K769382-3, issued 7/26/99 at G & T by Cashin and RX 12 B, involving inspection certificate K 769381-5, also issued 7/26/99 at G & T and also done by Cashin. Tr. VI 107-109. Both inspections were done at the same time, one right after the other, and both pertained to potatoes from Agri-Empire. Tr. VI 109. Mr. Spinale stated that he originally requested the inspections on a Friday but that no inspector was available until the following Monday. At that time Cashin appeared but Mr.Spinale told him the product was not available to inspect. Tr. VI 112. However, Spinale told Cashin this because he believed that Cashin was no longer capable of writing an accurate inspection. Tr. VI 113. He was hoping Cashin would go away and another inspector would arrive to do the inspection. Unfortunately, it was Cashin who appeared later and at that time he

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(...continued)

as worse than its true condition. Faced with the overwhelming evidence that no such false downward evaluation occurred in any of the instances cited in this administrative complaint against Mr. Spinale, USDA has scrambled to invent other supposed "benefits" the Respondents received.

did the inspection. Tr. VI 114. Mr. Spinale stated that he probably gave Cashin $200 at that time because there were two inspections involved. Tr. VI 114. Again, Mr. Spinale specifically denied that he asked Cashin to falsify or alter the inspections. Tr. VI 114. Mr. Spinale explained that if a load arrives and is far out of grade he can refuse them to the shipper or to the railroad and in this instance he refused them to the railroad. Tr. VI 115. Once again, it is noted by the Court that Cashin was not recalled to rebut Mr. Spinale's credible testimony on these points. From an evidentiary standpoint, as the Court found Mr. Spinale to be credible, this is significant.

Mr. Spinale was then shown RX 11 B, which he stated reflected that it was inspected on July 26, 1999 in a railcar and RX 11A, which also indicated a railcar was involved and that both RX 11 A and 11 B involved the same railcar, BNFE 18703. Tr. VI 117. The loads involved with these exhibits were from Agri Empire. Tr. VI 119. Mr. Spinale recalled that all the potatoes out of California that year were of very poor quality. The Court again notes that there is *no* evidence in this record which contradicts that assertion and that Mr. Spinale was not the only witness asserting this.

Next, Mr. Spinale was directed to RX 13 C, (CX 9 -16), and inspection certificate number K 770380-4, which involved another inspection performed by Cashin, done on August 13, 1999 and involving a load of potatoes in a railcar. Tr. VI 120. Mr. Spinale stated that RX 13 B, inspection certificate K 770182-4, related to the same railcar, as both had same railcar number. Tr. VI 126-127. The record confirms that the same railcar, number BNSF 799582, did pertain to these two inspection certificates. Thus Mr. Spinale agreed that he had the same load inspected twice, the first time on August 9, 1999 and the second time on August 13, 1999. His explanation for this was that as this was August freezing of potatoes would not be easy to accomplish and, to protect himself and the shipper, he requested the second inspection. Tr. VI 124. As this was a "price after sale" arrangement, he did not have to request an inspection but still felt it would be better to do so and in that way he could help out the shipper. Tr.VI 124, 125. This was so because when potatoes become frozen the fault for that occurrence lies with the railroad. Having two inspections would help verify that was what happened.

This was the single count to which Mr. Spinale pled guilty. He explained that he pled guilty to that one because it was "price after sale" and because no other companies were involved. Tr. VI 125. Mr. Spinale also identified RX 13 CC as involving the same railcar. Tr. VI 126, He also identified a mistake in that it listed the potatoes as 100 lb sacks but they should have been listed as 50 lb sacks since 2400 100 lb bags could not fit in a railcar. Tr. VI 127. Mr. Spinale confirmed that the shipper did file a rail claim on this shipment. Tr. VI 128. Again, at the risk of being repetitive, but noting that this was the single count to which Mr. Spinale pled guilty, the Court observes once again that USDA Counsel elected once again *not* to call Mr. Cashin as a rebuttal witness. Tr. VI 129. The Court signed his subpoena at that time so that he could depart. *See also* Tr. VI at 141.

Mr. Spinale then was asked about RX 40 A and he confirmed that it was an inspection performed at his place of business and that inspection certificate K 234074-3 was the certificate associated with that inspection, which was performed on March 27, 1996. The inspection results indicated "U.S. Number 1" and though he admitted normally he would not seek an inspection under such circumstances, he explained that he had been having problems with the USDA inspectors from that area and he had been getting unjustified rejections on these types of potatoes from the supermarket that was receiving them, so he thought he would request an inspection on them in order to stop having them sent back without cause. Tr. VI 132.

Mr. Harris Cutler was called as witness for the Respondents. Mr. Cutler is the President of Philip G. Ball, Company ("Ball Brokerage") of Clarks Summit, Pennsylvania. Tr. IV[95] 5. His company is a brokerage for fresh fruits and vegetables. One of the primary products it deals with is potatoes. Tr. IV 6. He has been in the produce business for 32 years. It is a family business, which began in 1944. As a broker, Cutler makes contracts, working on behalf of farmers, agricultural cooperatives and packing facilities, helping those groups with the marketing of their product. Tr. IV 6-7. His commission is

[95]Transcript references to the fourth day of the hearing, October 28, 2004, are designated as "IV," followed by the page number.

based on the number of packages he sells. The Produce Reporter Company, which issues the Blue Book, gives Mr. Cutler's company a very good rating. Tr. IV 8. Mr. Cutler deals with a variety of shippers across the United States. Tr. IV 8. The receivers he deals with are wholesalers, re-packers, processors, and chain stores. Tr. IV 9.

Mr. Cutler, who has known Mr. Spinale since 1978, stated that Mr. Spinale's reputation in the potato business is that of an expert, a very hardworking man, with a reputation for fairness and as one who is extremely careful about what he sends his customers. Tr. IV 10. Mr. Cutler added that he knows personally of Mr. Spinale's reputation for fairness and related that he knows that Mr. Spinale has such a reputation with most of the shippers, and other brokers with whom he trades. Tr. IV 10. Mr. Cutler also stated that he believes that Mr. Spinale's rating in the Blue and Red books is also very good and that these books serve as a means for farmers to determine which merchants are reputable businessmen. Tr. IV 12. Mr. Cutler made it clear that his company does not need to do business with G & T. Thus, his testimony is not biased. Rather, he expressed that his company does business with Mr. Spinale because he has found him to be an honest and honorable person. Tr. IV 18. The Court finds that Mr. Cutler's appearance, as both a reputation witness and as one testifying as to pertinent facts in this case, in itself is a significant statement about the character of Mr. Spinale.

Mr. Cutler stated that in his 32 years of experience with G & T, no shipper ever had a problem with G & T. Tr. IV 19-20. He expressed that there were only a couple of instances where shippers raised questions about G & T, noting that Agri-Empire and D. M. Camp filed actions against Spinale once the USDA announced that anyone who lost money in connection with the dishonest Hunts Point inspectors could get their money back. Agri-Empire, seeing this notice, filed an action against Spinale and D. M. Camp did the same thing.. Mr. Cutler was involved because he was the broker for these transactions. He added that D. M. Camp dropped their claim, after speaking to him about the honesty of Mr. Spinale. Tr. IV 20, 22 - 23. On the basis of his long experience with G & T, Mr. Cutler also asserted that when G & T asks for an allowance, such a claim is consistent with the

condition of the produce at other locations where the same product has been sent. That is, one does not find G & T having a problem with a load of produce, while others who receive shipments from the same farm have no problems with it. Tr. IV 24.

Respondents' counsel then directed Mr. Cutler to RX 7 A through 7 W, starting with RX-7 S, a shipping ticket from Ball Brokerage. This ticket is created by Ball Brokerage once a shipment is loaded and sealed for delivery by truck or railcar. Tr. 28. Ball Brokerage, acting as the broker sells the produce from the shipper, in this case Gold Ribbon Potato Company, to the buyer, here G & T. The ticket was for a railcar of potatoes: 1,240 one hundred pound bags, B size, FOB-GGD, California, with "GGD" standing for "grade guaranteed to destination." Tr. IV 28, 30. FOB, "free on board," means that the in-transit risks would be assigned to the buyer, *not the seller*, unless the ticket said "grade guaranteed to destination," which this ticket has, i.e. it is GGD. In short, if anything went wrong in the shipping process, the burden would be on the shipper to recover any damages. Tr. 29. The railcar's number, as identified on the shipping ticket, was SPFE 457290. Tr. IV 30, RX 7 S. The product stays in the car until it reaches its destination. i.e. the produce is not moved from one railcar or truck to another. Tr. IV 30. Mr. Cutler was then asked about RX 7 T. He explained that it is an invoice from Gold Ribbon Potato Company and it showed the same railcar number – SPFE 457290. The shipping dates, and the amount of potatoes, match between the two exhibits, 7 S and 7 T. Tr. IV 31. Next, Mr. Cutler was asked about RX 7 U, a "Notice of Complaint" involving the same shipment. Tr. IV 32. He noted that on that date, June 23, 1999, his office received information concerning problems with the load. These included temperatures in the railcar between 57 and 70 degrees, soft-rot between 2 to 17 percent, and other defects that totaled 24 percent. Tr. IV 32 RX 7 U. He explained that the words "Action taken" on the document meant that G & T received the damaged potatoes and would try to get the best sale price it could. Tr. IV 33. Along with the Notice of Complaint, Ball would have received a copy of the inspection report, and the fact of such an inspection was noted in RX 7 U. When referred to RX 7 M, the USDA inspection certificate, he affirmed it related to the same load, and pointed out that the same load number, SPFE 457290, appears on the USDA inspection certificate.

Tr. IV 33-34. The inspection certificate bears a consistent date as well, June 23, 1999. It also shows the temperatures in the railcar at between 57 and 70 degrees (Fahrenheit). Tr. IV 33-34. Mr. Cutler stated that he received that inspection certificate from Mr. Spinale. Following that, he sent the notice of complaint to Gold Ribbon. Tr. IV 34.

Mr. Cutler identified the company listed on RX 7 H, "The Traffic Bureau," as his company. Tr. IV 39. The Traffic Bureau files railroad claims on shipments that are damaged in transit by the railroad. Tr. 39. Mr. Cutler noted that RX 7 M refers to 430 sacks, but stated there were actually 1240 sacks in the car. Tr. IV 39 - 40. Mr.Cutler, using the Traffic Bureau, was able to secure a satisfactory settlement from the railroad to satisfy Gold Ribbon's invoice. Tr. IV 40.

When Mr. Cutler was directed to RX 7, D, E, F, and G, he identified them as mimeographed copies of the temperature control tape that evidenced that the cooling for the railcar did not function properly. Tr. IV 41. The temperature tapes reveal that the load started out at 55 degrees, on June 2, 1999. He then noted that the temp dipped to 45 degrees by the first day. RX 7 D, Tr. IV 42. By day two, the temperature had shot up to 90 degrees. The Court finds that the exhibit, RX 7 D, confirms Cutler's statement regarding the temperature and that the same exhibit shows the same railroad car number as SPFE 457290. Mr. Cutler stated that the railroad admitted it was the railroad's problem, adding that any time potatoes are exposed to such temperature swings, from 40 to 90 degrees, all kinds of bad things would happen to them, which were reflected on the inspection of the 430 bags, showing excess decay. Tr. IV 47 Exhibit RX 7 S, the shipping ticket from Ball Brokerage, shows the potatoes were shipped on June 2, 1999. The shipment arrived on or about June 23. Tr. IV 49. RX 7 U. Typically, a load should make its journey from California in about 12 days, so this shipment was late as well. Tr. IV 49. RX 7 O is a "corrected memo" that re-confirms G & T's agreement with Gold Ribbon that G & T would be paying $1 for every 100 lb sack, instead of the original price of $3 per sack. Tr. IV 50. Cutler added that, as per RX 7 O, the claim rights against the railroad would remain with Gold Ribbon. The Traffic Bureau subsequently filed that claim against the railroad. Tr. IV 50. Exhibit RX 7 I, is the

railroad claim statement that the Traffic Bureau sent to Gold Ribbon, along with a check, derived from funds from the railroad, for $2481.00. That amount made Gold Ribbon whole, as the $1 per sack from G & T and the check amount of $2841.00 from the compensation received from the railroad totaled to the $3 per bag that originally it would have received, had the railroad problems not occurred. Tr. IV 50, RX 7 O. Mr. Cutler was then asked about RX 7 K, which he identified as a check from the Norfolk Southern Railway Company, in the amount of $3308. Tr. IV 51- 52. He confirmed that Gold Ribbon received the full payment. The extra amount in that check included The Traffic Bureau's fee. Tr. IV 52. Thus, the record evidence, not to mention the associated credible testimony of Mr. Spinale and Mr. Cutler, indisputably shows that the inspection reflected in RX 7 M accurately reflected the poor condition of the potatoes inspected by the USDA. Although this inspection was not part of the administrative complaint, it was part of the criminal indictment of Mr. Spinale. It is clearly relevant, as it further demonstrates that Mr. Spinale, while he felt compelled to pay Cashin's personal tariff, never acted to influence the inspection of produce to have it reflect anything other than its true condition.

Mr. Cutler was then directed to RX 8, A through N. RX 8 G is another Ball Brokerage Shipping ticket, indicating the shipment listed therein was shipped. Ball was the broker for the shipment. Tr. IV 53 - 54. It also was a railcar, number UPFE468012. The produce, potatoes, were shipped by Ball Brokerage from D. M. Camp to M & M Farms in Goshen, NY. Mr. Cutler, referring to that exhibit stated that on June 1, 1999 D. M. Camp had a car it wanted to ship of white and red potatoes. The load consisted of 499 100 lb sacks of red potatoes at $8 per sack, 386 50 lb sacks of red potatoes at $4 per sack, and 541 sacks of white B size potatoes at $5 per sack Tr. IV 55. Cutler stated that the shipment should have a temperature range between 38 and 42 degrees. Tr. IV 57. He noted that all the exhibits in RX 8 refer to the same shipment, that the railcar number, UPFE468012, was also the same and that the shipment date, June 1, 1999, was also consistent. Tr. IV 58. Cutler identified RX 8 E as the Notice of Complaint generated by his company, which indicated that the car arrived with pulp temperatures of the potatoes between 58 to 62 degrees. Two lots were inspected, one of 215 sacks showing an

average of 6 percent soft-rot and a lot of 215 sacks with an average of 5 percent soft rot. The potatoes also had enlarged, raised and discolored "lenticels" (which are potato air holes or pores), which indicated high temperatures in transit. Tr. IV 59. Cutler then noted that RX 8 C is the inspection for this load. RX 8 C, which in copying did not include the name of the consignee, reflects that it is Chain Trucking. Tr. IV 73. That RX 8 C is the inspection for this load is also reflected in Ball's Notice of Complaint as well, which bears the same inspection certificate number as the inspection. Tr. IV 61. The notice of complaint was sent to the shipper, D.M. Camp. Cutler summarized that the car arrived with problems, as reflected in exhibit RX 8 F, the "Trouble Car Sheet," generated by Ball. As reflected by RX 8 F, Mr. Cutler said it reflected concern on his part because the railcar had stopped moving. Tr. IV 63. The upshot of this was that the railcar took 22 days to arrive at its destination. Tr. IV 65. Normally the time would be between ten to twelve days. Tr. IV 65 - 66. Exhibit RX 8 H, a Ball Brokerage Corrected Memo relating to this railcar, reflects that on August 24, 1999, there was a settlement with D.H. Camp and G & T, which provided there would be an allowance of $2 per bag on the 100 lb sacks, $1 per bag on the 50 lb bags, and $2 per bag on the whites. Tr. IV 66. It also reflects that the Traffic Bureau would file a claim for D. M. Camp. Ultimately, Cutler's company did collect $1397.29 and sent it to D. M. Camp. Tr. IV 67. The railroad's actual check was for $1863.05, the higher amount again reflecting the inclusion of the Traffic Bureau's fee. Tr. IV 68. RX 8 K. Cutler affirmed the obvious: railroads don't pay claims unless they do something wrong, such as having an undue delay in the time to transport the produce or they have temperature problems with the railcar, and the person making the claim can establish such occurrence. Tr. IV 69. Here, both of those problems obtained. It has also been Cutler's experience that the railroads conduct their own investigations before they pay a claim and he estimated that the railroads inspect 95% of the railcars that arrive in New York. Tr. IV 69. In fact, he asserted that in cases where the produce was not damaged, the railroads have challenged such non-meritorious claims by producing their own inspection results. Tr. IV 70. Thus, as with the RX 7 exhibits, the RX 8 exhibits conclusively establish that the

inspection certificate accurately reflected the poor condition of the potatoes that were inspected. By now, it should be obvious from the foregoing evidence of record that Mr. Spinale was not influencing the accuracy of any of the USDA inspections. While paying off the corrupt Cashin to perform a timely, fair and accurate inspection was not, in the perfect vision that accompanies hindsight, a display of good judgment, when viewed in the full context of the circumstances, which include Mr. Spinale's penance through his single criminal plea, those payments hardly form cause for further retribution by having the licenses of the Respondents revoked.

Mr. Cutler was then directed to RX 9 A through 9 M, relating to railcar UPFE12894. Looking at RX 9 H, which is another Ball Brokerage Shipping Ticket, Cutler affirmed that it involved carload UPFE 12894 and that it was shipped on May 29, 1999. The seller was D.M. Camp. Tr. IV 73. The load was to travel from Bakersfield, California to Goshen, New York. It consisted of 1,225 100 lb sacks of white "B" potatoes at $5 per sack, FOB, GGD (grade guaranteed to destination). Tr. IV 74. Cutler affirmed that the shipping ticket, reflecting the same invoice number, matched with the invoice from D.M. Camp in RX 9 E. Upon examining the group of pages within RX 9, Cutler summarized that they show that temperatures were between 57 to 78 degrees and that the refrigeration unit would not operate. This caused various problems with the potatoes: decay, soft-rot, discoloration and lenticels. Tr. IV 75 - 76. These temperature problems demonstrated that there was a railroad problem. Tr. IV 76. RX 9 C, a copy of the applicable inspection certificate, had the same copying problem, with some information being cut off. Counsel for Respondent showed to the satisfaction of USDA counsel that the more complete copy of the same document reflected Chain Trucking as the applicant. Tr. IV 77. Cutler used the information on that inspection certificate for his documents, as reflected in RX 9 I and RX 9 J, its Notice of Complaint. Tr. IV 78. Cutler derived the information concerning the defective refrigeration from RX 9 B, which is an additional inspection report relating to the same load. Tr. IV 79. Cutler then sent copies of the inspection reports and his notice of complaint to D.M. Camp. Tr. IV 79. RX 9 G is another trouble car sheet, a copy of which was sent to the railroad. Cutler informed that RX 8 F and 8 G show that one railcar was sent on the May 31st and

the other on June 1st. Tr. IV 80. Eventually, for efficiency purposes, the railroad connected up the two cars in the trip. Tr. IV 82-83. RX 9 K, the "corrected memo" reflects the agreement between Camp and G & T. Tr. IV 84. Under the agreement, G & T would pay $1 (one dollar) per sack, instead of the original invoice price, but that all claim rights would go to D. M. Camp, with the Traffic Bureau filing the claim on its behalf. Tr. IV 84. The claim was successful: D.M. Camp was paid the full amount of its invoice. This is reflected on RX 9 L. Tr. IV 84-85. Thus, as with each of the foregoing inspections, the evidence demonstrates that the USDA inspections associated with this load of potatoes, RX 9 B, 9 C, and 9 D, accurately reflected the poor condition of this produce.

Next, RX 10, A through I, were discussed with witness Cutler. As with the other exhibits discussed by Mr. Cutler, he identified the shipping ticket from Ball Brokerage, which ticket lists the railcar number. In this case the car was BNFE18602. Tr IV 86, RX 10 E. Cutler agreed that it reflects July 2, 1999 as the date the load was to be shipped to G & T. The load consisted of 2400 50 lb. sacks of size A white potatoes at $3 per sack, FOB - GGD. Cutler identified RX 10 C as the invoice for that shipment. Tr. IV 87. Exhibit RX 10 F is another Notice of Complaint, just as identified in RX 8 and RX 9, except that it relates to railcar BNFE18602. Tr. IV 88. It notes 16 percent enlarged, raised and discolored lenticels, black spots and various other problems with the load. RX 10 F. Tr. IV 89. This information was derived from exhibit RX 10 B, which is the applicable USDA inspection certificate for that load. Cutler also confirmed and the exhibits themselves show that RX 10 B is the same as Complainant's Exhibit 7, at page 5. Tr. IV 89. Both bear the same inspection certificate number: K 768741-1. Tr. IV 90. Thus, RX 10 B is the same inspection certificate as CX 7 - 5. So too, RX 10 F, the Notice of Complaint, drew upon the information contained in that inspection certificate. Tr. IV 90. Exhibit RX 10 G is Ball's corrected memo, created on September 1, 1999, and reflecting that the price was settled at $1.05 per sack, FOB. Tr. IV 88. Cutler stated that the allowance was granted in this instance because the potatoes were "terrible." Tr. IV 91. This was based on the USDA certificate but

Cutler added that he also knew that Agri-Empire had a very bad crop of potatoes. Tr. IV 91. Thus, based on the credible testimony of Mr. Cutler and the Respondents' exhibits associated with RX 7, RX 8 and RX 9, as well as the credible testimony of Mr. Spinale, the Court finds that the June 23, 1999 USDA inspections associated with each of those loads of potatoes accurately reflected the true condition of the produce.

RX 10 H and RX 10 I, reflect Cutler's office file copies of the inspection certificates. It pertains to a railcar load of potatoes shipped to Markey's Wholesale in Elba, New York. These were shipped to Markey's around the same time as the load that went to G & T. Tr. IV 91. RX 10 H. As with the load to G & T, these involved 50 lb sacks, size "A," shipped around the same day, and showing, among similar problems, total defects of 49 percent. Tr. IV 92. Cutler's company was the broker for this shipment. RX 10 H reflects, through a sticker that was added to the exhibit by Cutler, that the produce was shipped on July 3, 1999. By comparison, G & T's load was shipped on July 2, 1999, only a day earlier. Tr. IV 92. Cutler then spoke to RX 10 I, which also had a sticker added to it by Cutler, indicating again a shipment date of July 2, 1999. Cutler indicated this was additional evidence that this crop of potatoes from Agri-Empire had tremendous problems. Tr. IV 94. Thus, Cutler's company was the broker regarding both 10 H and 10 I. In this instance the problem was not traceable to railcar temperature problems, but, based on his long experience, Cutler's educated guess was that these problem potatoes had been left too long in the field before harvesting. Tr. IV 93. As with the others, an allowance was also granted to the receiver of the load. Tr. IV 94. Cutler testified that other loads from this same bad crop were sent to Ohio and the receiver there also received an allowance. The potatoes were so poor, Cutler stated, that the receivers paid freight and "maybe a few cents" for the sacks. This amounted to a net cost of between 25 cents to 50 cents per 50 lb bag. Tr. IV 94. The shipper, Cutler stated, acknowledged there was a problem with these potatoes. Tr. IV 94 - 95. In fact, Cutler said the shipper begged him to get people to accept the loads at whatever Cutler could fetch for it. Tr. IV 95. Significantly, G & T paid $1.75 FOB per bag, which Cutler characterized as "a big return for these [poor] potatoes." Tr. IV 96. By contrast, Markey paid much less per bag than G & T for these

potatoes. Tr. IV 96. The price paid for the Ohio delivery of these potatoes was similar to that which G & T paid. Tr. IV 97. Although the Respondents had already solidly established the accuracy of the USDA inspections involved in these instances, the Markey evidence only serves to augment that conclusion.

Next witness Cutler was directed to RX 11, A through Q. RX 11 N is another Ball brokerage shipping ticket, with the buyer G & T and the seller/shipper Agri-Empire. Tr. IV 97, 100. In this instance the produce was shipped on July 13, 1999 in railcar number BNFE18703. Tr. IV 98. RX 11 N. All of the exhibits within the RX 11 group relate to the same railcar number. Tr. IV 108. Mr. Cutler noted the unusual inclusion of 'creamer' (i.e. very small) potatoes in the load, an item G& T does not typically handle. However Agri-Empire at that time, in July 1999, was desperate to move potatoes so that some return could be realized. Cutler also noted that the terms were atypical, because the potatoes were sent at "price [at] time of arrival." That arrangement is used when there is no market for potatoes because the market was saturated. Tr. IV 99-100. RX 11- O is another "Notice of Complaint" on the Ball letterhead. G & T had notified Ball of the many problems with this load, as reflected on that exhibit. Tr. IV 101.

As with the other notices of complaint, Ball used the USDA inspection certificate, as reflected in RX 11 B which is also identical to CX 8- 7, in preparing its document. Tr. IV 101- 103. Cutler then sent Ball's Notice of Complaint to Agri-Empire. Tr. IV 104. However, in this instance, as reflected in RX 11 P, G & T, as the consignee, refused delivery of the railcar because of the very poor condition of the potatoes. Tr. IV 104. The problems, however, were not attributable to the railroad; rather the potatoes were simply in poor condition from the outset. Tr. IV 112. As such the load failed the terms of the contract, as the problems far exceeded the allowable percentage of problems, which is 7 to 8 percent. Tr. IV 104, 105. When a load has problems to this degree, the shipper can only hope that the consignee will be willing to try to salvage it, obtaining whatever it can for it. Tr. IV 105. On this occasion, after the consignee was unable to find anyone willing to take the load, it implored Ball to see if G & T would try to salvage it. On August 9,

1999, G & T agreed to attempt to salvage the load. Tr. IV 107. RX 11 P. Cutler then described RX 11 Q, which is Ball's "Corrected Memo," bearing a date of September 2, 1999, as reflecting the settlement reached between G & T and Agri-Empire. Agri was pleased with the new agreed price because it covered its freight cost. Tr. IV 109. Mr. Cutler confirmed that at the same time as this poor load, and in the shipping period from July 2nd through September 13th, there was a "continuous stream of poor potatoes," from Agri-Empire, which were being rejected by receivers "across the United States." Tr. IV 109, 110. Accordingly, the Court finds that the evidence of record demonstrates that the inspection reflected in CX 8 - 7, (RX 11 B), accurately reflected the true condition of the produce inspected.

Mr. Cutler was then directed to RX 12 A through 12 U. Tr. IV 113. He agreed that RX 12 K is the Ball shipping ticket reflecting a July 13, 1999 shipment of 2400 50 lb bags of size "A" potatoes, which were priced at a time-of-arrival basis. G & T was sent a copy of the document the next day, July 14th, as reflected on the exhibit. Tr. IV 113, RX 12 K. Cutler confirmed that all of the exhibits within this group, RX 12 A through U, related to the same railcar, BNFE 18405. Tr. IV 114, 120. RX 12 L, another Ball Shipping Ticket pertaining to this load, and bearing the date of August 9, 1999, was sent to G & T and Agri-Empire. Cutler explained that, as with the RX 11 group of documents, this was another situation where the load had been refused; Agri-Empire had no place willing to take the potatoes, and it implored Ball to find someone to help them. As in the prior instance, G & T agreed to attempt to salvage the load, but with no guarantee, even as to whether it would be able to realize enough to cover the freight charge. Tr. IV 115. The Ball "Notice of Complaint" dated August 13, 1999, reflects that the load was originally rejected in July and that there was an inspection showing problems on the order of 30 percent. Tr. IV 117. RX 12 B, the USDA inspection for this load reflecting problems totaling 36 percent, was carried out on July 26, 1999. Tr. IV 119. The inspection reflects numerous problems, including lenticels, discoloration, black spots, sunken and chalky areas. Tr. IV 117- 118. A follow-up inspection was requested by G & T because the load had deteriorated further into decay, as reflected on USDA inspection certificate K 843307-0. Tr. IV 120.

RX 12 C. This occurred on August 13th. Tr. IV 119. RX 12 M is Ball's Notice of Complaint, reflecting the follow-up inspection. The end result was G & T agreed to pay the freight and 25 cents per bag, an amount which was satisfactory to Agri-Empire. Tr. IV 121. Ball's Traffic Bureau filed a complaint about the railcar, but was unsuccessful in the claim because there was no temperature tape in the railcar. The Court asked Cutler to explain the reason for different certificate numbers in RX 12 B and RX 12 M. Tr. IV 122-123. Cutler explained that RX 12 B refers to the initial inspection of July 26th, whereas RX 12 M, refers to the follow-up inspection of the same load, conducted on August 13th. Tr. IV 123. Thus, the Court concludes that the inspection certificate reflected in CX 8 - 6, which is identical to RX 12 B, was an accurate inspection of the produce for that load.

Last, Cutler was directed to RX 13 A through GG. Tr. IV 124. Asked about RX 13 CC, Cutler identified it as a Ball Shipping Ticket dated July 29, 1999 and sent to G & T. Tr. IV 125. It related to railcar BNSF 799582, shipped on July 26, 1999. The railcar was shipped to G & T without an order because Agri-Empire was awash in potatoes. Cutler asked G & T if they would take the load on a price-after-sale basis. Tr. IV 125-126. Thus, under such an arrangement, the price is not determined until the consignee, G & T in this case, actually sells the produce. Tr. IV 126. G & T agreed to take the car under this arrangement. Although the shipping ticket states that the car had 2400 100 lb sacks, Cutler explained that was a typographical error on the Ball ticket, as Agri-Empire only packs 50 lb sacks for this type of potato. Tr. IV 127. RX 13 DD, a Ball shipping ticket dated July 29, 1999 has a handwritten notation on the bottom of the page which reads: "No inspection taken for grade condition per Harris Cutler." Mr. Cutler, who stated that he did not write that notation but thought that it looked like Mazie Faraci's writing, explained that it meant that the railcar had very bad grade defects. His company was advised that the railcar was not going to

be inspected for grade defects. Tr. IV 128. RX 13 E[E][96] is another "Notice of Complaint" from Ball. It is based on a USDA inspection certificate, number K 770182- 4, dated August 9, 1999, and indicating that there was freezing affecting this load of potatoes. RX 13 B. Tr. IV 129. The Notice of Complaint reflects the extent of the freezing problem with the load, a problem attributable to the railroad. Tr. IV 131. Cutler also explained that the notation at the bottom of RX 13 DD was simply to protect the shipper's claim for recovery from the railroad, by noting that the railcar had freezing temperatures. Tr. IV 133. RX 13 D is the invoice from Agri-Empire, which was used to establish the market value of the potatoes in question at the time they were shipped. The invoice notes only the shipment date. Tr. IV 133. That is, when the invoice was created, it was already known there had been a freezing problem, but the railroad would need some basis for establishing the value of the load. Tr. IV 134. RX 13 C, USDA inspection certificate number K 770380- 4, was also identified by Cutler who noted that it involved the same railcar. Tr. IV 135. This inspection certificate also noted the freezing problems. The certificate also referenced inspection certificate K 770182- 4 of August 9, 1999. Cutler also agreed that RX 13C[ ][97] is the same as CX 9 at page 16. Tr. IV 135. Mr. Cutler then identified the railroad temperature tapes in connection with this railcar. RX 13 V, W, X, Y, Z and AA.[98]

The Court notes that this inspection is one of those the government claims was falsified. In fact, it involves the very important inspection

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[96]The Court observes that while the transcript reads that Respondents' Counsel asked about 13 E, it is obvious that the reference was to "13 EE" because 13 E is not a Notice of Complaint, but 13 EE is such a notice.

[97]Here again, the Court notes that the transcript reads Respondents' Counsel asking about whether RX 13 "CC" but obviously the reference was to RX 13 "C" as that is the same document as CX 9 at page 16. Further, Respondents' Counsel's next question *does* refer to RX 13 C. Tr. IV 136. Complainant's Counsel then stipulated to the identity of those documents. Tr. IV 137.

[98]As noted, the original temperature tape had to be used in order for Cutler to testify about it. Subsequently, per the Court's direction, Counsel for the Respondent made new copies of the original tape and the new copies were substituted and they now appear in the record as RX 13V through AA. Tr. IV 181.

for which Mr. Spinale pled guilty to the single count of bribery. Tr. IV 139. *Lead Counsel for Agriculture agreed that the load was frozen, but did not wish to withdraw the claim that the inspection was falsified.* Tr. IV 139.

Mr. Cutler went on to identify the temperature tapes associated with the exhibits listed next above and he noted that the temperature tapes related to railcar number BNSF 799582.[99] Tr. IV 140. At the hearing, he read the tape, noting a fluctuation from 66 degrees to a low of 30 degrees over a thirteen day period. Tr. IV 147. In contrast the temperature should have ranged from between 38 to 40 degrees. Tr. IV 148. In short, the tape itself confirms the accuracy of the USDA inspection certificate information that the potatoes had been frozen. Tr. IV 148-149. As with the other exhibits discussed by Mr. Cutler, the Traffic Bureau filed a claim. RX 13 GG. Tr. IV 149. Once the railroad received the results of the second inspection relating to this car, the inspection of August 13, 1999, the railroad then agreed to pay to settle the claim. Mr. Cutler noted that the railroad itself also inspected this railcar. Tr. IV 151. Cutler's letter of December 12, 2000 also reflects that Mr. Spinale advised that the railroad should carefully review the temperature tape. The upshot of this event, was that the railroad paid $3,250 for the claim and that, when added to the $1,200 that G & T paid for the potatoes, the total constituted a fair settlement overall. Tr. IV 152-153. Thus, consistent with Mr. Spinale's statement at his plea, the evidence shows and the Court finds that the inspection certificate accurately reflected the condition of the produce. Consequently, these exhibits also demonstrate that Mr. Spinale was paying a fee to Cashin, but not to work an inaccurate inspection of the produce.

During cross-examination, Counsel for USDA had Mr. Cutler acknowledge that the in-transit risk for the potatoes in RX 7 was on the shipper, Gold Ribbon. Tr. IV 158. Gold Ribbon was paid in full, between the amount Mr. Spinale paid and the amount the railroad

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[99]While initially there seemed to be a problem with these exhibits, because the temperature tape in question had a gap, this problem was eliminated because Counsel for Respondent produced the original temperature tape, which was somewhat unwieldy because of its approximate four foot length. Tr. IV 142.

paid. Tr. IV 159. Regarding RX 8, Mr. Cutler stated that the shipper also was paid in full, in part by G & T with the balance paid by the railroad claim. Tr. IV 160. Counsel's point is apparently to note that G & T did not end up paying the invoice price. In fact, this was expressly the point of Counsel for the USDA's questions - - that while the shipper was paid in full eventually, it was not paid in full by G & T. Tr. IV 162. Unfortunately, when USDA asked Mr. Cutler what he would have done, if he had known that Mr. Spinale was paying bribes, he received a resounding rebuff. Mr. Cutler testified with great earnestness and credibility that in *twenty years* of knowing Mr. Spinale he knew him *not* to be "cheat or a briber or whatever you're calling him here." Tr. IV 165.

The next witness for the Respondents was Edmund R. Esposito, who was formerly an inspector for USDA at Hunts Point Market. He worked at that job, which is formally titled "agricultural commodity grader," from July 1990 until October 1999 at Hunts Point. Tr. IV 183-184, 189. Mr. Esposito was one of the inspectors arrested during October 1999 in connection with "Operation Forbidden Fruit." Tr. IV 184. He was charged with RICO violations, bribery of a public official, and racketeering. Tr. IV 184. He pled guilty to some charges in March 2000 and other inspectors pled guilty at that time as well. Tr. IV 185. The other inspectors included Dave Ball, Paul Cutler, Glenn Jones, Mike Simous [ph], and Mike Stusiak [ph]. Tr. IV 185. Esposito ended up being sentenced to 24 months in prison and two years probation. Tr IV 187. Because of "good time" he actually served 21 months in prison. Tr. IV 186. As of the time of his testimony in this hearing he had completed his probation period. Tr. IV 186.

Esposito was trained on-the-job by none other than USDA inspector Bill Cashin. Tr. IV 190, 200. When Esposito began working for USDA, Lou Maniacci [ph] was the night supervisor. Around January or February of 1999 Glenn Jones became the night supervisor. As noted, Jones also was one of the USDA inspectors who was arrested. Tr. IV 192. Although inspections were to be carried out in the order received, that is, according to the date and time they were requested, Esposito stated that, for efficiency purposes, it often did not work out that way in practice. Tr. IV 194. While Esposito's supervisor, Officer in Charge, ("OIC") Mike Wells, wanted the

inspectors to do their inspections according to the time requested, Esposito maintained that the inspectors still did them as they wished and that the supervisors didn't push the point too much because "if they made us too mad, well, then we would slow down on inspections and get way behind." Tr. IV 195- 196. Mary Ann Stranch was the assistant to Mr. Wells during this time. Tr. IV 196. When Esposito started at Hunts Point there were about 17 to 18 USDA inspectors working at that location and about the same number worked there when his employment ended. Tr. IV 196-197.

In Mr. Esposito's opinion, there was a shortage of inspectors at Hunts Point. He based this on the fact that their inspections covered more than Hunts Point, as they included all five New York boroughs. His opinion was also based on the inspectors' delay in getting to assigned inspections. Esposito stated that "it might be two or three days before we'd even get to do an inspection for places." Tr. IV 197. Esposito stated that he was one of the most productive inspectors in that he was able to do from nine to thirteen inspections per day. Tr. IV 200. The time to conduct an inspection could vary from five minutes to an hour and a half. Tr. IV 200. Mr. Esposito also stated that his training was minimal, as he was trained for only a week before he was sent out to do inspections on his own. Tr. IV 200. He claimed that inspectors are supposed to go to market training school but that he never received that training until some four or five years after his employment began and only then because he insisted on it. Tr. IV 200. Esposito also stated that Cashin, during the time he was training him, went to some merchants' houses more than others. Tr. IV 202. He explained that at first this was due to bigger merchants having more requests for inspections than smaller houses but later on he learned "there were the houses that were ... a lot funner (*sic*) to go inspect for." Tr. IV 203. Mr. Esposito then related that, after some three or four weeks on the job, Cashin told him about merchants giving cash payments to inspectors for inspections. Tr. IV 203. Others told him of this arrangement too. Tr. IV 203. According to Esposito, he was told by these dishonest inspectors that "we're going to do inspections, we're going to make sure that they're out. We're going to make money. If they don't want to cooperate, then we turn

around and do what we have to do to convince them to pay." Tr. IV 204.

Mr. Esposito stated that Dan Arcery [ph] and Cashin were in charge of the group of dishonest inspectors. Tr. IV 206-207. According to Esposito, some in the group of dishonest inspectors were not indicted. Tr. IV 208. He asserted that something on the order of nine inspectors and thirteen wholesalers were indicted. Tr. IV 209. Esposito added that while former inspector Paul Cutler was one of the dishonest inspectors, he was not part of the "group" of dishonest inspectors, essentially because he was not well liked by the other inspectors. Tr. IV 210-211. Mr. Esposito knew Don Paradis [ph], a USDA employee who was in charge of the inspectors' division in Washington, D.C. Tr. IV 212. Esposito had heard from other inspectors that Paradis used to work at Hunts Point and that he was also taking cash payments from wholesalers. Tr. IV 212. The "group," as Esposito referred to the cabal of corrupt inspectors, would convene at Post and Taback's office in the market or at times in the USDA AMS lunch room at Hunts Point, in Row D. Tr. IV 213. At times, Esposito explained, one person from the group of dishonest inspectors would collect the money for the others. Later they would meet and divide up the money. Tr. IV 216. Some wholesalers preferred to make all their payments to a particular inspector, who would be the collector for the group. Tr. IV 216. The inspectors worked in concert, keeping track of their weekly inspections. Esposito, for example, would meet weekly with wholesaler Paul Steinberg and, effectively present the group's bill for the week. Then Esposito would distribute the shares to the "group." Tr. IV 217. USDA supervisor Glenn Jones was part of the group, as he would take care of inspection assignments and other details. In return the inspectors in the 'group' would each pay Jones $100 per week for his role. Tr. IV 218. Esposito stated that other inspectors collected money from other merchants and distributed it, naming Mike Simous [ph] as the inspector who collected from Fruitco, Elias Malibut [ph] as the inspector who collected from Rubin Brothers. For Post and Taback, Esposito stated that Stusiak [ph] and Cashin made the collections. Tr. IV 222. Esposito's legitimate salary from USDA was about $41,000 in 1998 and 1999. Tr. IV 223-224.

Esposito, like Cashman, admitted that he had some expensive habits to maintain. In his case, it was gambling, not women. Tr. IV 224. The amounts he would gamble varied from week to week but went as high as $30,000. Tr. IV 225. Having unusual expenses was not unusual among the dishonest inspectors. Esposito stated that Tommy Vincent, Dave Ball and Mike Simous [ph] were addicted to cocaine. Tr. IV 225. Cashin, he noted, was addicted to strippers, i.e. female "adult" entertainers. Tr. IV 225. While only an estimate, Esposito believed that somewhere between 30 to 50 percent of the merchants at Hunts Point paid inspectors. Tr. IV 227.

Mr. Esposito stated that he dealt with merchants who would not pay the inspectors by "screw[ing] them." Tr. IV 227-228. As an example he stated: ... if they had a load that was out of good delivery tolerances to where they could get an adjustment, I might make it in (sic) good so where they won't make nothing off of it. ...I would adjust the inspection. If they had an inspection that might fail good delivery, I might go in there and change - - you know, change the numbers and make sure that it passed a good delivery, and they would not get an adjustment on it. Or I would just change temperatures and make the inspection worthless. Tr. IV 228.

Mr. Esposito was not afraid that he would be exposed if a merchant asked for an appeal inspection because: "...the people coming down to do the appeal, most of the time, were people that were doing it like me and they would cover me." Tr. IV 229. In fact, as the Court noted, Esposito laughed and smiled when asked about the risk of an appeal inspection. Tr. IV 229. Esposito added that he also laughed because he recalled that Mr. Spinale used to call a lot of appeal inspections on him and that he also called a formal review on him. Tr. IV 230. He said he had a way of dealing with merchants that balked at paying or tried to pay him less than the standard amount. He would tell the merchant: "...no, you're going to pay me that much. And when they tried to give me what they wanted to give me, [i.e. less money than demanded], the next time I'd come down, I usually screwed them. Tr. IV 231. By "screwing them," Esposito meant making a bad load evaluated as "good." Tr. IV 231. When he would "screw" a merchant, the result was the merchant would get in line with

the inspectors' demands. Tr. IV 231. But, even then, the merchant would be effectively punished for not paying right up front because the inspector would not rewrite the original inspection. As Esposito put it: "...he [the merchant] would have to eat that one." Tr IV 231. Once a merchant got in line with the program, so to speak, Esposito stated that he would thereafter write up an accurate inspection "[f]rom there on out." Tr. IV 232. Esposito also stated that the inspectors would slow down their inspections whenever they felt someone "was messing" with them. This would cause the inspections to back up. In terms of the number of boxes inspectors were supposed to examine, Esposito stated they did not examine the one percent that were to be examined for an inspection. Instead they would examine about half that number. Tr. IV 234. This was their practice, whether the merchant was paying or not, because it allowed them to do more inspections and more inspections obviously meant more money. It also benefitted USDA because it increased the office's revenue, as there is a fee for each inspection. Tr. IV 235. Although the inspectors filled out a worksheet, they would simply record that they examined more boxes than they actually examined. Tr. IV 236.

In short, as expressed by Esposito, he felt like he was "God" and that he "wanted money for what I was doing and if you didn't give it to me, then I would do what I had to do to make sure you would ... by mess[ing] the inspections up that it would do you no good." Tr. IV 240- 241. Esposito stated that he tried to force the merchants to make cash payments and that the other inspectors worked the same way. As Esposito put it, it was "a system ... in place before [he] got there ..." Tr. IV 241- 242. Esposito also maintained that there were differences among the merchants who paid them. Some just paid although the inspectors did no favors for them, but there were others who paid and for whom favors were done. Tr. IV 244, 248. For the first group, they received the normal, fair inspection. Esposito stated that there were a lot of merchants who just paid to paid "to make sure they got a fair inspection." Tr. IV 248. If they didn't pay, those merchants would not receive a fair inspection. Others paid for "help," that is where a delivery was good but the merchant needed a delivery to appear to be in worse condition than it really was. Tr. IV 245. For those, Esposito would make the inspection reflect conditions which were worse than what really existed. Tr. IV 245. Such a "bump" in the numbers meant

an increase in the defects recorded of between 2 to 4 percentage points. Tr. IV 246. Significantly, Mr. Esposito stated he was careful not to increase the problems too much and make an unrealistic inspection. Tr. IV 246.

Regarding Mr. Spinale, Esposito affirmed that he knew him and that he did inspections at his places of business: G & T and Tray-Wrap. Tr. IV 249. Esposito stated Mr. Spinale was in the category of those merchants who paid and "just wanted to make sure he got a fair inspection." Tr. IV 250. Based on the Court's personal observation of Esposito's demeanor when testifying, the Court finds that Esposito was truthful in his characterization of the type of inspections performed for Mr. Spinale. That is to say, the Court accepts as credible Esposito's testimony that Mr. Spinale was paying only for a fair and accurate inspection. As with all the other witnesses who spoke to the subject, Esposito noted that Mr. Spinale knew his product. Tr. IV 250. As Esposito conceded, he learned from Mr. Spinale's expertise. Tr. IV 256. In fact, Esposito stated that he "learned a lot from [Mr. Spinale]." Tr. IV 250. One of the benefits of paying to get a timely inspection was that Esposito would go to Mr. Spinale's businesses after his normal work day was done and he was on overtime. This was the only way his superior, Wells, would allow an inspection to be done out of the order in which they were called. Tr IV 250. Specifically, Mr. Esposito denied that Mr. Spinale ever asked him to alter or to falsify an inspection. Tr. IV 251. Nor did he ever "downgrade" an inspection for Mr. Spinale, although he would give the merchant the "benefit of doubt on inspections." Tr. IV 251. Restated, although Mr. Spinale never asked him to do so, Esposito would rate an inspection that was borderline as being "out" of acceptable standards. Tr. IV 251. As noted, the Court finds these assertions of Esposito to be honest. He did this for a number of reasons. These included that Mr. Spinale paid, because he was a "nice guy," and because he finally stopped calling for appeals of his (Esposito's) inspections. Tr. IV 252. He related that, earlier, Mr. Spinale had appealed Esposito's inspection results "a lot" and even called for a formal review of him. Tr. IV 252. This occurred when Esposito first started and before Mr. Spinale started making cash payments to him. Tr. IV 253.

According to Esposito, the USDA office did not want inspectors failing inspected produce on account of grade.[100] He knew this because when he reported such a problem, his supervisors told him to keep running more samples. Tr. IV 261-262. The objective was, by running more samples, to have the inspection ultimately conclude that there was no failure on grade defects. Tr. IV 262. Also, to avoid this problem, inspectors would tell the merchant to just request a "condition inspection." Tr. IV 263. The upshot of this was that even if he found 8% grade defects, he would write it down as 5%. He would then be able to compensate for this underevaluation by increasing the problems regarding the "condition" defects with the produce. Tr. IV 264. For example, if he found 10% rot, he would list it as 13%. Tr. IV 265. Esposito also stated that there were times when the produce was in good condition and he would refuse to write an altered inspection and record that there were problems, because he was unwilling to "stick [his] neck out there too far." Tr. IV 265. This never happened with Mr. Spinale. Tr. IV 266. Mr. Spinale knew his product, and he "would never call in [for an inspection on] stuff that was going to pass." Tr. IV 266.

Esposito was shown RX 1 A, which is also CX 1- 5, relating to inspection certificate K 678086 - 0. He noted that it was "way out of grade," as it reflected 33% total defects and only 9% makes it fail.[101] Tr. IV 270. Because of this, Esposito said it would not be necessary to write down such a high percentage of defects (i.e. 33%) if they didn't exist. One would be asking for an appeal by the shipper if the

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[100]Esposito, as other witnesses had done, distinguished a grade defect from a condition problem, with the former referring to a problem that will not change such as a misshapen potato or one with "hollow heart." Tr. IV 257- 258. By his best recollection, he stated that for grade defects, 5% external or 5% internal, up to a maximum total of 8% defects were allowed. Tr. IV 259. Esposito stated that for Idaho potatoes if he found 8% grade defects he would have to call his office and report that finding, because such potatoes would have been inspected at the shipping point, in Idaho. Tr. IV 260.

[101]Regarding CX1-5, RX 1 A, K 678086, Esposito stated that it related to a truck load of tomatoes and that typically a load will have 1600 cartons. In this instance, 400 cartons were examined. Tr. V48. The temperature on this certificate reflects 54 to 56 degrees, with the normal temperature being between 50 to 60 degrees. Tr. V48.

defects were not really that bad. Tr. IV 271. A load with that percentage of problems was essentially "garbage" in Esposito's view. Tr. IV 270. Directed again to CX 1-5, Esposito stated it was a "condition" inspection, and added that the load description as "light red and red" meant that the whole load was over-ripe. Tr. IV 274. Esposito confirmed that the inspection was not for grade but that had that been part of the inspection, it would have resulted in lowering the percentage of the tomatoes that were considered U.S. number one. Tr. IV 275.

Mr. Esposito was then directed to CX 2 -5, inspection certificate number K 678091-0, RX 2A. He noted that the inspection reflected that the produce failed to meet grade, being about three times over the allowable limit for defects. Tr. IV 276. As with the previous inspection, Esposito stated he would not alter such an inspection because it already was clearly bad. Tr. IV 277. Thus, it was unnecessary to alter the inspection and doing so, if it were not accurate, would also provoke an appeal inspection. Tr. IV 277. Esposito also noted that no grade defects were listed for this inspection; that is it covered condition problems only. Tr. IV 278. Had grade defects been included, the inspection results would have been worse. Tr. IV 278. Directed to RX 3 A, inspection certificate number K 679811-0, Esposito, when asked the same questions posed with regard to CX 1 -5 and CX 2- 5, opined that it could possibly represent an altered inspection because it was barely out of grade.[102] Tr. IV 279-280. For CX 4 - 5, RX 4 A, inspection certificate K 765769-5, Esposito noted that it too failed as U.S. number one and was a little out, that is barely failing, on good delivery. Tr. IV 281. Because it was close, Esposito opined that this inspection could also

[102]This is indicative of Esposito's candor, as he expressed that this *could* have been an altered inspection because it was barely out of grade. However, as discussed earlier, the tomatoes associated with this load were *free*, a fact Mr. Esposito could not have known. As found by the Court, Mr. Spinale never *requested* an inspection on the load. Instead, Cashin had come by for another cash visit and Mr. Spinale felt obliged to pay him.

be an altered inspection.[103] Tr. IV 282. For CX 5 - 6, (RX 5 A), involving certificate number K 767032-6, Esposito stated it reflected produce that was far out of grade on all tolerances. Tr. IV 283. As with the others that were so far out of grade, Esposito stated he would not alter such an inspection, noting that with the degree of decay reflected, it "had to have been there." Tr. IV 284. As for CX 6 - 5, RX 6 A, involving inspection certificate K 767363-5, Esposito also described that load as being "way out on good delivery." Tr. IV 285. For the same reasons already stated, he would not alter such an inspection and accordingly he would consider such an inspection certificate as likely to be accurate. Tr. IV 285. For RX 7 M, involving inspection certificate 767365-0, and pertaining to a load of potatoes, Esposito stated that it too was "way out on good delivery" – by eight or nine percent. Tr. IV 287. As such, he would not alter an inspection reflecting that degree or problems "unless it was there." Tr. IV 288. As to RX 8 C, inspection certificate K 767366-8, dated June 23, 1999, Esposito noted that it was both out on grade and out on good delivery. As the problem was double the allowable limit for soft-rot for example, he concluded it too was likely an accurate inspection. Tr IV 291. Asked about RX 9 C, inspection certificate K767364, dated June 23, 1999, Esposito stated that it too was way out of tolerances and therefore was unlikely an altered inspection. Tr. IV 295. Esposito added that he would be more leery about altering an inspection of goods arriving by railcar, as the railroad has its own inspectors. Tr. IV 297-298.

The following day, October 29, 2004, Esposito, in a continuation of his testimony, was shown CX 7- 5, relating to railcar number BNFE 18602 and inspection certificate number K 768741-1, performed July 15, 1999. Tr. V6. Esposito said this inspection also reflected produce - potatoes - that were very much out of grade, at four or five times the allowable limit. Tr. V7. As with the other inspections he discussed that were far out of grade, Esposito said he would be taking a risk by writing such an inspection if in fact the load was not in such poor condition. Tr. V8. After some confusion,

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[103]Here too it needs to be emphasized that Mr. Spinale paid the *full* price for these tomatoes and *did not seek an allowance*.

Esposito acknowledged that the railroad would be likely to examine an inspection with such a poor evaluation. Tr. V 8-9. CX 8 - 6, RX 12 B, are the same, involving certificate number K 769381-5, and dealing with potatoes arriving on railcar number BNFE 18405 on July 26, 1999. Tr. V 10-11. Because of the symbol "LO" on the inspection certificate, Esposito informed it meant the railcar was loaded, that is the produce was still intact in the railcar. This load too was seriously out-of-grade, being out by 25 percent. Tr. V 10-11. For the same reason he gave numerous times, Esposito stated he would not risk writing such an inspection unless in fact it was in such poor condition. Tr. V 12. As before, he affirmed that the railroad would be likely to examine such a claim of poor condition as well, and this is another reason why an inspector would not risk falsifying an inspection. Tr. V 12.

Next, Esposito was shown CX 9-16, RX 13 C, dealing with inspection certificate number K 770380- 4, dated August 13, 1999. As with the railcar associated with CX 8- 6, this railcar, BNSF799582, was also loaded. Tr. V 13. Esposito noted that the potatoes in this load had been damaged by freezing. Tr. V 13- 14. He also observed that the load had been inspected earlier by another USDA inspector as stated on the certificate, which referenced inspection certificate number K 770182- 4, and was dated August 9, 1999. Tr. V 14. Esposito confirmed that RX 13 B was that earlier inspection to which he referred. In fact, Esposito noted that *he* was the inspector who inspected the load reflected in RX 13 B. Tr. V 15. In both instances, the certificates reflected that the railcar remained loaded with its goods. Tr. V 16. By the time of the second inspection of the load, four days had elapsed and the product had deteriorated further. Tr. V 17-18. Esposito stated firmly that his inspection, as reflected in RX 13, was not an altered inspection. He noted that he knew that the railroad would also be examining the load, as they do that whenever freezing is involved. Tr. V 19.

Esposito acknowledged that Mr. Spinale lent him money. He had been arrested and needed bail money. Tr. V 21. Mr. Spinale provided him with $17,000 so he could meet bail. Esposito stated that, for the most part, he repaid Mr. Spinale, but acknowledged that he might still owe him "a couple of hundred dollars." Tr. V 22. Esposito also stated

that while he often picked up money on behalf of other inspectors, that arrangement never existed with regard to G & T and Tray-Wrap. Tr. V 23. Esposito also stated that he knew that Cashin borrowed money from other merchants in the market, citing John Thomas of K & H. Thomas told Esposito about this loan. Tr. V 25. Thomas also told Esposito that Cashin never paid him back. The money was for his girlfriend/adult entertainer, i.e. "stripper," to have her breasts enlarged and then later to have the breasts reduced. Tr. V 25. Esposito also stated in response to questions from the Court that Cashin acknowledged to him that he got his girlfriend a "boob job." Tr. V 29. The information that Cashin later had to pay to have his friend's breasts reduced came from John Thomas of K & H, who told Esposito of the development, or under-development, as it were. Tr. V 29. Esposito said that Cashin got along with the other inspectors, although he characterized him as "strange," and in the last year or two of his employment, Cashin became "even more strange." Tr. V 26. This time period of "more strange[ness] involved 1997 through October 1999. Tr. V 27. Esposito also felt that Cash[i]n became embittered by being passed over for USDA promotions. Tr. V 28. Although Mr. Esposito also acknowledged that Mr. Spinale and G & T brought a lawsuit against him and that, to his knowledge, that suit is still pending, he stated that no promises were made to him in exchange for his testimony in this proceeding. Tr. V 31. Instead, Esposito explained that he was testifying because he knew that his actions while employed by USDA were wrong and because he recognized that Mr. Spinale had always been fair and nice to him. Tr. V 32.

On cross-examination Esposito acknowledged that one could alter other items in an inspection besides the condition, such as the number of boxes, the temperature listed on the certificate. Tr. V 34-35. Esposito explained that while the number of boxes listed might be less than recorded, the blame for this, in his view, was on USDA because of the delay in getting to requested inspections. Tr. V 35. Accordingly, he viewed it as understandable that some of the boxes of produce could be sold and accordingly the inspectors would give the merchants the benefit of the doubt as to the original numbers. Tr. V 35 *He added that this practice was done by all the inspectors, not just the ones who were corrupt.* Tr. V 36. USDA presented no rebuttal to this assertion either.

As noted, the Court finds the testimony of Mr. Esposito to be credible, particularly where it conflicted with assertions of Mr. Cashin, but also as it supported Mr. Spinale's contention that the payments he made to the inspectors were needed if one wanted rapid and fair inspections.[104]

Mr. Craig Bauer also testified on behalf of the Respondents. Directed to the summer of 1999 (i.e. June through September), Bauer was employed by Agri-Empire, in San Jancinto, California, where he was the sales manager, in charge of all red and white potatoes. Tr. V 60. At that time, Agri sold just reds and whites. Tr. V 62. Asked whether there were problems during the summer of 1999, Bauer stated there were always problems, but in particular at that time Agri had a field with acres of white potatoes which had stayed in the ground too long. He remembered seeing that these potatoes had problems, such as being misshapen and having lenticels and they were brown instead of white. Tr. V 63. Bauer, having directly observed the problems with these potatoes, told customers up front that the potatoes from these acres had problems. Tr. V 65. He remembered speaking to Ball Brokerage, i.e. Mr. Harris Cutler, and thought he might have spoken to Mr. Spinale as well. Tr. V 65. Because Agri had a policy that no

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[104]Were the stakes not so high, the USDA's characterization of Mr. Esposito as "an admittedly corrupt produce inspector who had never even seen the commodities in question" would be amusing. USDA Reply Brief at 6. In pointing to the "corrupt" Mr. Esposito, USDA seems to have forgotten that its star witness was none other than the "admittedly corrupt produce inspector" Cashin. It also sidesteps the fact that Cashin was a witness who could remember no details about the inspections which make up this administrative complaint and whose testimony was relegated to reciting, like a robot, from 302 reports for which he had no independent recollection of the underlying events and which he never even saw until years after they had been created. Further, USDA does not apprehend the purpose of Mr. Esposito's testimony. It was not offered to establish the accuracy of the particular inspections in the Complaint, rather, Esposito's testimony was presented to support the contention that the inspection certificates in issue were likely accurate, because the numbers of defects were so significantly above the acceptable level and the corrupt inspectors were careful not to make an inspection too far above such levels because it would invite a review. Esposito's testimony was also offered, and accepted as credible by the Court, to establish that Cashin's had a personal and expensive hobby with "female *entertainers*"and needed money far beyond what his USDA income provided, and that the inspectors were extorting merchants such as Mr. Spinale in return for a prompt and accurate inspection.

produce was to be shipped without a price, Bauer assured customers that the price would be adjusted. Tr. V 66. The potatoes were so bad that summer that, as Bauer put it, "I did a lot of begging that summer." Tr. V 66.

Referring Mr. Bauer to RX 10 E, he recognized it as the standard form used by Ball Brokerage and reflecting that Agri-Empire was the seller. Tr. V 68. Bauer agreed he was the one involved in this particular sale. Tr. V 68. RX 10 C was also identified by Bauer as Agri's invoice to G & T. Bauer agreed that Agri would have received a copy of RX 10 E from Ball. RX 10 F, also identified by Bauer as reflecting the results of the USDA inspection, showed, in Bauer's words, that "these potatoes were awful." Tr. V 69. The USDA inspection certificate involved here, as reflected in RX 10 B, is the same inspection certificate as reflected in CX 7 - 5. Bauer also identified RX 10 G as the Ball corrected memo reflecting that Agri agreed to settle on a price of $1.75 FOB, and he noted that his name, referenced as "Craig," appears on RX 10 G. Upon reviewing the documents within RX 10, Bauer agreed that they all related to the same shipment and the transactions involved with it. Tr. V 71-72. Bauer also agreed that the description of the load in RX 10- F was an accurate description of the problems with the potatoes. Tr. V 87. Not only was Agri satisfied with the settlement, as Bauer put it, "We loved it. That was more than I was expecting to get." Agri was trying to cover the freight, and so he was pleased because not only was the freight covered but G & T also paid $1.75. Tr. V 73.

Mr. Bauer was then referred to RX 11 A through G, and he first identified RX 11 P as the shipping ticket from Ball. While affirming that Agri's policy is for there to be a price on all that it ships, he noted that the word "open" appears on Ball's ticket. This meant that he had spoken with Ball and agreed that there would not be a price on the potatoes and Agri accepts that the merchant will do the best it can, and further that any written price, such as that reflected on the original invoice, had been "thrown out the window." Tr. V 74, 78. Bauer also confirmed that all of the exhibits within RX 11 related to the same load. Tr. V 75. Bauer agreed that while the date to be shipped, as reflected on RX 11 P, is July 13th, the document itself is dated August 9th. He speculated that could reflect that the potatoes had arrived and been rejected by G & T. Tr. V 76. Bauer also agreed that RX 11-O

related to the same load of potatoes and it too was dated July 26, 1999. Tr. V 76. This load, Bauer stated, had "serious problems." Tr. V 76. Bauer, speaking with particular importance to Mr. Spinale's reputation and credibility, explained that he was willing to accept an "open" price because he had been dealing with Mr. Spinale for *thirty* years, and he knew that he would be getting the best possible deal for Agri from Mr. Spinale. Thus, accepting as it does, the credibility of Mr. Bauer, the Court finds that it is totally at odds with Mr. Spinale's longstanding reputation that he would be a party to any scheme to have produce downgraded from its true condition in order to cheat producers.

Bauer reiterated, with reference to the load identified in RX 11, that Agri was very pleased that they received any money from this load because their chief concern was that the freight cost be covered. Tr. V 85. Bauer expressed that the description in RX 11- O was an accurate description of the poor condition of these potatoes. Tr. V 86. After all, he had personally observed serious problems with these potatoes *before* they began their 15 day rail journey. Tr. V 86. Discussing inspection certificate RX 11 B, which is the same inspection certificate for USDA's CX 8 - 7, Bauer noted that Agri did not file an appeal of the inspection certificate results, stating that "it was actually my decision" not to appeal because he knew "these potatoes were in trouble." Tr. V 89. Bauer said the same thing with regard to the RX 10 exhibits; he would not have taken an appeal on the inspection certificate because he knew those potatoes had problems. Tr. V 90.

When directed to the group of exhibits making up RX 12, Bauer identified the Agri-Empire invoice to G & T for 2400 sacks of number one size "A" potatoes, sold at $3.00 per bag, and dated July 13, 1999, and pertaining to railcar BNFE18405. Tr. V 91. RX 12 K, Bauer agreed, was a confirmation of invoice but with no price on it. As before, Bauer stated that he had to put a price on the invoice, but he was "going to hold [the merchant's] hand." Tr. V 92. The bottom line, from Agri-Empire's perspective in terms of this load, as reflected in the documents comprising RX 12, is that it agreed to a "price [at the] time of arrival" Tr. V 93. To Bauer, upon examining the RX 12 exhibits, it looked like G & T originally rejected the load from Agri. Tr. V 94. As with the previous group of exhibits, Bauer called the

potatoes with this load "ugly," having serious problems and noted that the problems added up to 42 percent. Tr. V 96. Bauer agreed that CX 8- 6, the USDA inspection certificate pertaining to this load, is the same certificate identified in RX 12 B. Tr. V 99. As noted in RX 12 N, Agri agreed to a renegotiated price of 25 cents FOB. Bauer noted his name appears on that exhibit with its reference to 'Craig.' Tr. V 102.

Next, Bauer was referred to the RX 13 documents, A through GG. The original invoice refers to 2400 sacks of potatoes at $3.25 per sack. All the documents in this group relate to the same load, which was on railcar BNSF 799582. Tr. V 103. As with the other exhibits, the Ball Brokerage ticket refers to "price after sale." RX 13 CC. Bauer confirmed, upon reviewing the temperature tape, RX 13 V, W, X, Y, Z, and RX 13AA, that it showed that the temperature in the railcar dropped down to between 30 and 35 degrees, which was far too cold for the potatoes. Tr. V 113. This was consistent, to Bauer, with the accuracy of the inspection certificate reflecting freezing of the potatoes. Tr. V 113. As stated earlier, the inspection certificate identified in RX 13 C is the same inspection certificate as CX 9 - 16.

Bauer was then directed to RX 10 H, another USDA inspection certificate, number K 662108-0, pertaining to an inspection carried out in Elba, New York. Tr. V 116. This exhibit clearly shows that, even in *other* inspection sites, the product coming from Agri-Empire during the same time period as the inspections forming the basis of USDA's Complaint, was also deemed to be bad. Tr. V 117. *As the Court noted*, *this information was clearly relevant.* Tr. V 117. Bauer noted that the applicant was Markey's Wholesale. RX 10 H. Tr. V 118. Bauer also identified Markey's as a customer of Ball's. Thus, Bauer confirmed that he made this sale through Ball to Markey's. Tr. V 119. Bauer then noted that the inspection of this load occurred approximately on July 11, 1999. Tr. V 120, RX 10 H. The inspection, with Bauer again noting that it was conducted out of Elba, New York, showed defects of 44 percent. Bauer reaffirmed that, unfortunately, such a poor product was typical for that period of time for Agri. Tr. V 121. Thus, the problems noted were consistent with the problems with the loads from Agri which were sent to G & T during that same time. Tr. V 121. The same observations were equally true for another Agri load sent to Markey's and inspected in

Elba, and bearing inspection certificate number K 662107- 2. Tr. V 122, RX 10 I. In that load 34 percent of the produce was out of grade. Tr. V 122. Notably, in stark contrast to G & T's actions, some other customers who received these poor potatoes during this time period paid nothing for the loads. Tr. V 123.

In fact, Bauer stated that for at least half of these problem shipments during this time period, Agri received *nothing* for them. Tr. V 123. Bauer stated he was aware of the arrests in connection with the Hunts Point matter, including Mr. Spinale's arrest. However, Bauer stated this did not alter his opinion of Mr. Spinale because he has known him for over thirty years. Bauer has held a high opinion of Mr. Spinale, an opinion that included his view that Mr. Spinale is an honest businessman. Tr. V 128, 132, 133. In fact, when he first learned about the Hunts Point matter, the rumor was that one inspector got caught and cut a deal with prosecutors. Tr. V 128. The arrest did not cause Bauer to stop doing business with Mr. Spinale, nor did the events alter his opinion "in the least bit." Tr. V 128, 133. Bauer described Mr. Spinale as one who "expects quality product for a quality price." Tr. V 129. Essentially, Bauer described Agri's PACA reparation against G & T and other Hunts Point merchants as a no-lose situation, as they only stood to gain by filing a complaint. Tr. V 130-131. Bauer did not know the outcome of the filing of that complaint by Agri. Tr. V 132. The Court observes that its conclusions regarding this case are well-supported apart from the testimony of Mr. Bauer, whose testimony the Court found to be credible. Thus Mr. Bauer's testimony only serves to augment the wealth of the evidence and the Court's conclusions. Though absolutely unnecessary for the Respondents to have done so, *as it was not their burden*, *but rather the government's to establish its claims by a preponderance of the evidence*, in fact the Respondents have proved their case at least by a preponderance of the evidence.

Paul Cutler also appeared as a witness for the Respondents. This occurred on November 1, 2004, the last day of the hearing. Mr. Cutler, who confirmed that he is unrelated to Harris Cutler, who had testified earlier in this proceeding, stated that he is currently unemployed and that his last job was as a USDA inspector at Hunts Point. Tr. VI 6. Mr. Cutler worked in that capacity from May 1991

until February 2000, when he resigned. He was arrested on October 27, 1999, charged with bribery and RICO violations. Tr. VI 6. Subsequently he pled guilty to one count of bribery, receiving a sentence of 15 months, followed by two years' probation. He actually served thirteen of those months in prison at Allenwood, Pennsylvania. Tr. VI 36. He also was required to forfeit some of the illegal money, approximately $70,000, into a fund. Tr. VI 37, 38. His duties involved inspection of fresh produce at Hunts Point Market and other stores in the New York area. Tr. VI 9. Cashin was the training officer when Cutler arrived at the USDA. Mr. Cutler admitted that he first started receiving cash from merchants for doing inspections around 1992 or 1993. Tr. VI 14. The first time this occurred, as best as he could recall, was at "Fierman's" [ph] which is a merchant or wholesale store at Hunts Point. Fierman expressed to Cutler that he was aware that he could not get prompt inspections from USDA and Fierman also believed that the inspections were not fair. Cutler agreed with these characterizations, stating that the inspectors were pressured to get a lot of inspections done. Tr. VI 15. As a result, according to Mr. Cutler, Fierman offered to pay in order to get a timely and fair inspection. Tr. VI 15-16. In Cutler's view the inspections were not in fact fair because the merchants would be upset and angry with the delays and when they took out that anger out on the inspectors, the inspectors would not be in a frame of mind to do a fair inspection. Tr. VI 16-17. Accordingly, when an inspection was borderline, and because there is a subjective element to an inspection, Cutler was then inclined *not* to give the merchant the benefit in close calls about the condition of the produce. Tr. VI 17 - 18. Cutler stated that "[b]y the book" they were supposed to sample 1% of the load but because of the pressure to get more done this could not be done, particularly on larger loads, which he defined as including loads with a thousand boxes. Tr. VI 20, 22. In contrast he identified smaller loads as those with 50 to 200 boxes. Tr. VI 23. By this description, the typical load of tomatoes would be classified as a large load, as it would have a thousand or more boxes. Tr. VI 23. Cutler defined the inspector's "note sheet" as the working paper listing the defects and numbers before the inspector would actually write up the inspection certificate. Tr.VI 20. However, on the note sheet he would not always write

down the number of samples he inspected and the number recorded on the sheet might be exaggerated. Tr. VI 21.

Mr. Cutler believed that nine or ten inspectors worked at Hunts Point Market in 1999. This number did not include the supervisors. Tr. VI 27. Cutler stated that there were times when he could not get to all the requested inspections but his supervisor would still urge him to try and get them done. Tr. VI 28. He stated he was not instructed to do the inspections in any particular order, but that it "was generally understood that [they were] to take care of the ones who paid." Tr. VI 28. Cutler stated that he knew there were other inspectors who took cash from the Hunts Point merchants. Although he was not part of the "group" that took cash, he was nevertheless aware of what they were doing and he would overhear their conversations in the lunchroom, confirming his knowledge. Tr. VI 31, 32. He also observed these inspectors pass cash among themselves. Tr. VI 33. Cutler elaborated that a number of merchants complained that they could not get timely inspections. Tr. VI 39-40. For one of the paying merchants, a Mr. Uribe [ph], Cutler stated that there were times when he would add a few percentage points to the number of defects found in a load, although the merchant did not request that to be done. Tr. VI 40. Though not prompted to increase the number of defects, Cutler stated that he was sympathetic to the merchants' situation where inspections were delayed and since the product is perishable. Tr. VI 41. Cutler conceded that he put pressure on the merchants to pay him. Tr. VI 43. When confronted with a merchant who was angry over the delay, he would tell them "if you want me to do it, pay me." Tr. VI 44. He also conceded that he would list an increased number of boxes above the number that he actually inspected and that a number of his fellow inspectors engaged in this practice. Tr. VI 45.

Cutler also stated that, if faced with a merchant would not pay, and a load that was borderline in terms of passing for allowable defects, he would rate the load as passing. Tr. VI 46. On the other hand, for a paying merchant, when faced with the same borderline situation, he would add two or three percentage points to the defects. Tr. VI 47. Cutler also contended that it was an implicit USDA policy in his office that the inspectors were to increase the number of containers listed as present at the time of the inspection in order to compensate for the

delay in getting the inspection done. Tr. VI 51. He learned about this "policy" from his fellow inspectors. Tr. VI 52. In fact, Cutler maintained that supervisor Mary Ann Stranch, as well as Cashin, told him to increase the numbers. Tr. VI 52. Cutler also stated, as did Esposito, that if an inspection had grade defects above the allowable limit, he was instructed to call the USDA office. Tr. VI 54. The inspectors were told to try and get the inspection changed to a "condition" inspection. Tr, VI 55-56. If the merchant refused to go along, the inspectors were told to have the inspection result in a passing grade for condition. Tr. V 56. Cutler also maintained that both supervisor Mike Wells and Washington USDA official Don Paradis [ph] both knew about the cash payments. Tr. VI 59- 60. Cutler never did inspections at G & T or at Tray-Wrap. Tr. VI 63-64. Unlike Cashin and Esposito, Cutler saved his cash payments, putting them in the stock market. Tr. VI 64. Cutler believed that he had power over the Hunts Point merchants because the inspectors could force them to pay to get a correct inspection. Tr. VI 67. Cutler also acknowledged that Mr. Spinale had filed a lawsuit against him, but stated there were no promises made to him as a consequence of his appearance as a witness in this procedure. Tr. VI 67. Mr. Cutler also conceded that he had commenced a lawsuit against Mr. Spinale but that it had been dismissed. Tr. VI 67. The Court found Paul Cutler to be a credible witness who, having served his time, had nothing to gain by testifying on behalf of the Respondents. His testimony, while cumulative, serves to underscore and affirm the testimony of others as further demonstrates that, at least for some of the merchants, the corrupt inspectors were extracting a fee for carrying out a fair and prompt inspection. Cutler's testimony also provides additional uncontradicted testimony that inspectors were encouraged to do more inspections than they could legitimately accomplish, and to that end, to cut corners in performing such inspections. Further, the uncontradicted testimony is that the USDA management did not want inspections to conclude that a load produce failed to meet grade.

Following the presentation of the Respondents' defense, USDA, on the last day of the hearing called Mr. John Koller as its sanction witness. Koller is employed by USDA in the Perishable Agricultural Commodities Act branch, otherwise known as PACA. Tr. VI 182. As noted, PACA regulates fair trade and good business practices

throughout the perishable fruit and vegetable industry. Tr. VI 183. Koller's role in this case was to review the case file and the evidence and to participate in the development of the sanction recommendation.[105] Tr. VI 185. Interestingly, Mr. Koller conceded during his direct exam about the importance of a prompt inspection: "Well, you know, since we're dealing with a perishable commodity, fruits and vegetables, the pace there is very hectic, and that is because there's always an interest on the wholesalers located on the market to unload the trucks that arrive, because they want to get the product and make it available to the market and for resale to any of its customers that come into the market...." Tr. VI 190-191. Yet, the evidence of record supports the conclusion that the USDA did not have an adequate number of inspectors. This shortage contributed to an environment which allowed the corrupt inspectors to demand payments.

As background, Koller explained that a USDA inspection of produce is an unbiased third-party review of a particular lot of produce that's been made available to an inspector - - a USDA inspector. The inspection is performed by the Fresh Products branch of the Department of Agriculture. Typically such inspections are requested by the receivers and wholesalers of produce. Inspections are requested if there are questions about the quality and condition of the product. In such cases the USDA is called to inspect the produce and if there are condition defects found that substantiate a breach of contract, the inspection report may be used to show the extent of the problems to the shipper and, ultimately to renegotiate terms on that particular transaction. Tr. VI 194-195. However, as applied to the facts in this case, the Court notes that although the USDA tried later on to create other reasons for a wholesaler to want to bribe an inspector, clearly the reason initially expressed by Mr. Koller was to have an inspector rate a load as worse than its actual condition and thereby allow the wholesaler to negotiate a lower price. The expanded reasons, in the Court's view, came about when USDA realized that it

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[105]Currently, Koller's position is a senior marketing specialist in Washington DC. Tr. VI 183. His duties include reviewing disciplinary investigations brought under PACA.

would be unable to show for any of the counts in this proceeding that Mr. Spinale illegitimately brought about an inspection that falsely represented the product to be worse than its actual condition.[106] As explained in this decision, the Court finds that as to the specific dates alleged in the Complaint, the produce really was as poor as the inspection certificate reflected and, in any event, Mr. Spinale did not improperly benefit financially from those transactions. Another problem with USDA's case is its fundamental premise. As Mr. Koller put it, citing Section 24 of the PACA: "[The Complainant's position is] that by the Respondents making bribery payments to a USDA inspector, it constitutes willful, repeated and flagrant ... violations of the PACA." (emphasis added) Tr.VI 195. Thus, the duty under PACA Section 24 that it is alleged that the Respondents failed to perform was: "... by Respondents making bribery payments to obtain false information on the inspection, or to affect the transaction, that this is not in keeping with the fair trade requirements of the act and it corrupts the integrity of the inspection process." Tr. VI 196. Koller added: "when you have a bribery payment made to a produce inspector, that affects the credibility of the inspection ..." Tr.VI 196. Thus the Court notes that a central determination in this case is whether in fact Mr. Spinale *was* bribing the inspectors or whether he was the victim of, as Mr. Spinale expressed it, "soft extortion."

As noted, Koller participated in the sanction recommendation that the Respondents' PACA licenses be revoked. Tr. VI 204. The first factor which led to his recommendation was "that bribery payments to a produce inspector is (sic) one of the most serious violations of the PACA." Tr. VI 204. Yet, although 'bribery' is the central claim here, Koller struggled to define what the term meant. As Mr. Koller put it:

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[106]Koller, after asserting that under Section 16 of PACA an act of an agent, etc. is the act of the licensee, which in this case are the Respondents, G & T and Tray-Wrap, then stated that a wholesaler could use a "bribed inspection" to "seek a price adjustment downward" from the shipper or to use it to file a carrier claim with the freight company. Having had the benefit of observing the Respondents evidence in its defense, he added that another 'use' could be to notify a shipper that a product doesn't look good but then go ahead and sell the product and create the impression that a 'great favor' was done by selling mediocre product. Tr. VI 197-200. As noted above, not only was this a created fallback argument, but it must also be emphasized that there is absolutely no evidence in this record to show that the 'great favor' approach was used for *any* of the Counts.

Well, bribery is where something is offered in exchange for - - whether it be for something immediate or anything in the future, anything that would be of use to the person who's interested in affecting someone else's thoughts and processes in what they do. Tr. VI 205.

The Court then asked Koller, "So, if that's your definition of bribery, if hypothetically money was given to a USDA inspector and the purpose was to get that inspector to make a prompt, timely inspection and an accurate inspection, does that fit within the definition you just stated or not?" Mr. Koller stated: "Yes, it does." The Court pressed Mr. Koller to explain how that hypothetical fit within his definition of bribery. Mr. Koller eventually responded directly stating: Again, it's - - with the action itself is an action that's affecting the - - that would be affecting an inspector, and it's objectivity of its role as - - that person has a role in the service and the process, and that if there's an impression that you will be able to in the future provide assistance to a wholesaler by providing an inspection sooner, than that in itself is cause and effect. You know, they've gotten money and they understand that, you know, hey, if I can provide an inspection for this person who shouldn't be getting it in terms of being queued up for an inspection, that would be an effect. Tr. VI 207.

The Court still wanted to know from Mr. Koller whether his answer had changed in terms of bribery if he "assumed that all this begins with the inspector initiating the requirement for money? What if the impetus comes from the inspectors? Do you still see that as no different in terms of your understanding of the term bribery?" Mr. Koller answered: "I would say it's no different." Tr. VI 207. This Court does not agree. While Mr. Koller discerned no difference, this Court does see one, and believes that if the corrupt inspectors were extorting Mr. Spinale, at a minimum such a determination must inform any sanction imposed. The First Circuit considers such a determination to be relevant as well.[107] In *Columbia Packing Company*, *Inc. v. USDA*, 563 F. 2d 495 (1st Cir. 1977), that court

[107]*See* also, *United States v. Alfisi*, 308 F.3d 144, (2nd Cir. 2002), which also recognized this distinction. The *Alfisi* decision is discussed herein.

noted, in the context of a FOIA request, that the packing company, which as with the Respondents here were at risk of losing the federal inspection service, had a right to see the personnel records of the former USDA meat inspectors who had been convicted of bribery, *in order to show that the company was a victim of extortion*. The court added that if those records supported the contention that the company was being extorted, that would present "a posture 'tending to mitigate its conduct." *Id.* at 498. *Further*, *the court expressed that if the inspectors were engaged in extortion, the packing company should prevail*. *Id.* at 501.

Mr. Koller then continued with his view of the factors which warranted revocation of the Respondents' PACA licenses. His second factor was the "role that the inspection plays in the industry in terms of being able to quickly resolve any disputes that have transpired in produce transaction... it's important ... that this inspection be accurate and impartial and that it is objective ... in regard to the quality and condition of the product that has been inspected at that time. When you have any suspicion that an inspection has been tainted because of a bribery payment made to a produce inspector to affect the outcome of the inspection certificate, ... including the quality and condition of the product and also in terms of its accuracy, that this undermines the credibility of the inspection process ...and it could result in tens of thousands of dollars in unjustified adjustments to any produce transactions." Koller added their were other "factors," citing the "competitive factor." By this he meant "a wholesaler who is paying bribes to get adjustments to an invoice. They could use this adjustment to sell a product for a lesser value than what may be called for in the market. ... an example ...would be ... a wholesaler ... who has received a particular commodity and they've bribed and received adjustments on the invoice, and they turn around and sell the product at a lower price compared to other competitors on the market...["] . Tr. VI 209-211. Koller also stated there was a deterrent factor ...bribery payments are a serious violation and ... a serious revocation sanction needs to be imposed ... . Tr. VI 211. Koller then added, as another factor, the "aggravating" factor, as "Mr. Spinale has said that

he had been paying bribes to Mr. Cashin as far back as 1991"[108]. Tr. VI 211. The problem with Koller's (and USDA's) analysis is that it collapses if the Court does not find bribery.[109] For the many reasons set forth in this decision this Court finds that bribery has not been established, that the USDA did not present a prima facie case, and, assuming arguendo that those were established, the Respondent's unrebutted evidence established that Mr. Spinale was a victim of soft extortion from the cabal of convicted USDA inspectors.

When USDA counsel asked if it would change his sanction recommendation if Mr. Spinale "made bribe payments to an inspector in order to obtain a fair inspection," Koller said "no" because what "we have is that the bribery payment took place, this is an illegal payment, and that is something that Mr. Spinale elected to do.[110] And by making these bribery payments, is not in keeping with the fair trading requirements of the act in terms of the Respondents not upholding that responsibility. An[d] also, it's, you know, unfair to the -- his fellow wholesalers on the Hunts Point Market in terms of paying these bribes to affect the inspection process overall." Tr. VI 212. Nor did Koller see the fact that Cashin, as a USDA employee, was receiving the payments as a basis for impacting his penalty recommendation because "bribery ... is one the most serious violations of the PACA .. ." Tr. VI 215. For the same reason, bribery, Koller

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[108]Of course, as has been pointed out several times, Mr. Spinale said no such thing.

[109]It is indeed unfortunate that the USDA continually, in its testimony and its briefs mischaracterized the evidence. As but one example, Mr. Koller's statement that Mr. Spinale admitted paying *bribes* as far back as 1991 is flat out incorrect. Whether USDA has ignorantly confused the important distinction between bribery and extortion, or intentionally done so, neither is acceptable in a legal proceeding.

[110]This assertion belied the claim of USDA that it had to wait until the Respondents had put on their case before the sanction witness testified. One of the reasons, in addition to the claim that this was the customary practice, was that it was possible that the sanction witness might change his/her view upon hearing a respondent's evidence. The Court found no basis in the procedural rules for this claim that the sanction testimony should await the conclusion of a respondent's case and it seems obvious that this is simply a strategic move to allow the sanction witness to make any necessary adjustments before expressing the sanction testimony.

did not feel it would be sufficient to impose a civil penalty in lieu of a license revocation. Tr. VI 215. Not surprisingly, Koller would not alter his view when asked to assume that the payments were involuntary because, from his perspective, Mr. Spinale "had a choice of not making the payments - - the *bribery* payments ... ." Tr. VI 216. Obviously, Koller could not, even for purposes of a hypothetical, put aside his presumption that bribery occurred. However, while Mr. Koller could not conceive of a penalty short of license revocation, he conceded that the Court has the authority to recommend a sanction short of a license revocation. Tr. VI 249, 251. Koller expressed the view that a reprimand or a warning letter were not options that he was aware of, however he did believe that a license suspension was available as a sanction. Tr. 251-252. Although he knew of no minimum suspension, he believed that the maximum suspension was 90 days. Tr. VI 252. Koller stated he knew of no other available sanctions. Tr. VI 252.

III. Discussion with Additional Findings

As part of the analysis of this case, it is important to step back for an overview of the government's evidence. When the USDA rested, its case only had two theoretical legs left standing in support of its claim: the testimony of Cashin and the Mr. Spinale's guilty plea to a single count of bribery. Both of these legs, in terms of establishing the USDA's claims and the sanction it seeks, have serious and irreparable flaws. First, regarding Cashin, the Court finds that in all aspects where his testimony conflicted with Mr. Spinale's testimony, Mr.Spinale's testimony was credible and Cashin's was not.[111] The

[111]It is well established that reviewing courts do not generally usurp a trial court's determinations regarding credibility of witnesses. *United States v. Turner*, 995 F.2d 1357, 1362 (6th Cir.), *cert. denied*, 510 U.S. 904, (1993). Thus, an administrative law judge's "credibility determination will not be disturbed unless it is patently wrong." *Cannon v. Apfel*, 213 F.3d 970, 977. The reasons for this are obvious. The trial judge, when also serving as the trier of fact, "has the best 'opportunity to observe the verbal and nonverbal behavior of the witnesses focusing on the subject's reactions and responses ... their facial expressions, attitudes, tone of voice, eye contact, posture and body movements' as well as confused or nervous speech patterns in contrast with merely

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Court paid particular attention to the demeanor, tone, and other indicia of believability during the testimony of these witnesses and concludes that where their testimony conflicted, Cashin did not tell the truth and that Mr. Spinale was truthful. Of course, the Court's credibility determination did not rest entirely on those assessments. Other witnesses, from Mr. Harris Cutler to Mr. Craig Bauer to Edmund Esposito and to Paul Cutler, all provided substantial support for this Court to conclude that Cashin's operation was nothing more than a "holdup" of Mr. Spinale, with Cashin only missing the formality of wearing a mask.

Thus, regarding Cashin, the Court finds that he was extracting a personal "fee" for every *visit* to Mr. Spinale's place of business and that in no instance was Mr. Spinale benefitting from those visits in the critical ways that USDA asserts.[112] That is to say, in no instance

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looking at the cold pages of an appellate record." *United States v. Tolson* 988 F.2d 1494 at 1497. (7th Cir. 1993). Thus, the judge, listening to the testimony, is in the best position to observe, weigh, and evaluate a witness' verbal as well as nonverbal behavior. *Knight v. Chater*, 55 F.3d 309 (7th Cir. 1995). Accordingly it is well settled that a reviewing court should not reweigh the evidence or reconsider credibility determinations made by an ALJ. *Prince v. Sullivan*, 993 F.2d 598, 601-602 (7th Cir. 1991). In sum, the administrative law judge's determinations regarding credibility are entitled to great deference. *Chen v. General Accounting Office*, 821 F.2d 732, 738 (D.C. Cir 1987), *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962).

[112]As mentioned above, the Court has found it troubling that the USDA in its post-hearing briefs uses the terms "bribes" and "illegal payments" interchangeably. As one example, among many, USDA states that the Respondent admitted that it *bribed* inspectors on many earlier occasions. USDA Reply Brief at 3, 4. As another example, USDA states that "Respondents in the instant case are relying on the accuracy of the inspection certificates *that they admit were the result of bribery*." USDA Reply Brief at 6 (emphasis added). As a third example, USDA states "Mr. Spinale admitted he had been regularly paying bribes to William Cashin for seven years prior to 1998." USDA Reply Brief at 9. Of course, the Respondents never admitted in this proceeding that payments made by Mr. Spinale were *bribe* payments. Rather, Respondents have contended that they were the victims of "soft extortion" by inspectors like Cashin. It is unfortunate that USDA has mischaracterized the Respondents' position. Regrettably,
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among the dates cited in the Complaint[113] did Mr. Spinale seek or obtain from Cashin an inspection report which downgraded a load of produce from its actual condition. Mr. Spinale, like at least some other merchants at Hunts Point, was paying Cashin in order to receive a prompt and accurate inspection. As USDA recognized, both through witnesses and in its statements through counsel, these inspections involve produce and as such, if they are to be useful, it is critical that inspections be carried out promptly. Because of that fact, Cashin and his cabal of corrupt cronies knew they had merchants like Mr. Spinale over a barrel.[114] The merchants could pay them or risk either a delayed inspection or an inspection which rated produce as acceptable when an honest assessment would determine otherwise. In a real sense, in addition to the Court's observations of Mr. Spinale and Cashin and the other witnesses who supported Mr. Spinale at the hearing, the credibility determination can also be viewed as a choice

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mischaracterizations by USDA were not limited to their description of the Respondents' statements. For example, citing Tr. I, 87, 104, USDA states that "Mr. Cashin testified that he altered the inspection certificate" regarding a March 24, 1999 tomato inspection, but as the transcript clearly shows, the fact is that Cashin had no ability to state, other than in generalities about his conduct, that the particular inspection was altered. It is one thing to make arguments, it is another to concoct facts to support arguments. As still another example, in addressing the April 23, 1999 tomato inspection for which the USDA was not able to rebut the Respondents' assertion that it did not request an inspection for that load, USDA leaves the evidentiary realm and engages in rank speculation asserting "it is *plausible* that Mr. Spinale showed this inspection certificate to ... brokers, sales managers, etc." to obtain a benefit. USDA Reply Brief at 12. (emphasis added). Conjecture is not the equivalent of evidence.

[113]No inference should be made that this Court has a different view about inspections conducted prior to those cited in the Complaint. Rather, unlike the USDA, the Court remains focused on the issues before it which are circumscribed by the instances and dates cited in the Complaint.

[114]The Court does not need to reach the Respondent's contention that Cashin, disappointed that Mr. Spinale would not "loan" him money had a motive to try and entrap him. This should not be construed as a rejection of that claim but simply that Cashin's motives regarding Mr. Spinale in collaborating with the FBI were not significant to the Court's determinations in this case.

between, on one hand, an acknowledged crook, who was able to 'cash-in' on a merchant who dealt with a fragile and time-sensitive commodity, a man who acknowledged spending *nineteen years* taking payments from merchants at Hunts Point, a man who had a compelling need to engage in his extortion of merchants like Mr. Spinale to support the great demands for cash required by the strippers he was addicted to, and, on the other hand, a man who, after serving his country in the Korean War, spent thirty-two years in the produce business, and had a spotless reputation and a respected expertise in tomatoes and potatoes. Viewing the evidence in its entirety this is not a hard determination to make.

Further, the contention advanced by USDA, that Mr. Spinale should have stood up to the corrupt cabal of inspectors, shows a remarkable disconnect from the real world by those have not had to deal with it, except as regulators. It borders on the outrageous to suggest that Mr. Spinale should have taken a more courageous stance in dealing with a corrupt group of federal inspectors, especially not knowing the extent and depth of corruption that he was facing. First, he had already learned that the bureaucracy was much more potent than him. Though many witnesses acknowledged that he is an expert where tomatoes and potatoes are concerned, Mr. Spinale's unrebutted testimony established that he could never win when he appealed the results of an inspection. Losing against the bureaucracy is not exactly a new story. Further, when he voiced other complaints to the USDA, his concerns were brushed aside. As the Court observed, USDA's position is akin to the idea that a motorist, pulled over by a corrupt state trooper for speeding when no violation had occurred, and subtly presented with the option to make a 'payment' or face the bureaucratic machinery by appealing, and though knowing full well that defeat would be a near certainty, the motorist should nevertheless stand one's ground. With good reason, few take on such a challenge. It should also be pointed out that this was not a case of a rogue inspector, acting alone. The breadth of the indictments and convictions demonstrates that the Hunts Point USDA office was contaminated with corruption and that other problems with inspections existed such as faking the number of items inspected and rigging the outcome when grade defects are alleged. Under these egregious conditions, it takes some

chutzpah for the USDA to seek to drive a merchant like Mr. Spinale out of the fruit and vegetable business. However, because such payments under any circumstances are still wrong, Mr. Spinale should not have caved in to the corrupt demands. The Court notes that Mr. Spinale recognizes this and observes that this 73-year-old man has already paid a significant price for that, by virtue of the ordeal of the criminal indictment, the plea to a single count, the associated legal representation fees, the significant fine of $30,000 that he paid, and the ignominy of home confinement with a monitoring device, along with five years' probation.[115]

Regarding the other "leg" upon which USDA supports its case, Mr. Spinale's guilty plea to *a single* count of the nine count indictment, the Court has already spoken to this in its oral ruling on the USDA's motion for summary judgment. Perhaps foreshadowing a recognized weakness with its own case, USDA attempted to avoid entirely the burden of proving violations by Mr. Spinale by bootstrapping the single plea and converting it into its entire case. Any analysis of Mr. Spinale's plea would be disingenuous in the extreme if it began and ended with the initial words spoken by Mr Spinale. While it is true that when before the Honorable Ronald J. Ellis, Magistrate, on January 26, 2001, Mr. Spinale stated: "On August 13, 1999 I paid money to Bill Cashin for the purpose of influencing the outcome of his inspection report on a load of potatoes. I told him the specific amount I wanted him to put in the inspection report." Upon finishing his plea, and without interruption nor prompting by any question, Mr. Spinale *immediately* added: "Your honor, I would like to state I never intended to defraud the shippers who had sent me the produce." Indictment Tr. at 10 -11.

Although there are cases standing for the principle that a plea operates to bind one to its terms, every case analyzing the effect of a plea must be evaluated on its own attendant facts. In addition,

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[115]No one should confuse these observations as suggestive that this Court's determinations were based on anything other than its evaluation of the evidence of record and the Court's credibility determinations. Still, the observations are worth noting if for no other purpose than to contrast the price Mr. Spinale has already paid with the treatment received by the USDA's William Cashin for the nineteen years of corrupt activity by the government's own inspector.

USDA's blindness to the fact that people enter guilty pleas for reasons other than being guilty in fact, is another example of its inability to take into account real world decisions. Factors such as: one's age, especially if one is of advanced years; the correct assumption that, even where one is in fact innocent, a jury's decision is unpredictable; and the enormous cost associated with defending oneself, are all real world considerations that enter the equation for anyone facing criminal charges. When those real world considerations are juxtaposed against the option of pleading to a single count and the elimination of any jail time, it would not be irrational for one to "choose" to plead guilty. Indeed, it can be credibly asserted that it would be an irrational decision for an innocent person to refuse such a plea arrangement.

The court's views regarding Mr. Spinale's guilty plea were addressed at the outset of this PACA hearing. At that time the Court issued its ruling from the bench regarding the Complainant's Motion for a Decision Without a Hearing.[116] Excerpts (with corrections) from those remarks from transcript pages Tr. I 5 - 20, along with additional comments, follow: [T]he Motion before the Court rests upon the transcripts of the guilty plea made by Anthony Spinale and the related sentencing hearing in Southern District of New York Criminal Action 99-CR-1093. The Motion is also based on statements made in the civil action brought by Mr. Spinale and G&T, docket number 03-CV-01704. That civil action alleged that the United States Department of Agriculture, acting through its inspectors, *extorted* money from the Plaintiffs in violation of Section 1962(c) of the Racketeer-Influenced and Corrupt Organizations Act, better known as RICO.

While the Complaint references ten alleged instances of illegal payments, Mr. Spinale pled guilty [in the criminal indictment] to *one* count of Bribery of a Public Official. The Department of Agriculture now states that because Mr. Spinale pled guilty to count nine of the

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[116]The motion was titled "Order Regarding Motion for Decision Without Hearing by Reason of Admissions and Motion to Take Official Notice." Although the Court stated its intention to issue a formal order on the motion, it later decided that, having denied the motion and as the hearing thereafter proceeded with both sides fully presenting their case, it was unnecessary to do so.

indictment and because he asserted in his civil action that illegal payments were made to agriculture inspectors, which illegal payments include the same illegal payments identified in this complaint, that Mr. Spinale should now be estopped from claiming that no illegal payment took place in this administrative proceeding. Thus, the Department of Agriculture is contending that the guilty plea, when coupled with the statements in Mr. Spinale's civil action, remove any issues of dispute as to material facts, and, as a consequence, a decision without a hearing is warranted.

[I]n brief, the complaint in this case charges that the Respondents G&T and Tray-Wrap, both licensed under the Perishable Agricultural Commodities Act ...[violated that Act in that] that those two companies made illegal payments to a United States Department of Agriculture inspector in connection with federal inspections of perishable commodities. In particular, the Complaint cites four instances of such alleged illegal payments made by G&T during July and August of 1999 and six instances of illegal payments made by Tray-Wrap from March through June of 1999. On the basis of these ten alleged illegal payments, the Department of Agriculture asserts that the Respondents' acts were willful, flagrant, and repeated violations of Section 2.4 of the PACA "by failing, without reasonable cause," and this is a quote from that particular section, "to perform any specification or duty, expressed or implied, arising out of any undertaking in connection with transactions involving perishable agricultural commodities purchased, received, and accepted in interstate of foreign commerce." [The Court] would love to meet the draftsman of that particular provision.

With that aside, the Court notes that on January 9, 2004, Magistrate James C. Francis IV issued his report and recommendation regarding a motion to dismiss the aforementioned RICO action brought by Respondents. That recommendation urging dismissal of the action was based on several grounds, including the determination that the United States is not a person under RICO. While the magistrate noted that a criminal conviction, including one arrived at through a plea, constitutes estoppel in a subsequent civil proceeding, *such estoppel is limited to those matters determined by the judgment in the criminal case*. From the Court's perspective, it is significant that the magistrate also stated that it is possible to read the RICO action as alleging that

Mr. Spinale's guilty plea does not bar his claim, because the bribes he paid were extorted from him by the inspector defendants. While the magistrate also determined that Mr. Spinale's guilty plea waived all non-jurisdictional defenses and thereby eliminated an extortion defense, that court added, "*It may be that the Plaintiffs are also claiming damage on the theory that they received inaccurate inspections when they refused to bribe the inspector defendants, implying that the inspector defendants deliberately misgraded their produce in order to coerce them into paying the bribes*." (emphasis added). The magistrate stated that if that is the Plaintiffs' assertion, they should be allowed to assert such a claim and that such a claim should be allowed to be re-pled. Of course, this is exactly the defense that the Respondents ably presented in this hearing.

In adopting the magistrate's recommendation, Judge Wood held that judicial estoppel did apply with the Respondents' RICO action, not because of Mr. Spinale's guilty plea, "but rather because of the facts he asserted in connection with that Plea." Judge Wood's Order, at pages 9 and 10. However, bearing in mind that the issues in this administrative Complaint are whether G&T and Tray-Wrap willfully, flagrantly, and repeatedly violated Section 2.4 of the PACA by making illegal payments on the ten dates cited in the complaint and further whether, on consideration of the attendant facts, revocation of the Respondents' licenses is warranted, it is apparent to this Court that the facts asserted in connection with the plea were, at best, equivocal. As agriculture itself concedes, the charges against Mr. Spinale for the alleged Tray-Wrap bribes were dropped. With that state of affairs, Agriculture is left to assert that the Tray-Wrap claims were revived for purposes of its Motion for a Decision Without a Hearing on the basis of the Respondents' RICO complaint.

When before Magistrate Ellis on January 26, 2001, and asked what he did, Mr. Spinale stated in what was obviously a prepared statement: "On August 13, I paid money to Bill Cashin ... for the purpose of influencing the outcome of his inspection report on a load of potatoes. I told him the specific amount I wanted him to put in the inspection report. On the other dates in the indictment, I paid Mr. Cashin $100 per inspection to influence the outcome of the report."

From the Court's perspective, it is noteworthy that Mr. Spinale, in making that statement, did not state that he sought a report that would overstate the extent of defects in the produce being inspected, only that he paid Mr. Cashin to "influence the outcome of the reports". It is the Respondents' contention in this proceeding, just as it was in connection with their ultimately dismissed RICO action against the USDA named inspectors, that the inspectors were extorting them, and that they only way that they could obtain a fair and accurate assessment of the condition of the produce for which inspections had been requested was to pay off those inspectors. And that is the heart of the matter in this case. Obviously, it is going to be critical for [the Court] to make credibility assessments in this case. [The Court will] have to determine which version is more credible, and that will depend upon my assessment of all of the factors that a judge [and] a jury would need to consider. In this instance, the Court acts as both the fact finder and the determiner of law. In terms of assessing credibility, [the Court will] have to assess the demeanor and believability of the witnesses, including their responses upon cross-examination, and make [its] best effort to determine where the truth lies.

Now [the Court] just referred to Mr. Spinale's statement at the time he made his plea. The plea, however, can not be read in isolation, as Mr. Spinale's statement at sentencing augments his plea. When before a Judge Casey for sentencing on August 21, 2001, Mr. Spinale stated: I accepted full responsibility for what I did. I also said I never intended to defraud the shipment of semi-produce.[117]

The Court notes that Agriculture looks for support to the Decision in *Post & Taback,* PACA Docket number D-01-0026, issued December 16, 2003, and in which decision it was referenced that Post and Taback's employee, Alfisi, had been convicted of *bribing* an

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[117]The Court noted that Mr. Spinale then added: "If you would like me to expand on that or explain it, I would be more than happy to." This Court noted that Mr. Spinale's remarks after that seemed to be somewhat disjointed, as he then added: "The last thing I want to say, Your Honor, is that I am a hardworking guy, and I never did anything bad in my life, and I think I deserve a break. That is all I have to say." One can only speculate why more was not stated but there is a risk that saying too much can unravel a guilty plea. Whatever may have been the reason, it does not detract from the critical and consistent statement by Mr. Spinale, both in his plea and at sentencing, that he was not admitting to defrauding anyone.

agriculture inspector in connection with produce inspections. [The Court] note[s] that [case] involved the very same inspector who has been subpoenaed for this proceeding and who is at the heart of this matter in terms of the Government's case, at least, seems to be one of the critical witnesses. That's Mr. William Cashin. The same Mr. Cashin was involved in the *Post & Taback* decision.

A few additional comments beyond those made in the Court's ruling on Complainant's Motion for Decision Without Hearing by Reason of Admissions and Motion to Take Official Notice are in order. *In re: Post & Taback, Inc.*,[118] PACA Docket No. D-01-0026, December 16, 2003, 2003 WL 22965185 (U.S.D.A.), Decision of the Judicial Officer, William G. Jenson, it was noted that Post & Taback's employee, Alfisi, *bribed*[119] a USDA inspector and used the fraudulent information generated through that bribe to "make false and misleading statements to produce sellers." As noted, Alfisi was paying the same William Cashin involved in this proceeding. One of the distinctions between *Post & Taback* and this case, is that Cashin testified his inspections for Alfisi would go over the good delivery marks. Cashin offered no such testimony regarding the inspections of G & T and Tray-Wrap. Although the Judicial Officer held that USDA did not have to introduce independent evidence of bribery in the administrative proceeding where there had been a trial and a finding of bribery on Alfisi's part, it must be noted that in Mr. Spinale's case there was no trial but rather a plea to a single count involving one of the Respondents – G & T.[120] The Judicial Officer also noted that in

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[118]A significant part of the decision in *Post & Taback* dealt with the Respondent's failure to make full and prompt payments, an aspect that has no relevance to this case.

[119]See also, on the subject of bribery under this section, *JSG Trading v. USDA*, 176 F.3d 536 (D.C. Cir. 1999), *In re Tipco, Inc.*, 50 *Agric. Dec.* 871, 1991 WL 295153 (1991), and *In re Sid Goodman & Co.*, 49 *Agric. Dec.* 1169, 1990 WL 320442 (1990).

[120]As noted, as a consequence of the plea, all charges against Tray-Wrap were dropped.

Alfisi's case[121] there was no evidence of extortion, and this is another distinction between the cases. Another difference between *Post & Taback* and this case is that the administrative law judge in *Post & Taback* "did not make a finding with respect to [the] unlawful gratuities and did not explain his failure to find that Mark Alfisi paid these unlawful gratuities .... [and accordingly] [b]ased on the record before [the Judicial Officer it was determined that] ... Alfisi paid unlawful gratuities ... ." *Id.* at * 15 (emphasis added). Still another distinction between the cases is that in *Post & Taback* the violations were repeated because, as the Judicial Officer noted, "repeated means more than one." *Id.* at *18. In this case, *at most*,[122] there is evidence to support only one violation: the single count pled by Mr. Spinale.

In terms of the appropriate sanction, the Judicial Officer noted that the sanction should take into account "all relevant circumstances." *Id.* at * 19. This Court also considers it noteworthy that as the Respondent did not have a PACA license, the appropriate sanction

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[121]After his trial, which took six days and for which the jury deliberated for four days, Alfisi appealed his conviction. The Second Circuit noted in that appeal that to support a bribery charge, a "corrupt" intent must be shown and that this means a "specific intent to give ...something of value *in exchange* for an official act." Thus, it distinguished bribery from an unlawful gratuity, as the latter lacks the *quid pro quo*. The court, recognizing the key difference, held that the jury instructions were "sufficiently specific" to "spell out the difference" between the two. *United States v. Alfisi*, 308 F. 3d 144, (2nd Cir. 2002) (emphasis in original). The point is that the jury could have found that Alfisi's payments were unlawful gratuities made for or because of an official act, namely to have Cashin perform his job faithfully but, after four days of deliberation, determined that bribery occurred. As the fact finder here, this Court has found that Mr. Spinale was not *bribing* Cashin but that unlawful gratuities were made. These unlawful gratuities, as should be abundantly clear in this decision by now, were made because the corrupt inspector, Cashin, was demanding payments each time he made a *visit* to the Respondents' place of business, if the Respondents wanted a fair, accurate and timely inspection.

[122]For the reasons already set forth in this decision this Court believes it is appropriate to look at Mr. Spinale's plea in its full context and that when that is done the plea should not be used to establish even one violation of the PACA in this proceeding. However, even if an approach is taken that ignores the context of the full plea, it is noted that there was no trial evidence, as in Alfisi's case, and that, a single violation, as noted by the Judicial Officer, can not establish repeated violations. In *Post & Taback*, the USDA's sanction witness based his recommendation in part on "the number of violations." *Id.* at * 19.

was "the publication of the facts and circumstances of Respondent's violations."[123] *Id.* at * 19.

The Court also notes that the Judicial officer, while speaking about the responsibility of wholesalers and other produce merchants, has spoken to the importance of honest inspectors. In the case of *Greenville Packing Company* at 59 Agricultural Decisions 194 (2000), it was stated that "[b]ribery goes to the heart of the inspection system. We assign inspectors into that establishment to be impartial. They must be independent figures. ... If inspectors accept bribes ... it compromises their integrity as well as the integrity of the inspection system and the confidence that consumers put in the product that bears the mark of inspection."[124] 59 *Agric. Dec.* at 208. Obviously, the compromise to the integrity of the inspectors and the inspection system is greater where the initiation of demands for money originates from the inspectors themselves.

It is also worth noting that, although Alphesy had been convicted of bribery, this did not operate to deny Post and Taback from an administrative hearing on its license revocation proceeding. While Mr. Spinale's plea to count nine and the statements in the RICO complaint filed by G&T and by Mr. Spinale, collectively concede that illegal payments took place, these hardly constitute sufficient cause to warrant revocation of the licenses of G&T and Tray-Wrap when the central contention of the Respondents is that they were being extorted by the Agriculture inspectors in that, if they wanted an accurate inspection of the produce, they would have to pay off the inspectors to receive one.

In the ruling from the bench at the outset of the hearing in this case, the Court also noted the USDA's position that even if the Respondents' contentions that they were being extorted to obtain an accurate inspection are true, then these individuals had a duty to stand

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[123]For the reasons expressed, this Court believes, based on the record, that dismissal is the appropriate result here but that at most any sanction should be limited to a publication of the facts and circumstances derived from the record.

[124]The principle of an honest inspectorate takes on additional gravitas when it is determined as here that soft extortion, not bribery, was at work.

up against the extorting inspectors. Thus, it is accurate to state that Agriculture contends, from the Court's understanding of its argument, that the *Respondents had a duty to regulate the regulators*.

Where the issue is the appropriateness of revoking PACA licenses and given that the statutory provisions provide that a license may be revoked where there are such violations, it is incumbent upon this Court to fully appreciate the circumstances surrounding the illegal payments. Indeed, as noted in *S. S. Farms Linn County, Inc*. at 50 Agricultural Decisions 473, 476, it was stated that the sanction in each case is to be determined by examining the nature of the violations in relation to the remedial purpose of the regulatory statute involved along with all relevant circumstances always giving appropriate weight, of course, to the recommendations of the administrative officials charged with responsibility for achieving the Congressional purpose.

In its ruling from the bench this Court noted that the issue of the effect of the guilty plea is a complex matter. Commentators also have recognized that the preclusive effect of a guilty plea is such a complex matter. For example, an extensive article at 70 Iowa Law Review 27, October 1984, makes that observation. This is equally true when the issue involves the effect of guilty pleas when dealing with subsequent administrative hearings. It has also been observed by these commentators that the existence of a factual basis for a guilty plea does not mean that the individual agrees that he or she committed the crime. Rather, it represents an acknowledgment that there is sufficient evidence to conclude that the defendant has acted as charged. Courts and commentators have recognized that the reality is that defendants enter guilty pleas for a variety of reasons, not the least of which is the incentive to obtain a lighter sentence when facing the possibility of a more significant one. Thus, while a guilty plea serves as an admission, many jurisdictions do not regard it as conclusive in subsequent civil proceedings. The Court also noted a brief article on this subject at 22 Colorado Lawyer 1889, September 1993.

In researching this matter, the Court also determined that the effect of a guilty plea is largely determined upon the particular state where the proceedings is occurring. And so in this case, one could look to the State of New York. As a matter of state law, New York takes the position that a guilty plea may have a preclusive effect in a subsequent

civil action, but that the party asserting such effect must demonstrate that the issue is *identical to* and *necessarily decided* at the prior proceeding, and further that the party seeking to be precluded from re-litigating the issue had a full and fair opportunity to contest it in the prior proceeding. In this administrative litigation, seeking as it does the revocation of G&T's and Tray-Wrap's PACA license, the most basic observation is that the criminal plea relied upon by Agriculture was made by Mr. Spinale, not by the Respondent corporations cited here. Accordingly the Court makes the observation that neither G&T, nor Tray-Wrap, the Respondents in this proceeding, were part of the criminal proceeding. Accordingly, it is without merit to assert that the Respondents had a full and fair opportunity to contest the prior Determination.

As the foregoing discussion and findings amply demonstrate, the sanction sought by the USDA must fail as it has not been shown that the Respondents committed willful, flagrant and repeated violations of Section 2(4) of the PACA, 7 U.S.C. § 499(b)(4) and because revocation or suspension is not warranted in any event. Accordingly, the following Order is issued.

Order

The case brought by the United States Department of Agriculture in the above captioned matter is hereby DISMISSED. Pursuant to the Rules of Practice, this decision will become final without further proceedings 35 days after the date of service upon Respondents as provided by Section 1.142 of the Rules of Practice, 7 C.F.R. § 1.142 unless it is appealed to the Judicial Officer by a party to the proceeding within 30 days as provided in Section 1.145 of the Rules of Practice, 7 C.F.R. § 1.145.

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In re: MARIO J. GREGORI.
PACA-APP Docket No. 02-0004.
De cision and Order.
Filed: April 8, 2005.

PACA – Responsibly connected – Criminal plea bargain by one corporate owner not necessarily binding on another owner –Reparation award unpaid.

Andrew Y. Stanton, for Complainant.
Mark R. Walling, for Respondent.
Decision and Order by Administrative Law Judge Jill S. Clifton.

Decision Summary

[1] I decide that Petitioner Mario J. Gregori, who was previously mistakenly identified as Mario J. Gregori, Jr.,[1] was responsibly connected as defined by 7 U.S.C. § 499a(b)(9) during 2001 and 2002, with Marky's and Sons, Inc. My decision is based upon Petitioner Mario J. Gregori's ownership, during 2001 and 2002, of 25% of the shares in Marky's and Sons, Inc. Such ownership under the circumstances here cannot be considered "nominal." I mention five reasons: (1) Mario J. Gregori truly owned and controlled his one-fourth interest; he was not holding that interest "in name only" for the benefit of another; (2) one-fourth ownership of a company is substantial; (3) no other shareholder owned a larger share; each shareholder owned the same portion, 25%; (4) the other shareholders were his brothers; they were family, not strangers, in this company that their father originated; and (5) he had been an "insider" who chose to quit being an officer and a director; he had until 1999 been the President and a Director. Consequently, by being a 25% shareholder in Marky's and Sons, Inc., who was not a nominal shareholder, Petitioner Mario J. Gregori was responsibly connected to Marky's and Sons, Inc. when it violated section 2 of the Perishable Agricultural Commodities Act (the PACA), 7 U.S.C. § 499b, by failing to pay reparation awards.

Procedural History

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[1] Mario J. Gregori, Jr. is Petitioner's son, who, at the time of the hearing, was a 20-year old college student and is not alleged to have been responsibly connected with Marky's and Sons, Inc.

[2] Petitioner Mario J. Gregori filed his petition for review on February 25, 2002. The agency record was "late filed"on March 21, 2002, over Petitioner's objection, as authorized by U. S. Administrative Law Judge Dorothea A. Baker by Order dated April 12, 2002.

[3] Confusion arose regarding Petitioner's true name, but clarity came from the hearing. Petitioner's true name is Mario J. Gregori, without the "Jr."[2] The case caption was amended during the hearing to "Mario J. Gregori, Petitioner." Tr. 17.

[4] Petitioner Mario J. Gregori (hereinafter frequently referred to as Mario J. Gregori) has been represented throughout the proceeding by Watson, Bennett, Colligan, Johnson & Schechter, LLP, of Buffalo, New York; by James W. Bennett, Esq., by Christopher B. Reich, Esq., and by Mark R. Walling, Esq.

[5] Respondent Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, USDA (hereinafter frequently referred to as "PACA") has been represented throughout the proceeding by Andrew Y. Stanton, Esq., Office of the General Counsel, United States Department of Agriculture.

[6] Judge Baker scheduled a hearing for March 12, 2003, in Buffalo, New York. On October 16, 2002, the case was reassigned to me, in view of Judge Baker's pending retirement. I held the hearing as scheduled. Witnesses testified and exhibits were admitted into evidence. Post-hearing, additional exhibits were admitted into

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[2]Petitioner's counsel (prior to Mr. Walling's involvement) filed the Petition using Mario J. Gregori, Jr. when referring to Petitioner Mario J. Gregori, because the PACA notification of the responsibly connected determination included Jr. The Jr. apparently crept into PACA's correspondence through the two affidavits (CARX 6) that Petitioner's counsel had submitted to PACA and which are also part of the Petition (Exhibit E). Petitioner Mario J. Gregory signed his own affidavit without correcting it, adding to the confusion. Petitioner Mario J. Gregori has a son who was born in or about 1982, whose name truly IS Mario J. Gregori, Jr. Petitioner Mario J. Gregori, full name Mario James Gregori, born in 1955 (Tr. 11), the son of the originator of the company, Mario Gregori (deceased), was called Junior at work, but he is Mario J. Gregori the first, as his father did not have the middle name James. Tr. 10-16.

evidence. The parties filed proposed transcript corrections, on June 4, 2003 and on June 18, 2003, which are hereby accepted.

[7] Mario J. Gregori's exhibits admitted into evidence are PX A, B, C, D, E, F & G (all attached to his Petition); and PX 1- PX 7. Several of these exhibits are filed within the case file instead of a separate exhibit file.

[8] PACA's exhibits admitted into evidence include the Certified Agency Record, which contains the determination by the Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, USDA, dated January 17, 2002 (CARX); and CARX 1-9; and RX 10 through RX 13. Some of these exhibits are filed within the case file instead of a separate exhibit file.

[9] Mario J. Gregori's Proposed Findings of Fact and Conclusions of Law with opening brief were timely filed on July 31, 2003; his reply brief was timely filed September 16, 2003.

[10] PACA's Proposed Findings of Fact, Conclusions, and Order with supporting response brief were timely filed August 22, 2003.

Findings of Fact

[11] Mario J. Gregori is an individual who was born in 1955 and whose mailing address at the time of hearing was 1287 Tanglewood Drive, North Tonawanda, New York 14120. Tr. 11-12.

[12] Marky's and Sons, Inc. (hereinafter frequently referred to as Marky's) was incorporated in approximately 1991. Tr. 89.

[13] Mario J. Gregori was a 1/3 owner of the shares of Marky's, originally, as were two of his brothers, Dominic and Peter, each being a 1/3 owner of the shares. Tr. 89.

[14] Mario J. Gregori, and his brothers Dominic and Peter, each became an equal shareholder with their brother John in 1998, each being a 1/4 owner of the shares. Tr. 90.

[15] Marky's had paid, by the date of the hearing, the $13,400 Reparation Award,[3] plus interest and handling fee, that had been

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[3]The award was $13,400, with interest thereon at the rate of 10 per centum per annum from July 1, 2000, until paid, plus the amount of $300. PACA Docket No. RD-

entered against Marky's by the Judicial Officer on March 13, 2001, in favor of Everkrisp Vegetables, Inc. CARX 2. Tr. 222.

[16] Marky's failed to pay the $6,023.50 Reparation Award,[4] plus interest and handling fee, that had been entered against Marky's by the Judicial Officer on March 13, 2001, in favor of Gold Ribbon Potato Co. CARX 2. Tr. 227.

[17] Marky's failed to pay the $13,557 Reparation Award,[5] plus interest and handling fee, that had been entered against Marky's, by the Judicial Officer on April 12, 2001, in favor of K.F. Thiel & Son's Produce. CARX 2. Tr. 228.

[18] In addition to the reparation awards identified in paragraphs [15], [16], and [17], which were identified in PACA's responsibly connected notification letter, four additional reparation awards were entered against Marky's during 2001 and 2002, as identified in paragraphs [19], [20], [21], and [22].

[19] Marky's failed to pay the $4,775 Reparation Award,[6] plus interest and handling fee, that had been entered against Marky's by the Judicial Officer on July 9, 2001, in favor of Tri Campbell Farms. RX 11. Tr. 228.

[20] Marky's failed to pay the $11,106 Reparation Award,[7] plus interest and handling fee, that had been entered against Marky's by the

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(...continued)

[4]The award was 6,023.50, with interest thereon at the rate of 10 per centum per annum from July 1, 2000, until paid, plus the amount of $300. PACA Docket No. RD-01-135. CARX 2.

[5]The award was 13,557, with interest thereon at the rate of 10 per centum per annum from September 1, 2000, until paid, plus the amount of $300. PACA Docket No. RD-01-140. CARX 2.

[6]The award was $4,775, with interest thereon at the rate of 10 per centum per annum from July 1, 2000, until paid, plus the amount of $300. PACA Docket No. RD-01-204. RX 11.

[7]The award was 11,106, with interest thereon at the rate of 10 per centum per annum from September 1, 2000, until paid, plus the amount of $300. PACA Docket No. RD-01-204. RX 11.

Judicial Officer on July 31, 2001, in favor of Sharyland L.P., d/b/a Plantation Produce Company. RX 11. Tr. 228.

[21] Marky's failed to pay the $50,656.87 Reparation Award,[8] plus interest and handling fee, that had been entered against Marky's, by the Judicial Officer on August 29, 2001, in favor of Agri-Empire. RX 11. [22] Marky's failed to pay the $17,537.50 Reparation Award,[9] plus interest and handling fee, that had been entered against Marky's, by the Judicial Officer on January 2, 2002, in favor of Hatco Packing. RX 11. Tr. 228.

[23] When the seven Reparation Awards identified in paragraphs [15], [16], [17], [19], [20], [21] and [22] were entered, Mario J. Gregori was a 25% shareholder in Marky's, and he remained a 25% shareholder through at least March 12, 2003, the date of the hearing.

[24] When the reparation awards were entered, Mario J. Gregori had not been an employee of Marky's for eight months or longer, and he had not been an officer or director of Marky's for nearly twenty months or longer.

[25] Until July 19, 1999, Mario J. Gregori was the President and a Director of Marky's. Tr. 91-94; 177. PX 1.

[26] Beginning about three weeks after July 19, 1999, and lasting for approximately one year, into July 2000, Mario J. Gregori continued to work as a buyer for Marky's, but as an employee only. Tr. 94-96; 177-80. PX 2.

[27] While employed by Marky's, Mario J. Gregori was the buyer of the potatoes from Everkrisp Vegetables, Inc. referenced in paragraph [15] and from Gold Ribbon Potato Co. referenced in paragraph [16]. Tr. 182-85, 238-39. CARX 3-4.

[28] Mario J. Gregori's last pay stub as an employee of Marky's was for the pay period ending July 2, 2000. Tr. 95-96; 179-80.

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[8]The award was 50,656.87, with interest thereon at the rate of 10 per centum per annum from July 1, 2000, until paid, plus the amount of $300. PACA Docket No. RD-01-251. RX 11.

[9]The award was 17,537.50, with interest thereon at the rate of 10 per centum per annum from November 1, 2000, until paid, plus the amount of $300. PACA Docket No. RD-02-044. RX 11.

[29] As of March 10, 2003, two days before the hearing, six of the seven reparation awards remained unpaid, those identified at paragraphs [16], [17], [19], [20], [21] and [22]. Tr. 222, 227-28.
[30] Mario J. Gregori was not served with copies of, and was unaware of (until notified in connection with PACA's consideration of his being responsibly connected), six of the seven reparation awards entered against Marky's. Tr. 155-57. He was aware, at least by May 2001 (Tr. 228-231, PX B), of the Everkrisp Vegetables, Inc. Reparation Award, which had been paid by the time of the hearing.

Discussion

[31] By being a 25% shareholder in Marky's and Sons, Inc., who was not a nominal shareholder, Mario J. Gregori was responsibly connected to Marky's and Sons, Inc. when it violated section 2 of the Perishable Agricultural Commodities Act (the PACA), 7 U.S.C. § 499b. [32] This Discussion, paragraphs [31] through [44], focuses on (1) why I determine that Mario J. Gregori was not actively involved in Marky's failures to pay reparation awards; and (2) why I determine that Mario J. Gregori was not a nominal shareholder and thus must nevertheless be determined to be responsibly connected to Marky's during its PACA violations.
[33] 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.

[34] Mario J. Gregori meets the first prong of the responsibly connected test; he was ***not actively involved***: he did not exercise judgment, discretion, or control ***with respect to the activities that resulted in a violation of the PACA, that is, failure to pay reparation awards***.

[35] The time period involved here is the time period in which Marky's violated the PACA by failing to pay reparation awards. The reparation awards were entered beginning in 2001. Marky's failure to pay them began in 2001 and continued into 2002. Consequently, whether Mario J. Gregori was actively involved in Marky's activities prior to 2001 is irrelevant to my decision.

[36] Based on the credible testimony of Mario J. Gregori and of each witness he called, and supporting documentation, I find that Mario J. Gregori did not participate in the activities of or decisions made by Marky's and Sons, Inc. that led to its failures to pay the reparation awards. Such activities of and decisions made by Marky's would have occurred in 2001 or 2002. Mario J. Gregori had previously ceased being an officer and a director, in mid-1999; and he no longer worked for Marky's and Sons, Inc., having last been an employee in mid-2000.

[37] PACA argues that Mario J. Gregori was Marky's buyer who purchased some of the perishable agricultural commodities that Marky's failed to pay for, those purchased from Everkrisp Vegetables, Inc. and Gold Ribbon Potato Co. I determine that such occurrences would have been ***prior*** to the time during which the responsibly connected determination must be made here, 2001 and 2002. Mario J. Gregori last worked for Marky's in July 2000. Tr. 94-96. PX 2.

[38] PACA argues that Mario J. Gregori still worked for Marky's in 2001, based on the $5,466 in wages from Marky's shown on his 2001 income tax return (PX 6). At the hearing it became clear that it was error to attribute that income to Marky's. I determine that the $5,466 in 2001 income was paid by Big M Services, Inc., the new corporation which Mario J. Gregori formed on September 22, 2000. PX 5, PX 6,

first page (Mario J. Gregori's 2001 W-2 form); PX 7 (2001 income tax return, Schedule E); PX F; Tr. 111-51.

[39] PACA argues that Mario J. Gregori was noted as a person to contact in the April 2000 Blue Book, the September 2000 Red Book, and the August 9, 2001 electronic Blue Book. I determine that the obsolete, inaccurate Blue Book and Red Book listings, which Marky's apparently had failed to update, do not render Mario J. Gregori actively involved beginning in 2001. Tr. 158-60; 164-69.

[40] PACA argues that Mario J. Gregori can be considered actively involved because of his failure to exercise the authority he held as a 25% shareholder to obviate the violations by Marky's, citing *Siegel v. Lyng*, 851 F.2d 412, 417 (D.C. Cir. 1988), and also the Judicial Officer's decision in *In re Anthony L. Thomas*, 59 *Agric. Dec.* 367, 386 (2000). Although those cases provide persuasive authority, the evidence here does not persuade me that Mario J. Gregori contributed to Marky's failure to pay the reparation orders; or that Mario J. Gregori could have, by virtue of his status as a 25% shareholder of Marky's, done anything to prevent Marky's from failing to pay the reparation orders. Consequently, I decline to find Mario J. Gregori to have been actively involved beginning in 2001 based upon his 25% ownership.

[41] Nevertheless, Mario J. Gregori was unable to establish both of the two prongs required to avoid being found responsibly connected. He did establish one of the two prongs: he proved by a preponderance of the evidence that during 2001 and 2002, he was not actively involved in Marky's and Sons, Inc.'s failures to pay for the perishable agricultural commodities that are evidenced by the unpaid reparation awards. But he cannot prove that he is a nominal shareholder.

[42] Cross-examination on March 12, 2003, by Andrew Stanton (Tr. 193-96), solidly established Mario J. Gregori's ongoing status as a 25% shareholder in control of his shares:

By Mr. Stanton:

Q. Now, you still have 25 percent stock interest in Marky's and Sons, isn't that right?

By Mario J. Gregori:

A. Yes, sir.

By Mr. Stanton:

Q. And you never gave that up, you still have it today, correct? You never gave it up?
By Mario J. Gregori:
A. Right, I still have it today.
By Mr. Stanton:
Q. All right. Now there's no reason why you just couldn't have written a letter to John Gregori, the president, and say, I hereby give up my stock interest, isn't that true? You could have done that?
By Mario J. Gregori:
A. Well, in my mind, who would buy my stock from - - from a family business? I would . . .
By Mr. Stanton:
Q. Well, you could have just given it up to Mr. - - to your brother. You could have just said, I hereby turn in my stock, and that's it, isn't that true?
By Mr. Walling:
Your Honor, I object.
By Mario J. Gregori:
A. But that never came to mind.
By Mr. Walling:
That . . .
By Administrative Law Judge:
Just a moment.
By Mario J. Gregori:
A. I mean the stock part . . .
By Administrative Law Judge:
Just a moment. Let me hear your lawyer's objection. Mr. Walling.
By Mr. Walling:
It's really - - it's really asking for a legal opinion, whether he could just give up his stock by writing a letter. It's really a legal issue. It's not a fact issue.
By Administrative Law Judge:
Objection is noted but overruled. The witness may answer. Now, do you remember his question?
By Mario J. Gregori:
A. Yeah, about the stock.
By Mr. Stanton:

Q. You could have written a letter to your brother, John Gregori, the President of Marky's and Sons, and just said, I hereby give up my stock. You could have done that, isn't that true?
By Mario J. Gregori:
A. Yeah.
By Mr. Stanton:
Q. But you chose not to do it?
By Mario J. Gregori:
A. Right. And I . . .
By Mr. Stanton:
Q. That would have meant - - that would have meant, of course, not getting money for your stock, right?
By Mario J. Gregori:
A. That's correct.
By Mr. Stanton:
Q. And you didn't want that?
By Mario J. Gregori:
A. Well, I'd like to get what I had coming to me. That's . . .
By Mr. Stanton:
Q. Right.
By Mario J. Gregori:
A. . . . I only had 25 percent of the company. I'd like to get my share.
By Mr. Stanton:
Q. So you were hoping to get something in return for your 25 percent?
By Mario J. Gregori:
A. Yes, sir.
By Mr. Stanton:
Q. And you're still hoping to get that now, right?
By Mario J. Gregori:
A. Whatever. If I do, I do. If I don't, I don't. I mean, yeah, still hoping to get it, yes, sir.
By Mr. Stanton:
Q. Isn't that the reason you just didn't abandon your stock, just didn't give it up?
By Mario J. Gregori:
A. Yes, sir, that is the reason why I didn't abandon it, yes.

Tr. 193 - 96.

[43] During April 12, 2001 through February 2, 2002, Mario J. Gregori owned 25% of Marky's, as he had since 1998. (Before that, he owned an even larger percentage, 33-1/3%.) An owner need not control a company to be found responsibly connected. Every holder of more than 10% of the outstanding stock of a corporation is held to be responsibly connected, unless he can prove that he should be excepted (under the two prong test). The prong that Mario J. Gregori cannot prove is being a nominal shareholder; for the reasons stated in paragraph [44], I hold that he was not.

[44] First, Mario J. Gregori truly owned and controlled his one-fourth interest; he was not holding that interest "in name only" for the benefit of another. Second, one-fourth ownership of a company is substantial. Third, no other shareholder owned a larger share; each shareholder owned the same portion, 25%. Fourth, the other shareholders were his brothers; they were family, not strangers, in this company that their father originated. And last, he had been an "insider" who chose to quit being an officer and a director; he had until 1999 been the President and a Director. Such a shareholder cannot be considered nominal. Thus, even though he was not actively involved during 2001 and 2002, Mario J. Gregori was responsibly connected. He cannot prove the second prong of the *Norinsberg* exception.

Conclusion

[45] By being more than a 10% shareholder, in fact a 25% shareholder, in Marky's and Sons, Inc., Mario J. Gregori, who was not a nominal shareholder, was responsibly connected to Marky's as defined by 7 U.S.C. § 499a(b)(9), during 2001 and 2002, when Marky's violated section 2 of the Perishable Agricultural Commodities Act (the PACA) (7 U.S.C. § 499b) by failing to pay reparation orders.

Order

[46] This Decision affirms the determination by the Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing

Service, USDA, contained in his letter dated January 17, 2002 (see CARX), that Mario J. Gregori was responsibly connected with Marky's and Sons, Inc. during the time of Marky's failure to pay reparation awards in violation of the PACA, which I find to have been during 2001 and 2002. [47] Accordingly, Mario J. Gregori 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)).

[48] This Decision and Order shall become final and effective thirty-five (35) days after service, unless an appeal to the Judicial Officer is filed within thirty (30) days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145, see attached Appendix A). Copies of this Decision and Order shall be served by the Hearing Clerk upon each of the parties.

APPENDIX A

7 C.F.R.:

TITLE 7—-AGRICULTURE

SUBTITLE A—-OFFICE OF THE SECRETARY OF AGRICULTURE

PART 1—-ADMINISTRATIVE REGULATIONS

. . . .

SUBPART H—-RULES OF PRACTICE GOVERNING FORMAL

ADJUDICATORY PROCEEDINGS INSTITUTED BY THE SECRETARY UNDER

VARIOUS STATUTES

. . .

§ 1.145 Appeal to Judicial Officer.

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

(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.

(c) *Transmittal of record*. Whenever an appeal of a Judge's decision is filed and a response thereto has been filed or time for filing a response has expired, the Hearing Clerk shall transmit to the Judicial Officer the record of the proceeding. Such record shall include: the pleadings; motions and requests filed and rulings thereon; the transcript or recording of the testimony taken at the hearing, together with the exhibits filed in connection therewith; any documents or papers filed in connection with a pre-hearing conference; such proposed findings of fact, conclusions, and orders, and briefs in support thereof, as may have been filed in connection with the proceeding; the Judge's decision; such exceptions, statements of objections and briefs in support thereof as may have been filed in the proceeding; and the appeal petition, and such briefs in support thereof and responses thereto as may have been filed in the proceeding.

(d) *Oral argument*. A party bringing an appeal may request, within the prescribed time for filing such appeal, an opportunity for oral

argument before the Judicial Officer. Within the time allowed for filing a response, appellee may file a request in writing for opportunity for such an oral argument. Failure to make such request in writing, within the prescribed time period, shall be deemed a waiver of oral argument. The Judicial Officer may grant, refuse, or limit any request for oral argument. Oral argument shall not be transcribed unless so ordered in advance by the Judicial Officer for good cause shown upon request of a party or upon the Judicial Officer's own motion.

(e) *Scope of argument.* Argument to be heard on appeal, whether oral or on brief, shall be limited to the issues raised in the appeal or in the response to the appeal, except that if the Judicial Officer determines that additional issues should be argued, the parties shall be given reasonable notice of such determination, so as to permit preparation of adequate arguments on all issues to be argued.

(f) *Notice of argument; postponement.* The Hearing Clerk shall advise all parties of the time and place at which oral argument will be heard. A request for postponement of the argument must be made by motion filed a reasonable amount of time in advance of the date fixed for argument.

(g) *Order of argument.* The appellant is entitled to open and conclude the argument.

(h) *Submission on briefs.* By agreement of the parties, an appeal may be submitted for decision on the briefs, but the Judicial Officer may direct that the appeal be argued orally.

(i) *Decision of the [J]udicial [O]fficer on appeal.* As soon as practicable after the receipt of the record from the Hearing Clerk, or, in case oral argument was had, as soon as practicable thereafter, the Judicial Officer, upon the basis of and after due consideration of the record and any matter of which official notice is taken, shall rule on the appeal. If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum. A final order issued by the Judicial Officer shall be filed with the Hearing Clerk. Such order may be regarded by the respondent as final for purposes of judicial

review without filing a petition for rehearing, reargument, or reconsideration of the decision of the Judicial Officer.

[42 FR 743, Jan. 4, 1977, as amended at 60 FR 8456, Feb. 14, 1995; 68 FR 6341, Feb. 7, 2003]

7 C.F.R. § 1.145

In re: BAIARDI CHAIN FOOD CORP.
PACA Docket No. D-01-0023.
Decision and Order.
Filed April 8, 2005.

PACA – Responsibly connected – Partial payment – *Scamcorp* rule.

David Richman, for Complainant.
Paul T. Gentile, for Respondent.
Decision and Order by Chief Administrative Law Judge Marc R. Hillson.

Decision

In this decision, I find that Respondent Baiardi Chain Food Corp. (Baiardi) committed willful, repeated and flagrant violations of section 2(4) of the Perishable Agricultural Commodities Act (PACA), by its failure to fully and promptly pay its suppliers of perishable agricultural commodities.

Procedural History

On August 1, 2001, a complaint was issued by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service against Respondent, alleging that Respondent had committed multiple violations of section 2(4) of the PACA. In particular, the complaint charged respondent with failure to make full payment promptly to 67 sellers in the amount of over $830,000 for 343 lots of perishable agricultural commodities. Respondent filed an answer, denying the violations, on October 15, 2001. On May 31,

2002, Complainant filed a Motion for an Order Requiring Respondent to Show Cause Why a Decision Without Hearing Should Not be issued. In its July 17, 2002 Opposition to the motion, Respondent contended that it was entitled to a hearing because there were contested issues of fact, and because it had "made payment" and because written agreements took the dispute "outside the jurisdiction of the PACA." Former Chief Judge James Hunt denied the Motion and the matter was set for hearing.

After several postponements and the eventual reassignment of the case to the undersigned judge, a hearing was conducted on February 2, 2004, in New York City. Complainant was represented by David Richman, and Respondent was represented by Paul Gentile. The hearing was completed on May 25, 2004.[1] Both parties subsequently filed briefs.

Factual Background

Respondent is a corporation that was licensed under the PACA from June 8, 1948 until its license terminated when it failed to pay the annual renewal fee on June 8, 2001. David Axelrod owned respondent from at least 1998 until the license terminated. CX 1. Complainant received a number of reparation complaints, generated by Baiardi's alleged nonpayment for produce, between October 2000 and January 2001, and so began an investigation of Baiardi in early January 2001. Carolyn Shelby, a marketing specialist with Complainant, personally conducted the investigation and met with Mr. Axelrod on January 8, 2001. Tr. 38. At her request, he produced an "entire sack of unpaid invoices," Tr. 41, and confirmed that each was a "past due and unpaid produce transaction." *Id.* These unpaid invoices involved 67 different companies and 343 separate transactions. CX 5-71, and totaled over $830,000. Axelrod also printed out for Ms. Shelby a copy of Baiardi's accounts payable aging. CX 72. After Ms. Shelby copied the records and returned the

[1] At the hearing, Complainant presented the testimony of four witnesses. Respondent called no witnesses. Complainant's exhibits (CX) 1-3, 5-72, 74-76, and 78 were admitted. Respondent's exhibits (RX) 1-50, 150-154 were also admitted.

originals to Mr. Axelrod, he confirmed that Respondent's unpaid invoice records were accurate. Tr. 41-42.

Ms. Shelby conducted two brief follow-up investigations in March 2002 and November 2003, where she contacted several of Respondent's creditor companies to determine whether Respondent still owed them money. Tr. 64, CX 74, 77. She was told by employees or agents of nine companies in March 2002 that Respondent still owed them over $342,000, and in November 2003 was told by employees or agents of seven companies that Respondent still owed them over $166,000 in unpaid produce transactions. Tr. 65, CX 74, 77.

Many of the creditor companies eventually received partial payment. Thus, while at the time of the initial investigation by Ms. Shelby, Agrexco (USA), Ltd. was owed over $21,000, a portion of the debt, $11, 791.45, was paid to Agrexco in 2002. Tr. 14-15, 24-25. This amount was paid by Summit Business Capital Corp., which apparently had the rights to Respondent's receivables, and was involved in using Respondent's remaining assets to pay off part of Respondent's debt now that Respondent was no longer engaged in the produce business. Tr. 14-15. The remainder of the debt has never been paid.

Ira Nathel testified that his company, Wishnatski & Nathel, agreed on January 17, 2001, to accept payment of approximately 50 cents on the dollar to resolve Respondent's indebtedness to his company. He testified that this settlement was appropriate because he knew that Respondent was having financial difficulties and that if he did not accept foregoing half the debt he thought he would not get paid anything by respondent. Tr. 121-26, CX 78. The agreement between the two companies stated that "Baiardi is closing its doors for business." CX 78. The amount owed was approximately $30,000, of which just under $15,000 was paid in accord with this agreement.

At the hearing, Respondent chose to call no witnesses, but rather essentially presented its case through cross-examination of Complainant's witnesses. All of Respondent's exhibits were likewise admitted through cross-examination, so I did not have the benefit of any direct Respondent testimony as to the preparation and meaning of these documents. Most of the documents I admitted were similar to CX 78, in that they were a final settlement of claims against

Respondent based on Respondent's representation that it was going out of business, and constituted settlements in the general range of 50 cents for each dollar owed by Respondent to each creditor with whom such an agreement was executed. While counsel for Complainant voiced a continuing objection to my admitting these documents without a witness to vouch for their authenticity (and be subject to cross-examination as to the information contained in the documents) I have no basis to doubt that they do constitute agreements with numerous creditors to settle claims for a reduced amount in recognition that that was the best deal they could get from Respondent under the circumstances.[2]

Statutory and Regulatory Background

The Perishable Agricultural Commodities Act governs the conduct of transactions in interstate commerce involving perishable agricultural commodities. Among other things, it defines and seeks to sanction unfair conduct in transactions involving perishables. Section 499b 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

[2] Interestingly, representatives from several of the creditors told Ms. Shelby that the original amount listed in the complaint were still due, even though in at least several of the cases, the matter had been compromised and presumably paid off (at 50 cents on the dollar) long before the disciplinary case was even filed by PACA.

> 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.

7 U.S.C. § 499a(b)4.

When the Secretary of Agriculture determines that a "merchant, dealer or broker has violated any of the provisions of section 499b 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.

The regulations define "full payment promptly" and illustrate the default rule for defining prompt payment and when deviation from the default is acceptable.

> (aa) *Full payment promptly* is the term used in the Act in specifying the period of time for making payment without committing a violation of the Act. "Full payment promptly," for the purpose of determining violations of the Act, means:
> . . .
> (5) Payment for produce purchased by a buyer, within 10 days after the day on which the produce is accepted;
> . . .
> (11) Parties who elect to use different times of payment than those set forth in paragraphs (aa) (1) through (10) of this section must reduce their agreement to writing before entering into the transaction and maintain a copy of the agreement in

> their records. If they have so agreed, then payment within the agreed upon time shall constitute "full payment promptly": *Provided*, That the party claiming the existence of such an agreement for time of payment shall have the burden of proving it.

7 C.F.R. § 46.2.

Findings of Fact

1. Baiardi Chain Food Corp. (Respondent) is a corporation that was organized and existing under the State of New York at the time of the transactions set forth in the complaint. Complaint, paragraph 2, Answer, paragraph 2. Respondent held PACA license 114748 from June 8, 1948 until the license terminated on June 8, 2001, for failure to pay the required PACA renewal fee.

2. Complainant conducted an investigation of Respondent after receiving complaints that Respondent was not paying for shipments of perishable agricultural commodities. As part of this investigation, Ms. Carolyn Shelby, a marketing specialist for Complainant, went to Respondent's place of business on January 8, 2001 and requested copies of various of Respondent's business records. David Axelrod, president of Respondent, provided the requested records to Ms. Shelby on January 11, 2001.

3. The records, which Axelrod represented were accurate, demonstrated that between the period March 2000 and January 2001 Respondent had received and not paid for 343 lots of perishable agricultural commodities from 67 produce sellers, and that the amount owed was over $830,000.

4. Representing that it was going out of business, Respondent settled a number of its accounts with produce sellers by paying 50 cents for each dollar owed. At least two other accounts were settled through court dispositions. There is no evidence that any sellers were paid, either in a timely fashion or otherwise, the original amounts owed at the time of the purchase of the perishable agricultural commodities.

Discussion

Respondent has violated the PACA willfully, repeatedly and flagrantly by failing to make full payment, promptly, to the 67 sellers of produce listed in the complaint. Respondent's contentions that the agreements to settle claims for a reduced amount are the equivalent of an "opting-out" of the requirements of PACA is inconsistent with both the statute and the clear, long-standing case law that governs these matters. While the appropriate penalty for such substantial noncompliance would normally include the revocation of the violator's license, Respondent's license has already been terminated for failure to pay its renewal fee. Thus, a finding that Respondent has committed willful, flagrant and repeated violations, and the publication of the facts and circumstances of these violations, is the only appropriate remedy.

Respondent failed to timely pay any of the 67 sellers the initial agreed upon purchase price for perishable agricultural commodities. There is no legitimate dispute that Respondent failed to pay 67 sellers of perishable agricultural commodities the amount that it had originally agreed to pay. Each of the 67 sellers was identified by Mr. Axelrod as having unpaid invoices at the time of Ms. Shelby's investigation. Respondent has demonstrated that six of the 67 creditors signed "work out agreements" with Respondent, where payment of approximately 50 cents on the dollar was agreed to settle their claims, and that at least two other creditors were resolved by other court dispositions. Many of the other exhibits submitted by Respondent appear to be similar settlements with a number of the other companies to which it owed payment for produce, under similar terms. Respondent contends that these agreements to accept reduced payments on a delayed basis, made after it had been delinquent in its produce payments and in the face of its decision to close the business, take these transactions out of the scope of the PACA. Resp. Br. at 4-5.

The lead case in determining whether a purchaser of perishable agricultural commodities is subject to the PACA sanctions for failure to pay promptly is *In re Scamcorp,* 57 *Agric. Dec.* 527 (1998). The Judicial Officer announced in *Scamcorp* that he was distinguishing "slow-pay" cases, where generally only civil penalties would be

assessed, from "no-pay" cases where in the case of flagrant or repeated violators license revocation would be the appropriate remedy. In the cases of failure to achieve "full compliance" with the PACA within 120 days of service of the complaint, or the date of the hearing, if that comes first, the violation would be treated as a "no-pay" case. *Id.*, at 548-9.

Actions to change the terms and conditions of payment subsequent to the initial transaction do not negate the PACA's prompt payment provisions. While Respondent contends that the work-out agreements allow Respondent to escape PACA sanctions, the case law holds squarely to the contrary. As the Judicial Officer stated in *In re Full Sail Produce*, 52 *Agric. Dec.* 608, 619 (1993), " . . . it has been repeatedly held that a seller's agreement to accept partial payment because of the buyer's insolvency does not constitute full payment or negate a violation of the PACA." While parties are free to negotiate alternatives to settling within ten days of the transaction, the regulations specify that such terms must be negotiated prior to the transaction, and be in writing. 7 C.F.R. § 46.2 (aa)(11). Respondent's contention that a creditor's choice to accept half-payment, when the other choice is to accept no payment at all, renders the situation not governable by the PACA and the debtor not subject to disciplinary action is not consistent with either the PACA or its underlying regulations, nor is it consistent with the case law. Indeed, the type of situation faced by Respondent's creditors—accepting half payment or nothing—is just the type of situation that the PACA was designed to prevent.

The same logic applies to matters resolved in litigation. There is no authority to support Respondent's contention that because Agrexco and Ocean Mist may have received partial payment of the debt owed them by Respondent as a result of litigation of these claims due to their non-payment, that the prompt payment provisions of the PACA cease to apply to those transactions.

The unpaid balance is substantial. The contention that the unpaid balance is de minimus and only warrants civil penalties is likewise without basis. There is no evidence in the record that any of the 67 creditors were paid either timely or in full for the original

amount that was due for the perishable produce. Witnesses testified that at the time of the initial investigation, Respondent's president supplied the very list of creditors that the PACA Branch is relying upon, and affirmed that the records, which indicated that 67 creditors were owed over $830,000 by Respondent, were accurate. That many of these claims were settled at 50 cents on the dollar does not render the delinquent amount acceptable under PACA regulations. Even if all payments were made under the work-out agreements, and even with the two court "dispositions," over $570,000 of the $830,000 in non-payments alleged in the complaint remains unpaid. Respondent's contention that only around $30,000 remains unpaid assumes that the work-out agreements and two court dispositions nullify all remaining debt. However, other than introducing a large packet of documents that indicate that a number of claims were settled for 50 cents on the dollar, Respondent has adduced no evidence to counter the testimony of the PACA witnesses, and the statement of its president, that apparently none of the 67 creditors were fully paid in a timely manner.

Respondent's Violations are Willful, Flagrant and Repeated. In PACA cases, a violation need not be accompanied by evil motive to be regarded as willful. Rather, if a person "intentionally does an act prohibited by a statute or if a person carelessly disregards the requirements of a statute," his acts are regarded as willful. *In re. Frank Tambone, Inc*., 53 *Agric. Dec.* 703 (714-15)(1994). Here, where Respondent continued to order and receive, and not pay for, produce for months, until it closed its doors in January 2001, putting numerous growers and sellers at risk, it was "clearly operat[ing] in disregard of the payment requirements of the PACA,"*Id.*, and has committed willful violations.

In determining whether a violation is flagrant, the Judicial Officer and other judges have factored in the number of violations, the amount of money involved, and the length of time during which the violations occurred. *In re. N. Pugatch, Inc.*, 55 *Agric. Dec.* 581 (1995), *Scamcorp, supra*. Both *Pugatch* and *Scamcorp*, as well as the other cases cited by Complainant in its opening brief at page 15, involved fewer transactions with fewer sellers for a lesser amount of money than is involved in the instant case, and in each of those cases the violations were found to be flagrant. The flagrant nature of the

violations is exacerbated by the 10-month period of time over which the violations occurred. And the repeated nature of the violation is established by the 343 occurrences.

Given the nature and number of the violations, a significant penalty is warranted. Normally, under the *Scamcorp* rule, license revocation would be one aspect of the remedy. Here, with Respondent already out of business and the license already terminated, the only appropriate remedy is the finding, which I hereby make, that Respondent, Baiardi Food Chain Corp. has committed willful, flagrant and repeated violations of section 2 (4) of the PACA.

The facts and circumstances of the violations shall be published.

The provisions of this order shall become effective on the first day after this decision becomes final. Unless appealed pursuant to the Rules of Practice at 7 C.F.R. § 1.145(a), this decision becomes final without further proceedings 35 days after service as provided in the Rules of Practice, 7 C.F.R. 1.142(c)(4).

Copies of this decision shall be served upon the parties.

_____

In re: KOAM PRODUCE, INC.
PACA Docket No. D-01-0032.
Decision and Order.
Filed April 19, 2005.

PACA – Bribery – Respondent superior doctrine under PACA.

Christopher Young-Morales and Ann K. Parnes, for Complainant.
Paul T. Gentile, for Respondent.
Decision and Order by Administrative Law Judge Jill S. Clifton.

Decision Summary

[1]Respondent KOAM Produce, Inc. (hereinafter frequently "KOAM") committed willful, flagrant and repeated violations of section 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)) during April through July 1999, at the Hunts Point Terminal Market in the Bronx, New York, New York, in connection with 42 illegal cash payments made by its employee Marvin Friedman to United States Department of Agriculture (hereinafter frequently "USDA") produce inspector William Cashin in connection with federal inspections of perishable agricultural commodities received or accepted in interstate or foreign commerce from 11 sellers. KOAM is responsible under the Perishable Agricultural Commodities Act (hereinafter frequently "the PACA") for the conduct of its employee Marvin Friedman, who, in the scope of his employment, paid the unlawful bribes or gratuities to the USDA produce inspector, notwithstanding any ignorance of the employee's actions. Revocation of KOAM's license is commensurate with the seriousness of KOAM's violations of the PACA.

Procedural History

[2]The Complainant is the Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture (frequently referred to herein as "AMS"). On May 3, 2002, AMS filed its Motion to Amend Complaint, together with the proposed Amended Complaint.

[3]KOAM opposed the Motion to Amend Complaint, in its Opposition filed June 18, 2002. By Order dated June 21, 2002, I granted the Motion to Amend Complaint. On July 29, 2002, KOAM filed its Answer to Amended Complaint.

[4]The hearing was held before me in New York, New York, on March 25, 2003, and on November 17 and 18, 2003. AMS was represented by Andrew Y. Stanton, Esq., Ann K. Parnes, Esq., and Christopher Young-Morales, Esq., each with the Trade Practices

Division, Office of the General Counsel, United States Department of Agriculture. KOAM was represented by Paul T. Gentile, Esq., of the law firm of Gentile & Dickler, New York, New York.

[5]AMS called three witnesses and submitted 19 exhibits, marked CX 1 through CX 19. KOAM called one witness and submitted 4 exhibits, marked RX 1 through RX 4. All the exhibits were admitted into evidence. The transcript is referred to as Tr.

Findings Of Fact

[6]KOAM Produce, Inc. is a New York corporation, incorporated on or about June 18, 1996, holding PACA license no. 961890, with an address of 238-241 Hunts Point Terminal Market, Bronx, New York, New York 10474. CX1.

[7]KOAM Produce, Inc. was owned in equal shares (50% each) by Jung Yong "C.J." Park (frequently herein "Mr. Park") and his wife, Kimberly S. Park (frequently herein "Mrs. Park") at all times material herein and particularly in 1999. CX 1, Tr. 269, 283-84.

[8]KOAM's Vice-President and Secretary were Mr. Park, KOAM's President and Treasurer were Mrs. Park, and KOAM's only two Directors were Mr. and Mrs. Park, at all times material herein and particularly in 1999. CX1, Tr. 269, 283-84.

[9]KOAM began doing business in the Hunts Point Terminal Market, in the Bronx, New York, New York, in about January 1997. Tr. 270.

[10]KOAM hired Marvin Friedman, also known as Marvin Steven Friedman, in about May 1998 to work as night produce salesman. Tr. 270. Marvin Friedman became a produce buyer in October 1998. Tr. 270-71, 274. Marvin Friedman continued to work for KOAM at all times material herein, and particularly in 1999.

[11]Marvin Friedman was arrested on or about October 27, 1999. Tr. 271.

[12]On February 25, 2000, Marvin Friedman pled guilty to and was convicted of each count of the 10-count indictment in Case No. 99 Crim. 1095, in the United States District Court for the Southern District of New York. CX 3, CX 18.

[13]On September 20, 2000, Marvin Steven Friedman was found to have paid $29,550[3] in bribes to USDA produce inspectors at the Hunts Point Terminal Market and was sentenced to the custody of the Bureau of Prisons for 12 months plus one day on each of the 10 counts, to run concurrently; followed by supervised release of 2 years on each count, to run concurrently; plus a $300 fine on each counts, for a total of $3,000; plus a $100 special assessment on each count, for a total of $1,000. CX 19, CX 4.

[14]The 10 counts of "Bribery of a Public Official" from April 6, 1999 through July 1, 1999, of which Marvin Friedman was convicted (CX 4), were based on the undercover work of William Cashin, a USDA produce inspector at the Hunts Point Terminal Market who had for many years accepted unlawful bribes or gratuities from many produce workers.

[15]William Cashin agreed, immediately after having been arrested himself on March 23, 1999, to cooperate with the Federal Bureau of Investigation (FBI) in its investigation by continuing to operate as he had in the past and reporting daily the payments he collected. Tr. 133-34, CX 16.

[16]In response to William Cashin's daily reports to the FBI, the FBI prepared FD-302s as a summary. *See* CX 17. The portions of the FD-302s which correlate to the unlawful bribes or gratuities Cashin received from Marvin (Friedman) are organized for each count of the Indictment, together with applicable inspection certificates, which

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[3] The $29,550 in bribes paid by Marvin Steven Friedman was determined through the sentencing process (CX 19 p.20; CX 4 p. 9); the bribes specified in the Indictment totaled $2,100. CX 3.

show KOAM as having applied for the inspections. Tr. 136-97, CX 6 through CX 16.

[17]Marvin Friedman was acting within the scope of his employment as a produce salesman or buyer for KOAM each time he paid an unlawful bribe or gratuity to William Cashin as reported in CX 6 through CX 16, and as reflected in each of the 10 counts of which he was convicted, regardless of whether anyone at KOAM directed him to make the unlawful payments, provided him the money to make the unlawful payments, or was even aware that he was making the unlawful payments.

[18]After careful consideration of all the evidence before me, I accept as credible the testimony of William J. Cashin, Sherry Thackeray, Basil W. Coale, Jr., and Jung Yong "C.J." Park.

Discussion

[19]Here, there is no question whether KOAM's employee Marvin Friedman paid unlawful bribes or gratuities to USDA produce inspector William Cashin during April 6, 1999 through July 1, 1999, in connection with produce inspections requested by KOAM. He did. Unquestionably. The only question is whether what Marvin Friedman did, causes his employer KOAM to suffer the consequences under the Perishable Agricultural Commodities Act, the PACA.

[20]KOAM argues that such criminal activity of an employee should not be imputed to his employer; that Marvin Friedman's criminal activity here cannot have been within the scope of his employment and cannot become KOAM's violation of the PACA.

[21]The PACA, section 16, incorporates principal-agent common law, making no exception for criminal activity of the agent:

> 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. § 499p.

Both the D.C. Circuit[4] and the 6th Circuit[5] have affirmed the PACA's use of its principal-agency provision under circumstances like those here. Marvin Friedman did pay the unlawful bribes and gratuities within the scope of his employment as KOAM's produce buyer or salesman. Tr. 307.

[22]Even if Marvin Friedman was not authorized or directed by KOAM to do so, and even if KOAM was unaware of his doing so, KOAM is indeed responsible under the PACA for the unlawful bribes and gratuities Marvin Friedman paid in connection with the produce inspections ordered by KOAM. 7 U.S.C. § 499p. *Post & Taback, Inc. v. (United States) Department of Agriculture*, not selected for publication[6] in the Federal Reporter, February 11, 2005, 120 Fed. Appx. ---- (D.C. Cir. 2005), 2005 WL 348466, a copy of which is attached as Appendix A. *H.C. MacClaren, Inc. v. United States Department of Agriculture*, 342 F.3d 584 (6th Cir. 2003). Thus, whether Marvin Friedman was directed by his employer KOAM to

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[4]*Post & Taback, Inc. v. (United States) Department of Agriculture*, not selected for publication in the Federal Reporter, February 11, 2005, 120 Fed. Appx. ---- (D.C. Cir. 2005), 2005 WL 348466.

[5]*H.C. MacClaren, Inc. v. United States Department of Agriculture*, 342 F.3d 584 (6th Cir. 2003).

[6]Unpublished judgments of the United States Court of Appeals for the D.C. Circuit entered on or after January 1, 2002, may be cited as precedent. Circuit Rule 28(c)(1)(B). A panel's decision to issue an unpublished disposition means that the panel sees no precedential value in that disposition. Circuit Rule 36(c)(2).

pay the unlawful bribes and gratuities does not affect the outcome here.

[23]After careful review of the evidence as a whole, I am unable to determine whether anyone at KOAM besides Marvin Friedman was involved in making the unlawful payments. Yet the evidence on that subject, together with the six years of experience AMS has had with KOAM since the unlawful payments were made in 1999, may impact the future course of AMS's interaction with KOAM and KOAM's principals.

[24]It is difficult to believe that Marvin Friedman paid the unlawful bribes and gratuities out of his own pocket, even if he was the most highly compensated employee at KOAM, at about $50,000 per year. CX 5. He apparently received no bonuses in addition. Tr. 274-75. The evidence fails to prove whether the money Marvin Friedman gave unlawfully to USDA inspectors was his own money, KOAM's money, Mr. or Mrs. Park's money, or money from some other source.

[25]Mr. Park testified that neither he, nor Mrs. Park to his knowledge, at any time, authorized, directed, or had knowledge that Marvin Friedman was paying money to inspectors. Tr. 286. Mr. Park testified that he had not known that Marvin Friedman was giving money to the USDA produce inspectors until after Mr. Friedman was arrested; that he was not present on June 28, 1999 when Marvin Friedman paid William Cashin, despite a notation to the contrary in the FBI form FD-302 (*see* CX 14); and that he was unaware that Marvin Friedman's attorney represented to the Court during sentencing, that Marvin Friedman's letter to the Court said that his employer directed him to pay bribes. Tr. 271-72, 278-79, 283. The letter is not in evidence, as access to it is apparently restricted. Tr. 339. Perhaps, as KOAM argues, Marvin Friedman implicated his employer in an attempt to be sentenced more leniently. The prosecutor in the criminal case asserted to the Court that there was no

factual support in the record that the employer directed this scheme. Tr. 329. CX 19 pp. 15-16.

[26]Marvin Friedman was not a witness before me. Neither KOAM nor I had the opportunity to see Marvin Friedman confronted or cross-examined. The hearsay evidence suggesting that someone at KOAM besides Marvin Friedman may have involved in paying the unlawful bribes and gratuities is not sufficiently reliable. The evidence fails to prove that Mr. or Mrs. Park or anyone else at KOAM knew Marvin Friedman was illegally giving money to USDA inspectors. The most valuable information on this topic, in my opinion, was the prosecutor's statement at Marvin Friedman's sentencing on September 20, 2000, which includes, in part, the following: THE COURT: I will listen to you for anything the government would like to tell me in connection with sentence.

MR. BARR: Thank you, your Honor, and I will be brief because most of my arguments have been set forth in some detail already in our memorandum.

With respect to the minor role issue, your Honor, essentially Mr. Krantz's argument hinges on the way that he is framing the issue and the people involved. The government views it differently. This is really a two-person crime. There is a briber, mainly (sic) the businessman wholesaler, and a bribee, namely the produce inspector.

The inclusion of Mr. Friedman's employer in the context here I think is inappropriate based on the record before your Honor. While Mr. Krantz has asserted it to the court there is no factual support in the record that the employer directed this scheme. Mr. Friedman did not provide the government or probation with any details on that allegation. So I think that is not really properly before the court. There is no factual foundation for it.

It may be true but it is not something that has ever been set forth. And so we find ourselves at a loss to be able to reply to something like that.

With respect to the relative culpability of the remaining players, namely, the inspector and the wholesaler, while it is certainly true that the public official has abused his or her trust when he or she commits bribery, that is an inherent component of the offense and under Mr. Krantz's logic essentially every bribe payer would be entitled to the inference of being less culpable than every bribe recipient. And I don't think that is the law and I don't think that it's even a fair inference.

In this case the inspectors got $50 per inspection. The wholesaler got, we believe based on our efforts, something more than $50. Putting our finger on the exact amount, as we told probation and the court, is difficult, but it is surely in a magnitude far greater than $50.

While it is true, as Mr. Krantz points out, that the primary beneficiary is the company that Mr. Friedman works for, it is quite clear to us that the individual salesman who helps the company make money looks better in the company's eyes and in a competitive atmosphere such as the Hunt Point Market that is a significant advantage for any salesman. CX 19, pp. 15-17.

Conclusions

[27]Marvin Friedman, an employee of Respondent KOAM Produce, Inc., paid unlawful bribes and gratuities to a United States Department of Agriculture (USDA) inspector, during April through July 1999, in connection with 42 federal inspections covering perishable agricultural commodities from 11 sellers received or accepted in interstate or foreign commerce. 7 U.S.C. § 499b(4).

[28]Marvin Friedman was acting as KOAM Produce, Inc.'s agent, when he did what is described in paragraph [27]. 7 U.S.C. § 499p.

[29]Marvin Friedman's willful violations of the PACA are deemed to be KOAM's willful violations of the PACA. *In re: H.C. MacClaren,*

Inc., 60 *Agric. Dec.* 733, 756-57 (2001), *aff'd* 342 F.3d 584 (6th Cir. 2003).

[30]KOAM Produce, Inc., through its employee and agent Marvin Friedman, paid unlawful bribes and gratuities to a USDA inspector, during April through July 1999, in connection with 42 federal inspections covering perishable agricultural commodities from 11 sellers received or accepted in interstate or foreign commerce, in violation of section 2(4) of the PACA. 7 U.S.C. § 499b(4).

[31]KOAM is responsible under the PACA for the conduct of its employee Marvin Friedman, who paid the unlawful bribes or gratuities to the USDA produce inspector in connection with the federal inspections, notwithstanding any ignorance of the employee's actions. *Post & Taback, Inc. v. (United States) Department of Agriculture*, not selected for publication in the Federal Reporter, February 11, 2005, 120 Fed. Appx. ---- (D.C. Cir. 2005), 2005 WL 348466, *See* Appendix A.

[32]KOAM willfully, flagrantly and repeatedly violated Section 2(4) of the Perishable Agricultural Commodities Act during April 1999 through July 1999, by failing, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with transactions involving perishable agricultural commodities received or accepted in interstate or foreign commerce. 7 U.S.C. § 499b(4).

[33]KOAM's violations of the PACA were egregious, requiring a remedy of suspension or revocation. *In re Geo. A. Heimos Produce Company, Inc.*, 62 *Agric. Dec.* 763, 780-781 (2003).

[34]Revocation of KOAM's license is commensurate with the seriousness of KOAM's violations of the PACA. Tr. 309-12.

[35]Any lesser remedy than revocation would not be commensurate with the seriousness of KOAM's violations, even though many of KOAM's competitors were committing like violations, and even though USDA inspectors who took the unlawful bribes and gratuities

were arguably more culpable than those that paid them. Tr. 309-12.

Order

[36]Respondent KOAM Produce, Inc. committed willful, flagrant and repeated violations of section 2(4) of the Perishable Agricultural Commodities Act (the PACA) (7 U.S.C. § 499b(4)), and the facts and circumstances of the violations shall be published.

[37]Respondent KOAM Produce, Inc.'s PACA license shall be revoked. [38]This Order shall take effect on the 11th day after this Decision becomes final.

Finality

[39]This Decision becomes final without further proceedings 35 days after service unless appealed to the Judicial Officer within 30 days after service, as provided in section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

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

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In re: HUNTS POINT TOMATO CO., INC.
PACA Docket No. D-03-0014.
Decision and Order.
Filed April 20, 2005.

PACA – License terminated – Prompt payment, failure to make.

Andrew Stanton, for Complainant.
Paul T. Gentile, for Respondent.
Decision and Order by Administrative Law Judge Marc R. Hillson.

Decision

In this decision, I find that Respondent Hunts Point Tomato Co., Inc. (Hunts Point) committed willful, repeated and flagrant violations of section 2(4) of the Perishable Agricultural Commodities Act (PACA), by its failure to fully and promptly pay its suppliers of perishable agricultural commodities. By way of sanction, I order that the facts and circumstances of the violations be published.

Procedural History

On March 21, 2003, the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service of the U. S. Department of Agriculture issued a complaint against Respondent, alleging that Respondent had committed multiple violations of section 2(4) of the PACA. In particular, the complaint alleged that during the period September 2001 through June 2002 Respondent failed to make full payment promptly to 33 sellers in the amount of over $795,000 for 118 lots of perishable agricultural commodities, and that such failure constituted the commission of willful, flagrant and repeated violations of the PACA. Respondent filed an answer, denying the commission of any violations, on July 29, 2003.

A hearing was conducted on August 10, 2004 in New York City. Andrew Stanton represented Complainant and Paul Gentile represented Respondent. At the start of the hearing, Respondent moved that the hearing be postponed so that Respondent could attempt to fully pay all of the creditors cited in the complaint. Complainant objected to a postponement at such a late date, and contended that it was entitled to prove its case at the scheduled hearing. I denied the motion to postpone the proceedings.

Complainant called two witnesses and introduced 36 exhibits into evidence (CX 1-CX 36). Respondent called no witnesses and introduced two exhibits into evidence (RX 1-2).

Factual Background

Respondent is a corporation that was licensed under the PACA from July 25, 1979 until its license automatically terminated for failure to pay the required license renewal fee on July 25, 2002. CX 1. Anthony Guerra was Respondent's president, sole director, and sole stockholder since July 2000. CX 1, pp. 7-8. Complainant received at least 10 reparation complaints against Respondent and, in June 2002, initiated an investigation of Respondent's alleged failures to pay, fully and promptly, for perishable agricultural commodities. Tr. 23-24. Wayne Shelby and Timothy Swainhart were assigned to conduct the investigation. *Id.* After sending Respondent a letter notifying it of the initiation of an investigation of these claims, Shelby and Swainhart visited Respondent's place of business on July 24, 2002. Tr. 31. Lenny Guerra, Respondent's office manager, met with Shelby and Swainhart. Guerra identified Respondent's accounts payable files, each of which was in a separate jacket, which the investigators removed from the premises, copied, and returned. Tr. 33-35. The investigators conducted an exit conference with Frederick,

Anthony and Lenny Guerra on August 7, 2002, at Respondent's place of business, at which time they handed a Notice of Investigation to Anthony Guerra. Tr. 35-36. (Lenny Guerra had refused to accept the Notice on July 24, Tr. 35.)

The accounts payable files indicated that between September 2001 and June 2002, Respondent had unpaid invoices for over $795,000 for118 lots of perishable agricultural commodities purchased from 33 sellers in the course of interstate commerce. CX 3-35, Tr. 37-49. Anthony Guerra admitted that over a million dollars in produce had not been paid for by Respondent, Tr. 46, but in the absence of evidence that several transactions were in the course of interstate commerce, Complainant excluded those apparently intra-state transactions from the complaint, resulting in the $795,000 amount actually alleged to be in violation. Tr. 47. Anthony Guerra said that the business had been having difficulties since September 11, 2001. Tr. 46-47.

Shortly before the hearing, Josephine Jenkins, a PACA Branch marketing specialist, made follow-up telephone calls to attempt to determine whether the largest creditors of Respondent had been paid. Tr. 73. She determined, by speaking with Lawrence Meuers, an attorney representing a number of creditors in a PACA trust action, that eight of the creditors, who the complaint alleged were owed over $321,000, had been paid over $275,000, and were still owed over $45,000. She also contacted two of the other creditors listed in the complaint and determined that they had not been paid any of the over $68,000 they were owed. CX 36, Tr. 77.

On May 31, 2002, months after the commencement of Complainant's investigation but nearly 10 months before the filing of the instant complaint, a PACA Trust complaint was filed against Respondent in the United States District Court for the Southern District in New York pursuant to 7 U.S.C. § 499e (c). On that day, Judge Casey issued a temporary restraining order "enjoining and restraining" Respondent "from dissipating, paying, transferring

assigning any and all assets." RX-2. On October 2, 2002, Judge McKenna issued a Preliminary Injunction and Order, superseding Judge Casey's TRO, on behalf of 16 plaintiff companies. RX 1. The Order recognized that Respondent was in possession of 100% of the assets at issue, and set up a PACA Trust Account into which all of Respondents assets would be deposited, and appointed an Escrow Agent, and set up a procedure for establishing and paying claims.

On August 6, 2004, the Friday before the hearing, Counsel for Respondent suggested to Counsel for Complainant that the hearing should be postponed so that Respondent could fully pay all its creditors. At the hearing, Respondent suggested that the hearing be postponed so that the creditors could be paid. Tr. 5-7. No evidence was introduced suggesting that Respondent had petitioned the Southern District to unfreeze Respondent's assets so that any of the creditors could be paid, and no one testified as to how long the process would take, or why the suggestion was made on the eve of the hearing.

Statutory and Regulatory Background

The Perishable Agricultural Commodities Act governs the conduct of transactions in interstate commerce involving perishable agricultural commodities. Among other things, it defines and seeks to sanction unfair conduct in transactions involving perishables. Section 499b provides:

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

. . .

> (4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or

> foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 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.

7 U.S.C. § 499a(b) 4.

When the Secretary of Agriculture determines that a "merchant, dealer or broker has violated any of the provisions of section 499b 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.

The regulations define "full payment promptly" and illustrate the default rule for defining prompt payment and when deviation from the default is acceptable.

> (aa) Full payment promptly is the term used in the Act in specifying the period of time for making payment without committing a violation of the Act. "Full payment promptly," for the purpose of determining violations of the Act, means:
> . . .

> (5) Payment for produce purchased by a buyer, within 10 days after the day on which the produce is accepted;
> . . .
> (11) Parties who elect to use different times of payment than those set forth in paragraphs (aa) (1) through (10) of this section must reduce their agreement to writing before entering into the transaction and maintain a copy of the agreement in their records. If they have so agreed, then payment within the agreed upon time shall constitute "full payment promptly": Provided, That the party claiming the existence of such an agreement for time of payment shall have the burden of proving it.

7 C.F.R. § 46.2.

7 U.S.C. § 499e (c) allows unpaid sellers of perishable commodities to seek the establishment of a trust "for the benefit of all unpaid suppliers or sellers of such commodities . . . until full payment of the sums owing in connection with such transactions has been received."

Findings of Fact

1. Hunts Point Tomato Co., Inc. (Respondent) is a corporation that was organized and existing under the State of New York at the time of the transactions set forth in the complaint. Complaint, paragraph 2, Answer, paragraph 2. Respondent held PACA license 791770 from July 25, 1979 until the license terminated on July 25, 2002, for failure to pay the required PACA renewal fee.

2. Complainant conducted an investigation of Respondent after it received at least 10 complaints that Respondent was not paying for shipments of perishable agricultural commodities. As part of this investigation, Wayne Shelby, a marketing specialist, and Timothy

Swainhart, Assistant Regional Director of Complainant's North Brunswick office, went to Respondent's place of business on July 24, 2002. They met with Lenny Guerra, Respondent's office manager, who identified and provided for copying Respondent's accounts payable files.

3. The files provided Complainant indicated that, between September 2001 and June 2002, Respondent had purchased and not paid for 118 lots of perishable agricultural commodities from 33 sellers in the course of interstate or foreign commerce, for a total of over $795,000.

4. At an exit conference on August 7, 2002, Respondent's president and sole shareholder, Anthony Guerra, acknowledged that Respondent owed more than a million dollars for produce purchased and received, some of which was not in interstate or foreign commerce.

5. On May 31, 2002 a PACA Trust proceeding under 7 U.S.C. § 499e (c) was instituted against Respondent. On that day, a temporary restraining order was issued against Respondent, superseded on September 30, 2002 by a preliminary injunction and order, requiring Respondent to put all its assets into a PACA Trust, and preventing it from otherwise distributing any of its assets. The injunction and order were still in effect at the time of the instant hearing.

Discussion and Conclusions of Law

1. Respondent has violated the PACA willfully, repeatedly and flagrantly by failing to make full payment, promptly, to the 33 sellers of produce listed in the complaint. Respondent's failure to pay the 33 sellers listed in the complaint fully and in a timely manner is essentially undisputed. The 11th hour offer of Respondent to pay the 33 sellers in full does not change the nature of this case to a slow-pay situation. While the appropriate penalty for such substantial noncompliance would normally include the revocation of the violator's license, Respondent's license has already been terminated for failure to pay its renewal fee. Thus, a finding that Respondent has committed willful, flagrant and repeated violations, and the publication of the facts and circumstances of these violations, is the only appropriate remedy.

2. Respondent failed to timely pay any of the 33 sellers listed in the complaint the initial agreed upon purchase price for perishable agricultural commodities. There is no legitimate dispute that Respondent failed to pay 33 sellers of perishable agricultural commodities the amount that it had originally agreed to pay. Respondent's own payable files, which were inspected and copied by Complainant's representatives, indicated that at the time of the inspection, Respondent had purchased, and not paid for, 118 lots of perishable agricultural commodities from 33 sellers, in the course of interstate or foreign commerce, and in the amount of over $795,000.

Subsequent to the initial investigation, approximately 16 of Respondent's creditors joined in a PACA trust action filed under 7 U.S.C. § 499e (c) (3). In a preliminary injunction and order issuing out of that action, the Escrow Agent appointed by the court was directed to pay off the undisputed valid PACA claims against

Respondent at 95 cents on the dollar, subject to availability of funds. No evidence was submitted as to how many creditors were actually paid. Complainant submitted, through the testimony of Josephine Jenkins, evidence that of the ten creditors she had contacted either directly or through their counsel, approximately a week before the hearing, none of them had been paid either in full or on time. In particular, she was notified that of eight creditors represented by Lawrence Meuers, all had been partially compensated by the PACA trust. These eight creditors had been paid $275,338 out of the $321,082 owed to them, which represents a payout of approximately 85.7%, significantly under the 95% authorized in the PACA trust action. Two other companies contacted by Ms. Jenkins indicated that they had not been paid any of the $68,302 owed to them.

There is no evidence in this record that any of the 33 creditors listed in the complaint have been paid in full.

3. The court order in the PACA Trust case does not excuse Respondent's failure to pay. While Judge McKenna enjoined Respondent from disbursing any of its assets other than through the actions of the court-appointed escrow agent operating the PACA Trust, the injunction does not act as a relief from Respondent's "no-pay" status. Since the PACA Trust action arose directly from Respondent's failure to pay its creditors in the first place, to allow it to act as a protection against no-pay sanctions would be counter to the clear purposes of the Act. While Respondent protests that it has the assets to pay all creditors fully, the record clearly indicates that as of the hearing date creditors were only being paid off at 85 cents on the dollar, rather than the 95 cents on the dollar authorized in the PACA Trust action. This is hardly consistent with Respondent's contention that it has sufficient assets to pay all creditors in full. Postponing a hearing based on Respondent's contention that it could now pay all creditors in full, where there is no evidence that Respondent petitioned

Judge McKenna to allow such payment, and there is no affirmative evidence that such financial capability actually exists, is unwarranted.

Oddly, Respondent implies in its brief (p. 5) that *Complainant* had some sort of an obligation to "attempt to have Judge McKenna modify his order." I see no basis for this suggestion. Clearly, if Respondent had the funds to fully pay all creditors, such funds would have been required to be deposited in the PACA Trust account established in the federal district court case. Presumably, if the funds existed, all creditors would have been paid—a circumstance that undisputedly has not occurred here.

4. Respondent's failure to pay creditors renders this matter a "no-pay" case. The lead case in determining whether a purchaser of perishable agricultural commodities is subject to the PACA sanctions for failure to pay promptly is *In re Scamcorp,* 57 *Agric. Dec.* 527 (1998). The Judicial Officer announced in *Scamcorp* that he was distinguishing "slow-pay" cases, where generally only civil penalties would be assessed, from "no-pay" cases where in the case of flagrant or repeated violators license revocation would be the appropriate remedy. In the cases of failure to achieve "full compliance" with the PACA within 120 days of service of the complaint, or the date of the hearing, if that comes first, the violation would be treated as a "no-pay" case. *Id.*, at 548-9.

Although Respondent has "offered" to settle this case by paying all creditors in full, the court order issued by Judge McKenna, which Respondent has not sought to lift, indicates that Respondent's offer was made without any legitimate basis and is quite speculative, to say the least. While it is unusual to even hear the discussion of settlement offers in open court, Complainant was under no obligation to accept Respondent's offer, particularly when there is no indication that the offer could even be honored, given Judge McKenna's preliminary injunction. Given the uncertainty as to whether Respondent's offer to

pay in full could even be effectuated, Respondent's contention in its brief (p. 6) that the failure of Complainant to accept its offer was "arbitrary, capricious and an abuse of discretion" has no basis.

Further, rescheduling a hearing to allow a settlement of a PACA case is inconsistent with the Agency's case law. In *Scamcorp*, the Judicial Officer held:

> Rescheduling a hearing in order to give a PACA violator additional time to pay produce suppliers thwarts Department policy, which is designed to encourage PACA violators to pay produce suppliers promptly. Further, rescheduling a hearing in order to give a PACA violator additional time to pay produce suppliers unnecessarily delays these proceedings, which should be handled expeditiously, and is specifically contrary to the requirement in section 1.141(b) of the Rules of Practice (7 C.F.R. § 1.141(b)) that "the Judge, upon motion of any party stating that the matter is at issue and is ready for hearing, shall set a time, place, and manner for hearing as soon as feasible after the motion is filed, with due regard for the public interest and the convenience and necessity of the parties."

Scamcorp, supra, at 548.

5. Respondent's Violations are Willful, Flagrant and Repeated. In PACA cases, a violation need not be accompanied by evil motive to be regarded as willful. Rather, if a person "intentionally does an act prohibited by a statute or if a person carelessly disregards the requirements of a statute," his acts are regarded as willful. *In re. Frank Tambone, Inc*., 53 *Agric. Dec.* 703, 714-15 (1994). Here, where Respondent continued to order and receive, and not pay for, produce for months, from September 2001 through June 2002, putting numerous growers and sellers at risk, it was "clearly operat[ing] in disregard of the payment requirements of the PACA,"*Id.*, and has committed willful violations.

In determining whether a violation is flagrant, the Judicial Officer and other judges have factored in the number of violations, the amount of money involved, and the length of time during which the violations occurred. *In re. N. Pugatch, Inc*., 55 *Agric. Dec.* 581 (1995), *Scamcorp, supra*. The number of sellers and transactions involved in *Pugatch* and *Scamcorp* were similar to those involved in the instant case, and in each of those cases the violations were found to be flagrant. The flagrant nature of the violations is exacerbated by the 9-month period of time over which the violations occurred. And the repeated nature of the violation is established by the 118 occurrences.

6. Given the nature and number of the violations, a significant penalty is warranted. Normally, under the *Scamcorp* rule, license revocation would be one aspect of the remedy. Here, with Respondent already out of business and the license already terminated, the only appropriate remedy is the finding, which I hereby make, that Respondent, Hunts Point Tomato Co, Inc., has committed willful, flagrant and repeated violations of section 2 (4) of the PACA.

The facts and circumstances of the violations shall be published.

The provisions of this order shall become effective on the first day after this decision becomes final. Unless appealed pursuant to the Rules of Practice at 7 C.F.R. § 1.145(a), this decision becomes final without further proceedings 35 days after service as provided in the Rules of Practice, 7 C.F.R. 1.142(c)(4).

Copies of this decision shall be served upon the parties.

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In re: M. TROMBETTA & SONS, INC.
PACA Docket No. D-02-0025.
Decision and Order.
Filed: May 12, 2005.

PACA – Bribes - Respondent superior under PACA.

Andrew Y. Stanton, for Complainant.
Mark C.H. Mandell, for Respondent.
Decision and Order by Administrative Law Judge Jill S. Clifton.

Decision Summary

[1]Respondent M. Trombetta & Sons, Inc. (hereinafter frequently "Trombetta, Inc.") committed willful, flagrant and repeated violations of section 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)) during April 1999 through July 1999, at the Hunts Point Terminal Market in the Bronx, New York, New York, in connection with seven illegal cash payments made by its employee Joseph ("Joe Joe") Auricchio to United States Department of Agriculture (hereinafter frequently "USDA") produce inspector William J. Cashin in connection with seven federal inspections of perishable agricultural commodities received or accepted in interstate or foreign commerce from six sellers. Trombetta, Inc. is responsible under the Perishable Agricultural Commodities Act (hereinafter frequently "the PACA"), notwithstanding any ignorance of the employee's actions, for the conduct of its employee Joseph ("Joe Joe") Auricchio, who, in the scope of his employment, paid the unlawful bribes and gratuities to the USDA produce inspector. Here, the acts of the employee are deemed to be the acts of the employer. Making illegal payments to a USDA produce inspector was an egregious failure by Trombetta, Inc. to perform its duty under the PACA to maintain fair trade practices. The remedy of revocation of Trombetta, Inc.'s license is commensurate with the seriousness of Trombetta, Inc.'s violations of the PACA.

Procedural History

[2]The Complainant is the Administrator, Fruit and Vegetable Programs,[1] Agricultural Marketing Service, United States Department of Agriculture (hereinafter frequently "AMS").

[3]On August 16, 2002, AMS filed the Complaint, alleging, among other things, that Trombetta, Inc. willfully, flagrantly and repeatedly violated Section 2(4) of the Perishable Agricultural Commodities Act during April 1999 through July 1999, by failing, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with transactions involving perishable agricultural commodities received or accepted in interstate or foreign commerce. 7 U.S.C. § 499b(4).

[4]Trombetta, Inc. timely filed its Answer on October 4, 2002. The Answer, among other things, denies the material allegations of the Complaint, raises five affirmative defenses, and requests an award of attorney's fees and costs.

[5]The nine-day hearing was held before me in New York, New York, on July 14-18, July 21-23, and August 21, 2003. AMS has been represented first by David A. Richman, Esq., and then by Andrew Y. Stanton, Esq., each with the Trade Practices Division, Office of the General Counsel, United States Department of Agriculture. Trombetta, Inc. has been represented by Mark C.H. Mandell, Esq., of Annandale, New Jersey. The case was very ably presented, by both AMS and Trombetta, Inc., throughout the entire proceeding.

[6]AMS called three witnesses (Joan Marie Colson, Tr. 25-127; William J. Cashin, Tr. 127-160, 172-358; and John Aloysius Koller, Tr. 359-371, 378-495, 1441-1532, 1546-1596, 1683-1725), and submitted the Certified Agency Record exhibits which are known as CARX, and 13 additional exhibits, CX 1 through CX 10; AX 1, AX 2, and AX 3.

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[1]Specifically, the PACA Branch of the Fruit and Vegetable Programs, is responsible for this case.

[7]Trombetta, Inc. called 11 witnesses (Philip James ("Phil") Margiotta, also known as Philip J. Margiotta (born in 1949), Tr. 498-551; 574-851, 996-1163, 1338-1381, 1390-1408, 1535-1545; Peter Silverstein, Tr. 872-924; Max Montalvo Tr. 932-974; Frank J. Falletta, Tr. 1199-1221; Matthew John ("Matt") Andras, Tr. 1221-1265; Harlow E. ("H.E.") Woodward III, Tr. 1266-1300; Stephen Trombetta, Tr. 1311-1336, Martin A. ("Marty") Shankman, Tr. 1412-1423; Patricia Baptiste, Tr. 1424-1433; Philip Harry Lucks, Tr. 1616-1638; and Philip Joseph ("Junior") Margiotta, also known as P.J. Margiotta (born in 1924), Tr. 1651-1681), and submitted 22 exhibits, RX A through RX U, and RX V, a DVD submitted post-hearing, which I hereby admit into evidence. [8]All of the parties' exhibits, and also ALJX 1 and ALJX 2 (*see* Tr. 1544-45), were admitted into evidence. The transcript is referred to as Tr.

[9]The three responsibly connected cases (PACA-APP Docket No. 03-0007, PACA-APP Docket No. 03-0008, and PACA-APP 03-0012) were consolidated with this disciplinary action for the hearing, and all the evidence is available for each of the four cases. The three responsibly connected cases will be briefed and decided at a later time.

[10]AMS's proposed transcript corrections, filed April 5, 2004, are hereby accepted. Trombetta, Inc's proposed transcript corrections, filed April 12, 2004, are hereby accepted. On my own motion, I change Jo-Jo to Joe Joe in the transcript excerpts included in this Decision.

[11]AMS's Proposed Findings of Fact, Conclusions and Order with opening brief were timely filed on February 6, 2004; AMS's Reply brief was timely filed April 30, 2004.

[12]Trombetta, Inc.'s Proposed Findings of Fact, Conclusions, and Order with supporting response brief were timely filed April 12, 2004.

Findings of Fact

[13]M. Trombetta & Sons, Inc. is a New York corporation, holding PACA license no. 021070, with an address of Units 100-105, Row A, Hunts Point Terminal Market, Bronx, New York, New York 10474. CX 1.

[14]The "company" (the beginning of Trombetta, Inc.) was started in the 1890s, and the fifth generation of the family is now in the business. Tr. 500. The current managers are Philip James ("Phil") Margiotta, also known as Philip J. Margiotta (at the Hunts Point Terminal Market), and Stephen ("Steve") Trombetta (at the Bronx Terminal Market). Tr. 1677. [15]Trombetta, Inc. was owned 60% by Philip Joseph ("Junior") Margiotta, also known as P.J. Margiotta, and 40% by Stephen ("Steve") Trombetta, at all times material herein and particularly in 1999. Tr. 1676-1677.

[16]Trombetta, Inc.'s President and Treasurer were Philip Joseph ("Junior") Margiotta, also known as P.J. Margiotta; Trombetta, Inc.'s Vice-President was Stephen ("Steve") Trombetta; and Trombetta, Inc.'s Secretary was Philip James ("Phil") Margiotta, also known as Philip J. Margiotta, at all times material herein and particularly in 1999. Tr. 1662, 1679.

[17]Trombetta, Inc. began doing business in the Hunts Point Terminal Market, in the Bronx, New York, New York, when Hunts Point opened, in about 1967 or 1968. Tr. 502.

[18]Trombetta, Inc. hired Joseph ("Joe Joe") Auricchio in about 1994 to do various jobs at the company. Tr. 504-05.

[19]Joseph ("Joe Joe") Auricchio continued to work for Trombetta, Inc. at all times material herein, and particularly in 1999, when he worked as a salesperson. Tr. 508, 1158.

[20]In 1999, Joseph ("Joe Joe") Auricchio was earning between $800 and $900 per week as a salesperson for Trombetta, Inc. Tr. 1131. Mr. Auricchio did not earn any commissions as part of his salary; he would receive bonuses equivalent to one or two weeks pay at Christmas. Tr. 1131.

[21]On March 14, 2000, Joseph ("Joe Joe") Auricchio pled guilty to one count of the 4-count indictment in criminal Case No. 99 CR 1088, in the United States District Court for the Southern District of New York, United States v. Joseph Auricchio. CX 4, RX N.

[22]The elements of the offense, bribery of a public official, to which Joseph ("Joe Joe") Auricchio pled guilty, are that he gave a thing of value to a person who is a public official with the corrupt intent to influence an official act by that public official. RX N at 11-12.

[23]In connection with his guilty plea, Joseph ("Joe Joe") Auricchio told the Judge under oath that on July 7 (1999) he offered a government official $100 to inspect a load of vegetables in the Hunts Point Terminal Market in the Bronx, New York; that he knew what he was doing was wrong; that he did it willfully and knowingly; that the government official was a U.S. government inspector; that he wanted the inspector to lower the grade; so that "we could sell it cheaper." RX N at 12-14. [24]On June 21, 2000, Joseph Auricchio was found to have paid approximately $29,100 in cash bribes[2] to USDA produce inspectors at the Hunts Point Terminal Market between 1996 and September 1999 (the only time period for which data was available), in connection with inspections of fresh fruit and vegetables at M. Trombetta & Sons, Inc., and was sentenced on Count 4 to the custody of the Bureau of Prisons for one year and a day; followed by supervised release of 2 years; plus a $5,000 fine; plus a $100 special assessment. The other three counts of the 4-count indictment were dismissed. ALJX 1, CX 4.

[25]The one count of "Bribery of a Public Official", on July 7, 1999, of which Joseph Auricchio was convicted (CX 4), was based on the

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[2] The $29,100 in cash bribes paid by Joseph (Joe Joe) Auricchio was determined by agreement of the parties for sentencing purposes (ALJX 1, p. 2; *See* A. Offense Level, including footnote); the bribe associated with the one count to which he pled guilty was $50.

undercover work of William J. Cashin, a USDA produce inspector at the Hunts Point Terminal Market who had for many years accepted unlawful bribes and gratuities from many produce workers.

[26]From July 1979 until August 1999, William J. Cashin was employed as a produce inspector for the United States Department of Agriculture at the Hunts Point, New York office of the Department's Fresh Products Branch. Tr. 128-29.

[27]William J. Cashin first inspected produce at Trombetta, Inc. when Mr. Cashin started working for the Inspection Service, in 1979. Tr. 134. [28]William J. Cashin was not paid a bribe at Trombetta, Inc. until Joseph ("Joe Joe") Auricchio at Trombetta, Inc. began paying him bribes, in 1997. Tr. 137, 142.

[29]William J. Cashin had already begun a bribe-taking relationship with Joseph ("Joe Joe") Auricchio at another location at Hunts Point Terminal Market where Mr. Auricchio worked before he started working at Trombetta. Tr. 139.

[30]William J. Cashin agreed, immediately after having been arrested himself on March 23, 1999, to cooperate with the Federal Bureau of Investigation (FBI) in its investigation by continuing to operate as he had in the past and reporting daily the payments he collected. Tr. 143, CX 6 - CX 9.

[31]In response to William J. Cashin's daily reports to the FBI, the FBI prepared FD-302s as a summary. *See* CX 5. The portions of the FD-302s which correlate to the unlawful bribes and gratuities Mr. Cashin received from Joseph ("Joe Joe") Auricchio are organized for each count of the Indictment, together with applicable inspection certificates, which show Trombetta, Inc. as having applied for the inspections. CX 6 through CX 9.

[32]Joseph ("Joe Joe") Auricchio was acting in the scope of his employment as a produce salesman for Trombetta, Inc. when he paid the unlawful bribes and gratuities. When he paid the unlawful bribes and gratuities, he was acting on behalf of his employer Trombetta,

Inc.; the unlawful payments could have benefited Trombetta, Inc.; the unlawful payments were incorporated into his regular work routine for Trombetta, Inc.; he made the unlawful payments on a regular basis; he was at his regular work place at Trombetta, Inc. when he made the unlawful payments; and he made the unlawful payments during his regular work hours for Trombetta, Inc. Tr. 363-65.

[33] Joseph ("Joe Joe") Auricchio was acting within the scope of his employment as a produce salesman for Trombetta, Inc. each time he paid an unlawful bribe or gratuity to William J. Cashin as reported in CX 6 through CX 9, and as reflected in the one count of which he was convicted, regardless of whether anyone at Trombetta, Inc. directed him to make the unlawful payments, provided him the money to make the unlawful payments, or was even aware that he was making the unlawful payments. Tr. 363-64.

[34]After careful consideration of all the evidence before me, I accept as credible the testimony of Joan Marie Colson; William J. Cashin; John Aloysius Koller; Philip James ("Phil") Margiotta, also known as Philip J. Margiotta; Peter Silverstein; Max Montalvo; Frank J. Falletta; Matthew John ("Matt") Andras; Harlow E. ("H.E.") Woodward III; Stephen Trombetta; Martin A. ("Marty") Shankman; Patricia Baptiste; Philip Harry Lucks; and Philip Joseph ("Junior") Margiotta, also known as P.J. Margiotta.

Discussion

[35]Here, there is no question whether Trombetta, Inc.'s employee Joseph ("Joe Joe") Auricchio paid unlawful bribes and gratuities to USDA produce inspector William Cashin during April 20, 1999 through July 7, 1999, in connection with produce inspections requested by Trombetta, Inc.. He did. Unquestionably. The only question is whether what Joseph ("Joe Joe") Auricchio did, causes his employer Trombetta, Inc. to suffer the consequences under the Perishable Agricultural Commodities Act, the PACA.

[36]Trombetta, Inc. argues that the seven inspection certificates may not have contained any false information. Trombetta, Inc. suggests that what William J. Cashin recorded was true; that in actuality, he gave no "help". I do not discuss the evidence that Trombetta, Inc cites in support of its argument (*see* Trombetta, Inc.'s Brief), because the outcome here remains the same even if the inspection certificates were accurate. The unlawful payments to William J. Cashin were egregious even if Trombetta, Inc. got nothing in return. *See JSG Trading Corp. v. USDA*, 235 F.3d 608, 614-15 (D.C. Cir. 2001), which held that there is no requirement that there be a *quid pro quo* arrangement between the payer and payee in bribery cases under the PACA.

[37]Trombetta, Inc. argues that AMS's entire case is founded upon the allegation that the inspections in issue contained false information. *See* Trombetta Inc.'s Brief at page 21. I disagree. Making the unlawful payments to the USDA produce inspector is the unfair trade practice, regardless of the produce inspector's response. *See* AMS's Reply Brief at pages 15-16.

[38]Trombetta, Inc. argues that the recorded conversations between Joseph ("Joe Joe") Auricchio and USDA Produce Inspector William J. Cashin, while Mr. Cashin was working undercover, impeach Mr. Cashin's credibility when Mr. Cashin testified that he "gave help" by reporting the produce he inspected to be in worse condition than it actually was. RX V I disagree. To me, the recorded conversations that Trombetta, Inc. relies upon, reveal caution on the part of both Mr. Auricchio and Mr. Cashin, regarding the extent to which the produce should be misrepresented, if at all, but I find Mr. Cashin's testimony to be credible. The daily reporting to the F.B.I. while Mr. Cashin was working undercover provides reliable verification of Joseph ("Joe Joe") Auricchio's unlawful payments on behalf of Trombetta, Inc. to a USDA produce inspector. CX 6 - CX 9.

[39]USDA Produce Inspector William J. Cashin testified, in part, as follows:

Mr. Richman: Was there any basic understanding between you and Mr. Auricchio about what you would be doing with regard to your inspections for Respondent?
Mr. Cashin: Yes.
Mr. Richman: What was that understanding?
Mr. Cashin: He was looking for help on the various loads of produce.
Mr. Richman: And how did that understanding come about between you and Mr. Auricchio?
Mr. Cashin: At M. Trombetta I don't remember the exact how it came about there, but I knew "Joe Joe" from another location in the market before he started working at Trombetta.
Mr. Richman: And you had that understanding from that time as well?
Mr. Cashin: Yes.
Mr. Richman: How did Mr. Auricchio let you know that he wanted help on a particular load?
Mr. Cashin: Usually I would in fact every time he was there, when I was sent to Trombetta, I would always talk to him. And he and I would discuss the load and he would tell me he needed help on the load.
Mr. Richman: And what was your understanding of the meaning of the phrase help, when it was requested in connection with the produce inspection?
Mr. Cashin: Help came in any one of three ways, and they weren't always done at the same time. The first one was he was asking me to write the condition defects on the certificate in such a way that they were over the delivery marks.
Mr. Richman: Can you explain that actually what is good delivery?
Mr. Cashin: Okay, in the USDA Standards there are tolerances for certain defects. The delivery standards are a parallel set of standards set forth either by the PACA or within the industry

itself and these standards were set a little bit higher than the USDA Standards. And for example if the USDA allowed three percent decay in a certain defect, the good delivery standard would be five percent. So one of the ways of help was that "Joe Joe" would want me to write the product up in such a way that it was over the good delivery standard, because he didn't want the product to fail USDA, but still make good delivery.

Mr. Richman: Okay and you mentioned there are three ways in which you would give help?

Mr. Cashin: Yes, the second way was the number of containers. He sometimes would need or want the number of containers reported on the certificate to closely match to the manifest of what was originally sent when loaded.

Mr. Richman: Why would you do that?

Mr. Cashin: It was my understanding it would make the certificate more legitimate, and also they would get more money back from the shippers.

Mr. Richman: And what is the third way that you would give help?

Mr. Cashin: The third help was temperature. You would need the temperature reported on the certificate to closely match the accepted levels of shipment. So again it would lend legitimacy to the inspection certificate.

Mr. Richman: Were the figures that you put down on the inspection certificate when you gave help, an accurate reflection of the produce you were inspecting?

Mr. Cashin: No.

Mr. Richman: When you gave help with respect to the condition of the produce, how would the figure that you put down on the certificate for the condition of the produce help the Respondent?

> Mr. Cashin: Again, it was my understanding that they would be able to get more money back from the shippers or renegotiate their deals.
> Mr. Richman: And when you gave help with respect to the quantity of the produce, I think you just answered this, but just to clarify. When you gave help with respect to the quantity of the produce inspected, how would the figures you put down for the quantity of the produce inspected help the Respondent?
> Mr. Cashin: Again, it was my understanding that it would lend legitimacy to the certificate and they were able to get more money back.
> Mr. Richman: And when you gave help with respect to the temperature of the produce, how would the figures that you put down for the temperature of the produce help the Respondent?
> Mr. Cashin: It again was my understanding it would lend legitimacy to the whole inspection package.
> Mr. Richman: On what percentage of the loads that you inspected of Respondent would you give help?
> Mr. Cashin: When "Joe Joe" was there, about 100 percent.
> Mr. Richman: **And when did you first start receiving these payments at Trombetta?** (emphasis added)
> Mr. Cashin: **In 1997**. (emphasis added)

Tr. 139-42.

[40]Trombetta, Inc. argues that what Joseph Auricchio did, may not have been "in connection with a produce transaction". *See* Trombetta Inc.'s Brief at page 22. Trombetta, Inc.'s argument is strained (AMS's Reply Brief calls it absurd, at page 17), in light of all the evidence that the money Auricchio gave Mr. Cashin was in connection with a produce transaction. But this is how Trombetta, Inc. summarizes it:

> Without an active Auricchio connection to the purchasing of the produce shipments and/or negotiations with suppliers, or Respondent's actual knowledge (with active or tacit approval) of

> Auricchio's alleged illegal activities down in the sales booth, the vital link between the actions alleged by (Trombetta, Inc.) and the produce transactions it seeks to protect is broken, and (AMS) cannot establish the violations of Section 2(4) that it has alleged. Since (AMS) has failed to make that connection, the Complaint must be dismissed.

Trombetta Inc.'s Brief at page 23.

I disagree. Mr. Auricchio worked for Trombetta, Inc. Even though Phil Margiotta, the buyer/broker for much of the produce, may have had no idea that Mr. Auricchio was arranging for incoming produce to be reported by the USDA produce inspector to be in worse condition than it actually was, the unlawful payments were nonetheless made in connection with produce transactions. Further, even though Trombetta, Inc.'s negotiations of the prices to be paid for the incoming produce may have been honest and trustworthy, the unlawful payments were nonetheless made in connection with produce transactions.

[41]Trombetta, Inc. argues that it provided proper supervision for Mr. Auricchio. Brief at page 22-23. Actually, Trombetta, Inc. did very little, in 1999 and before, to surveil its own employees Tr. 1140-1155. During the time since Mr. Auricchio's criminal activity was exposed, Trombetta, Inc. has taken commendable precautions. Tr. 1161-63.

[42]Trombetta, Inc. argues that USDA inspectors may have committed extortion; that Joseph Auricchio may have been the victim of extortion. RX O. Trombetta Inc.'s Response Brief at page 27. There is no evidence that Joseph ("Joe Joe") Auricchio was the victim of extortion. ALJX 1. Tr. 1129.

[43]The PACA, section 16, incorporates principal-agent common law, making no exception for criminal activity of the agent:

> 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. § 499p.

Both the D.C. Circuit[3] and the 6th Circuit[4] have affirmed the PACA's use of its principal-agency provision under circumstances like those here.

[44]Trombetta, Inc. argues that Section 16 of the Act is inapplicable to this case. Trombetta, Inc. argues that Auricchio's illegal payments to USDA produce inspector William J. Cashin were beyond the scope of his employment; that Joseph ("Joe Joe") Auricchio's criminal activity here cannot have been within the scope of his employment and cannot become Trombetta, Inc.'s violation of the PACA. I find to the contrary, that Joseph ("Joe Joe") Auricchio was working within the scope of his employment when he paid the unlawful bribes and gratuities.

[45]Joseph ("Joe Joe") Auricchio did pay the unlawful bribes and gratuities within the scope of his employment as Trombetta, Inc.'s produce salesman. During Joseph ("Joe Joe") Auricchio's working hours, at his employer Trombetta, Inc.'s location, as part of his job as a salesman for Trombetta, Inc., Joseph ("Joe Joe") Auricchio met with USDA produce inspectors to give them the information needed regarding the produce inspections. *See* Findings of Fact paragraph

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[3] *Post & Taback, Inc. v. (United States) Department of Agriculture*, not selected for publication in the Federal Reporter, February 11, 2005, 123 Fed. Appx. 406; 2005 U.S. App. LEXIS 2475.

[4] *H.C. MacClaren, Inc. v. United States Department of Agriculture*, 342 F.3d 584 (6th Cir. 2003).

[32]. Making illegal payments to the USDA produce inspectors in connection with the produce inspections, even if he did that on his own, unknown to others, did not remove Joseph ("Joe Joe") Auricchio from the scope of his employment.

[46]Even if Joseph ("Joe Joe") Auricchio was not authorized or directed by Trombetta, Inc. to pay unlawful bribes and gratuities to USDA inspectors, and even if Trombetta, Inc. was unaware of his doing so, Trombetta, Inc. is indeed responsible under the PACA for the payment of unlawful bribes and gratuities that Joseph ("Joe Joe") Auricchio paid in connection with the produce inspections ordered by Trombetta, Inc. 7 U.S.C. § 499p. *Post & Taback, Inc. v. (United States) Department of Agriculture*, not selected for publication[5] in the Federal Reporter, February 11, 2005, 123 Fed. Appx. 406; 2005 U.S. App. LEXIS 2475, a copy of which is attached as Appendix A. *H.C. MacClaren, Inc. v. United States Department of Agriculture*, 342 F.3d 584 (6th Cir. 2003). [47]Regarding payment of the unlawful bribes and gratuities, there may not have been unity between employee and employer factually, but the principal-agent legal principle imposes unity between employee and employer. Consequently, whether Joseph ("Joe Joe") Auricchio was authorized or directed by his employer Trombetta, Inc. to pay the unlawful bribes and gratuities does not affect the outcome here.

[48]After careful review of the evidence as a whole, I am unable to determine whether anyone at Trombetta, Inc. besides Joseph ("Joe Joe") Auricchio was involved in making the unlawful payments. Yet the evidence on that subject, together with the six years of experience

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[5]Unpublished judgments of the United States Court of Appeals for the D.C. Circuit entered on or after January 1, 2002, may be cited as precedent. Circuit Rule 28(c)(1)(B). A panel's decision to issue an unpublished disposition means that the panel sees no precedential value in that disposition. Circuit Rule 36(c)(2).

AMS has had with Trombetta, Inc. since the unlawful payments were made in 1999, may impact the future course of AMS's interaction with Trombetta, Inc. and Trombetta, Inc.'s principals.

[49]It is difficult to believe that Joseph ("Joe Joe") Auricchio paid the unlawful bribes and gratuities out of his own pocket *(see* Finding of Fact paragraph [20]). The evidence fails to prove whether the money Joseph ("Joe Joe") Auricchio gave unlawfully to the USDA inspector was his own money, or Trombetta, Inc.'s money, or money from some other source.

[50]Joseph ("Joe Joe") Auricchio was not a witness before me. Neither the parties nor I had the opportunity to see Joseph ("Joe Joe") Auricchio confronted or cross-examined. From the evidence before me, including particularly the plea agreement letter (ALJX 1), and the transcript of Mr. Auricchio's guilty plea (RX N), there is no evidence suggesting that anyone at Trombetta, Inc. besides Joseph ("Joe Joe") Auricchio may have involved in paying the unlawful bribes and gratuities. Joseph ("Joe Joe") Auricchio did not implicate his employer. The evidence does not prove that anyone else at Trombetta, Inc. knew Joseph ("Joe Joe") Auricchio was illegally giving money to USDA inspectors.

[51]John A. Koller, a USDA employee (Senior Marketing Specialist, PACA Branch, Fruit and Vegetable Programs, AMS), testified that the bribery of the USDA produce inspector was such a serious violation of the PACA that a strong sanction is necessary as a deterrent, and that USDA recommends license revocation as the only adequate option. I agree. I find that Joseph ("Joe Joe") Auricchio's actions within the scope of his employment are deemed to be the actions of Trombetta, Inc., and that those actions were so egregious that nothing less than license revocation is an adequate remedy. Mr. Koller explained USDA's recommendation for license revocation as follows: Mr. Richman: Are you aware of the sanction Complainant recommends in this case?

Mr. Koller: Yes, I am.

Mr. Richman: How are you aware of the sanction?
Mr. Koller: I participated in the development of the sanction recommendation.
Mr. Richman: And what is the sanction recommendation in this case? Mr. Koller: A license revocation.
Mr. Richman: And what is the basis for Complainant's sanction recommendation?
Mr. Koller: Well, the basis of Complainant's recommendation for a license revocation is based on several factors. The evidence clearly shows that Respondent (Trombetta, Inc.) paid bribes to a produce inspector. The FBI has documented that over a two-and-a-half month period of time, bribery payments were made that affected seven inspections. Further aggravating the situation, Mr. Cashin has testified that he had been accepting bribes from Respondent (Trombetta, Inc.) since 1997. And bribery payments to a produce inspector has an effect on the trade as a whole. And these - - what will happen is thousands of dollars in adjustments could arise or will arise from these false inspections. Another factor is the industry relies on the produce - - on the inspection certificate to quickly resolve disputes. And approximately 150,000 inspections are performed each year by the Fresh Products Branch, and it is important that these inspections are accurate. If there is any suspicion that these inspections have been tainted due to bribery payments being made to the produce inspector to change the outcome of the results, change the outcome of the inspection, this is something that affects the industry as a whole. Because as the sellers become aware of this bribery situation coming along, then it affects the credibility of the inspection certificate itself and the inspection process. It provides a problem for the industry. The trades rely on the results of that inspection to be impartial and accurate. Another

concern is the concern of when you have got a wholesaler that is paying bribes to a produce inspector, other wholesalers on the market may very well feel - - may very well pay bribes as well to the produce inspector. For example, when you have got a wholesaler in the Hunts Point Market who is paying bribes to a produce inspector to affect the outcome of the inspection and be in a position to get price adjustments on a particular commodity, then they will be able to sell the produce for less. And when other wholesalers become aware of this, they will feel that they are in a position to have to pay the bribes as well in order to compete with the wholesalers that are paying these bribes. And, again, with this is consideration, the effects that this causes on the inspection process and the effect on the Hunts Point Market itself is that whether there is a wholesaler paying bribes or not, it casts a concern to the industry as to who they can rely on in the market there at the market - - the wholesalers on the market. Excuse me. And finally, the Department strongly believes that a strong sanction not only on the Respondent will also - - will not only be a deterrent to Respondent, but will also be a deterrent to other members of the trade who are contemplating making bribery payments to a produce inspector.

* * *

Mr. Richman: Does the fact that it was Mr. Cashin, a USDA employee, who received the bribes, have any effect on Complainant's sanction recommendation?

Mr. Koller: No.

Mr. Richman: Why not?

Mr. Koller: Bribery payments being made to a produce inspector is a serious violation of the PACA. Whether it is to a produce inspector or to any member of the trade, and in the situation where a produce inspector has taken bribes on an

inspection, does not excuse the PACA licensee from those actions of committing the bribery itself.

Mr. Richman: Does Complainant recommend a civil penalty in this case as an alternative to license revocation?

Mr. Koller: No.

Mr. Richman: Why not?

Mr. Koller: The Department feels that - - or it believes that this type of violation is a most serious violation under the Act. And as, you know, the effects of bribery payments, you know, first off, it is bribery payments of the produce inspector. You have got that. The bribery payments have been taking place over a period of time, they are repeated. The bribery payments affect the credibility of the inspection certificate, and then that consequently affects the reliability and credibility of that inspection to the industry to quickly resolve disputes. The other concern, again, is the competitive nature, the competitive aspect of the industry on the Hunts Point Market or any other market. If you have got firms paying bribes that are giving - - that are getting an advantage with price adjustments, there again, causes a problem with competition. Those firms that are not in the same situation, they are not able to compete in that situation. Also, the aspect of Department - - in order to deter this type of action, this violation, from occurring, a strong sanction of a license revocation to deal with one of these most serious violations of the Act would be the appropriate thing. And the Department has also consistently recommended that a revocation of a license be the recommendation for sanction where a serious violation of the PACA by committing a bribe has taken place.

Mr. Richman: Is that the policy of the Department?

Mr. Koller: That is the policy of the Department.

Tr. 367-371.

Conclusions

[52]Joseph ("Joe Joe") Auricchio, an employee of Respondent M. Trombetta & Sons, Inc., paid unlawful bribes and gratuities to a United States Department of Agriculture inspector, during April through July 1999, in connection with seven federal inspections covering perishable agricultural commodities from six sellers received or accepted in interstate or foreign commerce. 7 U.S.C. § 499b(4).

[53]Joseph ("Joe Joe") Auricchio was acting in the scope of his employment as a produce salesman for Trombetta, Inc., when he did what is described in paragraph [52], even if what he did was unauthorized. When he paid the unlawful bribes and gratuities, he was acting on behalf of his employer Trombetta, Inc.; the unlawful payments could have benefitted Trombetta, Inc.; the unlawful payments were incorporated into his regular work routine for Trombetta, Inc.; he made the unlawful payments on a regular basis; he was at his regular work place at Trombetta, Inc. when he made the unlawful payments; and he made the unlawful payments during his regular work hours for Trombetta, Inc. 7 U.S.C. § 499p.

[54]Joseph ("Joe Joe") Auricchio was acting as Trombetta, Inc.'s agent, when he did what is described in paragraph [52]. 7 U.S.C. § 499p.

[55]Joseph ("Joe Joe") Auricchio's willful violations of the PACA are deemed to be Trombetta, Inc.'s willful violations of the PACA. *In re: H.C. MacClaren, Inc.*, 60 *Agric. Dec.* 733, 756-57 (2001), *aff'd* 342 F.3d 584 (6th Cir. 2003).

[56]M. Trombetta & Sons, Inc., through its employee and agent, paid unlawful bribes and gratuities to a USDA inspector, during April through July 1999, in connection with seven federal inspections covering perishable agricultural commodities from six sellers received or accepted in interstate or foreign commerce, in violation of section 2(4) of the PACA. 7 U.S.C. § 499b(4).

[57]Trombetta, Inc. is responsible under the PACA, notwithstanding any ignorance of the employee's actions, for the conduct of its employee who paid the unlawful bribes and gratuities to the USDA produce inspector in connection with the federal inspections. *Post & Taback, Inc. v. (United States) Department of Agriculture*, not selected for publication in the Federal Reporter, February 11, 2005, 123 Fed. Appx. 406; 2005 U.S. App. LEXIS 2475, *See*Appendix A.*

[58]M. Trombetta & Sons, Inc. willfully, flagrantly and repeatedly violated Section 2(4) of the Perishable Agricultural Commodities Act during April 1999 through July 1999, by failing, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with transactions involving perishable agricultural commodities received or accepted in interstate or foreign commerce. 7 U.S.C. § 499b(4).

[59]The duty that Trombetta, Inc. failed to perform is the duty to maintain fair trade practices required by the PACA. Paying the unlawful bribes and gratuities to the USDA produce inspector is the unfair trade practice and failure to maintain fair trade practices. Regardless of the produce inspector's response - - even if the produce inspector had not falsified his inspection reports - - and even if the wholesaler gained no unfair economic advantage and made no attempt to gain any unfair economic advantage - - making the unlawful payments to the USDA produce inspector is the unfair trade practice. The unlawful payments to the USDA produce inspector were egregious even if Trombetta, Inc. got nothing in return. *JSG Trading Corp. v. USDA*, 235 F.3d 608, 614-15 (D.C. Cir. 2001).

[60]Trombetta, Inc.'s violations of the PACA were egregious, requiring a remedy of suspension or revocation. *In re Geo. A. Heimos Produce Company, Inc.*, 62 *Agric. Dec.* 763, 780-781 (2003).

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*Appendix A not included herein– Editor

Although suspension was the chosen remedy in *Heimos*, which concerned Heimos' employees altering inspection certificates, suspension would not be adequate to respond to the seriousness of Trombetta, Inc.'s failures here.

[61]Trombetta, Inc.'s failures here threatened the integrity of the USDA inspection process, casting suspicion on inspection results and tending to taint the marketplace.

[62]This case, and a similar case I recently decided, *In re KOAM Produce, Inc.*, PACA Docket No. D-01-0032, April 18, 2005, ____ *Agric. Dec.* _____, illustrate how difficult it is to determine and prove where the money came from that was used to pay the unlawful bribes and gratuities to the USDA inspector. Responsibility under principal-agent law is indispensable under the PACA.

[63]Considering all of the evidence, Trombetta, Inc., but for the actions of Joseph ("Joe Joe") Auricchio, appears to have been trustworthy and honest and fair dealing. For the purpose of this Decision, I find no culpability on the part of anyone within Trombetta, Inc. other than Joseph ("Joe Joe") Auricchio. Of particular significance is the fact that USDA Produce Inspector William J. Cashin, who had been collecting bribes at Hunts Point Terminal Market for about 20 years, and had been inspecting at Trombetta, Inc. for about 20 years, collected no bribes at Trombetta, Inc. until Joseph ("Joe Joe") Auricchio started to work as a salesman there, in 1997. Also significant is that Mr. Cashin had already begun a bribe-taking relationship with Joseph ("Joe Joe") Auricchio at another location at Hunts Point Terminal Market where Mr. Auricchio worked before he started working at Trombetta. *See*Findings of Fact paragraphs [27], [28], and [29]. Nevertheless, I hold Trombetta, Inc. responsible for the actions of Joseph ("Joe Joe") Auricchio, just as if Trombetta, Inc. itself had performed each of Mr. Auricchio's acts.

[64]USDA is charged with overseeing the integrity of the USDA inspection process and must take appropriate action against a licensee committing a unfair trade practice, even where there is evidence of

only one employee of the licensee committing the unfair trade practice, and whether or not such employee is a manager, supervisor, officer, director, or shareholder of licensee.

[65]Revocation of Trombetta, Inc.'s license is commensurate with the seriousness of Trombetta, Inc.'s violations of the PACA. Tr. 367-71.

[66]Any lesser remedy than revocation would not be commensurate with the seriousness of Trombetta, Inc.'s PACA violations, even though many of Trombetta, Inc.'s competitors were committing like violations, and even though USDA inspectors who took the unlawful bribes and gratuities were arguably more culpable than those that paid them. Tr. 367-71.

Order

[67]Respondent Trombetta, Inc. committed willful, flagrant and repeated violations of section 2(4) of the Perishable Agricultural Commodities Act (the PACA) (7 U.S.C. § 499b(4)), and the facts and circumstances of the violations shall be published.

[68]Respondent Trombetta, Inc.'s PACA license shall be revoked.

[69]This Order shall take effect on the 11th day after this Decision becomes final.

Finality

[70]This Decision becomes final without further proceedings 35 days after service unless appealed to the Judicial Officer within 30 days after service, as provided in section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

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

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PERISHABLE AGRICULTURAL COMMODITIES ACT

REPARATION DECISIONS

OMEGA PRODUCE COMPANY, INC. v. BOSTON TOMATO & PACKING, LLC, d/b/a BOSTON TOMATO.
PACA Docket No. R-05-033.
Decision and Order.
Filed February 15, 2005.

PACA - Tomato Suspension Agreement – Exclusion of Implied Warranties.

Where tomatoes were purchased by Respondent from Complainant pursuant to the December 4, 2002 Suspension Agreement on Fresh Tomatoes Imported from Mexico, Respondent's claim that the tomatoes were not merchantable due primarily to the quality defects disclosed by a USDA inspection cannot be considered because the Suspension Agreement permits adjustments to the sales price for the condition defects listed in the Agreement and for *no other defects.* The language used in the Suspension Agreement is sufficiently explicit to bring the exclusion of warranties to the buyer's attention and make plain that there are no implied warranties.

Daniel Deutsch, for Complainant.
Kimberly A. Howard, for Respondent.
Patrice 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*.). A timely complaint was filed with the Department within nine months from the accrual of the cause of action, in which Complainant seeks a reparation award against Respondent in the amount of $11,365.20 in connection with one trucklot of tomatoes shipped in the course of interstate and foreign 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.

Since the amount claimed in the formal complaint does not exceed

$30,000.00, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable. 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. Complainant also submitted a Brief.

Findings of Fact

1. Complainant, Omega Produce Company, Inc., is a company whose post office address is P.O. Box 277, Nogales, Arizona, 85628.

2. Respondent, Boston Tomato & Packaging, LLC, doing business as Boston Tomato, is a limited liability company whose post office address is 117-118 New England Produce Ctr., Chelsea, Massachusetts, 02150-1721. At the time of the transaction involved herein, Respondent was licensed under the Act.

3. On or about January 21, 2004, Complainant, by oral contract, sold to Respondent one trucklot of tomatoes comprised of 72-25 lb. cartons of extra large, 90-110 count, Roma tomatoes at $14.35 per carton, or $1,033.20, and 720-25 lb. cartons of large, 110-130 count, Roma tomatoes at $14.35 per carton, or $10,332.00, for a total f.o.b. contract price of $11,365.20.

4. The sale of the tomatoes mentioned in Finding of Fact 3 was negotiated by a broker, Agri-Sales Limited, Inc. (hereafter "Agri-Sales"), who acted in negotiating the sale as an agent for Respondent.

5. On February 3, 2004, the tomatoes were shipped from loading point in the state of Arizona, to Respondent in Chelsea, Massachusetts, in a truck operated by Central Coast Transport, Inc. (hereafter "Central Coast"), of Nogales, Arizona.

6. On February 10, 2004, Mr. Dino Robles of Central Coast sent a fax message to Complainant, Respondent, and Agri-Sales, advising as follows:

I'm writing this letter to inform you that the truck been [sic] up in

Boston since 5 AM EST. Feb. 9, 04 Monday. I need this trk. off by 2:00 PM EST. or we are going to sell the tomato for some one [sic] acct. or put in a cold storage. Please get back to me.

Later that same day, Central Coast moved the tomatoes to Stea Brothers, Inc., in Philadelphia, Pennsylvania, to be handled for their account.

7. On February 11, 2004, Mr. W. Winston Lopez of Agri-Sales sent a fax message to Central Coast's Mr. Dino Robles stating:

> As per our conversation yesterday after, in order to clearify [sic] that you and I did speak on this matter. I did receive your call advising me of this fax, which I reviewed upon my return to the office.
>
> 1. I am in accord of said action on your part of which you stated that Boston Tomato had said to you they would not unload without a confirmation of adjustment of price.
>
> 2. A confirmation was sent to them once it was approve [sic] by the shipper. Although the time frame did not allow for the shipment to be unload [sic] yesterday afternoon Boston did state that it be [sic] done this morning upon open [sic] his place of business.
>
> 3. You and I did discuss this matter, and agreed the truck to be present [sic] this morning for that purpose.
>
> 4. Presently there was no confirmation from the trucker or your office that truck attempted to get unloaded this morning other than you mentioning that the driver was present at 2:00am.
>
> I am going to speak with Boston in order to advise of the present position of this matter. Please contact me if you have any questions regarding this matter.

8. Also on February 11, 2004, at 9:18 a.m., the tomatoes were subjected to a USDA inspection at the place of business of Stea Brothers, Inc., in Philadelphia, Pennsylvania, the report of which disclosed 67% average defects, including 57% quality (puffiness, scars) and 10% sunken discolored areas, in the 720 cartons of large Roma tomatoes, and 66% average defects, including 60% quality (puffiness, scars) and 6% sunken discolored areas, in the 72 cartons of extra large Roma tomatoes. Pulp temperatures at the time of the inspection ranged from 50 to 52 degrees Fahrenheit.

9. Following the inspection, Mr. Dino Robles of Central Coast sent

a second fax message to Complainant, Respondent, and Agri-Sales, advising as follows:

I'm writing this letter to inform you that the tomato are [sic] placed at Stea Bros. in Phila, PA 215-336-2170 will work for my acct. on freight and remit balance to shipper. Also here's copy [sic] of inspection.

10. Stea Brothers, Inc. accounted to Central Coast for the tomatoes as follows:

Sales:

23 @	$10.00 = 230.00	80 @	$ 3.00 = 240.00
1 @	8.00 = 8.00	232 @	2.00 = 464.00
18 @	6.00 = 108.00	77 @	1.00 = 77.00
111 @	4.00 = 444.00	250 @	0.00 = 0.00

Total Packages sold 792
Average 1.98 per package

Total Sales $ 1571.00

Less:

15% Commission	$ 235.65
Handling 792pkgs @ .25	198.00
Inspection	144.00
Dump Charge 250pkgs @ 1.00	250.00
Total Net Due:	$ 743.35

11. Stea Brothers, Inc. paid Central Coast $743.35 for the tomatoes with check number 52331, dated February 27, 2004.

12. Respondent did not receive any of the proceeds from the sale of the tomatoes from Central Coast, nor has Respondent remitted any sums to Complainant toward the agreed purchase price of the tomatoes.

13. The informal complaint was filed on March 3, 2004, which is within nine months from the accrual of the cause of action.

Discussion

Complainant brings this action to recover the agreed purchase price for one trucklot of Roma tomatoes sold and shipped to Respondent. Complainant states Respondent accepted the tomatoes in compliance with the contract of sale, but that it has since failed, neglected and refused to pay the negotiated contract price of $11,365.20. As evidence in support of this allegation, Complainant attached to the formal complaint a copy of its invoice billing Respondent for the tomatoes in the amount stated, as well as a copy of the bill of lading signed by the trucker, which lists the destination for the tomatoes as Respondent's place of business in Chelsea, Massachusetts.[1]

In response to Complainant's allegations, Respondent submitted a sworn Answer wherein it raises several issues in defense of its failure to pay Complainant the amount claimed. Respondent maintains first that the broker, Agri-Sales, confirmed that Complainant granted protection for market decline for the subject load of tomatoes. According to Respondent, the market for Roma tomatoes was continuously dropping while the tomatoes were in transit. As a result, Respondent states that in each of three conversations with Agri-Sales, and between Agri-Sales and Complainant, the sales price of the tomatoes was adjusted downward by $2.00 per carton, thereby ultimately reducing the price from $14.35 to $8.35 per carton. Respondent states Complainant confirmed this by faxing a revised invoice to Respondent reflecting the new price of $8.35 per carton. To substantiate this contention, Respondent attached to the Answer a copy of Complainant's invoice for the tomatoes whereon the original sales price of $14.35 per carton is crossed through and $8.35 is handwritten in beside it.[2]

Upon review, we note first that the Report of Investigation prepared by the Department includes a copy of a February 12, 2004 letter addressed to Respondent from Complainant's attorney, wherein counsel advises Respondent, in pertinent part, as follows:

In the interest of resolving this matter and for settlement purposes only, Omega Produce Company is willing to grant a credit of $6.00 per

[1] Formal Complaint Exhibits 1A and 3A.

[2] Answer Exhibit A.

package leaving a total of $6,613.20 payable, if such amount is paid within twenty-one (21) days from shipment of the load. If Boston Tomato Company, Inc. fails to pay $6,613.20 by such period of time, we will proceed with a PACA complaint for $11,365.20, the full balance owed. [3]

Also included in the Report of Investigation is a May 27, 2004 statement issued by Complainant to Respondent showing the amount due for the invoice in question as $6,613.20.[4] It is therefore apparent that in spite of Respondent's failure to pay Complainant $6,613.20 within the time period stated in the February 12, 2004 correspondence prepared by Complainant's attorney, Complainant still considered the amount due for the shipment to be $6,613.20 several months later, when the statement just mentioned was prepared. On this basis, we find that the preponderance of the evidence supports Respondent's contention that the contract price of the tomatoes was reduced to $8.35 per carton, or a total of $6,613.20.

Respondent also maintains that when the truck arrived to deliver the tomatoes on February 9, 2004, Respondent discovered that there were 72 cartons of extra large and 720 cartons of large Roma tomatoes, and that the tomatoes were green in color, which was not in conformance with the purchase order. Respondent states it notified Agri-Sales of the non-conforming color and size of the tomatoes, after which it received instructions on February 10, 2004 to have the tomatoes inspected. At that time, the truck was reportedly requested to return to Respondent's place of business so that the tomatoes could be inspected; however, Respondent states the truck did not return by 2:00 p.m. on February 10, 2004, the time by which the trucker insisted the tomatoes should be unloaded. As a result, Respondent states the tomatoes were delivered on February 11, 2004 to Stea Brothers, Inc., in Philadelphia, Pennsylvania, where a USDA inspection was performed. Respondent states that based on the USDA inspection results, which showed that the tomatoes contained 67% defects, including 57% "puffy" and "scars," and substantial amounts of sunken or discolored areas, the tomatoes were not

[3] Report of Investigation Exhibit No. 9F, ¶2.

[4] Report of Investigation Exhibit No. 12C.

merchantable for consumption. Respondent adds that due to the poor condition and quality, the tomatoes generated only $743.35 when sold by Stea Brothers, Inc. for the account of the trucker, and points out that the return from Stea Brothers, Inc. shows that more than 94% of the tomatoes were either dumped or sold at a price not even meeting the floor price.

Although Respondent claims that the tomatoes were not merchantable, there is no indication that Respondent ever notified Complainant that it was rejecting the tomatoes. Failure to reject produce in a reasonable time is an act of acceptance. 7 C.F.R. § 46.2(dd)(3). We conclude, on this basis, that Respondent accepted the tomatoes.

A buyer who accepts produce becomes liable to the seller for the full purchase price thereof, less any damages resulting from any breach of contract by the seller. *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). As we mentioned, Respondent contends that the tomatoes in question were not merchantable and cites the USDA inspection results and the account of sales prepared by Stea Brothers, Inc. as proof in support of this contention.

On the issue of merchantability, the Uniform Commercial Code (UCC), section 2-314, states that "[u]nless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." It is well-established that Complainant is a dealer of fresh tomatoes. Thus, any sale by Complainant of fresh tomatoes would normally include an implied warranty of merchantability in accordance UCC § 2-314. Moreover, the substantial quality defects disclosed by the USDA inspection of the tomatoes in question would certainly be sufficient to establish a breach by Complainant of this warranty. We note, however, that in reference to the account of sales, Respondent mentions a "floor price."[5] Respondent's mention of a "floor price" is an implicit acknowledgement on the part of Respondent that the tomatoes in question were sold subject to the December 4, 2002

[5] Answer, pg. 3, ¶6.

Suspension Agreement for Fresh Tomatoes from Mexico[6] ("Suspension Agreement"), which provides that such tomatoes must be sold at or above an established reference price. In addition, Complainant's invoice to Respondent for the tomatoes bears a statement that reads:

The tomatoes sold pursuant to this invoice are subject to that Suspension Agreement dated December 4, 2002 between the U.S. Department of Trade and certain tomato growers, the Clarification thereof, and to (a) certain letter agreement(s) between yourselves and ourselves regarding the same, each of which is incorporated by this reference as if set forth in full. Said agreements will be mailed to you upon request.

We conclude, therefore, that the tomatoes at issue herein were sold subject to the Suspension Agreement.

Appendix D, subsection (A)(5) of the Suspension Agreement states:

Under this Agreement, adjustments to the sales price of signatory tomatoes will be permitted only for the condition defects identified in the table below and for no other defects.

Condition Defects

(1) Sunken & Discolored Areas
(2) Sunburn
(3) Internal Discoloration
(4) Freezing Injury
(5) Chilling Injury
(6) Alternaria Rot
(7) Gray Mold Rot
(8) Bacterial Soft Rot
(9) Soft/Decay

As we mentioned, the implied warranty of merchantability is applicable in the contract for the sale of goods if the seller is a merchant with respect to the type of goods, *unless excluded or modified*. In this regard, subsection 3(a) of UCC § 2-316, Exclusion or Modification of Warranties, states "unless the circumstances indicate otherwise, all

[6] See 67 FR 77044, dated December 16, 2002, "Suspension of Antidumping Investigation: Fresh Tomatoes From Mexico," issued by the Department of Commerce, International Trade Administration, Import Administration.

implied warranties are excluded by expressions like 'as is', 'with all faults' or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty." The language used in Appendix D, subsection (A)(5), of the Suspension Agreement expressly limits the seller's responsibility for the defective nature of the tomatoes to the defects listed therein. In so doing, we find that the Suspension Agreement specifically excludes any other implied warranties that would normally apply.

We should also note that even if the implied warranty of merchantability was in effect for the shipment in question, the Suspension Agreement would nevertheless limit the remedies available to Respondent for the recovery of damages resulting from a breach. UCC section 2-719(1), Contractual Modification or Limitation of Remedy, states "(a) the agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this article... and (b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy" Official Comment 2 to UCC § 2-719(1)(b) states this section "creates a presumption that clauses prescribing remedies are cumulative rather than exclusive," and that "[i]f the parties intend the term to describe the sole remedy under the contract, this must be clearly expressed." In this regard, the Suspension Agreement in question provides a specific procedure for making adjustments to the sales price for tomatoes sold under the Agreement and expressly limits the conditions under which such adjustments will be permitted.

> Pursuant to the Suspension Agreement, Respondent's claim for damages is deficient in several respects. First, the Suspension Agreement requires that a USDA inspection be called for no more than six hours from the time of arrival at the destination specified by the receiver, and that the inspection be performed in a timely fashion thereafter. (Appendix D, subsection (A)(4)¶1). As the record reflects, this was not accomplished by Respondent. In addition, subsection (A)(4)¶3 of the Suspension Agreement states, "no adjustments will be granted for a USDA inspection at a destination that is different from the destination specified by the first receiver of the product." In the instant case, the destination specified by

Complainant for the tomatoes was Respondent's place of business in Chelsea, Massachusetts. However, as we mentioned, the USDA inspection was performed at Stea Brothers, Inc., in Philadelphia, Pennsylvania. Finally, as we already mentioned, Appendix D, subsection (A)(5) of the Suspension Agreement states specifically that, "adjustments to the sales price of signatory tomatoes will be permitted *only* for the condition defects identified in the table below *and for no other defects*." (emphasis supplied). While the condition defects listed in the table include sunken discolored areas, subsection (A)(2) of Appendix D establishes a threshold for any one condition defect of 15%, and subsection (A)(3) of Appendix D provides that no adjustments will be granted unless the percentage of defects disclosed by the USDA inspection exceeds this threshold. Therefore, since the USDA inspection in question disclosed no more than 10% sunken discolored areas in either of the lots of tomatoes inspected, no adjustment for the condition defects disclosed by the USDA inspection are permitted under the Suspension Agreement. Moreover, Respondent's claims regarding the quality, size and color of the tomatoes cannot be considered because, as we mentioned, the Suspension Agreement specifically provides that adjustments will be granted for condition defects only, and for no other defects.

Therefore, having failed to establish that it is entitled to any adjustments pursuant to the Suspension Agreement under which the tomatoes were purchased, Respondent is liable to Complainant for the tomatoes it accepted at the adjusted contract price of $6,613.20. Respondent's failure to pay Complainant $6,613.20 is a violation of section 2 of the Act for which reparation should be awarded to Complainant. Section 5(a) of the Act requires that we award to the person or persons injured by a violation of section 2 of the Act "the full amount of damages sustained in consequence of such violations." Such damages include interest. *Louisville & Nashville Railroad Co. v. Sloss Sheffield Co.*, 269 U.S. 217 (1925); *Louisville & Nashville Railroad Co. v. Ohio Valley Tie Co.,* 242 U.S. 288 (1916). Since the Secretary is charged with the duty of awarding damages, he/she also has the duty, where appropriate, to award interest. *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 v. Producers Marketing Association, Inc.,* 22 Agric. Dec. 66 (1963).

Complainant in this action paid $300.00 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 $6,613.20, with interest thereon at the rate of 10% per annum from March 1, 2004, until paid, plus the amount of $300.00.

Copies of this Order shall be served upon the parties.

In re: THE NUNES COMPANY, INC. v. WEST COAST DISTRIBUTING, INC.
PACA Docket No. R-04-107.
Decision and Order.
Filed March 7, 2005.

PACA - Evidence, best – Good Delivery Standard.

Where a shipment of 630 cartons of lettuce were shipped, and 620 cartons were inspected indicating that the product met the Good Delivery Standard for iceberg lettuce, the receiver called for and obtained an appeal inspection two hours later, covering only 420 cartons of the shipment. The appeal inspection, although it did not nullify the first inspection, was considered to represent the best evidence of the condition of the lettuce. In determining whether the appeal inspection revealed a breach of the Good Delivery Standard, the missing 210 cartons were considered to have contained no defects.

Mark C.H. Mandell, for Complainant.
Thomas R. Oliveri, for Respondent.
Patrice 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.*). A timely complaint was filed in which Complainant seeks an award of reparation in the amount of $14,809.00 in connection with a transaction in interstate commerce involving a truckload of lettuce. Complainant subsequently adjusted the amount being sought in this proceeding to $3,845.10.

Copies of the Report of Investigation prepared by the Department were served upon the parties. A copy of the formal complaint was served upon Respondent, which filed an Answer thereto denying liability to Complainant. Respondent's Answer also included a counterclaim in the amount of $7,484.40, for damages which it alleges arise out of the same transaction as that in the complaint. Complainant filed a reply to the counterclaim denying any liability thereunder.

The amount claimed in the formal complaint does not exceed $30,000.00. Therefore, the documentary procedure provided in the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's Report of Investigation. In addition, the parties were given an opportunity to file evidence in the form of verified statements. Complainant filed an Opening Statement and a Statement in Reply. Respondent filed an Answering Statement. The parties were also given the opportunity to file Briefs. Both parties filed Briefs.

Findings of Fact

1. Complainant, The Nunes Company, Inc., is a corporation whose post office address is P.O. Box 80006, Salinas, California. At the time of the transactions involved herein, Complainant was licensed under the Act.
2. Respondent, West Coast Distributing, Inc., is a corporation whose post office address is 350 Main Street, Suite 15, Malden, Massachusetts. At the time of the transactions involved herein, Respondent was licensed under the Act.
3. On or about June 27, 2003, under invoice 1455840, Complainant sold and shipped from a loading point in the State of California to Respondent in Boston, Massachusetts, 630 cartons of "Tubby" brand

lettuce and 210 cartons of "Foxy" brand lettuce at $17.60 per carton, for a total f.o.b. invoice price of $14,809.00, which includes $25.00 for a temperature recorder.

4. On or about July 2, 2003, the invoice price was subsequently adjusted to $12.75 per carton for the "Tubby" brand lettuce and $13.50 per carton for the "Foxy" brand lettuce, making the total adjusted invoice price of $10,985.50.

5. On or about July 3, 2003 at 6:05 a.m., 620 cartons of "Tubby" brand lettuce were federally inspected at Respondent's customer, W.H. Lailer & Co., Inc., in Chelsea, Massachusetts. Inspection certificate T-577432-8 disclosed the following, in relevant part:

TEMPERATURES	PRODUCT	BRAND MARKINGS	ORIGIN	LOT ID	NO.of CONTAINERS
39 TO 41°F	Iceberg Lettuce	"Tubby" 24 Heads	CA	Hakey 01-1034 178-1034 178-1???	620 cartons

AVERAGE DEFECTS	**including SER DAM**	**OFFSIZE/DEFECTS**	**OTHER**
00%	00%	Quality	Decay early stages
08%	01%	Tipburn (0 to 21%)	
01%	00%	Discoloration following bruising	
01%	01%	Upper leaf decay	
04%	04%	Head leaf decay (0 to 8%)	
14%	**06%**	**CHECKSUM**	

GRADE: Fails to Grade U.S. No. 1. only account of condition
REMARKS: Lot made accessible for inspection by applicant.

6. On or about July 3, 2003, at 8:05 a.m., an appeal inspection was conducted on 420 cartons of "Tubby" brand lettuce. The appeal inspection was also conducted at Respondent's customer, W.H. Lailer & Co., Inc., in Chelsea, Massachusetts. Inspection certificate T-577324-7 disclosed the following, in relevant part:

TEMPERATURES	**PRODUCT**	**BRAND MARKINGS**	**ORIGIN**	**LOT ID**	**NO. of CONTAINERS**
37 TO 39°F	Iceberg Lettuce	"Tubby" 24 Heads	CA	Liner	420 cartons

AVERAGE DEFECTS	**including SER DAM**	**OFFSIZE/DEFECTS**	**OTHER**
00%	00%	Quality	Decay early stages, affecting head leaves and butts.
10%	00%	Tipburn (0 to 21%)	
10%	10%	Decay (4 to 13%)	

20% 10% CHECKSUM
This certificate covers an appeal inspection on certificate #T577432-8 and is revised as to condition.
GRADE: Fails to Grade U.S. No. 1. only account of condition
REMARKS: cartons stickered 0223 178 1034, 0223 011 034

7. On or about November 14, 2003, with check 80908, Respondent paid Complainant $3,942.30 for the load shipped under invoice 1455840.
8. On or about December 26, 2003, with check 82489, Respondent paid Complainant an additional $3,108.10 for the load.
9. An informal complaint was filed on September 22, 2003, which is within nine months from when the cause of action accrued.

Conclusions

Complainant brings this action to recover the invoice price for a truckload of iceberg lettuce sold to Respondent. Both parties acknowledge that while the original contract price for the lettuce was $17.60 per carton, the parties orally agreed to adjust the prices to $12.75 f.o.b. for the "Tubby" label and $13.50 f.o.b. for the "Foxy" label, for a total adjusted invoice price of $10,895.50.[1] Complainant asserts that the load was received and accepted by Respondent's customer, but Respondent has only paid $7,050.40, and has since refused and failed to pay the remainder of the invoice price of $3,845.10. As proponent of this claim, Complainant has the burden of proving its allegations by a preponderance of the evidence.[2] In this regard, Complainant submitted into evidence copies of its invoice, bill of lading, and inspection certificates T-577432-8 and T-577324-7.[3]

In response to the formal complaint, Respondent filed a sworn Answer and a sworn Counterclaim. In its Answer, Respondent acknowledges that it agreed to purchase and its customer received and accepted, the load of lettuce which is the subject of this proceeding.

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[1] See Respondent's Answer and Complainant's Opening Statement.

[2] *Sun World International, Inc. v. J. Nichols Produce Co.*, 46 Agric. Dec. 893 (1987); *W.W. Rodgers & Sons v. California Produce Distributors, Inc.*, 34 Agric. Dec. 914 (1975); *New York Trade Association v. Sidney Sandler*, 32 Agric. Dec. 702 (1973).

[3] See Formal Complaint, Exhibits 1-4.

Respondent, however, asserts that the "Tubby" label lettuce was not in suitable shipping condition and it suffered damages in the amount of $7,484.40 for which it has filed a counterclaim.

In response to Respondent's Answer, as its Opening Statement, Complainant filed a sworn affidavit from its Sales Associate, Doug Classen. In his affidavit, Mr. Classen states that, on behalf of Complainant, he negotiated the transaction which is the subject of this proceeding. Mr. Classen states that after the load arrived, on or about July 2, 2003, Respondent's Mr. Keegan contacted him seeking a market adjustment on the iceberg lettuce. Mr. Classen states that the parties agreed to reduce the price of the liner iceberg lettuce to $12.75 per carton and the wrapped lettuce to $13.50 per carton, for a total adjustment to the invoice price of $3,916.50.

Mr. Classen states that he told Mr. Keegan that no further adjustments would be granted as the federal inspection accurately reflects the quality and condition of the lot upon arrival and showed that the iceberg lettuce met good delivery standards upon arrival in Chelsea, Massachusetts. Mr. Classen maintains that the appeal inspection should not be given any consideration, as it was performed on only a portion of the lot of iceberg lettuce and the lot had lost its identity and character. Mr. Classen states that considering the amount that Respondent has paid and the adjustment which was granted, the amount due and owing Complainant from Respondent is $3,845.10.

In response to Respondent's counterclaim, Complainant filed a sworn Response in which it denies that it failed to ship lettuce in good shipping condition. As a result, Complainant maintains that Respondent has not suffered any damages.

In response to Mr. Classen's sworn affidavit, as its Answering Statement, Respondent filed a sworn affidavit from Steve Keegan. Mr. Keegan acknowledges that the parties reached an agreement to adjust the prices to $12.75 per carton for the "Tubby" brand lettuce and $13.60 per carton for the "Foxy" brand lettuce. Mr. Keegan, however, states that upon arrival he received an immediate protest from his customer concerning the condition of the "Tubby" lettuce. Mr. Keegan states that his customer called for an appeal inspection because the amount of decay and tipburn was higher than the amount indicated on the original inspection. Mr. Keegan notes that due to the holiday and falling market prices, its customer sold a portion of the product to preserve its value

while awaiting the appeal inspection.

Mr. Keegan states that since the appeal inspection showed that the lot failed to meet good delivery standards, he agreed with his customer that the lot be handled for Complainant's account. Mr. Keegan maintains that, as evidenced by his customer's account of sale, it suffered damages in the amount of $7,482.80.[4] Furthermore, Mr. Keegan maintains that the adjusted invoice for the load was $10,983.50, and after considering the amount of Respondent's damages, $7,482.80, and the amount which Respondent has already paid Complainant, $7,050.40, Complainant has been overpaid in the amount of $3,640.70.

In response to Mr. Keegan's sworn affidavit, as its Statement in Reply, Complainant filed another sworn affidavit from Doug Classen. Mr. Classen states that contrary to Mr. Keegan's sworn statements, he never discussed the appeal inspection, nor did he agree to the consignment handling of the lettuce. In addition, Mr. Classen reiterates that the first inspection conducted on the lettuce shows that the load met contract specifications upon arrival.

Both parties filed Briefs in which they reiterated their respective arguments.

We first turn to Respondent's allegation that its customer was authorized to handle the load on a consignment basis. As previously stated, Respondent, as the party alleging a modification in the contract terms from a sale to a consignment, has the burden of proving this allegation by a preponderance of the evidence.[5] In this regard, we note that Respondent has offered no evidence to support the contention that Complainant agreed to have the load handled on a consignment basis. In fact, Respondent does not specifically assert that Complainant agreed to the consignment handling, only that Respondent agreed with its customer that the load be handled for Complainant's account.[6] Complainant, on the other hand, maintains that after the price was adjusted to reflect the market, it informed Complainant that there would

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[4] See Respondent's Answering Statement, Exhibits B and C.

[5] *Regency Packing Co. v. The Auster Company, Inc.*, 42 Agric. Dec. 2042 (1983); *F.H. Hogue Produce Co .v. Singer's Sons*, 33 Agric. Dec. 451 (1974).

[6] Respondent's Answering Statement – Sworn Affidavit of Steve Keegan.

be no further adjustments and full payment was anticipated. Based upon a review of the evidence, we find that Respondent has failed to satisfy its burden of proof to show that the parties agreed to modify the terms of the agreement from a sale to a consignment.

We conclude that Respondent accepted the load, and it is, therefore, liable to Complainant for the full purchase price thereof, less any damages resulting from any breach of warranty by Complainant.[7] Therefore, the burden of proof to show both a breach and damages rests upon Respondent. In this regard, Respondent asserts that the load failed to arrive in good condition.[8]

The lettuce in this shipment was sold f.o.b., which means that the warranty of suitable shipping condition is applicable. That warranty provides, "that the commodity, at the 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."[9] For lettuce

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[7] *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 Agic. Dec. 1681 (1987).

[8] See Respondent's Answer.

[9] 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. 1at 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 description at destination. If the latter result is desired then the parties should effect a delivered sale rather than a f.o.b. sale. For all commodities other than lettuce (for which

(continued...)

what constitutes delivery without abnormal deterioration, or what is elsewhere called "good delivery," is set forth in section 46.44 of the Regulations, which reads, in relevant part, as follows:

> (a) Lettuce. (1) If the contract specifies a U.S. grade, the lettuce many contain an average of not more than 3 percent condition defects, including not more than 2 percent decay affecting any portion of the head exclusive of wrapper leaves in excess of the destination tolerances provided for the applicable grade in the U.S. Standards for Grades of Lettuce. (For example, the U.S. No. 1 grade provides a 12 percent tolerance for damage at destination. If a lot contains 5 percent damage by permanent grade factors, 7 percent of the tolerance can be applied to damage by condition factors. The additional 3 percent Good Delivery tolerance would then allow a total of 10 percent damage by condition factors in this shipment at destination.
>
> (2) If the contract does not specify a U.S. grade or percentage of condition defects, the lettuce at destination may contain a maximum of 15 percent, by count, of the heads in any lot which are damaged by condition defects, including therein not more than 9 percent serious damage of which not more than 5 percent may be decay affecting any portion of the head exclusive of wrapper leaves. Sales made on a percentage of a U.S. grade, without specifying the percentage of condition defects separately from the permanent defects, fall under this provision, and the lettuce may not contain more than a total of 15 percent condition defects at destination.

The load was shipped on June 27, 2003 and consisted of 630 cartons of "Tubby" brand lettuce and 210 cartons of "Foxy" brand lettuce. On or about July 3, 2003 at 6:05 a.m., 620 cartons of "Tubby" brand lettuce were federally inspected in Chelsea, Massachusetts. Inspection certificate T-577432-8 disclosed that the lot had average condition defects of 14%, including 4% head leaf decay, 1% wrapper leaf decay,

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[9](...continued)
specific good delivery standards have been promulgated) 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).

1% discoloration following bruising, and 8% tipburn. We find that these results normally would establish that the lettuce made good delivery. In this case, however, we must consider an appeal inspection which was conducted approximately two hours after the initial federal inspection. As a general rule, we accept the results of a timely federal appeal inspection, and rely on these results in preference to the results of the original inspection. The Regulations, in fact, state that:[10]

After an appeal inspection has been completed, an appeal inspection certificate shall be issued showing the results of such appeal inspection; and such certificate shall supersede the inspection certificate previously issued for the produce involved . . . The superseded certificate shall become null and void upon the issuance of the appeal inspection certificate and shall no longer represent the quality described therein .

The appeal inspection must be performed by an inspector or inspectors of equal or higher position than the first inspector, and must involve inspection of least double the normal number of samples.[11] Procedures are also in place to assure that the lot to be inspected is the same lot as originally inspected.[12]

The appeal inspection in this instance was conducted on 420 cartons of "Tubby" brand lettuce. However, as previously mentioned, the lot originally consisted of a total of 630 cartons of "Tubby" brand lettuce. Complainant maintains that the appeal inspection should not be given any consideration because it was only conducted on a portion of the lot. In this regard, in *Vukasovich v. Feldman Bros. Produce Co.*, we held that an appeal inspection conducted on only a portion of a load that was originally inspected does not guarantee an accurate review of the original inspection; such an inspection may be valid in its own right, but not as an appeal inspection that renders the original inspection null and

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[10] 7 CFR § 51.31

[11] See USDA Fresh Product Branch's General Market Inspection Instructions, April 1988, paragraph 131(a) and 133.

[12] See USDA Fresh Product Branch's General Market Inspection Instructions, April 1988, paragraphs 120 – 149.

void. [13] Therefore, since only 420 of the 630 cartons of the lot was subject to the appeal inspection, we conclude that the original inspection was not reversed by the subsequent appeal inspection.

However, as previously stated, we can consider the appeal inspection in its own right. Federal inspection certificate T-577324-7 disclosed that the 420 cartons had average condition defects of 20%, including 10% tipburn and 10% decay. Since 210 cartons of the 630 cartons were not inspected, we will assume that they were free of defects. Taking into account the 210 cartons which we presumed were free of defects, we find that the entire lot of 630 cartons of "Tubby" brand lettuce had average condition defects of only 13%, including 7% decay. Therefore, even assuming that the portion of the lot that was not inspected contained no defects, we find that the average amount of decay was not within the acceptable tolerances. As a result, given the results of the appeal inspection, we find that Respondent has proven a breach as to the entire lot of 630 cartons of "Tubby" brand lettuce.

The general measure of damages for a breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.[14] The value of accepted goods is best shown by the gross proceeds of a prompt and proper resale as evidenced by proper accounting prepared by the ultimate consignee. In this regard, Respondent submitted into evidence two accounts of sale from its customer, W.H. Lailer & Co., Inc.[15] The first account of sale summarily shows that 620 cartons of "Tubby" label lettuce was sold at the average price of $9.74 per carton, for total proceeds of $6,036.00.[16] The second account of sale shows the breakdown of the sales of individual lots of

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[13] *Vukasovich v. Feldman Bros. Produce Co.*, 37 Agric. Dec. 436 (1978).

[14] UCC § 2-714(2).

[15] See Respondent's Answering Statement, Exhibit B and C.

[16] See Respondent's Answering Statement, Exhibit B.

produce with the number of containers sold at each price and the date on which the sales of each lot took place.[17] This account of sale shows that sales took place between July 3, 2003 and July 10, 2003 for total proceeds of $6,036.00.

We find that Respondent's accounting shows that the resale was prompt and proper. The account of sales shows that 620 cartons of "Tubby" lettuce were sold for total sales of $6,036.00, or $9.74 per carton. The load, however, consisted of a total of 630 cartons. We will add the missing ten cartons back in at the average sales price of $9.74, or $97.40. Therefore, we find that the entire lot of 630 cartons had a total reasonable value of $6,133.40.

The first and best method of ascertaining the value of goods as warranted is to use the average prices shown by USDA Market News Service Reports for the destination market on the first day on which resales could have been made following arrival.[18] In this case, we will refer to the prices reported by the USDA Market News Service office in Boston, Massachusetts, the nearest reporting office to Chelsea, Massachusetts. The report on July 3, 2003 shows that 24 count heads of iceberg lettuce originating out of California were mostly selling between $19.00 and $20.00 per carton. Using the average price of $19.50 per carton, we find that the 630 cartons had a value as warranted of $12,285.00.

Respondent's basic damages are measured as the difference between the value of the lot had they been as warranted ($12,285.00) and their value as accepted ($6,133.40), or $6,151.60. In addition, Respondent is entitled to recover the USDA inspection fee of $86.00 as incidental damages. Therefore, Respondent's damages for the 630 cartons of "Tubby" lettuce amount to $6,237.60.

In regard to the remainder of the load shipped under invoice 1455840, 210 cartons of "Foxy" brand lettuce, we find no evidence it failed to arrive in good condition. As a result, Respondent remains liable to Complainant for the adjusted invoice price of the lot of 210 cartons of "Foxy" brand lettuce.

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[17] See Respondent's Answering Statement, Exhibit C.

[18] *Pandol Bros., Inc. v. Prevor Marketing International, Inc.*, 49 Agric. Dec. 1193 (1990).

The adjusted invoice price for the load shipped under invoice 1455840 is $10,983.50. Respondent's damages amount to $6,237.60, leaving a balance due of $4,745.90. A review of the file shows that Respondent has already paid Complainant $7,050.40 for the load. Therefore, there is no amount due and owing Complainant from Respondent for the load shipped under invoice 1455840. As a result, the complaint is dismissed.

Now we turn to Respondent's counterclaim wherein it asserts that it is entitled to recover damages in the amount of $7,484.00 which it incurred as a result of Complainant's breach. We have found that Respondent's damages total $6,237.60. We find that Respondent is entitled to recover the amount which it has overpaid Complainant. As previously stated, we find that the amount due and owing Complainant from Respondent for the load shipped under invoice 1455840 is $4,745.90. Respondent paid Complainant $7,050.40. Therefore, we find that the amount due and owing Respondent from Complainant is $2,304.50.

Complainant's failure to pay Respondent $2,304.50 is a violation of section 2 of the Act for which reparation should be awarded to Complainant. Section 5(a) of the Act requires that we award to the person or persons injured by a violation of section 2 of the Act 'the full amount of damages sustained in consequence of such violations." Such damages include interest.[19] Since the Secretary is charged with the duty of awarding damages, he/she also has the duty, where appropriate, to award interest.[20] Complainant in this action paid $300.00 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.

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[19] *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).

[20] 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 v. Producers Marketing Association, Inc.*, 22 Agric. Dec 66 (1963).

Order

The complaint is dismissed.

Within 30 days from the date of this order Complainant shall pay the Respondent, as reparation, $2,304.50, with interest thereon at the rate of 10% per annum from August 1, 2003, until paid, plus the amount of $300.00.

Copies of this order shall be served upon the parties.

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In re: DELORME INTERNATIONAL BROKERS, INC. v. FRESH NETWORK LLC.
PACA Docket No. R-04-0017.
Order of Dismissal.
Filed April 4, 2005.

Mark C.H. Mandell, for Complainant.
Thomas R. Oliveri, for Respondent.
Patrice Harps, Presiding Officer.
Order issued by William G. Jenson, Judicial Officer.

PACA-R – Failure to Furnish Bond – Dismissal.

The Secretary has authority to dismiss a reparation complaint without further procedure if a foreign Complainant fails to furnish the required bond. This is true even where the foreign Complainant is a resident of a country that allows a U.S. resident to file a claim against one of its citizens without furnishing a bond if the Secretary finds that denial of the waiver contemplated in section 6(e) of the PACA (7 USC 499(e)) is necessary in order to effectuate the purposes of the Act or to protect the interests of the businesses concerned.

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), a formal Complaint was filed on September 1, 2003, in which Complainant, a resident of Canada, seeks reparation from Respondent. Respondent

which filed an Answer thereto, denying liability to Complainant. Included in the Answer, Respondent filed a Petition to Demand the Filing of a Bond for Complainant. The Complainant was given an opportunity to respond to the Petition but did not do so.

In our March 15, 2004, Order we stated that pursuant to Section 6(e) of the PACA (7 U.S.C. § 499f(e)), the Complainant as a resident of Canada is required to file a bond. Canada is a country which permits the filing of a complaint by a resident of the U.S. without the furnishing of a bond. Thus, reciprocity exists between the two countries with regard to administrative complaints involving perishable agricultural commodities in foreign commerce and the Secretary has authority, therefore, to waive the filing of a bond by Complainant. *See,* 7 U.S.C. § 499f(e). However, we found that even if Complainant filed a request for waiver of the bond requirement, the facts set out in Respondent's Petition, that have not been challenged by Complainant, raise concerns regarding Complainant's accountability if Respondent prevails in this reparation action and becomes entitled to fees from Complainant, or if an Order is issued against Complainant on a possible counterclaim filed by Respondent. We concluded that in order to protect the interests of Respondent, the Secretary should exercise discretion and deny, in advance, a request for waiver of the required bond filing by Complainant. *See,* 7 C.F.R. § 47.6(b).

The Order Granting Petition to Demand Complainant to File a Bond issued on March 15, 2004, required Complainant to file a bond in double the amount of its claim within 30 days of receipt of the Order, and stated that if notification of the filing of the appropriate bond was not received by the Office of the Hearing Clerk within the prescribed time period, the Complaint in this matter would be dismissed without further procedure. Complainant did not seek reconsideration of the Order.

The Office of the Hearing Clerk has not received notification that Complainant has filed the required bond. Therefore, as stated in our Order, the complaint shall be dismissed without further procedure.

Order

The Complaint filed in PACA Docket No. R-04-0017 is hereby dismissed.

This Order shall be served upon the parties.

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PERISHABLE AGRICULTURAL COMMODITIES ACT

MISCELLANEOUS ORDERS

In re: CHRISTOPHER BLOEBAUM.
PACA-APP Docket No. 05-0002.
Order Dismissing Case.
Filed January 21, 2005.

Mary Hobbie, for Respondent.
Stephen P. McCarron, for Petitioner.
Order issued by Jill S. Clifton, Administrative Law Judge.

Respondent is the Chief of the PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. Petitioner's counsel reported on December 21, 2004, that the Chief of the PACA Branch was reviewing Petitioner's request to determine whether Petitioner was responsibly connected to DAl-Don Produce Company, Inc.

This case has been prematurely opened and is accordingly, **DISMISSED** without prejudice.

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

In re: JOSEPH T. GERNIGLIA AND MORRIS C. LEWIS, III.
PACA-APP-04-0012.
PACA-APP-04-0013.
Order.
Filed March 2, 2005.

Charles Spicknall, for Respondent.
Robin N. Loeb, for Petitioner.
Order issued by Peter M. Davenport, Administrative Law Judge.

The above captioned matters were previously consolidated for hearing together with the case of E.Mason McGowin, III (PACA-APP

Docket No. 04-0011). Upon the Motion of the Administrator of Fruit and Vegetable Programs withdrawing his determination that E. Mason McGowin, III was dismissed was responsibly connected with Fresh Solutions, Inc., the said Petitioner was dismissed as a party. The matter is now before the Administrative Law Judge upon the Motion of Morris C. Lewis, III to withdraw his Petition for Review.

Being sufficiently advised, it is **ORDERED** that:

1.The Petition for Review filed by Morris C. Lewis, III is hereby withdrawn and **DISMISSED.**

2.PACA-APP Docket No. 04-0013 having been dismissed, the same is severed from the consolidated action and **STRICKEN** from the Docket and the caption shall be amended to reflect only the name of Joseph T. Cerniglia as Petitioner.

Copies of this **ORDER** shall be served upon the parties by the Hearing Clerk's Office.

In re: MICHIGAN REPACKING AND PRODUCE CO., INC.
PACA Docket No. D-02-0015.
Order Vacating Order Staying Effective Date Of Decision.
Filed March 15, 2005.

Charles Kendall, for Complainant.
Mary E. Gardner, for Respondent.
Order issued by Peter M. Davenport, Administrative Law Judge.

This matter is before the Administrative Law Judge upon the Motion of the Complainant seeking vacation of the Stay Order entered in this case by then Chief Administrative Law Judge James W. Hunt on May 8, 2003. This action was commenced on March 29, 2002 by the filing of a Complaint alleging willful violations of the Perishable Agricultural Commodities Act of 1930 (7 U.S.C. §499a *et seq.*), hereinafter "PACA" and the Regulations issued thereunder (7 C.F.R. Part 46). After several attempts at service, service was finally effected on September 20, 2002 upon Robert Tringale, the President of Michigan Repacking and Produce Co., Inc. Although no formal answer apepars of record, the file

does contain correspondence dated October 7, 2002 from Mr. Tringale to Complainant's attorney advising him of the bankruptcy of the Respondent and the automatic stay imposed by the bankruptcy proceedings. Following receipt of the letter on October 25, 2002, the Complainant filed a Status Report and on January 9, 2003, the Complainant filed its Motion for Decision Without Hearing by Reason of Default. The attempt to deliver the Motion by certified mail was again unsuccessful and was resent pursunat to the Rules of Practice by first class mail on February 10, 2003. Mr. Tringale sought and received an Extension of Time until April 10, 2003 to file an Answer. Notwithstanding the extension granted, no Answer was received and on April 21, 2003, a Decision Without Hearing by Reason of Default was entered by Judge Hunt.

Belatedly, Mr. Tringale was again heard from in the form of correspondence dated and received on May 6, 2003. In it, he wrote:

> I write to remind you of the fact this action has either been stayed or expressly barred. In other words, your office should have stopped pursuing this action or never have filed it in the first place. Either way, your actions are in direct violation of a federal court order. This order expressly states as follows:

Any and all pending claims by or on behalf of other persons or entities holding claims against any of the Defendants which arise under or relate to the PACA or unpaid deliveries of Produce are hereby stayed and all subsequent actions by any unpaid seller of Produce to the Company are hereby barred. *This prohibition shall apply to all action or proceedings before the USDA and in all courts or other forums pending further Order of this Court.* Except as set forth herein, all persons or entities having unsatisfied claims against the Defendants arising under or relating to the PACA for unpaid deliveries of Produce to the Defendants shall have the right to seek a recovery on such claims in this action only by following the procedure established herein. Counsel shall serve a copy of this Order upon the plaintiffs in any known actions promptly upon learining of any such further actions. (Emphasis in original)

Judge Hunt, construing the above correspondence as a Motion for Reconsideration, entered his Order Staying the Effective Date of the Decision on May 8, 2003. The Complainant filed a Rely to Respondent's Motion and on May 29, 2003, Judge entered an Order Continuing his Stay. A status updated was filed by the Complainant suggesting that clarification would be forthcoming; however, none was received and when directed to file a further Status Report, the Complaint reported that despite numerous attempts to obtain a clarification of the federal court order, none was now anticipated and at the same time renewed their Motion to Vacate the Stay Order. At the request of Mr. Tringale, Mary E. Gardner, an attoney for nine of the PACA creditors has advised that the consolidated case against Respondent in United States Court for the Eastern District of Michigan were dismissed pursuant to a stipulation and settlement agreement between the parties[1] As noted in the Complaint's Reply to Respondent's Motion for Reconsideration of Decision Without Hearing by Reason of Default, the instant action is a disciplinary hearing brought under the Perishable Commodities Act of 1930, as amended. Although actions by creditors are automatically stayed by the filing of a petition in bankruptcy, 11 U.S.C. § 362(b)(4) of the Bankruptcy Act expressly provides that the automatic stay does not extend to an action of proceeding by a governmental unit to enforce that unit's police or regulatory power:

> (b)The filing of a petition under section 301,302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay -

(4) under paragraph (1), (2), (3), or (6) of subsection (a) of this section, of the commencement or continuation of an action or proceeding by a governmental unit or any organization exercising authority under the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction,

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[1] *AZ Puchi III Enterprises, Inc. vs. Michigan Repacking and Produce Co., Inc.* Case No. 01-73853 and a case consolidated with it (Case No. 01-73942).

opened for signature on January 13, 1993, to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power;

Morever, 11 U.S.C. § 525(a) specifically excludes the Perishable Agricultural Commodities Act from the code's provisions limiting the revocation, suspension, or refusal of licenses:

See. 525. Protection against discriminatory treatment

(a) **Except as provided in the Perishable Agricultural Commodities Act, 1930,** the Packers and Stockyards Act, 1921, and section 1 of the Act entitled "An Act making appropriations of the Department of Agriculture for the fiscal year ending June 30, 1944, and for other purposes," approved July 12, 1943, a governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, or another person with whom such bankrupt or debtor has been associated, solely because such bankrupt or debtor is or as been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the commencement of the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act (Emphasis added)

As is clear frm the legislative history, in carving out the above exceptions, Congress recognized the importance of having only financially responsible firms in the perishable agricultural commodity business and was well aware of the Department's well established

policy of revoking one's license for failure to pay in full for produce purchases. The Departmental policy has repeatedly been upheld in the Federal Circuit Courts. *Carlton Fruit Co.,* 49 *Agric. Dec.*513 (1990), *aff'd* 922 F.2D 847 (11th Cir. 1990) (unpublished); *Melvin Beene Produce Co.,* 41 *Agric. Dec.* 2422 (1982), *aff'd* 728 F.2d 347 (6th Cir. 1984); *Carpenito Bros. Inc.,* 46 *Agric. Dec.* 486 (1987), *aff'd* 851 F.2d 1500 (D.C. Cir. 1988) (Table).

Accordingly, being sufficiently advised, it is **ORDERED** that the Order Staying Effective Date of Decision dated May 8, 2003 and the Order Continuing Stay dated May 29, 2003 are **VACATED** and the Decision Without Hearing by Reason of Default dated April 21,2003 is reinstated as of this date.

Copies of this Order shall be served upon the parties by the Hearing Clerk's Office.

PERISHABLE AGRICULTURAL COMMODITIES ACT

DEFAULT DECISIONS

In re: JOHN MANNING COMPANY, INC.
PACA. Docket No. D-03-0015.
Decision Without Hearing by Reason of Default.
Filed October 21, 2004.[*]

PACA - Default.

Ann Parnes, for Complainant.
Respondent, Pro se.
Decision and Order issued by Victor W. Palmer, 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 complaint filed on April 22, 2003, by the Associate Deputy Administrator, Perishable Agricultural Commodities Branch, Fruit and Vegetable Programs of the Agricultural Marketing Service, United States Department of Agriculture.

The complaint alleges that during the period October 13, 2001 through August 28, 2002, Respondent John Manning Company, Inc., (hereinafter "Respondent") failed to make full payment promptly to 58 sellers of the agreed purchase prices, or balances thereof, in the total amount of $1,953,098.39 for 1,102 lots of perishable agricultural commodities that it purchased, received, and accepted in interstate and foreign commerce.

A copy of the complaint was sent to Respondent's last known principal place of business by certified mail on October 29, 2003, but

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[*]This case was inadvertently omitted from Volume 63 Agric. Dec. Jul. - Dec. (2004) – Editor.

was returned unclaimed on December 10, 2003. The copy of the complaint was then re-mailed to a forwarding address by regular mail on December 18, 2003. Pursuant to section 1.147 of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary Under Various Statues (7 C.F.R. § 1.130 *et seq.*, hereinafter "Rules of Practice"), the complaint is deemed served on December 18, 2003, the date on which the Hearing Clerk re-mailed the complaint by regular mail. This complaint has not been answered. The time for filing an answer having expired, and upon motion of the Complainant for the issuance of a decision without hearing based upon Respondent's default, 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 Georgia. Respondent's last known business address is 146 Forest Parkway, Building C, Forest Park, Georgia 30297.

2.At all times material herein, Respondent was licensed under the provisions of the PACA. License number 811167 was issued to Respondent on June 5, 1981. This license terminated on June 5, 2003, pursuant to Section 4(a) of the PACA (7U.S.C. § 499(a)), when Respondent failed to pay the required annual renewal fee.

3. During the period October 13, 2001 through August 28, 2002, Respondent purchased, received and accepted in interstate and foreign commerce 1,102 lots of perishable agricultural commodities from 58 sellers but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of $1,953,098.39.

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, flagrant and repeated violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)), for which the Order below is issued.

Order

A finding is made that Respondent has committed willful, flagrant and repeated violations of Section 2(4) of the Act (7 U.S.C. §499b(4)), and the facts and circumstances of the violations set forth above shall be published.

This order shall take effect on the 11th day after this Decision become 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 the parties.

[This Decision and Order became final January 7, 2005, and effective on January 18, 2005. - Editor]

In re: WOOTEN FARMS, INC., d/b/a CAROLINA BROKERAGE CO., a/t/a VISTA PRODUCE CO.
PACA Docket No. D-03-0021.
Decision Without Hearing – Failure to Deny.
Filed: February 28, 2005.

PACA – Default.

Christopher Young-Morales and Ann K. Parnes, for Complainant.
Paul T. Gentile, for Respondent.
Decision and Order by Administrative Law Judge Peter M. Davenport.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.) hereinafter referred to as the "Act", instituted by a Complaint filed on May 16, 2003, by the Associate Deputy Administrator, Fruit and

Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The Complaint alleges that during the period March 1993 through July 2001 Respondent purchased, received, and accepted, in interstate and foreign commerce, from 19 sellers, 116 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices in the total amount of $281,446.93.

A copy of the Complaint was served upon Respondent; Respondent submitted an answer in which it generally denied the allegations of the Complaint pertaining to its failure to make payment promptly. On August 25, 2004 a follow up investigation was conducted by the PACA Branch of the Agricultural Marketing Service which revealed that as of August 25, 2004, 18 of the 19 sellers listed in the Complaint were still owed $279,425.08. Based on the results of the investigation, Complainant filed a Motion for an Order Requiring Respondent to Show Cause Why a Decision Without Hearing Should Not Be Issued; Respondent did not answer the Motion. Hearing no objection, the Administrative Law Judge issued a Notice To Show Cause Why A Decision Without Hearing Should Not Be Issued, based upon Complainant's allegation in its Motion, substantiated by affidavit, that Respondent failed to pay the produce debt alleged in the Complaint within 120 days of the service of the Complaint.

Under the sanction policy enunciated by the Judicial Officer in *In re Scamcorp, Inc., d/b/a Goodness Greeness*, 57 Agric. Dec. 527, 547 (1998),

> PACA requires *full payment promptly*, and commission merchants, dealers and brokers are required to be in compliance with the payment provisions of the PACA at all times....In any PACA disciplinary proceeding in which it is shown that a [R]espondent has failed to pay in accordance with the PACA and is not in full compliance with the PACA within 120 days after the [C]omplaint is served on that [R]espondent, or the date of the hearing, whichever occurs first, the PACA case will be treated as a "no-pay" case.... In any "no-pay" case in which the violations are flagrant or repeated, the license of a PACA licensee, shown to have violated the payment

provisions of the PACA, will be revoked. *Id*. at 548-549.

According to the Judicial Officer's policy set forth in *Scamcorp*, in this case, Respondent had 120 days from the date the complaint was served upon it, or until October 24, 2003, to come into full compliance with the PACA. Therefore, as Respondent was not in full compliance by that date, this case should be treated as a "no pay" case for purposes of sanction, which warrants the issuance of a Decision Without Hearing finding that Respondent committed willful, flagrant and repeated violations of section 2(4) of the PACA and ordering that Respondent's violations be published.

As Respondent has failed to Show Cause Why a Decision Without Hearing Should Not Be Issued, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent is a corporation organized and existing under the laws of the state of South Carolina. Its mailing address is 1001 Bluff Road, South Carolina State Farmers Market, Columbia, South Carolina 29201.
2. At all times material herein, Respondent was licensed under the provisions of the PACA. Pursuant to the licensing provisions of the Act, license number 901840 was issued to Respondent on September 4, 1990. This license terminated on September 4, 2001, when Respondent failed to pay the required annual fee.
3. As more fully set forth in paragraph III of the Complaint, during the period March 1993 through July 2001, Respondent purchased, received, and accepted, in interstate and foreign commerce, from 19 sellers, 116 lots of fruits and vegetables, all being perishable agricultural commodities, and failed to make full payment promptly of the agreed purchase prices, in the total amount of $281,446.93.
4. Respondent failed to pay the produce debt described above and to come into full compliance with the PACA within 120 days of the filing of the Complaint against it.

Conclusions

Respondent's failure to make full payment promptly with respect to the 116 transactions set forth in Finding of Fact No. 3, above, constitutes willful, flagrant and repeated violations of Section 2(4) of the Act (7 U.S.C. § 499b), for which the Order below is issued.

Order

A finding is made that Respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. § 499b), and the violations of Respondent shall be published.

This order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon parties.

In re: PERFECTLY FRESH CONSOLIDATION, INC.
PACA Docket No. D-05-0002.
Decision Without Hearing By Reason of Default.
Filed: March 31, 2005.

PACA – Default.

Christopher Yong-Morales, for Complainant.
Albert Israel, Christopher Bryan, Douglas B. Kerr, for Respondent.
Decision and Order by Administrative Law Judge Peter M. Davenport.

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 1, 2004, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The complaint alleges that during the period November 17, 2002 through February 15, 2003, Respondent purchased, received, and accepted, in interstate and foreign commerce, from 24 sellers, 286 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices in the total amount of $373,944.19.

A copy of the complaint was mailed by the Hearing Clerk to Respondent by certified mail on October 1, 2004, and was returned by the U.S. Postal Service to the Hearing Clerk's office on October 18, 2004. The Hearing Clerk remailed the complaint via regular mail on November 5, 2004, and therefore served the complaint upon Respondent pursuant to Section 1.147 of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted By The Secretary (7 C.F.R. § 1.147, hereinafter referred to as the "Rules of Practice), as of that date. Respondent did not file an answer to the Complaint within the 20 day time period prescribed by Section 1.136 of the Rules of Practice. Complainant moved for the issuance of a Decision Without Hearing by the Administrative Law Judge, pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). As Respondent failed to answer within the 20 day time period prescribed by the Rules of Practice, and upon the motion of the Complainant for the issuance of a Default Order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1.Respondent is a corporation organized and existing under the laws of the state of California. Its business mailing address is 12840 Leyva Street, Norwalk, California 90650.

2.At all times material herein, Respondent was licensed under the

provisions of the PACA. Pursuant to the licensing provisions of the Act, license number 20021540 was issued to Respondent on August 21, 2002. This license terminated on August 21, 2003, pursuant to Section 4(a) of the Act (7 U.S.C. § 499d(a)) when Respondent failed to pay its required annual renewal fee.

3.As more fully set forth in paragraph III of the complaint, during the period November 17, 2002 through February 15, 2003, Respondent purchased, received, and accepted, in interstate and foreign commerce, from 24 sellers, 286 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices in the total amount of $373,944.19.

Conclusions

Respondent's failure to make full payment promptly with respect to the 286 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)), for which the Order below is issued.

Order

A finding is made that Respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. § 499b(4)), and the facts and circumstances 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 governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon parties.

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In re: PERFECTLY FRESH SPECIALITIES.
PACA Docket No. D-05-0003.
Decision Without Hearing by Reason of Default.
Filed March 31, 2005.

PACA - Default.

Christopher Young-Morales, for Complainant.
Respondent, Pro se.
Decision and Order issued by Peter M. Davenport, 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 1, 2004, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The complaint alleges that during the period November 1, 2002 through February 20, 2003, Respondent purchased, received, and accepted, in interstate and foreign commerce, from 28 sellers, 796 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices in the total amount of $263,801.40.

A copy of the complaint was mailed by the Hearing Clerk to Respondent by certified mail on October 1, 2004, and was returned by the U.S. Postal Service to the Hearing Clerk's office on October 18, 2004. The Hearing Clerk remailed the complaint via regular mail on November 5, 2004, and therefore served the complaint upon Respondent pursuant to Section 1.147 of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted By The Secretary (7 C.F.R. § 1.147, hereinafter referred to as the "Rules of Practice), as of that date. Respondent did not file an answer to the Complaint within the 20 day time period prescribed by Section 1.136 of the Rules of Practice. Complainant moved for the issuance of a Decision Without Hearing by the Administrative Law Judge, pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. §

1.139). As Respondent failed to answer within the 20 day time period prescribed by the Rules of Practice, and upon the motion of the Complainant for the issuance of a Default Order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1.Respondent is a corporation organized and existing under the laws of the state of California. Its business mailing address is 12840 Leyva Street, Norwalk, California 90650.
2.At all times material herein, Respondent was licensed under the provisions of the PACA. Pursuant to the licensing provisions of the Act, license number 20021539 was issued to Respondent on August 21, 2002. This license terminated on August 21, 2003, pursuant to Section 4(a) of the Act (7 U.S.C. § 499d(a)) when Respondent failed to pay its required annual renewal fee.
3.As more fully set forth in paragraph III of the complaint, during the period November 1, 2002 through February 20, 2003, Respondent purchased, received, and accepted, in interstate and foreign commerce, from 28 sellers, 796 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices in the total amount of $263,801.40.

Conclusions

Respondent's failure to make full payment promptly with respect to the 796 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)), for which the Order below is issued.

Order

A finding is made that Respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. § 499b(4)), and the facts and circumstances 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 governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon parties.

[This Decision and Order became final May 27, 2005 and effective June 7, 2005.-Editor]

In re: HUGO N. IRAHETA, d/b/a HUGO PRODUCE COMPANY and as HUGO IRAHETA PRODUCE COMPANY.
PACA Docket No. D-04-0011.
Decision Without Hearing by Reason of Default.
Filed March 31, 2005.

PACA - Default.

Ruben Rudolph, Jr., for Complainant.
Respondent, Pro se.
Decision and Order issued by Peter M. Davenport, Administrative Law Judge.

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*, hereinafter referred to as "PACA" or the "Act"), instituted by a complaint filed on April 27, 2004 by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture.

The complaint alleges that during the period of January through May 2002, Hugo N. Iraheta, doing business as Hugo Produce Company, and also doing business as Hugo Iraheta Produce Company (hereinafter "Respondent"), failed to make full payment promptly to 15 sellers of the agreed purchase prices in the amount of $322,394.59 for 78 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in the course of

interstate commerce.

A copy of the complaint, filed April on 27, 2004, was sent to Respondent at 800 McGarry Street, # 6, Los Angeles, California 90021-1951 by certified mail on April 27, 2004. The complaint was returned to the Hearing Clerk's office "undelivered" on May 11, 2004. The complaint was then mailed to Respondent via regular mail to this address on May 14, 2004.

A copy of the complaint was sent to Respondent at 2900 Sunset Place, Apt. 323, Los Angeles, California 90005 by certified mail on May 14, 2004. Respondent had listed this address as his address in Respondent's Bankruptcy filing 0228581 in United States Bankruptcy Court for the Central District of California. The complaint mailed to this address was returned "undelivered" June 30, 2004. The complaint was then mailed to Respondent via regular mail to this address on July 2, 2004.

By operation of the rule 1.147(c)(1) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §1.147(c)(1)), after the complaint was returned as unclaimed or refused by certified mail, it was deemed received by Respondent when the complaint was mailed again by regular mail on May 11, 2004. Respondent was deemed to have received the complaint at its last known address that Respondent had provided USDA. The USDA made a second attempt to provide Respondent with the complaint at an address that Respondent had listed as his address during Respondent's bankruptcy proceedings.

No answer to the complaint has been received. The time for filing an answer having expired, and upon motion of the Complainant for the issuance of a default decision, 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. Hugo N. Iraheta, doing business as Hugo Produce Company and also doing business as Hugo Iraheta Produce Company, is an individual whose principal place of business is in the State of California. Respondent reported to the USDA that his business

mailing address is 800 McGarry Street, # 6, Los Angeles, California 90021-1951. Respondent's Bankruptcy filing 0228581 in United States Bankruptcy Court for the Central District of California indicates Respondent's address as 2900 Sunset Place, Apt. 323, Los Angeles, California 90005.

2. At all times material to the allegations of the complaint, Respondent was licensed under the provisions of PACA. License number 011258 was issued to Respondent on July 12, 2001. This license terminated on July 12, 2002, pursuant to section 4(a) of the PACA (7 U.S.C. § 499d (a)), when Respondent failed to pay the annual fee.

3. Respondent, during the period of January through May 2002, failed to make full payment promptly to 15 sellers of the agreed purchase prices in the amount of $322,394.59 for 78 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in the course of interstate commerce.

4. On June 27, 2002, Respondent filed a Voluntary Petition pursuant to Chapter 7 of the U.S. Bankruptcy Code (11 U.S.C. §701 *et. seq.*) in the United States Bankruptcy Court, Central District of California, docket number 0228581. Respondent filed for bankruptcy protection for himself individually, and also for his sole proprietorship companies Hugo Produce and Hugo Iraheta Produce Company. Respondent admits in bankruptcy schedule F that all 15 sellers also listed in paragraph III of the complaint held unsecured debts. In his bankruptcy petition, Respondent admits that all 15 fifteen creditors are owed the amount listed in paragraph III, or more, for produce debt incurred in 2002, for a total of $376,000. The Bankruptcy Court discharged Respondent's debts on October 7, 2002.

Conclusions

Respondent's failure to make full payment promptly with respect to the78 lots of perishable agricultural commodities set forth in Finding of Fact No. 3 above, constitutes wilful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), for which the order below is issued.

Order

A finding is made that Respondent has committed wilful, flagrant and repeated violations of section 2 of the Act (7 U.S.C. § 499b(4)), and the facts and circumstances of the violations shall be published. This Order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice, this Decision will become final without further proceedings thirty-five days after service hereof unless appealed to the Secretary by a party to the proceeding within thirty days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R.§§ 1.139, 1.145).

[This Decision and Order became final June 24, 2005, and effective on July 5, 2005.-Editor]

In re: A & B PRODUCE, INC.
PACA Docket No. D-04-0021.
Decision Without Hearing by Reason of Default.
Filed: March 31, 2005.

PACA – Default.

Clara Kim, for Complainant.
Respondent, Pro Se.
Decision and Order by Administrative Law Judge Peter M. Davenport.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*; hereinafter "Act" or "PACA"), instituted by a Complaint filed on August 26, 2004, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The Complaint alleges that during the period December 2002 through October 2003, Respondent A & B Produce, Inc., (hereinafter "Respondent") failed to make full payment

promptly to 31 sellers of the agreed purchase prices, or balances thereof, in the total amount of $1,426,837.12 for 204 lots of perishable agricultural commodities which it purchased, received, and accepted in interstate and foreign commerce.

On August 26, 2004, a copy of the Complaint was mailed to Respondent via certified mail to its business mailing address. The Complaint was returned unclaimed on September 24, 2004. On November 12, 2004, a copy of the Complaint was re-mailed to Respondent's business address via regular mail by the Hearing Clerk. Pursuant to Section 1.147(c) (7 C.F.R. § 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"), service is deemed made on the date of remailing by regular mail. Respondent has not answered the Complaint. The time for filing an Answer having expired, and upon motion of the Complainant for the issuance of a Default Order, the following Decision and Order shall be issued without further investigation or hearing pursuant to Section 1.139 (7 C.F.R § 1.139) of the Rules of Practice.

Findings of Fact

1. Respondent is a corporation organized and existing under the laws of the State of Pennsylvania. Its business mailing address is 3301 S. Galloway Street, Unit 65, Philadelphia, Pennsylvania 19148-5442.
2. At all times material herein, Respondent was licensed under the provisions of the PACA. PACA license number 20021152 was issued to Respondent on June 4, 2002. That license terminated on June 4, 2004, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499d(a)), when Respondent failed to pay the required annual renewal fee.
3. During the period December 2002 through October 2003, Respondent purchased, received and accepted in interstate and foreign commerce from 31 sellers, 204 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, or balances thereof,

in the total amount of $1,426,837.12.

Conclusions

Respondent's failure to make full payment promptly with respect to the 204 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)), for which the Order below is issued.

Order

A finding is made that Respondent has committed willful, flagrant and repeated violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)), and the facts and circumstances of the violations shall be published.

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.

In re: POTATOES & VEGETABLE EXPRESS, INC., d/b/a POTATO EXPRESS AND POTATOES & VEGETABLE EXPRESS.
PACA Docket No. D-04-0014.
Decision Without Hearing by Reason of Default.
Filed: April 4, 2005.

PACA – Default.

Jeffrey Armistead, for Complainant.
Respondent, Pro Se.
Decision and Order filed by Chief Administrative Law Judge, Marc R. Hillson

Decision

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (hereinafter, "PACA"), instituted by a complaint filed on April 27, 2004, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The complaint alleged that Respondent, during the period January 2000 through July 2002, failed to make full payment promptly to 10 sellers of the agreed purchase prices in the total amount of $381,766.94 for 233 lots of perishable agricultural commodities that Respondent purchased, received, and accepted in interstate and foreign commerce, in willful, flagrant and repeated violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). The complaint requested that the Administrative Law Judge issue a finding that Respondent willfully, flagrantly and repeatedly violated section 2(4) of the PACA, and order publication of the facts and circumstances of the violations.

A copy of the complaint was mailed, by certified mail, to Respondent's mailing address on May 19, 2004, and was returned to the office of the Hearing Clerk. A copy of the complaint was remailed to Respondent by regular mail on June 10, 2004, pursuant to section 1.147(c)(1) of the Rules of Practice Governing Formal Adjudicatory Procedures Instituted by the Secretary Covering Various Statutes (7 C.F.R. § 1.147(c)(1)) (hereinafter, "Rules of Practice"). No answer to the complaint has been received. The time for filing an answer having run, and upon motion of the Complainant for the issuance of a Decision Without Hearing by Reason of Default, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1.Potatoes & Vegetable Express, Inc., d/b/a Potato Express and Potatoes & Vegetable Express (hereinafter "Respondent"), is a

corporation incorporated in the State of Nevada.[1]

At all times material herein, Respondents business address was 100 West Carey Avenue, Suite 11, North Las Vegas, Nevada 89030.

2.At all times material herein, Respondent was licensed under the provisions of the PACA. License number 1991-1705 was issued to Respondent on September 10, 1991. This license was renewed on an annual basis, but terminated on September 10, 2003, pursuant to section 4(a) of the PACA (7 U.S.C. § 499d(a)), due to Respondent's failure to pay the required annual renewal fee.

3.As more fully set forth in paragraph III of the complaint, Respondent, during the period January 2000 through July 2002, failed to make full payment promptly to 10 sellers of the agreed purchase prices in the total amount of $381,766.94 for 233 lots of perishable agricultural commodities that Respondent purchased, received, and accepted in interstate and foreign commerce.

Conclusions

Respondent's failure to make full payment promptly with respect to the transactions 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

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 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

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[1]According to the public record s of the Nevada Secretary of State, Respondent's corporate status has been revoked.

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.

In re: CHRISTOPHER B. LOYD, d/b/a FARM FRESH PRODUCE.
PACA Docket No. D-04-0003.
Decision Without Hearing by Reason of Default.
Filed April 6, 2005.

PACA - Default.

Jeffrey Armistead, for Complainant.
Respondent, Pro se.
Decision and Order issued by Marc R. Hillson, Administrative Law Judge.

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) hereinafter referred to as the "Act", instituted by a Complaint filed on December 2, 2003, 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 May 2002, Respondent Christopher B. Loyd, doing business as Farm Fresh Produce, (hereinafter "Respondent") failed to make full payment promptly to nine sellers, of the agreed purchase prices, or balances thereof, in the total amount of $363,500.27 for 125 lots of perishable agricultural commodities which it received, accepted and sold in interstate and foreign commerce.

A copy of the Complaint was served upon Respondent, which Respondent has not answered. The time for filing an answer having expired, and 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 while operating was 73621 Highway 25, Covington, Louisiana 70433. Its mailing address was P.O. Box 160, Folsom, Louisiana 70433.
2.At all times material herein, Respondent was licensed under the provisions of the PACA. License number 970376 was issued to Respondent on November 29, 1996. This license was suspended on November 4, 2002, when the company failed to produce records required under Section 13(b) of the PACA (7 U.S.C. § 499m(b)) of the PACA (7 U.S.C. § 499d(a)), when Respondent failed to pay its required annual renewal fee.
3.As more fully set forth in paragraph III of the Complaint, during the period May 2000 through May 2002, Respondent failed to make full payment promptly to nine sellers of the agreed purchase prices, or balances thereof, in the total amount of $363,500.27 for 125 lots of perishable agricultural commodities, which is purchased, received, and accepted in interstate and foreign commerce.
4.On June 30, 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 Eastern District of Louisiana. That petition was designated Case No. 02-14588. Respondent admits in its Bankruptcy schedules that all nine of the sellers listed in paragraph III of the Complaint hold unsecured claims that are less than or equal to the amounts alleged in paragraph III, for a total of $363, 500.27.

Conclusions

Respondent's failure to make full payment promptly with respect to the 125 transactions set forth in Finding of Fact No. 3 above, constitutes willful, repeated and flagrant violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)), for which the Order below is issued.

Order

A finding is made that Respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. 499b), and the facts and circumstances set forth above, shall be published.

This order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in Sections 1.139 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 June 24, 2005 and effective on July 5, 2005.-Editor]

In re: PLATINUM FROZEN FOODS, INC.
PACA Docket No. D-04-0024.
Filed April 6, 2005.
Decision Without Hearing by Reason of Default.

PACA - Default.

Andrew Y. Stanton, for Complainant.
Respondent, Pro se.
Decision and Order issued by Marc R. Hillson, Administrative Law Judge.

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (hereinafter, "PACA"), instituted by a complaint filed on September 24, 2004, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The complaint alleged that Respondent, during the period November 2002 through November 2003, failed to make full payment promptly to five sellers of the agreed purchase prices in the total amount of $607,836.33 for 39 lots of perishable agricultural commodities, which it purchased, received, and accepted in interstate

and foreign commerce, in willful, flagrant and repeated violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). The complaint requested the issuance of an order finding that Respondent willfully, flagrantly and repeatedly violated section 2(4) of the PACA, and directing publication of the facts and circumstances of the violations.

A copy of the complaint was served upon Respondent on September 30, 2004. Respondent has not filed an answer within 20 days of service, pursuant to section 1.136(a) the of the Rules of Practice Governing Formal Adjudicatory Procedures Instituted by the Secretary Covering Various Statutes (hereinafter, "Rules of Practice") (7 C.F.R. § 1.136(a)) and is, therefore, in default (7 C.F.R. § 1.136(c)). The time for filing an answer having run, and upon motion of the Complainant for the issuance of a Decision Without Hearing by Reason of Default, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1.Platinum Frozen Foods, Inc. (hereinafter "Respondent"), is a corporation organized and existing under the laws of the State of Illinois. Its business mailing address is 26 W 333 Street, Charles Road, Carol Stream, Illinois 60188-1944.

2.At all times material herein, Respondent was licensed under the PACA. License number 20011050 was issued to Respondent on May 8, 2001. This license terminated on May 8, 2003, when Respondent failed to submit the required renewal fee.

3.As more fully set forth in paragraph 3 of the complaint, Respondent, during the period November 2002 through November 2003, failed to make full payment promptly to five sellers of the agreed purchase prices in the total amount of $607,836.33 for 39 lots of perishable agricultural commodities, which it purchased, received, and accepted in interstate and foreign commerce.

Conclusions

Respondent's failure to make full payment promptly with respect to

the 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, Platinum Frozen Foods, Inc., has committed willful, repeated and flagrant violations of section 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)).

The facts and circumstances of Respondent's violations are hereby ordered 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 June 24, 2005 and effective on July 5, 2005.-Editor]

In re: DIVERSIFIED FOOD EXPORT, INC.
PACA Docket No. D-04-0008.
Decision Without Hearing by Reason of Default.
Filed: May 26, 2005.

PACA – Default.

Jeffrey Armistead, for Complainant.
Jordan L. Rappaport, for Respondent.
Decision and Order filed by Administrative Law Judge, Peter M. Davenport.

Decision

This is a disciplinary proceeding under the Perishable Agricultural

Commodities Act, 1930, as amended (7 U.S.C. §499a *et seq.*) (hereinafter, APACA "), instituted by a complaint filed on March 8, 2004, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The complaint alleged that Respondent, during the period July 2000 through September 2002, failed to make full payment promptly to nine sellers of the agreed purchase prices in the total amount of $302,165.55 for 87 lots of perishable agricultural commodities that Respondent purchased, received, and accepted in interstate and foreign commerce, in willful, flagrant and repeated violation of section 2(4) of the PACA (7 U.S.C. §499b(4)). The complaint requested that the Administrative Law Judge issue a finding that Respondent willfully, flagrantly and repeatedly violated section 2(4) of the PACA, and order publication of the facts and circumstances of the violations.

A copy of the complaint was mailed, by certified mail, to Respondent's business address at c/o Kenneth S. Rappaport, Esq., 709 N.W. 12th Terrace, Pompano Beach, Florida 33069 and Respondent's mailing address at 1300 North Federal Highway, Boca Raton, Florida 33432. The complaint was received and accepted at both addresses on March 18, 2004, and March 13, 2004, respectively. According to section 1.136(a) of the Rules of Practice Governing Formal Adjudicatory Procedures Instituted by the Secretary Covering Various Statutes (7 C.F.R. §1.136(a)) (hereinafter, ARules of Practice "), an answer is due within 20 days after service of the complaint. As Respondent has failed to file an answer to the complaint within the time allowed for that purpose, Respondent is in default, pursuant to section 1.136(c) of the Rules of Practice (7 C.F.R. §1.136(c)).

On March 25, 2004, Respondent filed a document entitled "Suggestion of Bankruptcy." The document asserts that, on September 30, 2002, Respondent filed a Chapter 7 bankruptcy petition in the United States Bankruptcy Court for the Southern District of Florida, Case Number 02-27368-BKC-PGH. The document asserts further that, pursuant to section 362 of the Bankruptcy Code (11 U.S.C. §362), an automatic stay is in effect. However, Respondent's "Suggestion of

Bankruptcy" does not meet the requirements of an answer to the complaint that are set forth in section 1.136(b) of the Rules of Practice (7 C.F.R. §1.136(b)):

(b) *Contents*. The answer shall:
(1) Clearly admit, deny, or explain each of the allegations of the Complaint and shall clearly set forth any defense asserted by the respondent; or
(2) State that the respondent admits all the facts alleged in the complaint; or
(3) State that the respondent admits the jurisdictional allegations of the complaint and neither admits nor denies the remaining allegations and consents to the issuance of an order without further procedure.

Respondent's "Suggestion of Bankruptcy" does not admit, deny or explain any of the allegations of the complaint. Moreover, the claim in the "Suggestion of Bankruptcy" that the automatic stay is in effect is not an adequate affirmative defense to the allegations of the complaint, as it is well established that disciplinary proceedings to enforce the PACA are not subject to the automatic stay provision in the Bankruptcy Code.

Section 362(b)(4) of the Bankruptcy Code (11 U.S.C. §362(b)(4)) states that the filing of a bankruptcy petition does not stay Athe commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power. . . . " The purpose of this disciplinary action is to enforce the regulatory power of the Department of Agriculture against a firm that has committed serious violations of the PACA by failing to make full and prompt payment for produce purchases. Section 525(a) of the Bankruptcy Code (11 U.S.C. §525(a)) provides that a governmental unit may not deny, revoke, suspend or refuse to renew a license to a debtor who has filed for bankruptcy, with a few limited exceptions, one of which is when there is a disciplinary action brought under the PACA:

> (a) Except as provided in the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499a-499s), the Packers and

> Stockyards Act, 1921 (7 U.S.C. 181-229), and section 1 of the Act entitled "An Act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1944, and for other purposes," approved July 12, 1943 (57 Stat. 422; 7 U.S.C. 204), a governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act, or another person with whom such bankrupt or debtor has been associated, solely because such bankrupt or debtor is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the commencement of the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act. [*emphasis supplied*].

The Department's Judicial Officer has held that PACA disciplinary proceedings are unaffected by the automatic stay, stating as follows, in *In re Ruma Fruit and Produce Co., Inc*., 55 *Agric. Dec.* 642, 654-655 (1996):

> 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.*, 49 B.R. 494, 496- 98 (N.D. Tex. 1985). In addition, 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,* 49 B.R. at 496.

As Respondent's "Suggestion of Bankruptcy" does not constitute an answer, and an answer has not been filed within the time period allowed for that purchase, upon motion of the Complainant for the issuance of a Decision Without Hearing by Reason of Default, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. §1.139).

Findings of Fact

1.Diversified Food Export, Inc., (hereinafter "Respondent"), is a corporation organized and existing under the laws of the State of Florida. At all times material herein, Respondent's business address was 709 N.W. 12th Terrace, Pompano Beach, Florida 33069. Respondent's mailing address is c/o Kenneth S. Rappaport, Esq., 1300 North Federal Highway, Boca Raton, Florida 33432.

2.At all times material herein, Respondent was licensed under the provisions of the PACA. License number 971814 was issued to Respondent on July 14, 1997. This license was renewed on an annual basis, but terminated on July 14, 2003, pursuant to section 4(a) of the PACA (7 U.S.C. §499d(a)), due to Respondent's failure to pay the required annual renewal fee.

3. As more fully set forth in paragraph III of the complaint, Respondent, during the period July 2000 through September 2002, failed to make full payment promptly to nine sellers of the agreed purchase prices in the total amount of $302,165.55 for 87 lots of perishable agricultural commodities that Respondent purchased, received, and accepted in interstate and foreign commerce.

Conclusions

Respondent's failure to make full payment promptly with respect to the transactions 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

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 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.

In re: SILVER CREEK, INC., d/b/a QUALITY PRODUCE.
PACA Docket No. D-05-0004.
Decision Without Hearing by Reason of Default.
Filed: May 27, 2005.

PACA – Default.

Andrew Stanton, for Respondent.
Respondent, Pro Se.
Decision and Order issued by Administrative Law Judge, Peter M. Davenport.

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (hereinafter, "PACA"), instituted by a complaint filed on January 19, 2005, by the Associate Deputy Administrator, Fruit and Vegetable

Programs, Agricultural Marketing Service, United States Department of Agriculture. The complaint alleged that Respondent, during the period April 2002 through July 2004, failed to make full payment promptly to 17 sellers of the agreed purchase prices in the total amount of $752,378.73 for 232 lots of perishable agricultural commodities, which it purchased, received, and accepted in interstate commerce, in willful, flagrant and repeated violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). The complaint requested that the Administrative Law Judge issue a finding that Respondent willfully, flagrantly and repeatedly violated section 2(4) of the PACA, and order publication of the facts and circumstances of the violations.

The complaint was mailed, by certified mail, to Respondent's business mailing address of at 107 2 East 44th Street, Boise, Idaho 83714-4820. The complaint was received and accepted on January 27, 2005. According to section 1.136(a) of the Rules of Practice Governing Formal Adjudicatory Procedures Instituted by the Secretary Covering Various Statutes (7 C.F.R. § 1.136(a)) (hereinafter, "Rules of Practice"), an answer is due within 20 days after service of the complaint. As Respondent has failed to file an answer to the complaint within the time allowed for that purpose, Respondent is in default, pursuant to section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)).

Upon motion of the Complainant for the issuance of a Decision Without Hearing by Reason of Default, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1.Silver Creek, Inc., also doing business as Quality Produce (hereinafter "Respondent"), is a corporation organized and existing under the laws of the State of Idaho. Its business mailing address is 1072 East 44th Street, Boise, Idaho 83714-4820.

2.At all times material herein, Respondent was licensed under the provisions of the PACA. License number 2002-1581 was issued to Respondent on August 28, 2002. This license is next subject for

renewal on August 28, 2005, but was suspended on May 20, 2004, pursuant to section 8(d) of the PACA (7 U.S.C.§ 499h(d)) when Respondent failed to satisfy a reparation order.

3.As more fully set forth in paragraph III of the complaint, Respondent, during the period April 2002 through July 2004, failed to make full payment promptly to 17 sellers of the agreed purchase prices in the total amount of $752,378.73 for 232 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 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

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 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.

In re: PRODUCE DIVERSIFIED SERVICES, INC.
PACA Docket No. D-04-0022.
Decision and Order By Reason of Default.
Filed: May 31, 2005.

PACA – Default.

Clara Kim, for Complainant.
Respondent, Pro Se.
Decision and Order by Administrative Law Judge Jill S. Clifton.

Procedural History

[1]This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § *499a et seq.*) (hereinafter frequently "the Act" or "the PACA"), instituted by a Complaint filed on September 15, 2004.
[2]The Complainant is the Administrator, Perishable Agricultural Commodities Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture (hereinafter frequently "AMS").
[3]On September 15, 2004, the Hearing Clerk sent to Respondent Produce Diversified Services, Inc. (hereinafter frequently "Respondent Produce Diversified" or "Respondent"), by certified mail, return receipt requested, to its business mailing address, a copy of the Complaint and a copy of the Rules of Practice, together with a cover letter (service letter). Respondent was informed in the service letter, among other things, that it had 20 days from receipt to file its answer.
[4]Respondent Produce Diversified received the Complaint, Rules of Practice, and service letter on September 20, 2004, and did not answer the Complaint. The Rules of Practice provide 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. 7 C.F.R. §1.136(c). Further, the failure to file an answer constitutes a waiver of hearing. 7 C.F.R. § 1.139.
[5]Accordingly, the material allegations of the Complaint, which are admitted by Respondent's default, are adopted and set forth herein as Findings of Fact. This Decision and Order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139.

See 7 C.F.R. §1.130 *et seq.*
[6]AMS filed a Motion for a Decision Without Hearing by Reason of Default on April 22, 2005. Respondent Produce Diversified received a copy of the Motion April 26, 2005, and did not respond to the Motion.

Findings of Fact

[7]Respondent Produce Diversified Services, Inc. is a corporation organized and existing under the laws of the State of Minnesota, with a business mailing address of 1329 Pinehurst Avenue, St. Paul, Minnesota 55116.
[8]At all times material herein, Respondent Produce Diversified was licensed under the provisions of the PACA. PACA license number 20000201 was issued to Respondent on November 9, 1999. That license terminated on November 9, 2002 pursuant to Section 4(a) of the PACA (7 U.S.C. § 499d(a)), when Respondent failed to pay the required license renewal fee.
[9]Respondent Produce Diversified Services, Inc. failed to make full payment promptly to 13 sellers of the agreed purchase prices, or balances thereof, in the total amount of $152,120.30, for 66 lots of fruits and vegetables, all being perishable agricultural commodities, which it purchased, received, and accepted in interstate and foreign commerce during February 2002 through October 2002.

Conclusions

[10]The Secretary of Agriculture has jurisdiction.
[11]Respondent Produce Diversified Services, Inc. willfully, flagrantly and repeatedly violated Section 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)) during February 2002 through October 2002.

Order

[12]Respondent Produce Diversified Services, Inc. committed willful, flagrant and repeated violations of Section 2(4) of the Perishable Agricultural Commodities Act (the PACA) (7 U.S.C. § 499b(4)) during February 2002 through October 2002, and the facts and circumstances of the violations shall be published.

[13]This Decision and Order shall have the same force and effect as if entered after a full hearing and shall be final without further proceedings 35 days after service unless an appeal to the Judicial Officer is filed within 30 days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145, *See* attached Appendix A)

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

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CONSENT DECISION

(Not published herein - Editor)

PERISHABLE AGRICULTURAL COMMODITIES ACT

American Produce Company, Inc.[1] PACA Docket No. D-04-0001. 2/1/05.

[1] According to the public records of the Nevada Secretary of State, Respondent's corporate status has been revoked

AGRICULTURE DECISIONS

Volume 64

January - June 2005
Part Four
List of Decisions Reported (Alphabetical Listing)
Index (Subject Matter)

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

AGRICULTURE DECISIONS

Agriculture Decisions is an official publication by the Secretary of Agriculture consisting of decisions and orders issued in adjudicatory administrative proceedings conducted for the Department under various statutes and regulations. Selected court decisions concerning the Department's regulatory programs are also included. The Department is required to publish its rules and regulations in the *Federal Register* and, therefore, they are not included in *Agriculture Decisions.*

Beginning in 1989, *Agriculture Decisions* is comprised of three Parts, each of which is published every six months. Part One is organized alphabetically by statute and contains all decisions and orders other than those pertaining to the Packers and Stockyards Act and the Perishable Agricultural Commodities Act, which are contained in Parts Two and Three, respectively.

The published decisions and orders may be cited by giving the volume number, page number and year, e.g., 1 Agric. Dec. 472 (1942). It is unnecessary to cite a decision's docket number, e.g., AWA Docket No. 99-0022, and the use of such references generally indicates that the decision has not been published in *Agriculture Decisions.*

Consent decisions entered subsequent to December 31, 1986, are no longer published in *Agriculture Decisions.* However, a list of consent decisions is included in the printed edition. Since Volume 62, the full text of consent decisions is posted on the USDA/OALJ website (See url below). Consent decisions are on file in portable document format (pdf) format and may be inspected upon request made to the Hearing Clerk, Office of Administrative Law Judges (ALJ).

Beginning in Volume 63, all **Initial Decisions** decided in the calendar year by the Administrative Law Judge(s) will arranged by the controlling statute and will be published chronologically along with appeals (if any) of those ALJ decisions issued by the Judicial Officer.

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 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.

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