AGRICULTURE DECISIONS

Volume 65

July – December 2006

UNITED STATES DEPARTMENT
OF AGRICULTURE

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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 65

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Part One (General)
Pages 767 - 1230

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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COURT DECISION

EDALEEN DAIRY, L.L.C. v. USDA.
Case No. 06-5010.
Filed October 31, 2006.

(Cite as: 467 F.3D 778)*.

AMAA – Producer-handler - Administrative remedies, failure to exhaust - Standing – Settlement fund – Disorderly marketing conditions.

Appellant, a large volume milk "producer-handler", alleged the amendment of milk marketing order requiring assessments to be paid by Appellant was beyond the authority of the Secretary of USDA. In hearings conducted by the USDA, it found that there were disorderly marketing conditions due to large volume "producer-handlers" not contributing to the settlement fund. The USDA promulgated new rules for the region where Appellant conducted business which caused it to pay into a "producer settlement" fund whereas it did not before. Under *U.S. v. Ruzicha*, 329 U.S. 287, milk "handlers" have a mandatory requirement to assert claimed injuries in an administrative setting as a "handler." The court found that the Appellant was required to assert its claims as if it were a "handler" because it was being compelled to pay money into the settlement fund whereas "producers" don't pay into the fund and would have no standing to complain. The court contrasted this case from *Stark v. Wickard*, 321 U.S. 340. As a "producer-handler," Appellant had failed to exhaust its administrative remedies.

United States Court of Appeals,
District of Columbia Circuit

Before: SENTELLE, ROGERS and GARLAND, Circuit Judges.

Opinion for the Court filed by Circuit Judge SENTELLE.SENTELLE, Circuit Judge:

Edaleen Dairy, LLC ("Edaleen") appeals from a district court decision denying its motion for a preliminary injunction. Edaleen seeks to enjoin the Secretary of Agriculture from enforcing a new rule that changed the regulatory status of "producer-handlers" of milk, alleging that the rule exceeds the Secretary's authority under the Agricultural

*Rehearing was denied on January 19, 2007 by District of Columbia Circuit Appeals. - Editor.

Marketing Agreement Act of 1937, 7 U.S.C. §§ 601-674 (2000) ("AMAA"). We need not reach the question whether Edaleen is entitled to preliminary injunctive relief because Edaleen has failed to exhaust its administrative remedies as required by the AMAA.

I.

Milk markets in the United States are governed by a complex system of price controls that dates back to the Depression era. The AMAA authorizes the Secretary of Agriculture to issue "milk marketing order[s]" to regulate milk sales in different regions of the country. 7 U.S.C. § 608c(5).

Under a typical milk marketing order, a "producer" (*i.e.,* dairy farmer) supplies raw milk to a "handler" (*i.e.,* processor or distributor), and the handler pays money into a "producer settlement fund" at fixed prices based on the intended use of the milk. *See, e.g., Alto Dairy v. Veneman,* 336 F.3d 560, 562-63 (7th Cir.2003). Handlers using their milk for "high-value" uses, such as fluid milk, must pay higher prices than handlers that engage in "low-value" uses, such as processing of butter and cheese. *Id.* The money that handlers pay into the producer settlement fund is then redistributed to milk producers at a uniform "blend price" per quantity of milk sold. *See*7 U.S.C. § 608c(5) (B)(ii). This system ensures that all dairy farmers will receive the same price for their raw milk whether they sell to high-value handlers or low-value handlers.

A complication arises, however, when the same firm is both a producer and a handler. In such cases, there is no opportunity for the producer-handler to pay into the producer settlement fund because there is no intermediate sale of raw milk. The producer-handler simply processes the milk that it has already produced; it need not purchase milk from other dairy farmers. Historically, the Secretary of Agriculture has exempted producer-handlers from the pooling and pricing requirements of milk marketing orders. *See*Milk in the Pacific Northwest and Arizona-Las Vegas Marketing Areas; Final Decision on Proposed Amendments to Marketing Agreement and to Orders, 70 Fed.Reg. 74,166, 74,167-68 (Dec. 14, 2005) (to be codified at 7 C.F.R. pts. 1124, 1131) ("*Proposed Rule* ").

Because they could process and sell high-value milk products without having to pay into the pool, producer-handlers often enjoyed a

significant competitive advantage in milk markets. Initially, this raised little concern because most producer-handlers were small family operations that had little effect on the market. In recent years, however, several producer-handlers have grown much larger, which had a twofold effect on the pooling system. First, because they did not have to contribute to the producer settlement fund, the large producer-handlers could sell their milk at lower prices than their regulated rivals, thus gaining sales and market share. *See Proposed Rule,* 70 Fed.Reg. at 74,186-88. Second, the amount of money in the producer settlement fund was shrinking because fully-regulated handlers-who did contribute to the pool-were losing business to the unregulated producer-handlers. *Id.*

In response to these concerns, the Secretary of Agriculture initiated a formal, on-the-record rulemaking to determine whether the regulatory status of producer-handlers should be changed in the Pacific Northwest and Arizona-Las Vegas marketing areas. After two years of hearings, testimony, and data analysis, the Secretary issued a Recommended Decision on April 7, 2005. Recommended Decision and Opportunity to File Written Exceptions on Proposed Amendments, 70 Fed.Reg. 19,636 (Apr. 13, 2005). As required by the AMAA, this proposed rule was then approved by a referendum of milk producers in January 2006, after which it became final. *See* Milk in the Pacific Northwest and Arizona-Las Vegas Marketing Areas; Order Amending the Orders, 71 Fed.Reg. 9430 (Feb. 24, 2006) (codified at 7 C.F.R. pts. 1124, 1131 (2006)) ("*Final Rule* ").

The final rule modified the definition of "producer-handler" to exclude dairies that produce, process, and distribute more than three million pounds of fluid milk per month within a given marketing area. 7 C.F.R. §§ 1124.10, 1131.10. These large producer-handlers-such as appellant Edaleen-are now required to pay into the producer settlement fund to the extent that their use-value of milk exceeds the blend price in a given region. *See id.* § 1124.71 (explaining how handler payments are calculated in the Pacific Northwest Marketing Area). The decision to eliminate the exemption for large producer-handlers was based upon evidence of "disorderly marketing conditions"-namely, that the large producer-handlers were obtaining a "competitive sales advantage" over fully-regulated handlers, and were causing a "measurabl[e] and significant[ ]" decrease in the blend price being paid to regulated producers. *Proposed Rule,* 70 Fed.Reg. at 74,186-88.

Edaleen is a large producer-handler that lost its exemption from the pricing-pooling system as a result of this rulemaking. Edaleen sued the Secretary of Agriculture in U.S. District Court for the District of Columbia to enjoin enforcement of the new rule on the grounds that it exceeded the Secretary's authority under the AMAA.

The district court denied preliminary injunctive relief in a statement read from the bench. Transcript of Hearing at 75-99, *Edaleen Dairy, LLC v. Johanns,* No. 05-cv-2442 (D.D.C. Dec. 29, 2005). First, the court noted that the case was probably not ripe at that time because the rule had not yet been approved by the required producer referendum. *Id.* at 81-83. This referendum has since been held, so ripeness is no longer an issue in this case. The district court then held that the arguments raised by Edaleen were "the very kind of thing that can be raised in the administrative process" and thus the court should not "hear this case before [plaintiffs] have exhausted their administrative remedies." *Id.* at 84-86. Finally, the district court also concluded that the plaintiffs were not entitled to a preliminary injunction. The court held that it was unlikely that this order exceeded the Secretary's statutory authority under the AMAA, and noted that the alleged injury-overpayment of funds into the pool-was "economic loss" that could be adequately addressed in a suit for damages. *Id.* at 86-94. The court also concluded that other producers were likely to be harmed if large producer-handlers like Edaleen did not begin to pay into the producer settlement fund. *Id.* at 95-96. Thus, the district court denied Edaleen's motion for a preliminary injunction.

Edaleen sought timely appeal, and now contends that the district court abused its discretion in denying preliminary injunctive relief.

II.

The first-and only-issue that we must address is whether Edaleen, a producer-handler of milk, may challenge the provisions of a milk marketing order in district court before exhausting its administrative remedies under the AMAA. We hold that it may not.

A.

The Agricultural Marketing Agreement Act provides for review of the Secretary's milk marketing orders as follows:

> (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 a petition .... 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.

7 U.S.C. § 608c(15).

The Supreme Court has held that these provisions of the AMAA impose a mandatory administrative exhaustion requirement upon milk handlers seeking to challenge the provisions of a milk marketing order. *United States v. Ruzicka,* 329 U.S. 287, 67 S.Ct. 207, 91 L.Ed. 290 (1946). In *Ruzicka,* the federal government sued a handler to enforce a milk marketing order, and the handler attempted to argue in defense that the order was unlawful. The Supreme Court, in an opinion by Justice Frankfurter, declined to consider this argument because the handler had not yet raised it in an administrative review proceeding. The Court stated:

> And so Congress has provided that *the remedy in the first instance must be sought from the Secretary of Agriculture.* It is on the basis of his ruling, and of the elucidation which he would presumably give to his ruling, that resort may be had to the courts. *Id.* at 294, 67 S.Ct. 207 (emphasis added).

Similarly, in *Block v. Community Nutrition Institute,* 467 U.S. 340, 346, 104 S.Ct. 2450, 81 L.Ed.2d 270 (1984), the Court explained the AMAA's judicial review provisions as follows:Section 608c(15) requires handlers first to exhaust the administrative remedies made available by the Secretary .... After these formal administrative remedies have been exhausted, handlers may obtain judicial review of the Secretary's ruling.

This Court has also held on several occasions that handlers must exhaust their administrative remedies prior to seeking judicial review of a milk marketing order. *See Hershey Foods Corp. v. Dep't of Agric.,* 293 F.3d 520, 526-27 (D.C.Cir.2002); *Am. Dairy of Evansville v.*

Bergland, 627 F.2d 1252, 1259 (D.C.Cir.1980); *Benson v. Schofield,* 236 F.2d 719, 722 (D.C.Cir.1956).

There is, however, a narrow exception to the exhaustion requirement for certain milk *producers* who seek to challenge a milk marketing order. In *Stark v. Wickard,* 321 U.S. 288, 289, 64 S.Ct. 559, 88 L.Ed. 733 (1944), several milk producers sued the Secretary of Agriculture, alleging that the Secretary was "unlawfully diverting funds" from the producer settlement pool. The Supreme Court held that these producers could seek judicial review of the Secretary's actions in district court even though they had not sought administrative relief first. *Id.* at 307-11, 64 S.Ct. 559. However, *Stark* was a limited holding that turned on the unique circumstances of that case. As the Court explained:

> When ...*definite personal rights* are created by federal statute ..., the silence of Congress as to judicial review is, at any rate *in the absence of an administrative remedy,* not to be construed as a denial of authority to the aggrieved person to seek appropriate relief in the federal courts in the exercise of their general jurisdiction. *Id.* at 309, 64 S.Ct. 559 (emphasis added).

Thus, the direct right of action that was allowed in *Stark* turned on two key factors. First, the Court emphasized that the producers were not merely objecting to a regulation; rather, they were suing to protect their "definite personal rights" in the settlement pool fund. *Id.* at 308, 64 S.Ct. 559 ("It is because every dollar of deduction comes from the producer that he may challenge the use of the fund."). Second, the Court stated that these producers were able to sue directly in district court because they did not have access to an administrative remedy under the AMAA. *Id.* at 309, 64 S.Ct. 559. *See also Ruzicka,* 329 U.S. at 295, 67 S.Ct. 207 (holding that the *Stark* direct right of action is not available to handlers because they have an administrative remedy under the AMAA). Overall, while handlers are *always* required to exhaust their administrative remedies prior to seeking judicial review, *id.* at 294, 64 S.Ct. 559, producers may be able to avoid the exhaustion requirement if they are suing to protect "definite personal rights" for which there is no access to an administrative remedy. *Stark,* 321 U.S. at 309, 64 S.Ct. 559.

Thus, with respect to producer-handlers, the crucial question is whether a producer-handler is bringing suit in its capacity as a producer or as a handler. If a producer-handler asserts an injury in its capacity as a handler, then it is bound by the administrative exhaustion

requirements of the AMAA. For example, in *Rasmussen v. Hardin,* 461 F.2d 595, 596-97 (9th Cir.1972), a producer-handler brought suit in district court to challenge a rule that required producer-handlers to pay into the settlement pool if they purchased powdered milk from other producers and reconstituted the powder into fluid milk. This affected the plaintiffs' interests as handlers because it required them to make payments into the settlement fund for their use-value of milk, which is an obligation that is *only* borne by handlers. Accordingly, the Ninth Circuit affirmed the district court's dismissal of the case because the plaintiffs had not exhausted their administrative remedies before bringing suit. *Id.* at 598. In contrast, when a producer-handler asserts an injury in its capacity as a producer, then it may be able to immediately bring suit in district court. In *Dairylea Co-op. v. Butz,* 504 F.2d 80, 82-83 (2d Cir.1974), a cooperative that both produced and handled milk brought suit in district court alleging that a milk marketing order unlawfully reduced the amount of money that producers would receive for certain types of milk sales. The court held that this producer-handler was suing to protect its interests as a producer:

> The concern of Dairylea in this action is not the money which it paid into the Producer-Settlement Fund ..., but with the money collected on behalf of its producer-members ..., which will increase if the action succeeds. *Id.* at 83.

Only producers are eligible to receive money from the settlement fund, and thus any action by the Secretary that reduces the amount of money in the fund will cause injury exclusively to producers. Thus, the Second Circuit held that the plaintiff was not required to exhaust administrative remedies before bringing suit. *Id.*

Here, Edaleen is clearly bringing suit in its capacity as a handler. Prior to the adoption of the rule being challenged in this case, producer-handlers were fully exempt from the pricing and pooling provisions of the milk marketing orders. *See Proposed Rule,* 70 Fed.Reg. at 74,167. The final rule eliminates this exemption for producer-handlers with in-area route disposition of more than three million pounds of milk per month. *Final Rule,* 71 Fed.Reg. at 9430. In other words, large producer-handlers-just like all other milk handlers-must now *pay* into the producer settlement fund to the extent that their use-value of milk exceeds the blend price in a given region. *See, e.g.,*7 C.F.R. § 1124.71 (explaining how handler payments are calculated in the Pacific Northwest Marketing Area). As the Final Rule states, "[t]he amendments will place entities currently considered to be

producer-handlers *...on the same terms as all other fully regulated handlers.*" 71 Fed.Reg. 9430 (emphasis added). Edaleen is not challenging the amounts being paid *out* of the pool, nor is it challenging the Secretary's management of funds in the pool arguments that would be raised if it were suing in its capacity as a producer. *Cf. Stark,* 321 U.S. at 308-10, 64 S.Ct. 559 (holding that a producer may seek immediate judicial review of the Secretary's deductions from the settlement pool funds); *Dairylea,* 504 F.2d at 83 (noting that a producer-handler that disputes the amount of money being received from the fund is suing in its capacity as a producer). Rather, Edaleen objects to the new rule because it will now be forced to *pay* into the producer settlement fund. *See* Appellant's Br. at 32 (arguing that Edaleen has suffered irreparable injury because it must now pay "hundreds of thousands of dollars per month and millions of dollars per year" into the settlement fund). Producers do not pay into the settlement fund; only handlers bear this obligation. Thus, we hold that Edaleen has brought this suit in its capacity as a handler, and therefore Edaleen was required to exhaust its remedies under the AMAA before seeking judicial review.

We emphasize that this holding is entirely consistent with the Seventh Circuit's decision in *Alto Dairy v. Veneman,* 336 F.3d 560 (7th Cir.2003). In that case, the court held that the plaintiffs-a group of producers and producer-handlers-were entitled to judicial review even though they had not sought administrative relief prior to bringing suit. *Id.* at 568-69. The plaintiffs argued that a new rule-which limited when producers could qualify for the blend price in certain marketing areas-was adopted without proper notice from the Secretary. *Id.* at 564-65. Given that the plaintiffs were seeking *access* to pooling funds, they were clearly bringing suit in their capacity as producers. Indeed, the Seventh Circuit specifically noted that the plaintiffs "have no quarrel *as handlers* with the order." *Id.* at 569. Thus, the plaintiffs in *Alto Dairy* were not bound by the AMAA's exhaustion requirement. In contrast, Edaleen seeks relief in its capacity as a handler, and therefore it is required to exhaust administrative remedies prior to challenging the Secretary's actions in district court.

B.

Edaleen argues that we should excuse the exhaustion requirement in this case. It contends that the issue was "fully framed" in the rulemaking process, that the Secretary's "full expertise" has already been

brought to bear on this issue, and that it would be "utterly duplicative" to require Edaleen to seek administrative review prior to bringing suit. Appellant's Br. at 41-42. There is no need to address these arguments, however, because courts have held on numerous occasions that the AMAA's exhaustion requirement is mandatory. Thus, we hold that Edaleen may not be excused from complying with this requirement.

Since the AMAA was enacted in 1937, courts have repeatedly held that its exhaustion requirement is mandatory, and that aggrieved handlers may not seek judicial review of milk marketing orders until they have exhausted their administrative remedies. *See Block,* 467 U.S. at 346, 104 S.Ct. 2450 (stating that "handlers may obtain judicial review" only after exhausting the AMAA's "formal administrative remedies"); *Ruzicka,* 329 U.S. at 294, 67 S.Ct. 207 (holding that "resort may be had to the courts" only after administrative remedies have been exhausted); *Hershey Foods,* 293 F.3d at 527 ("A handler of milk thus *must* petition the Secretary before seeking judicial review of a milk marketing order ....") (emphasis added); *United States v. United Dairy Farmers Co-op. Ass'n,* 611 F.2d 488, 490 (3d Cir.1979) ("It has long been established that the administrative relief provided in the [AMAA] is not merely permissive but *exclusive* in the first instance: any challenge to the applicability of an order *must* first be made administratively.") (emphasis added); *Dairylea Co-op.,* 504 F.2d at 80 (holding that "handlers may apply for judicial review of agricultural orders only after exhausting their administrative remedies").

Consistent with this long line of cases, we hold that the AMAA's administrative appeal process is a *mandatory* procedure that handlers must follow prior to seeking judicial review of a milk marketing order. Therefore, we decline to excuse the exhaustion requirement in this case.

Although Edaleen is both a producer and a handler, in this case, it is suing to protect its interests as a handler. A handler may not seek judicial review of a milk marketing order until it has exhausted its administrative remedies under the AMAA. Edaleen has failed to pursue these administrative remedies. Therefore, we remand the case to the district court with instructions to dismiss the complaint.

_____

LEWIS DIXON, JACK DIXON, AND RED HAWK FARMING AND COOLING v. USDA.
D. Ariz.,2006.
Filed November 21, 2006.

(Cite as No. CV-05-03740-PHX-NVW).
WRPA – Watermelon promotion – First Amendment, claims as applied – Government speech – Speech not attributed to Petitioner – Advertisement, generic, government financed – Compelled subsidies – Compelled speech, issue of, filed untimely –APA standard of review – Rehearings within discretion of ALJ – Remand, when not warranted – Arbitrary and capricious, when not – Alternate theories of relief, timely filing of.

The court affirmed the Judicial Officer (JO) in dismissing Petitioner's appeal in summary judgement. Based upon *Johanns v. Livestock Marketing Ass'n*, (544 U.S. 550), the court left standing the JO's finding that watermelon advertising and promotion, and assessment therefore, was authorized by the Watermelon Research and Promotion Act (7 U.S.C. §§ 4901-4916) and was government speech not susceptible to First Amendment compelled-subsidy challenge. Consequently, the JO had dismissed the appeal in which Petitioner sought exemption from assessments imposed by the National Watermelon Promotion Board (NWPB) and used for generic advertising and promotion of watermelons. The JO found the NWPB's advertising and promotional materials were not directly attributable to Petitioner and rejected Petitioner's "as-applied" First Amendment claim. Petitioner could have, (a) raised an issue of "compelled speech" under *R. J. Reynolds Tobacco Co.,* (384 F.3d 1126), and (b) presented or proffered evidence in support of that legal theory, but did not raise the new issue in a timely manner and did not adequately show that intervening law, *Livestock Marketing,* gave rise to reasons for new alternative theories of relief to be received or would result in manifest injustice.

United States District Court,D. Arizona.

ORDER

NEIL V. WAKE, District Judge.
Pending before the court are Defendant's Motion for Summary Judgment (Doc. # 18) and Plaintiffs' Cross-Motion for Summary Judgment (Doc. # 23).

I. Background

This dispute arises from Plaintiffs' refusal to pay assessments to the National Watermelon Promotion Board ("Board") as required by the

Watermelon Research and Promotion Act ("Act"), 7 U.S.C. § 4901*et seq*. Plaintiff Red Hawk Farming and Cooling ("Red Hawk") is an Arizona general partnership engaged in the business of producing, handling, and importing watermelons. Plaintiffs Lewis Dixon, Jr. and Jack Dixon are partners in Red Hawk. The following facts are undisputed.

The National Watermelon Promotion Board was created in 1989 pursuant to the Watermelon Research and Promotion Act. Composed largely of private representatives of the watermelon industry, the Board educates retailers and consumers about the nutritional benefits of watermelon consumption. The Board also disseminates information to retailers about proper watermelon storage practices and safety.

Promotion Board activities are closely supervised by the United States Department of Agriculture ("USDA"). The Secretary of Agriculture appoints all of the Board's members and approves its marketing plan and budget. The USDA also supervises Board activities, approves its research contracts and projects, and participates in its meetings. Expenses incurred under the Board's budget are funded by assessments on private watermelon growers and importers.

Most of the Board's budget funds watermelon promotional activities, such as the publication of industry resource guides and other literature. One such publication, a media kit, states:

> The National Watermelon Promotion Board (NWPB) operates with a single objective: to increase consumer demand for watermelon through promotion research and educational programs. The Orlando-based non-profit organization was formed in 1989 by watermelon growers and shippers. Since then, the NWPB has developed marketing programs to boost watermelon sales in supermarkets through the U.S. and Canada.
> Today, the NWPB represents 3,100 growers, shippers and importers of watermelon in the United States. These members fund the organization through crop assessments. The NWPB's 32-member Board of Directors, comprised of watermelon growers, shippers, importers, and a member who represents the public, decides how to invest its $1 .6 million budget in board programs....

Nutrition is in the news forefront these days, and watermelon can play a big role as a source of nutrition. We already know that a 2-cup serving of watermelon is high in vitamins A and C, and industry-funded research is currently investigating what else is in watermelon will help you stay healthy. New methods of analyzing food allow scientists to discover previously unknown substances in fruits and vegetables that help the body function and repair itself. One of the most intriguing discoveries is that watermelon contains high levels of lycopene, an antioxidant that may prevent certain types of cancer.

Food safety is another "hot topic," and the watermelon industry shines as a pacesetter. From the farm to your local grocery store or restaurant, industry funded research has discovered the best methods to grow, ship, store and cut watermelon. This information is provided to growers, shippers and retailers through many avenues, such as printed guidelines for production and handling, through educational videos and CD-ROM's for retail and foodservice, and handling information to consumers through newspaper and magazine articles.

The environment is everybody's concern, and the watermelon industry is responding to those concerns. The following projects are just some of the ways scientists are looking into environmentally sound protection methods:

-A recycling project to find a disposal method for certain materials used during production.

-A weather-condition disease forecasting system, "Melcast," is used to help producers know when their crop needs certain materials applied, rather than applying them according to a set schedule.

-Extensive research to identify disease-resistant watermelon varieties, so the producer can reduce the amount of chemicals applied to the crop.

Watermelon growers and shippers realize they have to look at the long-term partnership they have with the environment, and are committed to protecting our world.

Doc. # 14, Exhibit 4.

A Promotion Board resource guide similarly states:

When the National Watermelon Promotion Board was formed in 1989, watermelon consumption was declining. The board was charged with a single mission: to increase consumer demand of

watermelon through coordinated, unified marketing, research and promotion campaigns. Throughout the past ten years, consumption has steadily increased.

The NWPB's more than 3,100 producer, handler and importer members are committed to providing the highest quality melons during the entire year. Their continued efforts have made the very latest developments in seed, acreage yield and post-harvest techniques standard in an industry that is more than 100 years old. Watermelon producers, handlers and importers fund the board through a four cent per hundredweight assessment. The National Watermelon Promotion Board is made up of producers, handlers, importers and a public member who make all key decisions regarding how the board's $1.6 million budget is invested in marketing, research and promotional programs.

Our industry has been proactively pursuing initiatives for excellence in quality and safety. This season, we are pleased to introduce our new "Voluntary Food Safety Guidelines for the Watermelon Industry."Drafted directly by a dedicated team of NWPB growers and shipper members, this document is more than just words, but a true commitment by our industry. Incorporating "best practices" outlined by Western Glowers [sic], the Food & Drug Administration and other key industry groups, our own Guidelines specifically address:

-Pre-harvest control of microbial hazards
-Responsible use of fertilizers and pesticides
-Irrigation practices and water purification standards
-Field and employee health and sanitation
-Packinghouse/processing plant operational standards
-Critical issues in loading, refrigeration and transportation
-Comprehensive trace back systems

Remember that your NWPB Merchandising Manager has an arsenal of tools to help build customized procurement and promotional programs for your specific operations. Let that PowerMate be with you as you embark on what may be the best watermelon season ever!

Doc. # 14, Exhibit 2.

Plaintiffs disagree with the content of these materials for "philosophical, political and commercial" reasons. Doc. # 24 at ¶ 29. They believe that the Board's promotional assistance is unnecessary to

their commercial success because they produce a type of watermelon so superior as to advertise for itself. They would not fund Board advertisements or even belong to the Board if they were not required to do so. Plaintiffs therefore refused to pay assessments for 1999 and 2000.

On July 18, 2001, Plaintiffs filed a petition before the USDA requesting an exemption from the Board's assessments. The petition challenged the constitutionality of the Act exclusively on the theory that it authorized compelled subsidies. The petition did not allege that the use of Board assessments to promote the watermelon industry constituted compelled speech. R. at 1. Plaintiffs filed two subsequent amended petitions with the USDA on September 10, 2001 and January 3, 2002. The amended petitions were similar in all respects relevant for the purposes of this order.

The USDA conducted a three-day hearing on Plaintiffs' Second Amended Petition on March 12-13, 2002 and January 23, 2003. Each party submitted testimony and exhibits to a USDA administrative law judge ("ALJ") during the course of the hearing. At the time, the case law governing Plaintiffs' First Amendment claim was *United States v. United Foods, Inc.,* 533 U.S. 405 (2001).

On May 23, 2005, while Plaintiffs' Second Amended Petition was pending before the ALJ, the United States Supreme Court decided *Johanns v. Livestock Marketing Association,* 544 U.S. 550 (2005), a case concerning the constitutionality of a federal program that financed generic advertising to promote the beef industry. Exactly three months later, the ALJ denied Plaintiffs' compelled subsidy claim on the ground that the advertising authorized by the Act is government speech not protected by the First Amendment. The ALJ relied on *Livestock Marketing* to reach this result. R. at 1481. The ALJ also found that "Red Hawk is not actually compelled to speak when it does not wish to speak, because the advertising is not attributed to Red Hawk; Red Hawk is not identified as the speaker; Red Hawk is not compelled to 'utter' the message with which it does not agree."R. at 1492.

Plaintiffs appealed the ALJ's decision before a USDA judicial officer on September 20, 2005. The appeal petition challenged the ALJ's disposition of Plaintiffs' compelled subsidy claim and argued for the first time that the Board's assessments were unconstitutional on a theory of compelled speech. R. at 1495. The appeal petition also argued that, because the Second Amended Petition was "sufficiently broad to include

[a compelled speech] claim and evidence was adduced at hearing on that claim," the ALJ committed reversible error by failing even to consider whether the application of the Act was constitutional. *Id.* At the very least, Plaintiffs argued, the ALJ's decision should be vacated and the case remanded to allow further opportunity to develop the evidentiary basis for their compelled speech challenge. R. at 1502.

Considering the same record evidence presented by Plaintiffs to the ALJ, the judicial officer upheld the ALJ's denial of the petition in a Decision and Order dated November 8, 2005. With regard to Plaintiffs' compelled subsidy claim, the judicial officer first observed that the disputed assessments were specifically authorized by 7 U.S.C. §§ 4906(f) and 4906(g). R. at 1534-35. Noting that Congress had declared the assessments necessary to the promotional activities authorized under the Act, the judicial officer found that the advertising funded by the assessments was government speech. *Id.* at 1535.The judicial officer then held on the basis of *Livestock Marketing* that § 4906 did not violate the First Amendment because there is no constitutional right not to fund government speech. R. at 1535-36.

The Decision and Order concluded with a rejection of Red Hawk's compelled speech claim. The judicial officer reasoned that no First Amendment violation occurred because compelled speech challenges can only succeed "if a party establishes that advertisements are attributable to" itself and Red Hawk had failed to show such attribution under the doctrine articulated in *Livestock Marketing*. *Id.* at 1536.For these reasons, the judicial officer denied Plaintiffs' request for remand and dismissed their claim. *Id.* at 1538.

Plaintiffs now contend that the judicial officer's dismissal and refusal to remand constituted an abuse of discretion under 5 U.S.C. § 706, and that the judicial officer committed reversible error in rejecting their compelled speech claim. As remedies, Plaintiffs seek (1) an order staying the Decision and Order pending a final judgment in this action, (2) a declaration that the Watermelon Research and Promotion Act is unconstitutional as applied to them, (3) an order remanding the proceeding to Defendant with instructions to withdraw and rescind the Decision and Order, exempt Plaintiffs from the assessments, and cease applying the Act in an unconstitutional manner, and (4) costs and attorney's fees pursuant to 5 U.S.C. § 504 and 28 U.S.C. § 2412. Both

parties move for summary judgment under Federal Rule of Civil Procedure 56.

II. Standard of Review

When parties move for summary judgment in a dispute involving the application of the Administrative Procedure Act ("APA"), the "task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing court."*Florida Power & Light Co. v. Lorion,* 470 U.S. 729, 743-44 (1985)."If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation."*Id.* at 744.

III. Analysis

The parties do not dispute the underlying facts in the case. They rely on the same record and do not argue that it is incomplete or misleading. To the extent that there is disagreement, it stems from varying characterizations of available record evidence. Because such characterizations do not constitute a "genuine dispute of material fact," summary judgment is proper. *Kalka v. Megathlin,* 10 F.Supp.2d 1117, 1120 (D.Ariz.1998) ("Although the parties characterize the facts differently, the Court agrees that there is no issue of material fact, and therefore the claims may be decided as a matter of law.").

A. Count I: Remand

Plaintiffs first contend that the judicial officer's failure to remand constituted reversible error under 5 U.S.C. § 706. They assert that when a case such as *Livestock Marketing* triggers a change in a relevant legal standard while a case is pending but after the time for the presentation of evidence has passed, remand is necessary to provide an opportunity to present evidence directed at the new standard. The First Amended Complaint does not identify the particular provision of § 706 on which this claim is based, but Plaintiffs' Response to Defendant's Motion for Summary Judgment explains that the failure to remand was "arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law."Doc. # 23 at 5. It therefore appears that Plaintiffs seek review of the judicial officer's decision under 5 U.S.C. § 706(2)(A). Because Plaintiffs' claim implicates the Due Process Clause of the Fifth Amendment, the judicial officer's decision will also be reviewed under 5 U.S.C. § 706(2)(B).

1. 5 U.S.C. § 706(2)(A)

Section 706(2)(A) of the APA provides that agency adjudications shall be held unlawful and set aside if they are "found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."5 U.S.C. § 706(2)(A)."The scope of review under the 'arbitrary and capricious' standard is narrow, and a court is not to substitute its judgment for that of the agency."*Motor Vehicle Manuf. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983). An agency decision is not arbitrary and capricious if it "examine[s] the relevant data and articulate[s] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.' " *Id.* Generally, a decision is only arbitrary and capricious if the agency "has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the produce of agency expertise." *Id.*

Under the lenient standard of § 706(2)(A), the Judicial Officer's denial of remand cannot be reversed. The decision was based on the

reasoned conclusion that Plaintiffs' substantive arguments lacked merit. Plaintiffs argued on appeal that (1) the ALJ committed reversible error in failing to consider their compelled speech challenge; (2) the assessments authorized under the Act constitute compelled speech; and (3) "[a]t the very least, [the ALJ's decision] must be vacated and the case remanded for further proceedings to determine whether speech was attributed to watermelon producers ... and if so whether such attribution can and does support a claim that the [Act] is unconstitutional as applied."R. at 1502. The judicial officer addressed the first argument by considering the merits of the compelled speech claim. *See*5 U.S .C. § 557(b) ("On appeal from or review of [an] initial decision, an agency has all the powers which it would have in making the initial decision."). He addressed the second by finding that the Board's advertisements were not sufficiently attributed to Plaintiffs under the reasoning articulated in *Livestock Marketing*.R. at 1536-37. Finally, the judicial officer denied remand on the ground that the arguments raised in the appeal petition were unpersuasive. *Id.* at 1537-38.

In denying remand, the judicial officer did not consider whether Plaintiffs had been deprived of an opportunity to present evidence in support of their compelled speech claim, but, given the content of the appeal petition, he was under no obligation to do so. A petition for remand to receive additional evidence is treated as a petition to reopen a hearing, *see In re De Graaf Dairies, Inc.,* 41 Agric. Dec. 388, 428, 1982 WL 36950, at 27 (U.S.D.A. Mar. 29, 1982), and may be granted upon satisfaction of 7 C.F.R. § 900.68(2). Under that regulation, it is the burden of the party seeking remand to "state briefly the nature and purpose of the evidence to be adduced ... show that such evidence is not merely cumulative, and ... set forth a good reason why such evidence was not adduced at the hearing."*Id.* An agency's refusal to reopen the record generally cannot be deemed arbitrary and capricious "unless the new evidence offered, if true, would clearly mandate a change in result."*Greene County Planning Bd. v. Fed. Power Comm'n,* 559 F.2d 1227, 1233 (2nd Cir.1976); *see also Reese Sales Co. v. Hardin,* 458 F.2d 183, 186 (9th Cir.1972) ("It has been uniformly held that rehearings before administrative bodies are addressed to their own discretion. Only a showing of the clearest abuse of discretion can sustain an exception to that rule.").

Plaintiffs essentially concede that they failed to comply with 7 C.F.R. § 900.68(2). They admit that they did not provide the judicial officer with any explanation for why they did not adduce evidence concerning

the compelled speech claim in the original proceedings before the ALJ. *Compare* Doc. # 19 at ¶ 9 ("Plaintiffs did not plead nor brief an as-applied challenge to the [Act] before the ALJ, nor did their petition for appeal proffer what sort of evidence they hoped to uncover upon remand, or why this hypothetical evidence was not presented at the initial hearing.") *with* Doc. # 24 at 2 ¶ 2 ("Plaintiffs do not dispute the statement contained in Paragraph ... 9 of Defendant's Statement of Facts In Support of Motion for Summary Judgment."). There was no representation that the evidence was unavailable, or that the compelled speech claim was precluded by the legal doctrines operative at the time of the initial proceedings, or that an intervening change in law had deprived Plaintiffs of the opportunity to argue the claim. Nor did Plaintiffs ever articulate the precise nature of the new evidence they wished to adduce. *See* R. at 1502.

In fact, rather than set forth a "good reason" why the evidence in support of the compelled speech challenge had not been adduced in the original proceedings, Plaintiffs' appeal petition suggested that further proceedings were unnecessary. The document stated that the "Second Amended Petition was sufficiently broad to include" a compelled speech claim, R. at 1502, that evidence already "adduced at hearing on that claim" was sufficient to demonstrate that the application of the Act was unconstitutional, *id.,* and that the ALJ "committed reversible error in failing to consider" whether the NWPB advertisements constituted compelled speech, R. at 1495. These statements implied that evidence had already been collected in support of a compelled speech claim actually argued before the ALJ. Given that the judicial officer had full authority to adjudicate the claims raised before the ALJ, 5 U.S.C. § 557(b), he had no reason to believe that additional proceedings would be needed.

Finally, it is noteworthy that even now Plaintiffs are unable to identify any existent non-record evidence that could support their compelled speech claim. At oral argument before this court, Plaintiffs explained that, if remand were granted, they would possibly interview social scientists and conduct surveys in an effort to establish speech attribution. This is therefore not a case where the judicial officer's refusal to remand precluded the plaintiffs from presenting identified evidence. Remand would only allow Plaintiffs to search for new evidence for which they have not yet searched. Given that this litigation has already gone on for over five years, the judicial officer's refusal to

permit additional proceedings of such questionable utility was reasonable. *Cf. Eagle v. Armco, Inc.,* 943 F.2d 509, 513 (4th Cir.1991) (refusing to remand a claim for benefits for another round of administrative evaluation in part because the claim had been pending for ten years).

Requests for rehearing have been denied in similar circumstances. In *Boonville Farms Coop., Inc. v. Freeman,* 358 F.2d 681 (2nd Cir.1966), for example, a plaintiff milk handler who challenged a USDA assessment pursuant to the Agricultural Marketing Act of 1937 only produced one witness during initial administrative proceedings. When that witness's testimony was later deemed insufficient to support the claim, the plaintiff sought a rehearing to submit additional evidence. However, the Second Circuit denied that request under 7 C.F.R. § 900.68 because the plaintiff had "every opportunity to submit" that evidence originally, and had simply failed to do so. *Id.* at 682.

2. 5 U.S.C. § 706(2)(B)

Under 5 U.S.C. § 706(2)(B), an agency action must be held unlawful and set aside if it is "contrary to constitutional right, power, privilege, or immunity."Plaintiffs' argument that remand of their compelled speech claim is necessary because *Livestock Marketing* effected an intervening change in the doctrine on compelled subsidies is unpersuasive to the extent that it raises a constitutional issue to be reviewed under this statute.

Due process encompasses the right to present evidence under governing legal standards. *See Mathews v. Eldridge,* 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' "). Where the application of an intervening change in law would interfere with this right, remand is necessary to prevent "manifest injustice." *See, e.g., Cissell Mfg. Co. v. United States,* 101 F.3d 1132, 1137 (6th Cir.1996) (granting remand on a claim directly invalidated by an intervening rule change); *Consol. Coal Co.,* 77 F.3d at 904-05 (same); *PPG Indus., Inc. v. United States,* 52 F.3d 363, 366 (D.C.Cir.1995) (same); *Harlan Bell Coal Co. v. Lemar,* 904 F.2d 1042, 1047-48 (6th Cir.1990) (same). By contrast, remand is not granted where a party had a motive and opportunity to present evidence in support of a claim doctrinally unaffected by any intervening change in law and simply chose not to assert the claim. *Betty B Coal Co.,* 194 F.3d at 502 ("We

very much doubt that due process would be offended by failing to afford [a claimant] a second opportunity to garner and present evidence on an issue it could have and should have anticipated originally."); *see generally Chevron, Inc. v. Hand,* 763 F.2d 1184, 1186 (10th Cir.1985) (finding that a party waived its right to introduce evidence that it neglected to proffer originally).

Tackett v. Benefits Review Board, 806 F.2d 640 (6th Cir.1986), and *Faries v. United States,* 909 F.2d 170 (6th Cir.1990), respectively illustrate when remand is and is not warranted under this rule. In *Tackett,* a coal miner's widow brought suit under the Black Lung Benefits Act. The ALJ initially awarded benefits because, at the time, the miner's lung cancer legally constituted a chronic disease that was sufficient to invoke a presumption in favor of the claimant. However, while the case was pending on administrative appeal, the benefits review board, in an unrelated case, overruled the law which had formed the basis for the ALJ's initial decision. Rather than categorically treat lung cancer as a chronic disease sufficient to invoke a presumption that benefits should be awarded, the new law placed the burden on the claimant to establish that his or her form of lung cancer was a chronic disease. Applying this new rule, the review board reversed the ALJ's award. *Tackett* in turn reversed the review board, finding remand necessary because the widow never had an opportunity to gather evidence in light of the new evidentiary standard. *Id.* at 642.

In *Faries,* an ALJ initially denied benefits to a coal miner under the Black Lung Benefits Act because the preponderance of evidence did not indicate that he had lung cancer. The governing evidentiary standard was subsequently relaxed so that benefits could be awarded based on a single positive x-ray, and the ALJ reversed its initial decision in light of this change. Several months later, however, the United States Supreme Court invalidated the law authorizing benefits under the relaxed standard. Instead of a single x-ray, claimants would, as before, have to show a preponderance of the evidence in order to receive benefits. The claimant then sought remand for a new decision in light of the standard articulated by the Supreme Court. However, remand was denied. It was explained that further proceedings were unwarranted because the new evidentiary standard was effectively the same as the original standard under which the ALJ had denied benefits, and under which the claimant had already failed to present sufficient evidence despite having had the opportunity to do so. *Id.* at 175-76.

Plaintiffs' claim is unpersuasive in light of this authority. First, due process does not require remand because Plaintiffs had an opportunity to raise a compelled speech claim from the very beginning. Compelled speech challenges have long been recognized under the First Amendment, *see, e.g., Wooley v. Maynard,* 430 U.S. 705 (1977); *West Virginia State Bd. of Educ. v. Barnette,* 319 U .S. 624 (1943), and *Livestock Marketing* left untouched the doctrines operative in this area of law. Faced with the narrow issue of whether a government advertisement attributed to "America's Beef Producers" constituted compelled speech, it was found that, on the basis of the record evidence, no First Amendment violation had occurred. *Livestock Mktg. Ass'n,* 544 U.S. at 566-67. This conclusion followed logically from precedent and announced no new doctrine. *See id.* at 565 n.8 (discussing the plaintiffs' compelled-speech argument as drawing upon *Wooley,* 430 U.S. 705, and *Barnette,* 319 U.S. 624);*id.* at 567 n. 11 (discussing how, in light of *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.,* 515 U.S. 557 (1995), the plaintiff's claim might have succeed if framed differently); *id.* at 568 (Thomas, J., concurring) (discussing a long line of compelled-speech cases that would have justified a finding in favor of the plaintiffs, had they provided additional evidentiary support). Because claims are typically remanded only when the intervening change constitutes a substantial departure from the prior law, *compare Consol. Coal Co. v. McMahon,* 77 F.3d 898, 903 (6th Cir.1996) (remanding the case after the Supreme Court invalidated the doctrine on which the ALJ relied to reach his decision) *with Faries v. United States,* 909 F.2d 170, 175 n.4 (6th Cir.1990) (declining to remand where the intervening change was not "substantial"), remand is not warranted. *See also Kaiser Steel Corp. v. United States,* 1992 U.S.App. LEXIS 2831, at *4 (10th Cir .1992) (concluding that due process did not mandate a new hearing when the new law was "substantially the same" as the old law). Where Plaintiffs simply chose not to assert a compelled speech claim originally and *Livestock Marketing* did not change the requirements for such a claim, it cannot be said that Plaintiffs were unjustly deprived of an opportunity to make their case.

Even if *Livestock Marketing* had hypothetically changed the law on compelled speech, remand is not necessary to avoid "manifest injustice" because Plaintiffs neglected an opportunity to present additional evidence in support of their compelled speech claim after *Livestock Marketing* was decided. "On appeal from or review of [an] initial decision, [an] agency has all the powers which it would have in making the initial decision except as it may limit the issue on notice or by rule."5 U.S.C. § 557(b). These appellate powers include the power to preside at the taking of evidence.[1] *Seacoast Anti-Pollution League v. Costle,* 572 F.2d 872, 879 (1st Cir.1978). Thus, evidence in support of Plaintiffs' compelled speech claim could have been adduced in light of *Livestock Marketing* while the case was on appeal before the judicial officer. Yet there is no indication in the record that Plaintiffs made any effort to adduce evidence before the judicial officer, or that he in any way precluded them from doing so. Plaintiffs state that the judicial officer denied their appeal "without allowing [them] an opportunity to develop an 'as applied' challenge."Doc. # 12 at ¶ 42. However, the portion of the record cited in support of this statement simply shows that the judicial officer denied remand, not that he denied an attempt by Plaintiffs to adduce evidence while the case was pending on appeal. *See id.*

Plaintiffs' contention is also unpersuasive because they had ample motive to assert a compelled speech claim in the initial proceedings before the ALJ. Even under *United Foods,* it was less than certain that Plaintiffs' compelled subsidy challenge would succeed. A series of cases had previously implied that compelled funding of government speech does not raise First Amendment concerns. *See, e.g., Bd. of Regents v. Southworth,* 529 U.S. 217, 229 (2000); *Rosenberger v. Rector,* 515 U.S. 819, 833 (1995); *United States v. Lee,* 455 U.S. 252, 260 (1982); *Abood v. Detroit Bd. of Educ.,* 431 U.S. 209, 259 n.13 (1977). In *United Foods* itself, the Department of Agriculture raised the possibility that

[1]5 U.S.C. § 556(e) provides in relevant part that the "transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties."Plaintiffs contend that this section precluded the judicial officer from considering additional evidence on appeal. However, that interpretation has been rejected. *See Costle,* 572 F.2d at 879 ("The first point to make about this section is that it does not limit the time frame during which any papers must be received.").

compelled subsidies similar to those imposed by the Watermelon Promotion Board were constitutional under this precedent. 533 U.S. at 416. The issue was simply not decided because it had not been properly raised on appeal. *Id.* at 417.Given the USDA's extensive supervisory authority over the Watermelon Promotion Board, the body of precedent suggesting the possibility of a government-speech defense to compelled subsidy claims, and the explicit references to that defense in *United Foods,* Plaintiffs had ample reason to anticipate a tenable government-speech defense to their compelled subsidy challenge, and ample reason to add a claim not subject to that defense.

Ultimately, Plaintiffs' request is more like the request that was denied in *Faries* than the request that was granted in *Tackett.*Plaintiffs had the option of raising a compelled speech challenge from the very beginning. They knew the existing doctrine on compelled speech, they knew what evidence was necessary to make the claim, and *Livestock Marketing* in no way altered the requirements for that claim. They also had an opportunity to adduce new evidence before the judicial officer after *Livestock Marketing* was decided. Moreover, given the probability of a tenable government-speech defense to their compelled subsidy challenge, they had reason to assert a compelled speech claim in the initial proceedings. Plaintiffs simply chose not to challenge the Board's assessments on this theory. They took a strategic gamble and lost. In these circumstances, remand is not necessary to avoid a "manifest injustice." *Faries,* 909 F.2d at 176.

Cases cited by Plaintiffs are distinguishable. In *Pelts & Skins, LLC v. Landreneau,* 448 F.3d 743 (5th Cir.2006), the plaintiff contested the constitutionality of a compelled subsidy of the Louisiana alligator marketing program. The subsidy was originally held to be unconstitutional under the law as it existed before *Livestock Marketing.*However, once *Livestock Marketing* was decided, the Fifth Circuit remanded so that the plaintiff could present additional evidence in light of the new doctrine on compelled subsidies. *Id.* at 743-44.While *Landreneau* addressed the propriety of remand in light of *Livestock Marketing,* the similarities end there. Remand was granted on a compelled subsidy claim, not a different claim such as compelled speech. The procedure was warranted with regard to the former because the standard established in *Livestock Marketing* changed the requirements for the plaintiff's compelled subsidy claim and affected the relevance of its evidence after it had made its case. *Id.* at 743.In those circumstances, without remand, the plaintiff would have had no

opportunity to argue its claim in light of the governing law. Here, by contrast, Plaintiffs' had an opportunity to assert a compelled speech claim before the ALJ and simply chose not to take advantage of it.

Plaintiffs also cite to *Peabody Coal Co. v. Greer,* 62 F.3d 801 (6th Cir.1995). In that case, a miner sought relief under the Black Lung Benefits Act, and the defendant mining company attempted to rebut the claim with defenses based on 20 C.F.R. §§ 727.203(b)(1)(4). The ALJ found the employer's arguments unpersuasive with respect to (b)(1), (b)(3), and (b)(4). However, because it appeared that the miner was still capable of performing work, the ALJ found in favor of the employer under (b)(2) and denied relief. The Sixth Circuit subsequently made it substantially more difficult for employers to rebut claims under (b)(2). On appeal, the review board applied the new (b)(2) standard to reverse the ALJ decision. Because the employer had not challenged the ALJ's initial findings on (b)(1), (b)(3), or (b)(4), the board also upheld the ALJ's decision in favor of the miner on those defenses and awarded benefits. Noting that "manifest injustice" would otherwise occur, *Peabody* then remanded so that the employer could gather additional evidence in support of its defense under 20 C.F.R. § 727.203(b)(3). In reaching this outcome, it was noted that the employer had only failed to challenge the ALJ's initial finding on (b)(3) because the ALJ's denial of benefits under (b)(2) had lulled the employer into a false sense of security. *Id.* at 804.It was also noted that although the law governing (b)(3) never changed, the substantial alteration of the (b)(2) standard warranted remand because it "dramatically affect[ed]" the employer's litigation strategy. *Id.*

Peabody thus granted remand even though the law affecting the claim on which remand was sought never changed. However, two important justifying circumstances for that result do not apply here: First, the mining company only failed to present evidence in support of its (b)(3) defense because of a decision already rendered in its favor under (b)(2). By contrast, Plaintiffs failed to present evidence on their compelled speech claim because of their own independent judgment that it was extraneous to the compelled subsidy challenge on which they were originally content to rest their case. While it may be "manifest injustice" to deny remand when a party has been lulled into a false sense of security by a favorable adjudication in its own case, it is no injustice to do so when a party failed to assert available claims based on a

presumption concerning the outcome of litigation not yet begun, and on which it has not prevailed in any stage of the proceedings.

Peabody is also distinguished because the alteration of the (b)(2) standard in that case "dramatically affect[ed]" the employer's litigation strategy.*Id.* at 804.Prior to the intervening change in law on (b)(2), the employer had no reason to challenge the ALJ's adverse decisions on its other defenses; it had already won under (b)(2). However, when the employer's (b)(2) defense became unpersuasive in light of the intervening change, the employer developed a new motive to challenge the ALJ's disposition of its other defenses. Here, by contrast, Plaintiffs had a reason to assert a compelled speech claim from the very beginning. The substantial body of cases suggesting the existence of a government-speech defense gave Plaintiffs reason to believe that their compelled subsidy claim may fail, and therefore reason to assert alternative theories of relief.

For these reasons, Defendant's motion for summary judgment on Count I will be granted. Plaintiffs' cross-motion for summary judgment on Count I will be denied.

B. Count II: Compelled Speech

"It has long been established that the First Amendment prohibits the government from compelling citizens to express beliefs that they do not hold." *R.J. Reynolds Tobacco Co. v. Shewry,* 384 F.3d 1126, 1134 (9th Cir.2004)."The right of freedom of thought ... includes both the right to speak freely and the right to refrain from speaking at all."*Wooley v. Maynard,* 430 U.S. 705, 714 (1977). The government may violate this right either by compelling an individual actually to speak in a manner that contravenes his or her personal views, *see West Virginia State Bd. of Educ. v. Barnette,* 319 U.S. 624 (1943), or by attributing its own speech to an individual who disagrees with the government message, *see Wooley,* 430 U.S. 705. While the precise level of attribution necessary to sustain a claim of compelled speech has never been articulated, it is clear that government speech generically attributed to a large group, such as an entire agricultural industry, does not constitute compelled speech with regard to individual members of the group. *Johanns v. Livestock Mktg. Ass'n,* 544 U.S. 550, 566-67 (2005).

Plaintiffs do not contend that the government has actually compelled them to speak. Rather, they argue that they disagree with the advertisements of the Promotion Board, and that those advertisements are sufficiently attributed to them to constitute compelled speech violative of the First Amendment. The argument is unpersuasive. *Livestock Marketing* is precisely on point. In that case, two associations of beef producers objected to the content of government advertisements funded by statutorily mandated assessments on members of the cattle industry. The plaintiffs argued that the advertisements unconstitutionally attributed government speech to them by using a funding tagline which read, "America's Beef Producers." However, the claim was rejected because the words "America's Beef Producers" referred to the beef industry as a whole and did not explicitly associate the individual plaintiffs with the government's message. *Id.* at 565-67.*See also Avocados Plus Inc. v. Johanns,* 421 F.Supp.2d 45, 57 (D.D.C.2006) ("Given that Avocado Act promotions make no reference to individual avocado growers or importers, the Court has grave doubts that Plaintiffs can succeed on their as-applied claim. Livestock Marketing makes clear that a generic tagline ... without more, is insufficient to raise the possibility of attribution.").

Like the advertisement at issue in *Livestock Marketing,* the Board's promotional materials refer only generically to the members of a large agricultural industry. The Board's Resource Guide mentions the organization's "more than 3,100 producer, handler and importer members," but says nothing directly about Plaintiffs as individuals. Doc. # 14, Exhibits 2 & 3. The same is true for the Board's Media Kit, which merely refers to "[w]atermelon growers and shippers." Doc. # 14, Exhibit 4. Such language does not attribute the advertisements to Plaintiffs as individuals.

Plaintiffs brave that a finding of attribution is warranted because the promotions are attributed exclusively to members of the watermelon industry and do not communicate that they are funded through a government program. They also argue that attribution is warranted because a consumer would naturally conclude that Plaintiffs, as watermelon growers, support the message communicated by the Board. However, the same could have been said about the beef advertisements in *Livestock Marketing.*The funding tagline that attributed those

promotions to "America's Beef Producers" did not mention any government program, and a beef consumer would have naturally concluded that the beef industry plaintiffs supported the Cattlemen Board's pro-beef message.

IT IS THEREFORE ORDERED that Defendant's Motion for Summary Judgment (Doc. # 18) is GRANTED.

IT IS FURTHER ORDERED that Plaintiffs' Cross-Motion for Summary Judgment (Doc. # 23) is DENIED.

IT IS FURTHER ORDERED that the clerk enter judgment in favor of Defendant and that Plaintiffs take nothing. The clerk shall terminate this case.

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AGRICULTURAL MARKETING AGREEMENT ACT

DEPARTMENTAL DECISIONS

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.
Decision and Order.
Filed October 24, 2006.

AMAA – PPRCIA – Pork Checkoff – AFO – Substantial interest – Checkoff funds, legitimate uses of, when not.

Babak Rastgoufard, and Frank Martin, Jr., for Complainant
Susan E. Stokes, for Respondent.
Decision and order by Administrative Law Judge Peter M. Davenport.

DECISION AND ORDER

Preliminary Statement

This action was brought by the Petitioners, who include both individual hog farmers and a number of unincorporated associations representing their pork checkoff paying hog farmer members, challenging the commitment of $6,000,000.00 of the funds received by the National Pork Board ("Pork Board") through producer assessments (pork checkoffs) under the Pork Promotion, Research, and Consumer Information Act ("Pork Act"), 7 U.S.C. § 4801 *et seq*.(2005), commonly referred to as the "pork checkoff program." In their Second Amended Petition[1], the Petitioners allege that this particular obligation of checkoff funds to support the work of the Agricultural Air Resource Council

[1] This action was originally initiated by a letter dated March 2, 2005 addressed to Secretary of Agriculture Mike Johanns. The letter along with a Notice of Filing was filed with the Hearing Clerk's Office on March 14, 2005 by the Office of General Counsel.

("AARC") or the National Air Emissions Monitoring Study ("Monitoring Study" or "Air Emissions Study") being conducted pursuant to the United States Environmental Protection Agency's ("EPA") Animal Feeding Operations ("AFO's") Consent Judgment and Final Order ("Notice of Consent Agreement") is not in accordance with law as being outside the scope of the Pork Board's authority under the Pork Act and Pork Order and because it is a violation of the express provisions of the Pork Act and Pork Order.

The Respondent, the Administrator of the Agricultural Marketing Service ("AMS"), has filed serial Motions to Dismiss, contending that none of the Petitions state a legally cognizable claim in compliance with 7 U.S.C. §4814(a)(1)(A) and 7 C.F.R. § 1200.52(b)(4) of the Rules of Practice and that they should be dismissed with prejudice. The extensive procedural history of the case is set forth in detail in the Joint Statement of Undisputed Facts ("JSUD") filed by the parties is incorporated by reference without repetition herein.

Although the parties were offered an opportunity to orally argue their respective positions, neither side desired to avail themselves of that opportunity, briefs have been received from both parties, and the parties agree that the case is now ripe for determination on the record.[2]

Statutory and Regulatory Provisions

Congress, in enacting the Pork Act in 1985, found that pork and pork products are basic foods that are a valuable part of the human diet and that production of pork and pork products plays a significant role in the economy of the United States. In 7 U.S.C. § 4801(b)(1), the Congress expressed the purpose of the chapter to be:

(b)(1) It is the purpose of this chapter to authorize the establishment of an orderly procedure for financing, through adequate assessments, and carrying out an effective and coordinated program of promotion, research and consumer information designed to –

(A) strengthen the position of the pork industry in the marketplace; and

(B) maintain, develop, and expand markets for pork and pork products.

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[2] In addition to the Joint Statement of Undisputed Facts (JSUD), the Briefs of the Parties, the record now consists of three volumes of pleadings and contains a number of exhibits and attachments to the various pleadings. References to these attachments will be prefaced with P for Petitioners' exhibits or attachments and R for Respondent's exhibits or attachments.

The term "research" is defined in 7 U.S.C. § 4802(13):

(13) The term "research" means—
(A) research designed to advance, expand, or improve the image, desirability, nutritional value, usage, marketability, production, or quality of porcine animals, pork, or pork products; or
(B) dissemination to a person of the results of such research.

A similar provision appears in the implementing regulation:

Research means any action designed to advance, expand, or improve the image, desirability, nutritional value, usage, marketability, production, or quality of porcine animals, pork, or pork products, including the dissemination of the results of such research. 7 C.F.R. § 1230.23

The Board is vested with specific authority concerning promotion, research, and consumer information:

7 C.F.R. § 1320.58. Powers and duties of the Board.

The Board shall have the following powers and duties:

....

(s) To carry out an effective and coordinated program of promotion, research, and consumer information designed to strengthen the position of the pork industry in the marketplace and maintain, develop, and expand markets for pork and pork products.

The Regulations also contain an express prohibition for the use of checkoff funds:

(a) No funds collected under this subpart shall in any manner be used for the purpose of influencing legislation as that term is defined in section 4911 (d) and (e)(2) of the Internal Revenue Code of 1954, or for the purpose of influencing governmental policy or action except in recommending to the Secretary amendments to this part. 7 C.F.R. § 1320.74

7 U.S.C. § 4814(a)(1) of the Act expressly permits those subject to an order to petition for review of the order, a provision of the order, or an obligation imposed in connection with the order, to request modification or exemption from its provisions, and specifies the grounds on which an order may be challenged:

(a)(1) A person subject to an order may file with the Secretary a petition—

(A) stating that such order, a provision of such order, or an *obligation imposed* in connection with such order is not in accordance with law; and

(B) requesting modification of such order or an exemption from such order.

The Petitioners' Challenges to the obligation of funds.

The Petitioners set forth four grounds upon which they assert that the obligation of funds is not in accordance with law:

1. It violates 7 C.F.R. § 1230.74(a) of the Pork Order because it will influence the development of EPA's policies, regulations, standards, guidelines and methodologies;

2. It violates 7 C.F.R. § 1230.74 of the Pork Order because it will influence EPA's enforcement actions for certain past, on-going, and future violations under the Clean Air Act[3] ("CAA"), the Comprehensive Environmental Response, Compensation and Liability Act[4] ("CERCLA"), and the Emergency Planning and Community Right-To-Know Act[5] ("EPCRA");

3. It violates 7 U.S.C. § 4801(b)(1) and 7 C.F.R. § 1230.58(s), the express purpose of the Pork Act and Order, because it is not designed to strengthen the position of the pork industry in the marketplace or maintain, develop, and expand markets for pork and pork products; and

4. It violates 7 U.S.C. § 4802(13)(A) of the Pork Act and 7 C.F.R. § 1230.23 of the Pork Order because it is not research designed to advance, expand, or improve the image, desirability, nutritional value, usage, marketability, production, or quality of porcine animals, pork, or pork products.

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[3] 42 U.S.C. § 4601, *et seq.*

[4] 42 U.S.C. § 9601, *et seq.*

[5] 42 U.S.C. § 11001, *et seq.*

The Respondent's Response to the Petitioners' Challenges.

In response, the Respondent maintains:

1. The Air Emissions Study is "research" and the use of pork checkoff funds for such research is in accordance with the Act. In explaining its position, the Respondent argues that despite the fact that the Air Emissions Study is "environmental," it is impossible to separate environmental issues and air emissions concerns from the production or image of pork, pointing to the existence of committees established at the Pork Board dedicated to environmental issues and environmental stewardship. The research study would be consistent with the Act by producing unbiased factual information which could be used in developing management practices and environmental management systems to reduce air emissions, thereby improving pork production and the image of the pork industry and strengthening the industry's position.

2. The commitment of pork checkoff funds to the study was rational and reasonable.

3. The use of pork checkoff funds for research is not barred by the order and Petitioner's reliance upon § 1230.74(a) of the Order is misplaced as the collection and study of data concerning air emissions falls far short of "influencing government policy or action."

4. The National Pork Board's role in the Air Emissions Study is not unlawful.

Discussion

It is clear from the language of the enabling legislation that the Pork Board has broad statutory authority to obligate and expend checkoff funds on research designed to strengthen the position of the pork industry in the marketplace and maintain, develop, and expand markets

for pork and pork products.[6] An Air Emissions Study, similar to that to be performed by the AARC, might well produce information of benefit to the pork industry as a whole, as environmental concerns do significantly impact the image of pork producers, large and small. Accordingly, to the extent the Petitioners are suggesting that an unbiased study which collects and analyzes emissions data might "influence governmental policy or action," their argument must be rejected as such studies provide policy neutral information upon which informed and enlightened choices might be made in determining policy rather than to advocate a particular approach as is done with lobbying efforts.

Notwithstanding the Board's broad power to obligate funds for research, the commitment being challenged, while being labeled as being for research, is in fact to be used to cover a portion of the costs of securing the limited and conditional release of civil liability as well as a covenant not to sue for certain past and on-going violations of CAA, CERCLA, and EPCRA for [pork producing] AFOs that voluntarily sign an Air Compliance Agreement. (RX E-H, JSUF ¶35). The two components of the Notice of Consent Agreement and the Air Compliance Agreement are (a) a civil penalty component which is based upon the size of the AFO which would be borne by the AFO and (b) the $2,500.00 per farm fee to be used to fund the Air Emissions Study. It is the Board's $6,000,000.00 commitment to fund the per farm fee for participating AFOs that is being challenged in this case.

There can be little doubt that the Board could have independently commissioned and funded an Air Emissions Study as research; however, public policy precludes the Board from purchasing,[7] as is contemplated in this case, a limited and conditional release of civil liability and a covenant on the part of another governmental agency not to sue for past or on-going violations of federal statutes for selected pork producers with pork checkoff funds assessed against all pork producers.

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[6] 7 U.S.C. §§ 4801(b)(1),4802(13), and 4809(c)(3)(B)

[7] In order to secure EPA's limited and conditional release of civil liability and the covenant not to sue for past or on-going violations, an AFO is obligated to pay both the civil penalty and the per farm fee. As the components are not severable, and may be viewed as comparable to restitution required to be paid in addition to a fine or confinement, the lack of severability taints what otherwise might have been considered a legitimate expenditure for research. The public policy is reflected in the well established rule that fines or similar penalties for violations of any law may not be deducted under the Internal Revenue Code. 26 U.S.C. § 162(f)

Accordingly, I find that the Pork Board's obligation of $6,000,000.00 to secure the limited and conditional release of civil liability as well as a covenant not to sue for certain past and on-going violations of the CAA, CERCLA and EPCRA for AFOs that voluntarily sign an Air Compliance Agreement contravenes public policy and is not in accordance with law. For the foregoing reasons, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. Mark McDowell, Jim Joens and Richard Smith are individual hog farmers, each of whom pay the pork checkoff assessments. McDowell resides in Hampton, Iowa; Joens and Smith reside in Wilmont, Minnesota.

2. The Campaign for Family Farms is an unincorporated association comprised of: Iowa Citizens for Community Improvement, Des Moines, Iowa; Land Stewardship Project, Minneapolis, Minnesota; Missouri Rural Crisis Center, Columbia Missouri; Illinois Stewardship Alliance, Rochester, Illinois; and Citizens Action Coalition of Indiana, Indianapolis, Indiana. The Campaign for Family Farms and its member organizations have hog farmer members who are subject to the Pork Act and Pork Order who are required to pay the mandatory pork checkoff assessments.

3. The National Pork Board (the "Pork Board") is a 15 member entity created by § 4808 of the Pork Act to carry out the policies and provisions of the Pork Act. The Pork Board is subject to the Secretary of Agriculture's oversight and is responsible for developing and implementing programs and projects under the Pork Act through the collection and expenditure of pork checkoff funds.

4. The EPA is an agency of the United States federal government that is administering the Air Emissions Study in conjunction with the Consent Agreement, in which AFO's can voluntarily participate. The EPA is responsible for enforcement of numerous environmental statutes, including the Clean Air Act,[8] the Comprehensive Environmental

[8] 42 U.S.C. § 4601, *et seq.*

Response, Compensation and Liability Act,[9] and the Emergency Planning and Community Right-To-Know Act.[10]

5. The AARC is the nonprofit organization ("NPO") established by the Consent Agreement to administer the funding for and to oversee the Air Emissions Study, including role of receiving of funds, approving the budget, selecting the Science Advisor and the Independent Monitoring Contractor ("IMC"),[11] receiving reports on progress, reviewing audits and expenditures, disbursing funds for the completion of the study, and compiling a list of candidate AFOs to participate in the study, from which the Science Advisor would choose the actual sites to be monitored in the study. 70 Fed. Reg at 4970.

6. On January 30 1, 2005, EPA published a Notice of Consent Agreement and Final Order in the Federal Register, 70 Fed. Reg. 4958 (January 31, 2005). EPA refers to the agreement discussed in that notice as the "Consent Agreement" or the "Air Compliance Agreement." Pursuant to the Notice of Consent Agreement and the Air Compliance Agreement, EPA agreed to a limited and conditional release of civil liability and a covenant not to sue for certain past and ongoing violations of the CAA, CERCLA, and EPCRA for AFOs that voluntarily sign an Air Compliance Agreement. AFOs entering an Air Compliance Agreement agree (1) "to pay a civil penalty which is based on the size of the AFO" and (2) to pay a $2500 per farm fee "into a fund to conduct a nationwide emissions monitoring study." 70 Fed. Reg. at 4959, JSUD ¶34. *See also* 70 Fed. Reg. at 4963, ¶¶ 25, 26, 28.

7. The decision to conduct the Air Emissions Study is contingent upon EPA's determination that "a sufficient number of AFOs of each species[12] have elected to participate. The determination will be based on whether the number of participants is sufficient to fully fund the monitoring study and whether the number of participants for each type

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[9] 42 U.S.C. § 9601, *et seq.*

[10] 42 U.S.C. § 11001, *et seq.*

[11] Purdue University was selected as the IMC and Albert J. Heber, Ph.D. as the Science Advisor. Payne Declaration, Exh.A, JSUD ¶33.

[12] Both livestock, including both beef and pork producers and poultry operations are to participate.

of operation is sufficient to provide a representative sample to monitor." 70 Fed. Reg. at 4962. If EPA determines that "the total number of participants is insufficient, EPA will not sign any air compliance agreements and will not proceed with the [Air Emissions] monitoring study." *Id*., JSUD ¶37.

8. The Pork Board agreed to expend $6,000,000.00 of pork checkoff assessments to cover participating pork producing AFOs's at $2500 per farm as the fee required under the Consent Agreement to fund the Air Emissions Study.[13] Payne Declaration, Exh. E.-H, JSUD ¶35. On April 28, 2005, the Pork Board entered into a Memorandum of Understanding with AARC on the Conduct of A National Air Emissions Study for the Pork Industry. Payne Declaration, Exh. I.

9. By approving the Pork Board's budget submissions, AMS has authorized the Pork Board's actions.

10. To date, the only funds expended on the Air Emissions Study by the Pork Board have been for administrative costs pursuant to the Board's agreement with the AARC. JSUD ¶43.

Conclusions of Law

1. The Secretary of Agriculture has jurisdiction over this matter pursuant to 7 U.S.C. § 4814(a)(1).

2. The Petitioners, who include both individual hog farmers subject to the Act and the unincorporated associations that have joined on behalf of their pork checkoff paying members, have standing to bring this action.

` 3. The Petitioners have alleged sufficient facts in the Second Amended Petition to support a legally cognizable claim that the commitment of $6,000,000.00 in pork checkoff funds to support the work of the AARC and the Monitoring Study to be conducted pursuant to the Notice of Consent Agreement is contrary to public policy and not in accordance with law.

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[13] The Pork Board submitted a budget of $4,500,000.00 2004 and $1,500,000.00 for 2005, both of which were approved by AMS. (Payne Declaration, Exh. E-H)

4. The Respondent's approval of the 2004 and 2005 Pork Board budgets was not in accordance with law to the extent that those budgets included funds to pay the per farm fee which was a part of the cost of securing a limited and conditional release of civil liability and a convenant not to sue for violations of certain past and on-going violations of federal and environmental statutes.

Order

1. The Respondent's Motion to Dismiss for failure to state a legally cognizable claim is **DENIED.**

2. The Pork Board is **ENJOINED** from expending funds received from the pork checkoff assessments collected from pork producers for the purpose of paying the per farm cost of participation in the AARC study being conducted pursuant to the United States Environmental Protection Agency Animal Feeding Operations Consent Judgment and Final Order.

3. Pursuant to 7 C.F.R. § 900.64(c), this Order shall become final and effective without further proceedings 35 days after service upon the Petitioner, unless appealed to the Judicial Officer.

Copies of this Decision and Order will be served upon the parties by the Hearing Clerk.

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IN RE: MARVIN D. HORNE AND LAURA R. HORNE, D/B/A RAISIN VALLEY FARMS, A PARTNERSHIP AND D/B/A RAISIN VALLEY FARMS MARKETING ASSOCIATION, ALSO KNOWN AS RAISIN VALLEY MARKETING, AN UNINCORPORATED ASSOCIATION AND MARVIN D. HORNE,LAURA R. HORNE, DON DURBAHN AND THE ESTATE OF RENA DURBAHN, D/B/A LASSEN VINEYARDS, A PARTNERSHIP.
AMAA Docket No. 04-0002.
Decision and Order.
Filed November 8, 2006.

AMAA – RAC – Reporting requirements – Packer – Handler, first, acquired possession as a trigger event – Assessments, unpaid, multiple crop years.

Frank Martin, Jr. and Babak A. Rastgoufard for Complainant.
Respondent Pro se.
Decision and Order filed by Administrative Law Judge Victor M. Palmer.

Decision and Order

This is a disciplinary proceeding under the Agricultural Marketing Agreement Act of 1937, (AMAA), as amended, 7 U.S.C. § 601 *et seq*. It was instituted by the United States Department of Agriculture's Administrator of the Agricultural Marketing Service (AMS) who alleged that respondents did not comply with the provisions of the federal marketing order and the implementing regulation that applied for crop years 2002-2003 and 2003-2004 to first handlers of raisins produced from grapes grown in California (7 C.F.R. §§ 989.1-989.95 (Raisin Order), and 7 C.F.R. § 989.166 (Reserve tonnage regulation)).Under the Raisin Order and the Reserve tonnage regulation, first handlers are required to: (1) obtain inspections of raisins acquired or received (7 C.F.R. § 989.58(d)); (2) hold acquired raisins designated as reserve tonnage for the account of the Raisin Administrative Committee (RAC) (7 C.F.R. § 66 and 7 C.F.R. § 989.166); (3) file accurate reports with the RAC (7 C.F.R. § 73); (4) allow access to their records to verify their accuracy (7 C.F.R. § 989.77); and (5) pay assessments to the RAC (7 C.F.R. § 989.80). Respondents dispute that they are handlers in that they never obtained any raisins through purchase or transfer of ownership to any of the business entities that they operate and argue, therefore, they did not *acquire* raisins within the meaning of the Raisin Order. Respondents further argue that they are not subject to the requirements of the Raisin Order because they are farmers/producers who have acted

in good faith to advance the stated policy of the Farmer-to-Consumer Direct Marketing Act of 1976, 7 U.S.C. §§ 3001-3006.

I held oral hearings in Fresno, California at which transcribed testimony was taken and exhibits were received (February 9-11, 2005 (Tr. I); May 23, 2006 (Tr. II)). AMS was represented at the first hearing by Frank Martin, Jr., Esq. who was joined at the second hearing by Babak A. Rastgoufard, Esq. Both are attorneys with the Office of the General Counsel, United States Department of Agriculture. Respondents were represented by David Domina, Esq. and Michael Stumo, Esq. Complainant and respondents simultaneously filed their second post-hearing proposed findings, conclusions and supporting briefs on November 1, 2006.

Upon consideration of the record evidence, review of the provisions of the controlling Raisin Order, regulations and applicable and cited statutes, as well as the arguments of the parties, I have found and concluded that respondents Marvin D. Horne, Laura R. Horne, Don Durbahn and Reba Durbahn, now deceased, acting together as partners doing business as Lassen Vineyards, at all times material herein, acted as a first handler of raisins subject to the inspection, assessment, reporting, verification and reserve requirements of the Raisin Order and the Reserve tonnage regulation. I further find that these respondents violated the AMAA and the Raisin Order by failing to obtain inspections of acquired incoming raisins; failing to hold requisite tonnages of raisins in reserve; failing to file accurate reports; failing to allow access to their records; and failing to pay requisite assessments. I have concluded that the Farmer-to-Consumer Direct Marketing Act of 1976 has not exempted farmers/producers who act as handlers from being subject to regulation by federal marketing orders. I have further concluded that the violations by Marvin D. Horne, Laura R. Horne and Don Durbahn, on behalf of and doing business as Lassen Vineyards, require the entry of an order directing them to pay the RAC assessments they have failed to pay, and to pay the RAC the dollar equivalent of the raisins they failed to hold in reserve. Moreover, I have concluded that their violations were deliberate and were designed to obtain an unfair competitive advantage over other California raisin handlers who were in compliance with the Raisin Order, and a civil penalty should therefore be assessed against them (excluding Rena Durbahn, now deceased) pursuant to 7 U.S.C. § 608c(14)(B), in the amount of $731,500.

Findings of Fact

1. Marvin D. Horne is a farmer who has farmed since 1969, growing Thompson seedless grapes for raisins. He does business with his wife Laura R. Horne as "Raisin Valley Farms" which is a registered trademark for their grape growing and raisin producing activities that are the largest in the California valley where most of the world's raisins are produced (Tr. I, at 868-869). Marvin D. Horne and Laura R. Horne also do business as Raisin Valley Farms Marketing Association (also known as Raisin Valley Marketing). Both Raisin Valley Farms and Raisin Valley Farms Marketing Association have the same business mailing address: 3678 North Modoc, Kerman, California 93630 (Tr. I, at 873).

2. During the 2002-2003 and 2003-2004 crop years, Marvin D. Horne and Laura R. Horne also operated a general partnership with Laura's father, Don Durbahn, and Laura's mother, Rena Durbahn (now deceased). This partnership did business and continues to do business as Lassen Vineyards at 2267 North Lassen, Kerman, California 93630. Prior to 2002, Lassen Vineyards was exclusively a farming partnership that produced Thompson seedless grapes made into raisins (Tr. I, at 870). In 2001, the partnership ordered packing plant equipment that it commenced to use in 2002 (Tr. I, at 871-873).

3. Marvin D. Horne was a member or alternate member of the RAC for six years (Tr. I, at 175). As early as 1998, Marvin D. Horne and Laura R. Horne indicated to the RAC their interest in acting as a handler of California raisins under the Raisin Order (CX 94). In crop years 2001-2002, 2002-2003, and 2003-2004, Mr. and Mrs. Horne's partnership, Raisin Valley Farms, filed notifications with the RAC of intentions to handle raisins as a packer under the Raisin Order (CX-98, CX-100 and CX-102).

4. Mr. Horne has both met and corresponded with representatives of the United States Department of Agriculture who have advised him concerning his responsibilities as a handler under the Raisin Order (CX-94, RX-100-103, RX 113, Tr. I, at 169-171).

5. On March 15, 2001, Marvin D. Horne and Laura R. Horne, acting as Raisin Valley Farms, through their then attorney, wrote to the Secretary of Agriculture and asked whether the obligations of the federal raisin marketing order regarding volume regulation, quality control, payment of assessments to the Raisin Administrative Committee and reporting requirements would apply if Raisin Valley Farms had its raisins "custom packed" by the Del Rey Packing Company, a packer that

would not take title to Raisin Valley Farms' raisins. On April 23, 2001, the Deputy Administrator, Fruit and Vegetable Programs, United States Department of Agriculture, replied on behalf of the Secretary (RX 98 (Appendix A); and Tr. II, at 957-960). The Deputy Administrator explained that under such circumstances, Raisin Valley Farms would be neither a packer nor a handler, but that Del Rey would be both. This type of arrangement, in which the grower retains title and has his raisins packed for a fee is, the Deputy Administrator explained, comparable to "toll packing", a form of raisin acquisition by a handler that was recognized as such by the promulgation record underlying the Raisin Marketing Order. He further explained that under section 989.17 of the Raisin Order, 7 C.F.R. § 989.17, once an entity has or obtains physical possession of raisins at a packing or processing plant, it has "acquired" raisins within the meaning of the section, and thus Del Rey would:

> . . .be required to meet the order's obligations regarding volume regulation, quality control, payment of assessments to the Raisin Administrative Committee (RAC), and reporting requirements.

(RX 98 (Appendix A), at 1).

The Deputy Administrator enclosed portions of the 1949 Recommended Decision and hearing testimony relevant to the question that showed it had been expressly considered and discussed in the hearing record and in the Secretary's stated rationale for promulgating the Raisin Order. (These enclosures are part of RX 98, attached to this Decision and Order as Appendix A).

6. On April 23, 2002, Mr. and Mrs. Horne notified the Secretary of Agriculture that they were registering as a handler under the Raisin Order under protest, but agreed to comply with its volume control (reserve) provisions (CX-101).

7. Marvin D. Horne was also specifically advised, on May 20, 2002, by the Administrator of Marketing and Regulatory Progams, AMS, in response to an e-mail and a letter Mr. Horne had sent to the Secretary of Agriculture, that if he packed and handled his own raisins:

> Such activities would make you a handler under the order. As a handler, you would be required to meet all of the order's regulations regarding volume control, quality control (incoming and outgoing inspection), assessments, and reporting to the RAC.

(RX 101, attached to this Decision and Order as Appendix B).

8. The Departmental interpretations of the terms of the Raisin Order that Marvin D. Horne requested and received were expressly disregarded. Though he did not have Del Rey custom pack his raisins, Mr. Horne elected to set up a family-owned toll packing operation at Lassen Vineyards and pack raisins for his family, and for growers for a fee (Tr.1, at 977). Contrary to the interpretive advice Marvin D. Horne had received from USDA, Lassen Vineyards did not pay any assessments, did not have any incoming inspections performed, did not file any reports, and did not hold any raisins in reserve in respect to any of the raisins Lassen Vineyards received from and packed for growers during the 2002-2003 and 2003-2004 crop years (Tr. I, at 965-973).

9. Lassen Vineyards, a general partnership operated by Marvin D. Horne, together with his partners, Laura R. Horne, Don Durbahn, and the late Rena Durbahn, owned land at 2267 N. Lassen, Kerman, California 93630, where they owned and operated equipment and a raisin packing plant that they used, in the crop years 2002-2003 and 2003-2004, to stem, sort, clean, grade and package California raisins for themselves and, for a fee, for others (Tr. II, at 25-27, and 962). The only difference Mr. Horne could state between the way packing was conducted at Lassen Vineyards and by a toll packer charging a fee for sorting, cleaning and packing raisins in boxes was that the packed product could leave Lassen Vineyards without the farmer being required to pay fees up front (Tr. I, at 979).

10. During crop years 2002-2003 and 2003-2004, Lassen Vineyards charged producers a 12 cent per pound fee to pack raisins and five dollars for the use of each pallet upon which the boxed raisins were stacked (Tr. II, at 28 and 44). The cost for labor and packaging materials was included in the fee charged (Tr. II, at 30-31, 44, and 48). Some raisin producers were given discounts from these fees for services they performed or the volumes of raisins they had packed at the plant (Tr. II, at 39-43).The packing activities at Lassen Vineyards were supervised by Don Durbahn and by Marvin A. Horne, Mr. and Mrs. Marvin D. Horne's son (Tr. I, at 879-880). The workers who performed the packing activities at Lassen Vineyards were "leased employees" who were leased by Laura R. Horne and Rena Durbahn for Lassen Vineyards (Tr. I, at 933-934). All of the raisins packed by Lassen Vineyards in crop years 2002-2003 and 2003-2004, were packaged in boxes stamped with the handler number 94-101 that had been assigned to Marvin D. Horne and Laura R. Horne (Tr. I, at 964-965).

11. During crop years 2002-2003 and 2003-2004, Mr. and Mrs. Horne also conducted business as a not-for-profit unincorporated grower association named Raisin Valley Farms Marketing Association (also known as Raisin Valley Marketing). It was formed by Mr. and Mrs. Horne to "attract the market of buyers" and allow them and other raisin growers to market their raisins together under the Hornes' protected trade name "Raisin Valley Farms" (Tr. II, at 874-878). Sixty raisin growers were members of Raisin Valley Farms Marketing Association (Tr. II, at 55). Mr. Horne conducted the marketing activities of Raisin Valley Farms Marketing Association and sold the packaged raisins either himself or through brokers (Tr. II, at 38 and 49). When the sale of the packaged raisin was negotiated through a broker, the grower whose raisins were sold had the brokerage fee and the fee for the packing performed by Lassen Vineyards deducted from his payment check (Tr. II , at 50-51).When the sale was made without an outside broker, the grower's payment check was reduced by the fee for the packing services performed by Lassen Vineyards and by charges by the Association in the form of an accounting fee and for a fund to protect members from customers who fail to pay (Tr. II , at 51-52). Mr. Horne acknowledged that Lassen Vineyards benefitted under these arrangements from the fees that it received from growers for "the rental of its equipment" (Tr. II, at 52).

12. When Mr. Horne or a broker found a buyer who desired raisins, Mr. Horne contacted one of Raisin Valley Farms Marketing Association's members on a rotational basis (that included the Raisin Valley Farms and the growing operations of Lassen Vineyards) and asked them to bring their raisins to Lassen Vineyard's packing plant to be stemmed, sorted, cleaned, graded and packaged (Tr. II, at 55-57). After the raisins were packed, the buyer's trucks picked them up, left a bill of lading and when the buyer paid, the money went into an Association bank account, out of which the grower was paid less deductions for brokerage, if any, and the packing fees owed and paid to Lassen Vineyards (Tr. II, at 58-60).

13. On or about August 3, 2002, the respondents[1] submitted an inaccurate RAC-1 Form, Weekly Report of Standard Raisin Acquisitions, to the Raisin Administrative Committee (RAC). The respondents reported to the RAC that they did not acquire any California

[1] As hereinafter used in the Decision and Order, "the respondents" refers to Marvin D. Horne, Laura R. Horne, Rena A. Durbahn and Don Durbahn acting on behalf of or doing business as Lassen Vineyards.

raisins during this time period. However, the record evidence shows that they acquired substantial amounts of California raisins during this time period (CX-1-2, CX-62, CX-82-87, CX-171-582, Tr. I, at 76-79 and 188-190).

14.From August 1, 2003 to November 30, 2003, the respondents submitted 13 inaccurate RAC-1 Forms Weekly Report of Standard Raisin Acquisitions, to the Raisin Administrative Committee (RAC). The respondents reported to the RAC that they did not acquire any California raisins during this time period. However, the record evidence shows that they acquired substantial amounts of California raisins during this time period (CX-3-56, CX-63-75, CX-171-582, Tr. I, at 80-101).

15.From August 1, 2003 to November 30, 2003, the respondents submitted four inaccurate RAC-20 Forms, Monthly Reports of Free Tonnage Raisin Disposition, to the RAC. The respondents reported to the RAC that they did not ship or dispose of any California raisins during this time period. However, the record evidence shows that the respondents shipped substantial amounts of California raisins during this time period (CX-3-56, CX-76-79, CX-171-582, Tr. I, at 80-101).

16.During crop year 2002-2003, the respondents submitted an inaccurate RAC-50 Form, Inventory of Free Tonnage Standard Quality Raisins on Hand, to the RAC. The respondents reported to the RAC that they did not have any California raisin inventories during this time period. However, the record evidence shows that they had inventories of California raisins in that they were shipping substantial amounts of California raisins during this time period (CX-1-2, CX-80, CX-82-87, CX-171-582, Tr. I, at 76-79).

17.During crop year 2002-2003, the respondents submitted an inaccurate RAC-51 Form, Inventory of Off-Grade Raisins on Hand, to the RAC. The respondents reported to the RAC that they did not have any California raisin inventories during this time period. However, the record evidence shows that they had inventories of California raisins in that they were shipping substantial amounts of California raisins during this time period (CX-1-2, CX-81-87, Tr. I, at 76-79).

18.During crop year 2002-2003, the respondents failed to obtain incoming inspections on approximately 1,504,020 pounds of California raisins (CX-170-582, Tr. I, at 76-79).

19.During crop year 2003-2004, the respondents failed to obtain incoming inspection on fifty-two occasions for approximately 2,066,066 pounds of California raisins (CX-3-54, CX-56, Tr. I, at 90, 97-99 and 967-970).

20.During crop year 2002-2003, the respondents failed to hold in reserve for 294 days approximately 369.8 tons of California Natural Sun-dried Seedless raisins (CX-1, CX-2, CX-171-582, Tr. I, at 176-179, 965 and 973). During crop year 2002-2003, the free tonnage price (field price) for California raisins was $745.00 a ton (CX-583). The respondents failed to pay $275, 501, to the RAC for California raisins they failed to hold in reserve for crop year 2002-2003 (CX-161, CX-171-582, Tr. I, at 972-973). The RAC issued two demand letters to the respondents to deliver reserve California raisins or to pay the dollar equivalent (RX-136-137).

21.During crop year 2003-2004, the respondents failed to hold in reserve for 298 days approximately 305.6 tons of California Natural Sun-Dried Seedless raisins (CX-3-54, CX-89, Tr. I, at 90 and 222-225). During crop year 2003-2004, the free tonnage price (field price) for California raisins was $810 a ton (CX-93, CX-583, Tr. I, at 225). The respondents failed to pay $247,536.00, to the RAC for California raisins they failed to hold in reserve for crop year 2003-2004 (CX-89, Tr. I, at 225 and 972-973). The RAC issued two demand letters to the respondents to deliver reserve California raisins or to pay the dollar equivalent (RX-136-137).

22.During crop year 2002-2003, the respondents failed to pay assessments to the RAC of approximately $3,438.10 (CX-1-2, CX-171-582, Tr. 1, at 76-79 and 217-222).

23.During crop year 2003-2004, the respondents failed to pay assessments to the RAC of approximately $5,951.63 (CX-3-54, Tr. I, at 90, 222-226, and 972-973).

24.The respondents failed to allow access to their records to the U.S. Department of Agriculture, even after being served with two subpoenas for such access (CX-153, CX-154, CX-164, RX-106, Tr. I, at 422-432 and 946-947).

Conclusions of Law

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

2. On August 3, 2002, the respondents violated section 989.73(b) of the Raisin Order (7 C.F.R. § 989.73(b)), by submitting an inaccurate RAC-1 Form, Weekly Report of Standard Raisin Acquisitions, to the Raisin Administrative Committee (RAC).

3. From August 1, 2003 to November 30, 2003, the respondents violated section 989.73(b) of the Raisin Order (7 C.F.R. §989.73(b)0, by submitting thirteen inaccurate RAC-1 Forms, Weekly Reports of Standard Raisin Acquisitions, to the RAC.

4. From August 1, 2003 to November 30, 2003, the respondents violated section 989.73(d) of the Raisin Order (7 C.F.R. §989.73(d)), by submitting four inaccurate RAC-20 Forms, Monthly Reports of Free Tonnage Raisin Disposition, to the RAC.

5. The respondents violated section 989.73(a) of the Raisin Order (7 C.F.R. §989.73(a)), by filing an inaccurate RAC-50 Form, Inventory of Free Tonnage Standard Quality Raisins on Hand, to the RAC for crop year 2002-2003.

6. The respondents violated section 989.73(a) of the Raisin Order (7 C.F.R. §989.73(a)), by filing an inaccurate RAC-51 Form, Inventory of Off-Grade Raisins on Hand, to the RAC for crop year 2002-2003.

7. The respondents violated section 989.58(d) of the Raisin Order (7 C.F.R. §989.58(d)), by failing to obtain incoming inspections for approximately 1,504,020 pounds of California raisins for crop year 2002-2003.

8. The respondents violated section 989.58(d) of the Raisin Order (7 C.F.R. §989.58(d)), on fifty-two occasions by failing to obtain incoming inspections for approximately 2,066,066 pounds of California raisins for crop year 2003-2004.

9. The respondents violated section 989.66 of the Raisin Order (7 C.F.R. §989.66) and section 989.166 of the Regulations (7 C.F.R. §989.166), by failing to hold in reserve for 294 days approximately 369.8 tons of California Natural Sun-dried Seedless raisins, and by failing to pay to the RAC $275,501.00, the dollar equivalent of the California raisins that were not held in reserve for crop year 2002-2003.

10. The respondents violated section 989.66 of the Raisin Order (7 C.F.R. §989.66) and section 989.166 of the Regulations (7 C.F.R. § 989.166), by failing to hold in reserve for 298 days approximately 305.6 tons of California Natural Sun-Dried Seedless raisins, and by failing to pay to the RAC $247,536.000, the dollar equivalent of the California raisins that were not held in reserve for crop year 2003-2004.

11. The respondents violated section 989.80 of the Raisin Order (7 C.F.R. §989.80), by failing to pay assessments to the RAC of approximately $3,438.10 for crop year 2002-2003.

12. The respondents violated section 989.80 of the Raisin Order (7 C.F.R. §989.80), by failing to pay assessments to the RAC of approximately $5,951.63 for crop year 2003-2004.

13. The respondents violated section 989.77 of the Raisin Order (7 C.F.R. §989.77), by failing to allow access to their records to the U.S. Department of Agriculture, even after being served with two subpoenas for such access.

Discussion

The handling of California raisins is subject to the requirements of the Raisin Order that came into being at the request of the raisin industry. The industry request was made to the Secretary of Agriculture pursuant to the AMAA that provides marketing tools for avoidance of disruption of the orderly exchange of agricultural commodities in interstate commerce (7 U.S.C. § 601). Among the marketing tools authorized by the AMAA for inclusion in marketing orders, are provisions that require handlers to comply with commodity inspection provisions and reserve pool requirements that withhold for a time a portion of an agricultural commodity from the market in order to keep prices from being depressed and to yield an equitable distribution of the net returns realized in the future when the reserve is sold (7 U.S.C. § 608c(6)(E)and(F)). The AMAA also authorizes marketing orders to be administered by industry committees and for the issuance of rules and regulations to effectuate the provisions of the marketing order (7 U.S.C. § 608c(7)(C) and(D)). The constitutionality of marketing orders promulgated pursuant to the AMAA has been upheld by the Supreme Court:

Appropriate respect for the power of congress to regulate commerce among the States provides abundant support for the constitutionality of these marketing orders….

Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 427, 476, 117 S. Ct. 2130, 2141, 138 L.Ed. 585 (1997).

Provisions in marketing orders that require handlers to hold a portion of a commodity in reserve and pay assessments to an Administrative Committee to defray its expenses cannot be used as grounds for a taking claim since handlers no longer have a property right that permits them to market their crop free of regulatory control. *Cal-Almond, Inc.,* 30 Fed Cl. 244, 246-247 (1994), *affirmed*, 73 F. 3d 381, *cert. denied*, 519 U.S. 963 (1996).

Nor may a person classified as a handler by a marketing order and made subject to its regulatory control, successfully assert an equal protection challenge when the Secretary has set forth a rational basis for the classification. *Lamers Dairy Inc*., 60 Agric Dec. 406, at 428 (2001) *citing*, *F.C.C. v. Beach Communications, Inc*. 508 U.S. 307, 313 (1993), In response to a request for a marketing order from the California raisin industry, a hearing was held at Fresno, California on December 13 through 16, 1948. Upon the basis of the evidence received at the hearing, a decision was issued that recommended the promulgation of the Raisin Order and enunciated a rational basis for its issuance and for its various terms and provisions (14 Fed Reg 3083). Interested parties were given an opportunity to file written exceptions to the recommended decision (Ibid). Upon consideration of the exceptions that were filed and the record evidence presented at the hearing, the Secretary of Agriculture, on July 8, 1949, found that the issuance of the Raisin Order as set forth in the recommended decision, would effectuate the declared policy of the AMAA, and ordered that a referendum be conducted among producers of raisin variety grapes grown in California to determine whether at least two-thirds of them favored its issuance (14 Fed. Reg. 3858 and 3868). The referendum was conducted and the requisite percentage of producers was found to favor the Raisin Order's terms and provisions. Those terms and provisions, as periodically amended through subsequent rulemaking proceedings, were fully applicable and governed the handling of California raisins during the 2002-2003 and 2003-2004 crop years when respondents via their partnership Lassen Vineyards, acted as first handlers of raisins.

Marvin D. Horne, his family and the growers who joined his marketing association decided to enhance their profitability by avoiding the requirements of the Raisin Order. By so doing, respondents obtained an

unfair competitive advantage over everyone in the raisin industry who complied with the Raisin Order and its regulations. That is what this proceeding is really about. Respondents' discussion of what *acquire* means and their expressed desire to achieve the policy of the Farmer-to-Consumer Direct Marketing Act are simply attempts to divert attention from their efforts to gain unfair advantage by freeing themselves from regulations the rest of their industry observed as the best way for all raisin growers and handlers to realize optimum prices.

The Raisin Order's regulatory provisions apply to "handlers" who "first handle" raisins. A "handler" is defined in the raisin order to include "any processor or packer" (7 C.F.R. § 989.15). A "packer" is defined as meaning A handler becomes a "first handler" when he "acquires" raisins, a term specifically and plainly defined by the Raisin Order:

> *Acquire* means to have or obtain physical possession of raisins by a handler at his packing or processing plant or at any other established receiving station operated by him….*Provided*..., That the term shall apply only to the handler who first acquires raisins.

7 C.F.R. § 989.17, emphasis by underlining added.

Findings of Fact 7, 8 and 9, conclusively demonstrate that the respondents in their operation of the packing house they owned as Lassen Vineyards came within each of these definitions during crop years 2002-2003 and 2003-2004. As such they were required as a handler to: (1) cause an inspection and certification to be made of all natural condition raisins acquired or received (7 C.F.R. § 989.58(d)); (2) hold in storage all acquired reserve tonnage as established by the controlling Reserve tonnage regulation (7 C.F.R. § 989.66, and 7 C.F.R. § 989.166); (3) file certified reports showing: inventory, acquisition and other information required by the Raisin Committee to enable it to perform its duties (7 C.F. R. § 73); (4) allow access to inspect the packing house premises, the raisins held there, and all records for the purposes of checking and verifying reports filed (7 C.F.R. § 989.77); and (5) pay assessment to the Raisin Committee with respect to free tonnage acquired, and any reserve tonnage released or sold for use in free tonnage outlets (7 C.F.R. § 989.80).

Respondents' arguments that they did not acquire raisins are unavailing in light of the plain meaning of the language of the Raisin Order defining acquire. Moreover, if there was any ambiguity, the interpretation given by the Department of Agriculture both at the time of the Raisin Order's issuance and in subsequent correspondence with

the Hornes, is clear, straightforward, of long-standing and controlling. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984); and *Barnhart v. Walton*, 535 U.S. 212, 122 S.Ct. 1265, 152 L.Ed.2d 330 (2002).

The 1949 proposed decision which was adopted as part of the Secretary's final decision, after explaining the need for the Raisin Order, explained the language employed and clarified that:

The term "acquire" should mean to obtain possession of raisins by the first handler thereof. The significance of the term "acquire" should be considered in light of the definition of "handler" (and related definitions of "packer" and "processor") in that the regulatory features of the order would apply to any handler who acquires raisins. Regulation should take place at the point in the marketing channel where a handler first obtains possession of raisins, so that the regulatory provisions of the order concerning the handling of raisins would apply only once to the same raisins. Numerous ways by which handlers might acquire raisins were proposed for inclusion in the definition of the term, the objective being to make sure that all raisins coming within the scope of handlers' functions were covered and, conversely, to prevent a way being available whereby a portion of the raisins handled in the area would not be covered. Some of the ways by which a handler might obtain possession of raisins include: (i) Receiving them from producers, dehydrators, or others, whether by purchase, contract, or by arrangement for toll packing, or packing for a cash consideration;....

14 Fed. Reg. 3086 (1949).

This interpretation was consistent with testimony at the hearing conducted to consider the need of the raisin industry for a marketing order and its appropriate terms:

Q. Mr. Hoak, suppose a packer stems, cleans, and performs other operations connected with the processing of raisins for a producer and then the producer sells the raisins to another packer. Under this proposal, which person should be required to set the raisins aside?

A. The man who performs the packing operation, who is the packer.

Q. Mr. Hoak, I believe that you have testified earlier that the term "packer" should include a toll packer. By that do you mean that it should include a person who takes raisins for someone for a fee?

A. That is right.

Q. Also, did I understand you to say that that person should be the one who would be required to set aside or establish the pools under the regulatory provisions?

A. That is right. He is the man who would be held responsible for setting aside the required amount of raisins.

Q. I take it that that man would not have title to any raisins as he is a toll packer; is that correct?

A. That is right.

Hearing transcript at 182-183, *see* Appendix A.

These excerpts from the recommended decision and the hearing transcript were sent to an attorney representing Mr. and Mrs. Horne on April 23, 2001. Apparently, they believe their personal interpretation of the word acquire as used in the Raisin Order should take precedent over its plain language and the interpretation of its meaning that was conveyed to them by the Department of Agriculture. But under *Chevron* the interpretation by an agency of a regulation it issued in implementation of a statute is, unless illegal, controlling. The decision of the Hornes to not follow the Department of Agriculture's interpretative advice, and instead to play a kind of shell game with interlocking partnerships and a marketing association to try to conceal their role as first handler, only shows that they acted willfully and intentionally when they decided to not file reports, not hold raisins in reserve, not have incoming raisins inspected, not pay assessments, and not allow inspection of their records for verification purposes.

The respondents have also advanced the patently specious argument that they were exempted from handler obligations under the Raisin Order because they were attempting to promote the policy of the Farmer-to-Consumer Direct Marketing Act of 1976, 7 U.S.C. §§ 3001-3006. Nowhere does the 1976 Act refer to the AMAA or make any suggestion that any of its terms have been supplanted. Moreover, the type of activity that the 1976 Act looked to encourage was the farmer market where farmer and consumer could come together directly and avoid middlemen. The respondents were instead marketing raisins to candy makers and food processors as ingredients.

Nor does the fact that the respondents primarily consider themselves to be producers exempt them from regulation by the Raisin Order for their performance of handler functions. The AMAA does exempt from a marketing order's regulation 'any producer in his capacity as a

producer" 7 U.S.C. § 608c(13)(B). This has given rise to specific but limited producer-handler exemption provisions in marketing orders that regulate the handling of milk. The potential harm, these exemptions may inflict on other producers and handlers was, however, recognized and explained in *United Dairymen of Arizona v. Veneman,* 279 F.3d 1160, 1165-1166 (9th Cir 2002).

In the instant proceeding, the respondents undertook to no longer confine themselves to producer functions but to also engage in handler functions that are regulated by the Raisin Order and are not within any exemption. The fact that a portion of the raisins they packed at the Lassen Vineyard packing house were raisins of their own production did not serve to exempt their handling and packing of those raisins from regulation. Mr. and Mrs. Horne had been specifically so advised by letter, dated May 20, 2002, from the Administrator of AMS:

> You indicate in your correspondence that you plan to pack and market your own raisins. Such activities would make you a handler under the order. As a handler, you would be required to meet all of the order's regulations regarding volume control, quality control (incoming and outgoing inspection), assessments, and reporting to the RAC.

RX-101, Appendix B

Under these circumstances, the respondents should be ordered to pay the assessments they withheld from the RAC, pay the dollar equivalent of the raisins they failed to hold in reserve, and be assessed a civil penalty pursuant to 7 U.S.C. § 608c(14)(B).

In determining the amount of the civil penalty, I have reviewed the recommendation of AMS in light of applicable holdings by the Judicial Officer respecting the appropriate amount to be imposed for violations similar to those committed by the respondents. *See Calabrese*, 51 Agric. Dec. 131, 161 (1992); *Saulsbury Enterprises*, 55 Agric. Dec. 6, 52-58 (1996); and *Strebin Farms*, 56 Agric. 1095, 1152-1157 (1997). Intentional violations of a marketing order's requirements that a handler shall pay assessments, have inspections performed, hold a percentage of the raisins handled in reserve, and file specified reports have all been held to be serious violations of both the AMAA and or a controlling marketing order that fully warrant civil penalties of $1,100 for each violation with "….each day during which such violation continues…deemed a separate violation…." (7 U.S.C. § 608c(14(B)).

Accordingly, I am following the recommendation of AMS that civil penalties be imposed on the respondents of $651,200, $1,100 per day for each of the 592 days of the crop years 2002-2003 and 2003-2004 that they failed to hold California raisins in reserve, and $80,300 for their failure to obtain inspections and file accurate reports. Civil penalties in these amounts are needed to deter the respondents from continuing to violate the Raisin Order and to deter others from similar or future violations. *See Calabrese, supra* at 162.

The following Order is herewith issued.

ORDER

It is ORDERED that respondents, Marvin D. Horne, Laura R. Horne and Don Durbahn, who do business as Lassen Vineyards, a general partnership, jointly and severally, are assessed a civil penalty of $731,500, are further ordered to pay to the Raisin Administrative Committee $9,389.73 in assessments for crop years 2002-2003 and 2003-2004, and are further ordered to pay to the Raisin Administrative Committee $523,037 for the dollar equivalent of the California raisins they failed to hold in reserve for crop years 2002-2003 and 2003-2004.

A certified check or money order in payment of the civil penalty shall be sent in the amount of $731,500 made payable to "Treasurer of the United States" to Frank Martin, Jr. or Babak A. Rastgoufard, Office of the General Counsel, Room 2343-South Bldg., United States Department of Agriculture, Washington, DC 20250-1417. Payments of the $9,389.73 for owed assessments, and of the $523,037 for the dollar equivalent of the California raisins that were not held in reserve shall be sent to the Raisin Administrative Committee. These payments shall all be made within 100 days after this order becomes effective.

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 and Order shall be served upon the parties.

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ANIMAL QUARANTINE ACT

DEPARTMENTAL DECISIONS

In re: MITCHELL STANLEY, d/b/a STANLEY BROTHERS.
A.Q. Docket No. 06-0007.
Decision and Order.
Filed October 26, 2006.

A.Q. – SHTP – Default decision – Animal Health Protection Act – Commercial Transportation of Equine for Slaughter Act – Failure to file timely answer – Time of filing established by date and time stamp – Intent irrelevant in civil administrative proceeding – Civil penalty.

The Judicial Officer issued a decision in which he found Mitchell Stanley (Respondent) violated the Animal Health Protection Act (7 U.S.C. §§ 8301-8321 (Supp. IV 2004)), the Commercial Transportation of Equine for Slaughter Act (7 U.S.C. § 1901 note), and regulations issued under the Animal Health Protection Act and the Commercial Transportation of Equine for Slaughter Act (9 C.F.R. §§ 75.4(b), 88.4(a)(3)) and assessed Respondent a $12,800 civil penalty. The Judicial Officer rejected Respondent's contention that he filed a timely response to the Complaint. The Judicial Officer stated the record established that the Hearing Clerk served Respondent with the Complaint on January 23, 2006, and Respondent's answer was filed August 15, 2006, 6 months 2 days after Respondent's answer was due. The Judicial Officer held intent is not an element of a violation of a regulation issued under the Animal Health Protection Act or the Commercial Transportation of Equine for Slaughter Act in a disciplinary administrative proceeding for the assessment of a civil penalty.

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

PROCEDURAL HISTORY

W. Ron DeHaven, 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 18, 2006. Complainant instituted the proceeding under the Animal Health Protection Act (7 U.S.C. §§ 8301-8321 (Supp. IV 2004)); the Commercial Transportation of Equine for Slaughter Act (7 U.S.C. § 1901 note); regulations issued under the Animal Health Protection Act (9 C.F.R. pt. 75); regulations issued under the Commercial Transportation of Equine for Slaughter Act (9 C.F.R. pt. 88); 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 October 20, 2003, Mitchell Stanley, d/b/a Stanley Brothers [hereinafter Respondent], shipped horses in commercial transportation from Louisiana to Dallas Crown in Kaufman, Texas, for slaughter, without a permit for movement of restricted animals, in violation of 9 C.F.R. § 75.4(b), and without a completed owner-shipper certificate, in violation of 9 C.F.R. § 88.4(a)(3)(iv)-(v), (vii) (Compl. ¶ III). The Hearing Clerk served Respondent with the Complaint, the Rules of Practice, and a service letter on January 23, 2006.[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)). In a letter dated February 23, 2006, the Hearing Clerk informed Respondent that he had failed to file a timely answer and that he would be informed of any future action taken in the proceeding.

On April 4, 2006, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for Adoption of Proposed Default Decision and Order [hereinafter Motion for Default Decision] and a Proposed Default Decision and Order [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 April 19, 2006.[2] Respondent failed to file objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision within 20 days after service, as required by section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). In a letter dated May 16, 2006, the Hearing Clerk informed Respondent that he had failed to file timely objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision and that the file would be referred to an administrative law judge for consideration and decision.

On June 14, 2006, Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] issued a Default Decision and Order [hereinafter Initial Decision]: (1) finding Respondent violated 9 C.F.R. §§ 75.4(b) and 88.4(a)(3)(iv)-(v), and (vii), as alleged in the Complaint; and (2) assessing Respondent a $12,800 civil penalty (Initial Decision at 2-4).

On August 15, 2006, Respondent appealed the ALJ's Initial Decision to the Judicial Officer. On August 30, 2006, Complainant filed a

[1]United States Postal Service Domestic Return Receipt for Article Number 7003 1010 0003 0642 2261.

[2]United States Postal Service Domestic Return Receipt for Article Number 7003 3110 0003 7112 2724.

response to Respondent's appeal petition. On October 20, 2006, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision. Based upon a careful review of the record, I affirm the ALJ's Initial Decision.

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 48—HUMANE METHODS OF LIVESTOCK SLAUGHTER

§ 1901. Findings and declaration of policy

. . . .

COMMERCIAL TRANSPORTATION OF EQUINE FOR SLAUGHTER

Pub. L. 104-127, title IX, subtitle A, Apr. 4, 1996, 110 Stat. 1184, provided that:

SEC. 901. FINDINGS.

Because of the unique and special needs of equine being transported to slaughter, Congress finds that it is appropriate for the Secretary of Agriculture to issue guidelines for the regulation of the commercial transportation of equine for slaughter by persons regularly engaged in that activity within the United States.

SEC. 902. DEFINITIONS.

In this subtitle:

(1) COMMERCIAL TRANSPORTATION.–The term "commercial transportation" means the regular operation for profit of a transport business that uses trucks, tractors, trailers, or semitrailers, or any combination thereof, propelled or drawn by mechanical power on any highway or public road.

(2) EQUINE FOR SLAUGHTER.–The term "equine for slaughter" means any member of the Equidae family being

transferred to a slaughter facility, including an assembly point, feedlot, or stockyard.

(3) PERSON.–The term "person"–

(A) means any individual, partnership, corporation, or cooperative association that regularly engages in the commercial transportation of equine for slaughter; but

(B) does not include any individual or other entity referred to in subparagraph (A) that occasionally transports equine for slaughter incidental to the principal activity of the individual or other entity in production agriculture.

SEC. 903. REGULATION OF COMMERCIAL TRANSPORTATION OF EQUINE FOR SLAUGHTER.

(a) IN GENERAL.–Subject to the availability of appropriations, the Secretary of Agriculture may issue guidelines for the regulation of the commercial transportation of equine for slaughter by persons regularly engaged in that activity within the United States.

(b) ISSUES FOR REVIEW.–In carrying out this section, the Secretary of Agriculture shall review the food, water, and rest provided to equine for slaughter in transit, the segregation of stallions from other equine during transit, and such other issues as the Secretary considers appropriate.

(c) ADDITIONAL AUTHORITY.–In carrying out this section, the Secretary of Agriculture may–

(1) require any person to maintain such records and reports as the Secretary considers necessary;

(2) conduct such investigations and inspections as the Secretary considers necessary; and

(3) establish and enforce appropriate and effective civil penalties.

SEC. 904. LIMITATION OF AUTHORITY TO EQUINE FOR SLAUGHTER.

Nothing in this subtitle authorizes the Secretary of Agriculture to regulate the routine or regular transportation, to slaughter or elsewhere, of–

(1) livestock other than equine; or

(2) poultry.

SEC. 905. EFFECTIVE DATE.

This subtitle shall become effective on the first day of the first month that begins 30 days or more after the date of enactment of this Act [Apr. 4, 1996].

CHAPTER 109—ANIMAL HEALTH PROTECTION

§ 8301. Findings

Congress finds that–

(1) the prevention, detection, control, and eradication of diseases and pests of animals are essential to protect–

(A) animal health;

(B) the health and welfare of the people of the United States;

(C) the economic interests of the livestock and related industries of the United States;

(D) the environment of the United States; and

(E) interstate commerce and foreign commerce of the United States in animals and other articles;

(2) animal diseases and pests are primarily transmitted by animals and articles regulated under this chapter;

(3) the health of animals is affected by the methods by which animals and articles are transported in interstate commerce and foreign commerce;

(4) the Secretary must continue to conduct research on animal diseases and pests that constitute a threat to the livestock of the United States; and

(5)(A) all animals and articles regulated under this chapter are in or affect interstate commerce or foreign commerce; and

(B) regulation by the Secretary and cooperation by the Secretary with foreign countries, States or other jurisdictions, or persons are necessary–

(i) to prevent and eliminate burdens on interstate commerce and foreign commerce;

(ii) to regulate effectively interstate commerce and foreign commerce; and

(iii) to protect the agriculture, environment, economy, and health and welfare of the people of the United States.

§ 8305. Interstate movement

The Secretary may prohibit or restrict—

(1) the movement in interstate commerce of any animal, article, or means of conveyance if the Secretary determines that the prohibition or restriction is necessary to prevent the introduction or dissemination of any pest or disease of livestock; and

(2) the use of any means of conveyance or facility in connection with the movement in interstate commerce of any animal or article if the Secretary determines that the prohibition or restriction is necessary to prevent the introduction or dissemination of any pest or disease of livestock.

§ 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.

§ 8315. Regulations and orders

The Secretary may promulgate such regulations, and issue such orders, as the Secretary determines necessary to carry out this chapter.

7 U.S.C. § 1901 note; 7 U.S.C. §§ 8301, 8305, 8313(b)(1)-(2), (4), 8315 (Supp. IV 2004).

9 C.F.R.:

TITLE 9—ANIMALS AND ANIMAL PRODUCTS

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

. . . .

SUBCHAPTER C—INTERSTATE TRANSPORTATION OF ANIMALS (INCLUDING POULTRY) AND ANIMAL PRODUCTS

. . . .

PART 75—COMMUNICABLE DISEASES IN HORSES, ASSES, PONIES, MULES, AND ZEBRAS

EQUINE INFECTIOUS ANEMIA (SWAMP FEVER)

§ 75.4 Interstate movement of equine infectious anemia reactors and approval of laboratories, diagnostic facilities, and research facilities.

. . . .

(b) *Interstate movement.* No reactor may be moved interstate unless the reactor is officially identified, is accompanied by a certificate, and meets the conditions of either paragraph (b)(1), (b)(2), (b)(3), or (b)(4) of this section: *Provided*, That official identification is not necessary if the reactor is moved directly to slaughter under a permit and in a conveyance sealed with an official seal[.]

PART 88—COMMERCIAL TRANSPORTATION OF EQUINES FOR SLAUGHTER

. . . .

§ 88.4 Requirements for transport.

(a) Prior to the commercial transportation of equines to a slaughtering facility, the owner/shipper must:

. . . .

(3) Complete and sign an owner-shipper certificate for each equine being transported. The owner-shipper certificate for each equine must accompany the equine throughout transit to the slaughtering facility and must include the following information, which must be typed or legibly completed in ink:

. . . .

(iv) A description of the conveyance, including the license plate number;

(v) A description of the equine's physical characteristics, including such information as sex, breed, coloring, distinguishing markings, permanent brands, tattoos, and electronic devices that could be used to identify the equine; [and]

. . . .

(vii) A statement of fitness to travel at the time of loading, which will indicate that the equine is able to bear weight on all four limbs, able to walk unassisted, not blind in both eyes, older than 6 months of age, and not likely to give birth during the trip[.]

88.6 Violations and penalties.

(a) The Secretary is authorized to assess civil penalties of up to $5,000 per violation of any of the regulations in this part.

(b) Each equine transported in violation of the regulations of this part will be considered a separate violation.

9 C.F.R. §§ 75.4(b); 88.4(a)(3)(iv)-(v), (vii), .6.

DECISION

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 who resides at 747 Highway 8 West, Hamburg, Arkansas 71646. Respondent engages in the commercial transportation of equines to slaughter under the name of Stanley Brothers. Respondent handles more than 20 horses per year in interstate commerce.

2. On or about October 20, 2003, Respondent shipped horses in commercial transportation from Louisiana to Dallas Crown in Kaufman, Texas, for slaughter. Two horses in the shipment, USDA backtag numbers USAU 3602 and USAU 3616, bore a brand on the left side of their necks, 72A, which identified the horses as positive reactors for equine infectious anemia, but the horses were not accompanied by the required permit for movement of restricted animals, VS Form 1-27, in violation of 9 C.F.R. § 75.4(b).

3. On or about October 20, 2003, Respondent shipped horses in commercial transportation from Louisiana to Dallas Crown in Kaufman, Texas, for slaughter, but Respondent did not complete the required owner-shipper certificate, VS Form 10-13. The owner-shipper certificate, VS Form 10-13, had the following deficiencies: (1) the license plate number of the conveyance was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(iv); (2) the 72A brands on the two positive reactors for equine infectious anemia were not listed, in violation of 9 C.F.R. § 88.4(a)(3)(v); and (3) the boxes indicating the fitness of the horses to travel at the time of loading were not marked, in violation of 9 C.F.R. § 88.4(a)(3)(vii).

Conclusions of Law

By reason of the findings of fact:

1. Respondent violated the Animal Health Protection Act (7 U.S.C. §§ 8301-8321 (Supp. IV 2004));

2. Respondent violated the Commercial Transportation of Equine for Slaughter Act (7 U.S.C. § 1901 note);

3. Respondent violated regulations issued under the Animal Health Protection Act (9 C.F.R. § 75.4(b)); and

4. Respondent violated regulations issued under the Commercial Transportation of Equine for Slaughter Act (9 C.F.R. § 88.4(a)(3)(iv)-(v), (vii)).

Respondent's Appeal Petition

Respondent raises two issues in his August 15, 2006, filing [hereinafter Appeal Petition]. First, Respondent contends he filed a timely response to the Complaint. In support of his contention, Respondent attached to his Appeal Petition a letter dated February 2, 2006, from Respondent to Regina Paris, Office of the Hearing Clerk. (Respondent's Appeal Pet. and Attach.)

The Hearing Clerk served Respondent with the Complaint, the Rules of Practice, and a service letter on January 23, 2006.[3] Section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) provides that, within 20 days after service of the complaint, the respondent shall file an answer with the Hearing Clerk. Thus, Respondent's answer was required to be filed with the Hearing Clerk no later than February 13, 2006.[4] Respondent's answer, dated February 2, 2006, does not establish that Respondent filed his answer on February 2, 2006.[5]

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[3]See note 1.

[4]Twenty days after January 23, 2006, was February 12, 2006. However, February 12, 2006, was a Sunday. Section 1.147(h) of the Rules of Practice provides that when the time for filing a document or paper expires on a Sunday, the time for filing shall be extended to the next business day, as follows:

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

7 C.F.R. § 1.147(h).

The next business day after Sunday, February 12, 2006, was Monday, February 13, 2006. Therefore, Respondent was required to file his answer no later than February 13, 2006.

[5]*See In re Anna Mae Noell*, 58 Agric. Dec. 130, 140 n.2 (1999) (stating the date typed on a pleading by a party filing the pleading does not constitute the date the pleading is filed with the Hearing Clerk; instead, the date a pleading is filed with the Hearing Clerk is the date the document reaches the Hearing Clerk), *appeal dismissed sub nom. The Chimp Farm, Inc. v. United States Dep't of Agric.*, No. 00-1068-A (11th Cir. July 20, 2000).

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.**
>
> . . . .
>
> (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).

Generally, the Hearing Clerk's date and time stamp establishes the date and time a document reaches the Hearing Clerk. The Hearing Clerk's date and time stamp indicates Respondent filed his answer at 9:47 a.m., on August 15, 2006, 6 months 2 days after Respondent's answer was due. Therefore, I reject Respondent's contention that he filed a timely response to the Complaint. 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)).

Second, Respondent contends he did not intend to violate the Animal Health Protection Act, the Commercial Transportation of Equine for Slaughter Act, and regulations issued under the Animal Health Protection Act and the Commercial Transportation of Equine for Slaughter Act (Respondent's Appeal Pet.).

Respondent admits in Respondent's late-filed answer and in Respondent's Appeal Petition that he committed the violations alleged in the Complaint, but contends the violations were not intentional. Respondent's contention that he did not intentionally violate the Animal Health Protection Act, the Commercial Transportation of Equine for Slaughter Act, and regulations issued under the Animal Health Protection Act and the Commercial Transportation of Equine for Slaughter Act is not relevant in an administrative proceeding for the assessment of a civil penalty.

The plain language of section 10414 of the Animal Health Protection Act (7 U.S.C. § 8313 (Supp. IV 2004)) establishes that intent is not an

element of a violation of a regulation issued under the Animal Health Protection Act in a disciplinary administrative proceeding for the assessment of a civil penalty. The term *knowingly* in section 10414 of the Animal Health Protection Act (7 U.S.C. § 8313 (Supp. IV 2004)) is only used in connection with criminal proceedings. Similarly, under the Commercial Transportation of Equine for Slaughter Act, intent is not an element of a violation in a disciplinary administrative proceeding for the assessment of a civil penalty. Therefore, even if I were to find Respondent's violations of 9 C.F.R. §§ 75.4(b) and 88.4(a)(3) were unintentional, as Respondent contends, that finding would not constitute a basis for my reversing the ALJ's conclusion that Respondent violated the Animal Health Protection Act, the Commercial Transportation of Equine for Slaughter Act, and regulations issued under the Animal Health Protection Act and the Commercial Transportation of Equine for Slaughter Act.

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

ORDER

Respondent is assessed a $12,800 civil penalty. The civil penalty shall be paid by certified check or money order 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 indicate on the certified check or money order that payment is in reference to A.Q. Docket No. 06-0007.

_____

In re: WILLIAM RICHARDSON.
A.Q. Docket No. 05-0012.
Decision and Order.
Filed December 19, 2006.

AQ – SHTP – Unnecessary discomfort – Trauma – Physical harm – Pre-existing injuries – Backtags – Safe and humane transport, when not..

Thomas Bolick for Complainant.
Respondent Pro se.
Decision and Order filed by Chief Administrative law Judge Marc R. Hillson.

Decision

In this decision, I find that Respondent William Richardson committed numerous serious violations and at least 25 moderate or minor violations of the Commercial Transportation of Equines for Slaughter Act and the regulations promulgated thereunder. I impose a penalty of $30,000 for the violations.

Procedural History

On September 1, 2005, a complaint was signed on behalf of the Administrator of USDA's Animal and Plant Inspection Service (APHIS), alleging that Respondent William Richardson had committed numerous violations of the Commercial Transportation of Equines for Slaughter Act ("the Act") between August 2003 and November 2004. After service was effectuated, a timely answer was filed by Respondent, through his attorney.

At a telephonic prehearing conference on February 14, 2006, the parties agreed to proceed to a hearing to be held beginning June 27, 2006 in Sherman, Texas. They also agreed to a schedule for exchanging witness lists and proposed exhibits. At this conference Respondent's attorney, Larry B. Sullivant, stated that he would be withdrawing from the case before trial due to illness. Mr. Sullivant formally withdrew from the proceeding on May 19, and indicated he had told Respondent "of his immediate need to retain counsel."

I conducted a follow-up telephonic conference on June 7 with Thomas Bolick, Esq., representing Complainant and Respondent representing himself. At this conference, Respondent, who had not submitted his exchange of materials as required by my February 16 order, represented that he had retained the services of a new attorney,

who he did not name, and that the hearing should proceed as scheduled. I scheduled another conference call on June 13 so Respondent's new attorney could participate, but on that date, Respondent again represented himself. He maintained that he had retained an attorney, but did not remember his name or address, and stated that he would have his attorney immediately file a notice of appearance.

On June 20, I granted Complainant's motion to conduct the hearing via audiovisual means, with Respondent, his attorney if he retained one, and several of Complainant's witnesses participating from the U.S. Attorney's office in Sherman, Texas, while Mr. Bolick, several of Complainant's witnesses and I would participate from Washington, D.C.

I conducted a hearing in Sherman, Texas and Washington, D.C. through audiovisual means on June 27-28, 2006. Respondent arrived late for the hearing and appeared pro se.[1] Complainant called eight witnesses and introduced 36 exhibits. Respondent testified on his own behalf and called no other witnesses, nor did he introduce any exhibits. At the conclusion of the hearing, I strongly urged Respondent, who apparently has some difficulty with reading and writing, to consider hiring an attorney to help him with his post-hearing submissions. I set a briefing schedule and received a timely brief from Complainant and no brief from Respondent. No responsive briefs were filed.

Statutory and Regulatory Background

The Commercial Transportation of Equine for Slaughter Act (7 U.S.C. § 1901 note et seq.), part of the 1996 Farm Bill, is intended to assure that equines (horses) being transported for slaughter not be subject to unsafe and inhumane conditions. Congress directed the Secretary of Agriculture to issue guidelines to accomplish this purpose. The Secretary delegated this rulemaking authority to the Animal Plant and Health Inspection Service (APHIS) which ultimately published a final rule at 9 C.F.R. Part 88 in December, 2001, with an effective date of April, 2002.

Among other things, the final rule defined an "owner/shipper" as someone who commercially transports more than 20 equines a year to slaughtering facilities. 9 C.F.R. § 88.1. An owner/shipper is subject to a number of regulations designed to prevent horses from suffering unduly while being transported to the slaughterhouse. Regulations

[1] Respondent arrived after the initial testimony of Dr. Cordes and during the initial testimony of Joey Astling. Mr. Bolick had Mr. Astling briefly recap his testimony for the benefit of Respondent, Tr. 55, and when Dr. Cordes was recalled on the second day of the hearing he likewise restated his previous day's testimony for Respondent's benefit, Tr. 425-431.

include standards for constructing conveyances, so that horses can be safely loaded, unloaded and transported, and regulations for the care of horses before and during shipment. The regulations, which are generally performance standards, seek to assure that equines being transported to the slaughterhouse are fit to travel, in that they must be weight-bearing on all four legs, must not be blind in both eyes, must be able to walk unassisted, are older than six months of age, and are not about to give birth. They are to be transported in a manner so as not to cause injury, must be checked at least once every six hours while being transported, and must be offloaded and fed and watered on trips over 28 hours in duration.

The final regulation also provides a number of what might be termed paperwork requirements. Each horse must be supplied with a backtag—literally a tag supplied by USDA that sticks to the back of the horse. In addition each horse being shipped must be accompanied by an owner/shipper certificate which contains pertinent information about the owner/shipper, the receiver (the slaughterhouse), the shipping vehicle, and the horse (including a statement of fitness to travel).

Because the Act and regulations are relatively new and the Agency did not have much manpower to assign to enforcement, Complainant put forth a significant effort to inform regulated parties of their obligations under the Act. Thus Dr. Timothy Cordes, a senior staff veterinarian for APHIS and the National Coordinator for Equine Programs, former veterinarian for the United States Equestrian Team, and Director of the Slaughter Horse Transportation Program (SHTP), explained that given the limited resources available to the program, it was necessary to develop public outreach materials. Tr. 34-39. The program developed five training tools, including videos, which were distributed to each known shipper of horses for slaughter. *Id.* The materials included back tags and Owner/Shipper Certificates. Respondent received these materials, and additionally was assisted a number of times in filling out his paperwork and otherwise educated on various aspects of the regulations directly by Animal Health Technician (AHT) Joey Thomas Astling. Tr. 40, 46-49.

The SHTP assigns an animal health technician to each of the plants at which horses are "processed" so that on the "killing days" each horse is inspected for compliance with the regulations. Tr. 31-33.

Discussion

The bulk of the testimony established that Respondent was a responsible owner/shipper on at least ten occasions, between August 26,

2003 and June 30, 2004, of horses which were shipped to Dallas Crown, Inc. to be slaughtered. In most of these instances, Respondent either directly delivered the horses to Dallas Crown or had hired the driver performing the delivery. Additionally, several deliveries were made in the name of another individual, but were actually for the benefit of Respondent, who was seeking to get around a quota imposed on him by Dallas Crown, and in at least one other instance he apparently let another individual use his name so that that individual could get a more favorable deal from Dallas Crown, for which he was paid a commission.

Complainant's evidence demonstrated that Respondent committed a significant number of particularly serious violations, as well as numerous lesser violations concerning backtags and the completion of proper paperwork, and for failing to cooperate in several aspects of the inspection process, including failure to return to Dallas Crown after dropping off a shipment of horses outside of normal business hours.

Complainant demonstrated that on or about August 26, 2003, as part of a shipment of 16 horses, Respondent transported a paint mare that was blind in both eyes. AHT Astling, assigned to the Dallas Crown facility, observed this horse being led off the truck. CX 3, Tr. 50. He noticed her normal locomotion was "very unstable" and that as the horse came closer "it was pretty obvious that she was being led for the reason that she couldn't see at all." CX 3, Tr. 63. Astling took photographs of the horse (CX 4) and testified that those photos indicated that the horse's eyes were bluish in color and had no pupil, which he stated was characteristic of blind horses. Tr. 63-64. He also testified that the horse had cuts on its face—a sign it was bumping into things because it was blind. Tr. 64-65. His testimony was corroborated by Diane Ramsey, an investigator who also observed this horse. Tr. 75-77.

Respondent did not dispute that this horse was blind, but rather contended that he was not the owner/shipper. CX 10, Tr. 375. He indicated that Dale Gilbreath was the driver of the shipment and the owner/shipper as well. *Id*. Petitioner testified that he authorized Gilbreath to use his name on the paperwork accompanying that shipment, so that Gilbreath could earn a significantly higher rate per pound for the horses he was selling, and for which Gilbreath would pay Respondent a commission. Tr. 374. Respondent never called Gilbreath to testify at the hearing, and it is evident that Respondent, who regularly employed Gilbreath as a driver, was at the very least a partner or joint venturer in this transaction, and is thus the owner/shipper with regards to this horse.

Complainant demonstrated that on January 27, 2004 Respondent transported for slaughter, as part of a load of 43 horses, an appaloosa that was blind in both eyes. The plant manager at Dallas Crown noted

the horse's condition, isolated it in a pen, and called the condition of the horse to the attention of AHT Astling. CX 44, Tr. 277-278. The plant manager told Astling that the horse was blind in both eyes, and Astling observed it walking into pipes and otherwise showing signs that it was not aware of its surroundings. Tr. 278. Astling took photographs of both eyes which supported his testimony that neither eye had a clearly defined pupil. CX 46, Tr. 278. Dr. Cordes testified that the photographs illustrated that the horse suffered from periodic ophthalmia or moon blindness, that the pupil was "completely locked shut" and that the horse was "functionally blind." Tr. 453-455.

Respondent countered by stating that he thought the horse might have been blind in one eye, and that appaloosas have trouble seeing at night. Tr. 302, 393-395. However, as I noted at the hearing, the photographs in evidence were time dated in the early afternoon, and the horse was showing every indication of blindness at that time. CX 46, Tr. 422-423. Accordingly, I find that the evidence establishes that Respondent shipped for slaughter a blind appaloosa on January 27, 2004, in contravention of the regulations.

Complainant demonstrated that on several occasions Respondent transported horses to Dallas Crown that were injured, either during the loading or shipping process, or had preexisting injuries to the extent that they were not weight bearing on all four limbs or were otherwise seriously injured and unable to travel without discomfort, stress, physical harm or trauma.

Thus, on August 26, 2003, a load of horses for which Respondent was the owner/shipper which was transported by Troy Ressler, included a horse which, according to Ressler, had been reloaded at the direction of Respondent, even though it had an injured leg. CX 3, Tr. 79-80, 86. When the shipment arrived at Dallas Crown, AHT Astling observed the horse lying in the back of the trailer. CX 3, CX 11, Tr. 79-80. Astling believed the horse was "profusely sweating" and in a state of shock. Id., Tr. 86, 418. Astling observed the horse attempt to stand up to exit the trailer, and then collapse. He ordered the horse to be euthanized. Id. Astling's observations were confirmed by Dianne Ramsey, who took photographs of the injured horse and testified as well that it appeared to her that the "horse's feet were ground off." CX 11, Tr. 90-91, 414. Dr. Cordes testified in his capacity as a veterinarian that the horse had suffered the equivalent of a surgical resection and that it bled so much it went into shock. Tr. 432-433.

Respondent acknowledged that the horse was injured at the time he loaded it onto his trailer, but then said it wasn't a serious injury and that the horse was able to walk onto his trailer. CX 10, Tr. 87-88, 91, 376-

378, 401-405. He claimed the injury was like trimming one's toenails a little too close (Tr. 405) but the bloody and rather gruesome photographs in CX 11 clearly indicate otherwise. He further claimed the horse stuck its leg through a hole in the loading chute upon arriving at Dallas Crown, but both Astling and Ramsey observed otherwise, and Dr. Cordes indicated that an injury of that severity could not be caused merely by stepping through a hole in the loading chute. Tr. 412-418, 434. Overall, the evidence overwhelmingly demonstrates a violation of the Act with regards to this horse.

On October 7, 2003 Respondent transported a load of 47 horses to Dallas Crown, of which three had significant injuries. All three of these horses apparently suffered their injuries when a loading chute collapsed as they were being loaded onto a truck in the middle of the night. CX 3, CX 10, Tr. 138-161. According to Astling, Ressler, who drove one of the two conveyances transporting these horses, told him that they had continued loading the horses even though three of them were injured after the chute collapsed. CX 3, Tr. 139-145. After the horses had been unloaded off his truck, Ressler notified Astling that one of the horses remained in the trailer with a broken leg. CX 3, CX 24, Tr. 140. After inspecting and photographing the horse, which had a break so severe that bone was exposed, Astling directed Dallas Crown to euthanize the horse. CX 3, CX 24, Tr. 140-143. Dr. Cordes confirmed that the photographs indicated that this horse was not weight bearing on all four legs, as required by the regulations. Tr. 449.

Later that same day, Respondent arrived at Dallas Crown with the load of horses that he was transporting. CX 3, Tr. 146-147, 157. He notified Astling that there were two horses in the back of his trailer, which he had separated from the other horses, which he thought Astling should look at. CX 3, Tr. 146-148. Astling noted that one of the horses was missing a substantial portion of its left hind foot. CX 3, CX 25, Tr. 145-148. Respondent indicated to Astling that while the horse was injured when the ramp collapsed it could still bear weight on all four limbs, but Astling observed that the horse was bleeding and could not bear weight on the injured foot, even though it was able to walk out of the trailer. Tr. 147-148, 150. Astling allowed the horse to be "processed" at Dallas Crown, rather than euthanized, only because the horse was very close to the entrance to the processing facility. CX 3, Tr. 150-151, 158.

Astling then noticed that another horse of Respondent's that was being weighed-in had severe lacerations on both left legs and lesser lacerations on the right legs. CX 3, Tr. 157-159. The photographs taken by Astling vividly illustrate the severity of at least two of the lacerations. CX 26. In particular, the left hind leg's laceration was deep enough so

that bone was visible and the left forelimb had lacerations deep enough that the knee was visible. Tr. 153. Astling testified that the horse could only bear weight on the severely injured limbs with "lots of pain and difficulty." Tr. 155. He indicated that the horse should have been euthanized, or at least have been given the prompt medical attention required by the regulations.

With respect to the three just-discussed horses, Respondent's principal explanation was that the loading chute collapse happened around 3 a.m. and that he did not realize the horses were injured. CX 10, Tr. 165-167, 386-387, 406. He also denied that the horse suffered a broken leg before it was transported, testifying that it was led up the chute and into the truck. Tr. 386-387, 406-407. Even if the chute collapsed in the dark of night there is no excuse for not checking on the condition of the horses after the occurrence of an event that obviously would have a propensity to cause significant injury. Moreover, the owner/shipper certificate signed by Respondent (CX 23) indicated that the horses were actually loaded at 6 a.m., when there should have been enough light to determine whether any horses were injured. The evidence overwhelmingly supports a finding, with respect to these three horses, that they were either unable to bear weight on all four limbs, or were otherwise not handled "in a manner that does not cause unnecessary discomfort, stress, physical harm, or trauma" as required in 9 C.F.R. § 88.5(c).

Complainant also demonstrated that on September 30, 2003 Respondent commercially transported to Dallas Crown two horses, out of a shipment of thirty, which had pre-existing injuries that rendered them unable to bear weight on all four limbs, and which thus should not have been eligible for shipment for slaughter. AHT Astling was notified by plant personnel at Dallas Crown that there was a horse he should look at, and he observed and photographed a roan mare with significant injuries to its right front foot and lower right leg. CX 19, CX 22, Tr. 119-120. Both Astling and Dr. Cordes, who testified based on the photographs Astling took, were of the opinion that the horse was suffering from an old injury seriously impacting its ability to walk. Tr. 117-123, 436-445. The right front foot had a substantial swollen mass that Dr. Cordes identified as a fibroma, which resulted in a large mass of tissue at the bottom of its right front limb which he analogized to standing "on top of a basketball." Tr. 436. Dr. Cordes was of the opinion that this horse would not be able to maintain its balance and equilibrium when being transported, and thus should not have been transported under the Act. Tr. 437. Respondent acknowledged shipping this horse, but maintained that it could bear weight on all four legs at the

time of loading. CX 10, Tr. 385. However, it is apparent to me upon examining the photos taken by AHT Astling that it would be extremely difficult for this horse to bear weight on its extremely swollen front right hoof. At best, the horse could only step gingerly on the injured extremity and, as Complainant points out in its brief, the horse would have had to endure unnecessary discomfort in the course of being transported to Dallas Crown, which would violate the prohibition contained in 9 C.F.R. § 88.4(c).

The other horse AHT Astling observed on September 30, 2003 was a paint mare which had an old injury to its left hind ankle as well as a fresh cut on its left hind tendon. CX 19, CX 21, Tr. 120. The left hind ankle injury was "a long-standing, chronic lesion" that caused the horse's hoof to flop forward at a right-angle to the leg, so that the weight of the horse was effectively on the back of the horse's ankle rather than its foot. Tr. 442-442. Both AHT Astling and Dr. Cordes characterized the injury as an old one and stated that, in essence, it was a failure of the horse's "suspensory apparatus." Tr. 117, 444-445. Dr. Cordes testified that "this horse should never have been loaded" (Tr. 443) and that it would have had difficulty maintaining its equilibrium while traveling, and that the fresh cut on its left hind tendon likely resulted from an injury while in transit. Shipping this horse was "not safe and humane" (Tr. 445) and was a violation of the proscription against exposure to "unnecessary discomfort, stress, physical harm, or trauma" as per the regulation.

On October 21, 2003, a black and white paint, one of 14 horses in a shipment owned by Respondent, was observed by AHT Astling and senior inspector Davis Green at Dallas Crown to be holding its left hind foot off the ground, and appeared to be unable to place any weight on it. CX 31-33, Tr. 184-191, 199-200. Green opined that the horse had an old, preexisting injury such that the area above the ankle and around the knee was extremely swollen. Tr. 189-190. It is clear from the photographs at CX33 that the horse was unable to bear weight on this leg. Respondent's principal defense regarding this horse is that he never saw the horse because this load of horses was purchased for him by an individual named Bubba Stokes. CX 37, Tr. 388. The fact that Stokes may have been Respondent's agent or employee does not change the fact that Respondent is the owner/shipper of this horse and is thus responsible for complying with the Act and regulations.

With respect to each of the seven injured horses discussed, Complainant also established that Respondent did not comply with the regulation requiring that "an owner/shipper must obtain veterinary assistance as soon as possible from an equine veterinarian for any equines in obvious physical distress." 9 C.F.R. § 88.4(b)(2). Since each

of the injured horses were inarguably in obvious physical distress, and since Respondent in none of these instances requested veterinary assistance, Complainant easily met its burden of proof.

Along with the above-discussed two blind and seven injured horses who were transported in violation of the Act, Respondent was cited for a number of other violations. When Astling asked to examine a horse that he thought was blind on October 7, 2003, Respondent first tried to take the horse into the plant itself, but was stopped by Astling who informed him that he wanted to examine the horse. CX 3, Tr. 157-158, 161-163. Instead, Respondent argued with Astling, and took the horse back to his trailer, and subsequently left the premises with it. Id. Respondent testified that he thought the horse could see, but did not deny that he removed it from the premises rather than let Astling examine it. CX 10, Tr. 166, 387. This is inconsistent with the requirement at 9 C.F.R. § 88.5(a)(3) that the owner/shipper must allow "a USDA representative access to the equines for the purpose of examination." Astling also testified that Respondent was the owner/shipper of 17 horses delivered to Dallas Crown at 3:15 a.m. on September 16, 2003. CX 12, CX 15, Tr. 108-110. Respondent left the premises and did not return. Id. Astling reported to duty at Dallas Crown between 9:30 and 10 a.m., and never saw Respondent. Id. The regulations allow the owner/shipper to leave the premises if he arrives outside of normal business hours, but require him to return to the facility to meet the USDA representative. Thus, Respondent's conduct was inconsistent with the specific requirements of 9 C.F.R. § 88.5(b).

Complainant also demonstrated that Respondent almost routinely violated the Act's various paperwork provisions. On three occasions, the horses transported by Respondent did not have the required backtags. On one of these occasions, August 26, 2003, the inspectors observed no backtag on the blind paint horse that has already been discussed, but did not find violations with regards to the other horses shipped that day. CX 3, Tr. 57-59, 75-76. On another occasion, November 23, 2003, none of a shipment of 42 horses picked up in Billings, Montana was backtagged. Tr. 331. Respondent stated that he called USDA and told them he was unable to have the tags affixed due to weather problems, but it appears to be undisputed that the tags were not affixed. CX 57, Tr. 330-332, 356-358. With respect to another shipment of 43 horses, Respondent called AHT Leslie Chandler and told him he was unable to backtag the horses because he was caught in a snowstorm. CX 44-45, Tr. 268, 285-287. Chandler consulted with Astling and told Respondent that he could ship the horses to Dallas Crown without backtags if he assigned each horse a backtag number on

the owner/shipper certificate and followed up by sending the backtags after the fact. *Id*. Respondent agreed, but then never did provide the backtags, stating that he threw them away, and admitting he was at fault. Tr. 389-390.

With respect to the other paperwork required under the regulations, principally the owner/shipper statement, Complainant demonstrated that the forms were either not filled out on a few occasions, and were incorrectly or partially filled out on numerous occasions. Omissions included not signing the certificate, failing to indicate the fitness of the horses, failure to complete the shipper's address or telephone number, failing to provide the full backtag number for each horse, etc.

Findings of Fact

1. Respondent William Richardson, a resident of Whitesboro, Texas, is engaged in the business of buying horses and transporting them for slaughter.

2. Respondent was the owner/shipper of horses being transported for slaughter to Dallas Crown in Kaufman, Texas on the following ten occasions between August 26, 2003 and June 30, 2004: August 26, 2003 (2 shipments of 15 and 16 horses), September 16, 2003 (17 horses), September 30, 2003 (30 horses), October 7, 2003 (47 horses), October 21, 2003 (14 horses), January 27, 2004 (43 horses), February 1, 2004 (28 horses), June 30, 2004 (12 horses), and November 23, 2004 (42 horses).

3. On August 26, 2003 and January 27, 2004, Respondent transported for slaughter horses that were blind in both eyes.

4. On August 26, 2003, Respondent transported for slaughter a horse with a serious leg injury to the extent that it had suffered the equivalent of a surgical resection. At the time it was observed at Dallas Crown it had collapsed and was in shock, and USDA officials ordered it euthanized. The horse obviously could not bear weight on all four limbs.

5. On October 7, 2003, Respondent transported for slaughter three horses that were severely injured when the loading chute collapsed. One of the horses had a broken leg and was euthanized shortly after arrival at Dallas Crown. Another horse was missing a significant portion of its left hind foot. A third horse suffered lacerations so sever its bones were visible. None of these horses could bear weight on all four limbs.

6. On September 30, 2003, Respondent transported for slaughter two horses that had significant pre-existing injuries, preventing them from bearing weight on all four limbs.

7. On October 21, 2003, Respondent transported for slaughter a horse that had a significant pre-existing injury, preventing it from bearing weight on all four limbs.

8. With respect to the horses described in Findings 4 through 7, each of the seven horses was in obvious physical distress, but Respondent did not seek veterinary care for any of these horses.

9. With respect to the horses described in Findings 3 through 7, each of these nine horses was not transported in a manner that did not cause unnecessary discomfort, stress, physical harm, or trauma.

10. On October 17, 2003, Respondent denied AHT Astling the opportunity to examine one of the horses he had transported for slaughter.

11. On September 16, 2003, Respondent delivered horses for slaughter to Dallas Crown outside of normal business hours, and neither waited with the horses, nor returned later that day to meet the USDA representative on site.

12. On at least three occasions, Respondent delivered horses for slaughter that were not backtagged.

13. On numerous occasions, Respondent delivered horses for slaughter that were accompanied by incomplete or improperly filled out owner/shipper certificates.

Conclusions of Law

1. Respondent violated 9 C.F.R. § 88.4(c) with respect to the two blind and seven injured horses described in Findings of Fact 3 through 7 by failing to transport them to the slaughtering facility "as expeditiously and carefully as possible in a manner that does not cause unnecessary discomfort, stress, physical harm, or trauma."

2. Respondent violated 9 C.F.R. § 88.4(b) (2) with respect to the seven injured horses described in Findings of Fact 4 through 7 by not

obtaining "veterinary assistance as soon as possible from an equine veterinarian for any equine in obvious physical distress."

3. Respondent violated 9 C.F.R. § 88.4 (a) in numerous respects on many occasions for failing to apply backtags to each horse, and for failing to properly fill out numerous aspects of the owner/shipper certificate.

4. Respondent violated 9 C.F.R. § 88.5 (a) (3) on October 17, 2003, by refusing to allow access to a horse for the purpose of examination.

5. Respondent violated 9 C.F.R. § 88.5(b) on September 16, 2003 by leaving the premises of a slaughtering facility when arriving outside of normal business hours without returning during normal business hours to meet the USDA representative.

Appropriate Sanctions

The only sanction provided by the Act for violation of these regulations is assessment of civil penalties of up to $5,000 per violation. Each horse transported in violation of the regulations is considered a separate violation. Neither the Act nor regulations provide any further guidance as to appropriate penalties, such as the violator's compliance history, size of business, culpability, seriousness of violations, ability to pay, etc.

Complainant contends that a civil penalty of $85,000 is appropriate. Even in the absence of statutory or regulatory guidance, Complainant addresses a number of factors it believes I should consider in assessing a penalty. While I agree with most of Complainant's arguments on these factors, I find that the proposed civil penalty for this first time violator, even factoring in the relative egregiousness of the violations is too high. I impose a penalty of $30,000.

I am mindful that Respondent committed these violations in spite of being afforded extensive assistance by Complainant before and continuing throughout the period the violations were committed. The violations of transporting blind and severely injured horses are probably the most serious types of violations subject to the Act. The violative actions took place ten times in less than one year, indicating that it was a fairly routine practice of Respondent to ignore the rules. Respondent did not present any evidence supporting his inability to pay a substantial penalty.

Complainant asks that I assess a maximum $5,000 for each of 15 violations and a $10,000 penalty for a combination of what he terms

"moderate or minor" violations. However, this calculation by Complainant imposes penalties for multiple violations with regard to several horses. The regulations seem to limit the penalties to a maximum of $5,000 for each horse transported in violation of the regulations. Thus, 9 C.F.R. § 88.6(b) provides:

Each equine transported in violation of the regulations of this part will be considered a separate violation.

Thus, since I have found serious violations with regard to nine horses, it would appear that for these violations the most I can assess is $45,000. However, assessing the maximum penalty is contraindicated by the fact that Complainant did not initiate an enforcement action until over a full year after the last of the ten violations. A party cannot be said to have a history of violations unless he has previously been found liable for violations. It is quite possible that Respondent might have corrected his violative conduct if he was subject to an enforcement action before he had the opportunity to violate the act on ten different occasions. Respondent has no past record of noncompliance with the Act—a factor which militates against the imposition of maximum penalties.

I conclude that a penalty of $3,000 for each of the nine horses transported in violation of the Act is appropriate. I am imposing an additional penalty of $1,000 for each of the two violations of 9 C.F.R. § 88.5, and a final $1,000 for the variety of paperwork violations.

Order

Respondent William Richardson is assessed a civil penalty of thirty thousand dollars ($30,000). Respondent shall send a certified check or money order for $30,000 payable to the Treasurer of the United States to

United States Department of Agriculture
APHIS, Accounts Receivable
P.O. Box 3334
Minneapolis, Minnesota

Within thirty days from the effective date of this Order. The certified check or money order should include the docket number of this proceeding.

This order shall 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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ANIMAL WELFARE ACT

DEPARTMENTAL DECISIONS

In re: CHERYL MORGAN, AN INDIVIDUAL, d/b/a EXOTIC PET CO.
AWA Docket No. 05-0032.
Decision and Order.
Filed July 6, 2006.

AWA – Animal Welfare Act – Failure to file timely answer – Default decision – Severity of sanction – Decision defined – Cease and desist order – Civil penalty – License revocation.

The Judicial Officer issued a decision in which he found that Cheryl Morgan (Respondent) violated the regulations and standards 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 rejected Respondent's contention that the revocation of her Animal Welfare Act licenses and assessment of a $16,280 civil penalty was too harsh, stating that the sanction was warranted in law and justified in fact.

Bernadette R. Juarez, for Complainant.
Phillip Westergren, Corpus Christi, TX, for Respondent.
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 9, 2005. 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 Cheryl Morgan [hereinafter Respondent] willfully violated the Regulations and Standards (Compl. ¶¶ 6-11). The Hearing Clerk served Respondent with the Complaint, the Rules of

Practice, and a service letter on November 9, 2005.[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 December 6, 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 Proposed Decision and Order [hereinafter Motion for Default Decision] and a proposed Decision and Order as to Cheryl Morgan by Reason of Admission of Facts [hereinafter Proposed Default Decision]. On December 28, 2005, Respondent requested an extension of time within which "to solve this misunderstanding."[2] On December 29, 2005, Acting Chief Administrative Law Judge Jill S. Clifton [hereinafter the Acting Chief ALJ] granted Respondent an extension of time within which to respond to Complainant's Motion for Default Decision. On January 31, 2006, Respondent filed timely objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision. On February 23, 2006, Complainant filed Complainant's Reply to Respondent's Objections to Motion for Adoption of Proposed Decision and Order.

On March 29, 2006, Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] issued a Decision and Order [hereinafter Initial Decision]: (1) concluding Respondent willfully violated the Regulations and Standards as alleged in the Complaint; (2) ordering Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; (3) assessing Respondent a $16,280 civil penalty; and (4) revoking Respondent's Animal Welfare Act licenses (Animal Welfare Act license number 74-C-0406 and Animal Welfare Act license number 74-B-0530) (Initial Decision at 2-3, 22).

On May 1, 2006, Respondent appealed to the Judicial Officer. On May 26, 2006, Complainant filed Complainant's Response to Respondent's Appeal Petition. On June 6, 2006, 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 Initial Decision; therefore, I affirm the ALJ's Initial Decision.

APPLICABLE STATUTORY PROVISIONS

[1]Memorandum to the File dated November 9, 2005, and signed by Tonya Fisher, Legal Technician.

[2]Letter from Respondent to the United States Department of Agriculture, Office of Administrative Law Judges, dated and filed December 28, 2005.

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[.]

. . . .

(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.

DECISION

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 Exotic Pet Co. and whose mailing address is 2006 Smith Lane, Beeville, Texas 78102.

2. At all times material to this proceeding, and between December 16, 2001, and December 16, 2004, Respondent was licensed and operating as an *exhibitor*, as that term is defined in the Animal Welfare Act and the Regulations and Standards, and held Animal Welfare Act license number 74-C-0406. On December 16, 2004, Animal Welfare

Act license number 74-C-0406 expired because Respondent did not renew it.

3. On or about March 16, 2005, Respondent applied for a new Animal Welfare Act license and, since June 21, 2005, Respondent has operated as a *dealer*, as that term is defined in the Animal Welfare Act and the Regulations and Standards, and holds Animal Welfare Act license number 74-B-0530.

4. Animal and Plant Health Inspection Service personnel conducted inspections of Respondent's facilities, records, and animals for the purpose of determining Respondent's compliance with the Animal Welfare Act and the Regulations and Standards on May 23, 2002 (10 animals inspected), February 25, 2003 (28 animals inspected), February 26, 2003 (43 animals inspected), August 28, 2003 (40 animals inspected), September 29, 2003 (20 animals inspected), May 26, 2004 (40 animals inspected), and August 12, 2004 (30 animals inspected).

5. Respondent has a medium-size business. At all times material to this proceeding, Respondent held, on average, 30 animals for exhibition or resale (including spider monkeys, capuchin monkeys, baboons, rhesus monkeys, vervet monkeys, kinkajous, cavies, kangaroos, porcupines, a blackbuck antelope, and a camel).

6. The gravity of Respondent's violations of the Regulations and Standards is great. Respondent's violations include numerous instances in which Respondent failed to provide minimally-adequate veterinary care, husbandry, and shelter to her animals.

7. Respondent has a previous history of violations. On July 4, 1999, Respondent paid a $ 2,250 civil penalty for violations of the Animal Welfare Act and the Regulations documented in Animal Welfare Act investigation TX 99-086AC. At all times material to this proceeding, Respondent has continually failed to provide minimally-adequate veterinary care and husbandry to her animals despite having been repeatedly advised of deficiencies. An ongoing pattern of violations establishes a history of previous violations and a lack of good faith for the purposes of section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)).

8. Respondent violated the attending veterinarian and veterinary care regulations, as follows:

a. On May 23, 2002, August 28, 2003, and September 29, 2003, Respondent failed to establish and maintain programs of adequate veterinary care that included a written program of veterinary care and regularly scheduled visits to Respondent's premises. Specifically, Respondent failed to make her written program of veterinary care

available to Animal and Plant Health Inspection Service officials during their inspection of her facility.

b. Respondent failed to establish and maintain an adequate program of veterinary care that included the availability of appropriate facilities, equipment, and services, and the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, as follows:

(i) On May 23, 2002, Respondent failed to obtain veterinary treatment for a female capuchin monkey with a severely injured tail.

(ii) On May 23, 2002, Respondent housed nonhuman primates in enclosures that failed to protect them from injuries and disease.

(iii) On or about February 6, 2003, Respondent failed to have appropriate facilities, services, and methods available to provide minimally-adequate care to no fewer than eight animals, including: four hypothermic sugar gliders; one sugar glider that suffered from a prolapsed rectum; one neonatal capuchin monkey that suffered from diarrhea; one neonatal capuchin monkey that had nasal discharge and appeared dehydrated and lethargic; and one neonatal macaque that had nasal discharge and suffered from diarrhea.

(iv) On February 25, 2003, Respondent failed to obtain veterinary treatment for a spider monkey that had discharge exuding from both eyes and appeared hypothermic.

(v) On February 26, 2003, Respondent failed to obtain veterinary treatment for a spider monkey that had discharge exuding from both eyes and appeared hypothermic and a juvenile blackbuck antelope that appeared bloated, hypothermic, and had a rough hair coat.

(vi) On August 28, 2003, Respondent failed to obtain veterinary treatment for a juvenile blackbuck antelope that appeared bloated.

(vii) On September 29, 2003, Respondent failed to obtain veterinary treatment for a juvenile blackbuck antelope that appeared bloated.

c. On or about May 23, 2002, Respondent failed to establish and maintain programs of adequate veterinary care that included daily observation of all animals to assess their health and well-being with a mechanism of direct and frequent communication so that timely and accurate information on problems of animal health, behavior, and well-being is conveyed to the attending veterinarian. Specifically, Respondent failed to observe and convey timely and accurate information to her attending veterinarian concerning a female capuchin monkey that had a severely injured tail, which became infected and necrotic and was amputated.

9. Respondent violated the record-keeping regulations by failing to make, keep, and maintain records which fully and correctly disclose information concerning animals in her possession, as follows:

a. On May 23, 2002, August 28, 2003, and September 29, 2003, Respondent failed to maintain, and make available for inspection, records concerning her acquisition and disposition of animals and animals in her possession or under her control.

b. On May 26, 2004, Respondent failed to maintain, and make available for inspection, complete and accurate records concerning animals in her possession or under her control, records concerning the disposition of animals (including a female spider monkey, two juvenile tigers, a vervet monkey, and a capuchin monkey), and records concerning the acquisition of four infant rhesus monkeys.

10. Respondent violated the handling regulations by failing to take appropriate measures to alleviate the impact of climatic conditions that present a threat to an animal's health or well-being, as follows:

a. On February 25, 2003, Respondent failed to provide appropriate heat, shelter, and care to two lemurs, one baboon, seven capuchin monkeys, two macaques, and four vervet monkeys that were exposed to cold, wet weather.

b. On February 26, 2003, Respondent failed to provide appropriate heat, shelter, and care to four spider monkeys, seven capuchin monkeys, three vervet monkeys, a baboon, and rhesus monkeys that were exposed to temperatures below 45 degrees Fahrenheit.

11. On or about February 6, 2003, Respondent violated the handling regulations by failing to handle three kinkajous, three nonhuman primates, and 28 sugar gliders as expeditiously and careful as possible in a manner that does not cause trauma, behavioral stress, physical harm, or unnecessary discomfort.

12. Respondent violated the Regulations and Standards by failing to meet the minimum facilities and operating standards for nonhuman primates, as follows:

a. Respondent failed to construct and maintain housing facilities for nonhuman primates that are structurally sound for the species of nonhuman primates housed in the facilities, are maintained in good repair, protect the animals from injury, and contain the animals, as follows:

(i) On May 23, 2002, the wire wall that separated the adjacently housed pig-tailed macaque and five capuchin monkeys lacked

adequate structural integrity to contain the animals in their respective enclosures, thereby risking cross-contact injury.

(ii) On February 26, 2003, Respondent failed to repair or replace loose wire in an enclosure housing two capuchin monkeys and a collapsed resting shelf in the enclosure housing two rhesus monkeys and failed to remove an electrical cord in the enclosure housing a vervet monkey and broken glass in the enclosure housing two vervet monkeys.

(iii) On May 26, 2004, Respondent housed two capuchin monkeys in an enclosure that lacked adequate structural integrity and safety mechanisms to contain the animals, which failure allowed the animals to escape.

(iv) On August 12, 2004, Respondent failed to repair or replace chewed, holed, and splintered shelter structures in enclosures housing macaques, capuchin monkeys, and baboons.

b. Respondent failed to keep housing facilities and areas used for storing animal food or bedding free of any accumulation of trash, waste material, junk, weeds, and other discarded materials, as follows:

(i) On August 28, 2003, Respondent failed to remove boxes, tools, and trash from the room used to store animal food and bedding.

(ii) On May 26, 2004, Respondent failed to remove caulk, insecticides, bags, a jug, fertilizer, and other discarded items from the room used to store animal food and failed to clean and sanitize the refrigerator used to store animal food.

c. On May 26, 2004, Respondent failed to construct and maintain all surfaces of nonhuman primate facilities in a manner, and of materials, that protect the animals from injury, and that allow the facilities to be readily cleaned and sanitized. Specifically, Respondent failed to repair or replace chewed shelter boxes with exposed, splintered wood and chipped linoleum from the resting platforms in primate enclosures.

d. Respondent failed to spot-clean hard surfaces of primary enclosures for nonhuman primates daily to prevent accumulation of excreta or disease hazards, as follows:

(i) On February 25, 2003, Respondent deprived animals of the freedom to avoid contact with excreta by failing to remove excessive feces and old food from the floors, shelters, walls, and perches of enclosures that housed a baboon, seven capuchin monkeys, and three vervet monkeys.

(ii) On February 26, 2003, Respondent deprived animals of the freedom to avoid contact with excreta by failing to remove excessive feces and old food from the floors, shelters, walls, and perches of enclosures that housed a female baboon, seven capuchin monkeys, and two vervet monkeys.

(iii) On August 28, 2003, Respondent failed to remove old food, feces, and urine from the floors, shelters, walls, resting boards, and perches of enclosures that housed four capuchin monkeys, three vervet monkeys, and two white-faced capuchin monkeys.

(iv) On September 29, 2003, Respondent failed to remove dirt, body oils, and feces from the walls in the enclosures that housed five capuchin monkeys.

(v) On May 26, 2004, Respondent failed to remove accumulated body oils and old food from the resting shelves and shelter boxes in enclosures housing nonhuman primates.

e. Respondent failed to store supplies of food and bedding in a manner that protected the supplies from spoilage, contamination, and vermin infestation, as follows:

(i) On February 25, 2003, Respondent failed to store three open bags of feed in leakproof containers with tightly fitting lids.

(ii) On February 26, 2003, Respondent stored sacks of food on a wet floor and near insecticides, paints, old plastic bags, rags, and other discarded items.

(iii) On May 26, 2004, Respondent stored food supplies in a dirty refrigerator that contained spoiled food.

f. Respondent failed to only house nonhuman primates that are acclimated, as determined by the attending veterinarian, to the prevailing temperature and humidity at the outdoor housing facility during the time of year they are at the facility and that can tolerate the range of temperatures and climatic conditions known to occur at the facility without stress or discomfort, as follows:

(i) On February 25, 2003, two spider monkeys, two lemurs, one baboon, seven capuchin monkeys, two macaques, and four vervet monkeys housed in outdoor enclosures, without the attending veterinarian having determined that the animals were acclimated to the prevailing weather conditions, exhibited symptoms of discomfort and stress (shivered and appeared hypothermic) related to the prevailing climatic conditions.

(ii) On February 26, 2003, four spider monkeys and seven capuchin monkeys housed in outdoor enclosures, without the attending veterinarian having determined that the animals were acclimated to the prevailing weather conditions, exhibited symptoms of discomfort and stress (shivered and appeared hypothermic) related to the prevailing climatic conditions.

g. Respondent failed to provide nonhuman primates housed outdoors with adequate shelter from the elements at all times, as follows:

(i) On February 25, 2003, Respondent failed to provide any heat to two spider monkeys, two lemurs, one baboon, seven capuchin monkeys, two macaques, and four vervet monkeys when the ambient temperature was below 45 degrees Fahrenheit.

(ii) On February 26, 2003, Respondent failed to provide minimally-adequate shelter (including bedding and wind and rain breaks) and heat to four spider monkeys, seven capuchin monkeys, three vervet monkeys, a baboon, and rhesus monkeys when the ambient temperature was below 40 degrees Fahrenheit.

(iii) On August 12, 2004, Respondent failed to provide minimally-adequate shelter for four spider monkeys. A plastic barrel and a wood box were the animals' sole means of shelter and were too small to accommodate all four animals and lacked wind and rain breaks.

h. Respondent failed to house nonhuman primates in enclosures that provide the minimum space requirements, as follows:

(i) On or about February 6, 2003, Respondent housed three infant monkeys (two capuchin monkeys and one macaque) in an enclosure that lacked minimally-adequate space, thereby depriving the animals of the ability to make normal postural adjustments with adequate freedom of movement.

(ii) On May 26, 2004, Respondent housed four infant macaques in enclosures that lacked minimally-adequate space, thereby depriving the animals of the ability to make normal postural adjustments with adequate freedom of movement.

i. Respondent 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, and that is available to the Animal and Plant Health Inspection Service upon request, as follows:

(i) On May 23, 2002, Respondent failed to make her written plan for environment enhancement available to Animal and Plant Health Inspection Service officials during their inspection of her facility and failed to provide five capuchin monkeys with species-typical enrichment activities, including elevated perches and cage complexities.

(ii) On or about February 6, 2003, Respondent failed to provide any environment enhancement to three infant monkeys (two capuchin monkeys and one macaque).

(iii) On August 28, 2003, Respondent failed to make her written plan for environment enhancement available to Animal and Plant Health Inspection Service officials during their inspection of her facility.

(iv) On May 26, 2004, Respondent failed to make her written plan for environment enhancement available to Animal and Plant Health Inspection Service officials during their inspection of her facility and failed to provide spider monkeys with species-typical enrichment activities, including ropes or a brachiating structure.

13. Respondent violated the Regulations and Standards 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, as follows:

a. Respondent failed to construct indoor and outdoor housing facilities so that they were structurally sound and failed to maintain the facilities in good repair to protect the animals from injury and to contain the animals, as follows:

(i) On February 26, 2003, Respondent risked injury to her animals by failing to provide any housing for a camel that roamed throughout the facility and was exposed to, among other things, numerous electrical cords and by housing a juvenile blackbuck antelope in an enclosure that contained sharp, protruding chain link fencing.

(ii) On August 12, 2004, Respondent failed to house animals in enclosures that protect them from injury by housing a juvenile cougar and juvenile tiger in an enclosure that contained holes and gaps in the floor and Patagonian cavies and crested porcupines in enclosures that had floors with exposed, sharp, protruding wires.

b. On or about February 6, 2003, Respondent failed to make provisions for the removal and disposal of animal and food wastes, bedding, dead animals, trash, and debris and to provide and operate disposal facilities so as to minimize vermin infestation, odors, and disease hazards. Specifically, Respondent failed to remove animal and food waste, old bedding, and a dead animal from enclosures housing three kinkajous and 28 sugar gliders.

c. Respondent failed to construct a perimeter fence that restricts animals and unauthorized persons from going through or under it and having contact with the animals in the facility, and that acts as a secondary containment system for animals in the facility, as follows:

(i) On February 25, 2003, Respondent failed to construct and maintain a perimeter fence around three kangaroos, a juvenile blackbuck antelope, and a camel.

(ii) On February 26, 2003, Respondent failed to construct and maintain a perimeter fence around three kangaroos and three porcupines.

d. Respondent failed to provide animals with food that is wholesome, palatable, free from contamination, and of sufficient

quantity and nutritive value to maintain good animal health, that is prepared with consideration for the age, species, condition, size, and type of animal, and that is located so as to be accessible to all animals in the enclosure and placed so as to minimize contamination, as follows:

(i) On or about February 6, 2003, Respondent failed to provide 28 sugar gliders with food of sufficient quantity and nutritive value to maintain good animal health; all of the animals ate voraciously when offered food and many appeared malnourished and underweight.

(ii) On May 26, 2004, Respondent fed cavies, African porcupines, and capybaras decaying cabbage.

e. On or about February 6, 2003, Respondent 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. Specifically, Respondent provided a small amount (if any) of dirty water to 28 sugar gliders; when offered water, the animals drank thirstily.

f. Respondent failed to remove excreta from primary enclosures as often as necessary to prevent contamination of animals, minimize disease hazards, and reduce odors, as follows:

(i) On or about February 6, 2003, Respondent housed three kinkajous in an enclosure that contained excessive feces.

(ii) On February 25, 2003, Respondent housed two kinkajous in an enclosure that contained excessive feces.

(iii) On February 26, 2003, Respondent housed two kinkajous in an enclosure that contained excessive feces.

g. Respondent failed to utilize a sufficient number of adequately-trained employees to maintain the professionally acceptable level of husbandry practices, under a supervisor who has a background in animal care, as follows:

(i) On or about February 6, 2003, Respondent's one unsupervised employee was unable to provide minimally-adequate care and husbandry to Respondent's animals as evidenced by the condition of the animals and their enclosures.

(ii) On February 25, 2003, Respondent's one unsupervised, part-time employee was unable to provide minimally-adequate care and husbandry to Respondent's animals as evidenced by the excessive feces and food in the animals' enclosures and lack of basic shelter.

(iii) On February 26, 2003, Respondent's one unsupervised, part-time employee was unable to provide minimally-adequate care and husbandry to Respondent's animals as evidenced by the excessive feces and food in the animals' enclosures and lack of basic shelter.

Conclusions of Law

1. The Secretary has jurisdiction over this matter.

2. Respondent willfully violated sections 2.40 and 2.126 of the Regulations and Standards (9 C.F.R. §§ 2.40, .126), as follows:

a. On May 23, 2002, August 28, 2003, and September 29, 2003, Respondent failed to comply with sections 2.40(a)(1) and 2.126(a)(2) of the Regulations and Standards (9 C.F.R. §§ 2.40(a)(1), .126(a)(2)).

b. On May 23, 2002, February 25, 2003, February 26, 2003, August 28, 2003, and September 29, 2003, and on or about February 6, 2003, Respondent failed to comply with section 2.40(a) and (b)(1)-(2) of the Regulations and Standards (9 C.F.R. § 2.40(a), (b)(1)-(2)).

c. On or about May 23, 2002, Respondent failed to comply with section 2.40(a) and (b)(3) of the Regulations and Standards (9 C.F.R. § 2.40(a), (b)(3)).

3. On May 23, 2002, August 28, 2003, September 29, 2003, and May 26, 2004, Respondent willfully violated sections 2.75(b)(1) and 2.126(a)(2) of the Regulations and Standards (9 C.F.R. §§ 2.75(b)(1), .126(a)(2)) by failing to make, keep, and maintain records which fully and correctly disclose information concerning animals in her possession.

4. On February 25, 2003, and February 26, 2003, Respondent willfully violated section 2.131(d) of the Regulations and Standards (9 C.F.R. § 2.131(d) (2004)) [(9 C.F.R. § 2.131(e) (2006))] by failing to take appropriate measures to alleviate the impact of climatic conditions that present a threat to an animal's health or well-being.

5. On or about February 6, 2003, Respondent willfully violated section 2.131(a) of the Regulations and Standards (9 C.F.R. § 2.131(a) (2004)) [(9 C.F.R. § 2.131(b) (2006))] by failing to handle animals as expeditiously and carefully as possible in a manner that does not cause trauma, behavioral stress, physical harm, or unnecessary discomfort.

6. 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 facilities and operating standards for nonhuman primates (9 C.F.R. §§ 3.75-.92), as follows:

a. Respondent failed to construct and maintain housing facilities for nonhuman primates that are structurally sound for the species of nonhuman primates housed in the facilities, are maintained in good repair, protect the animals from injury, and contain the animals, as follows:

(i) On May 23, 2002, Respondent failed to comply with sections 2.100(a), 3.75(a), and 3.80(a)(2)(ii) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.75(a), .80(a)(2)(ii)).

(ii) On February 26, 2003, Respondent failed to comply with sections 2.100(a), 3.75(a), and 3.80(a)(2)(i)-(ii) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.75(a), .80(a)(2)(i)-(ii)).

(iii) On May 26, 2004, Respondent failed to comply with sections 2.100(a), 3.75(a), and 3.80(a)(2)(iii) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.75(a), .80(a)(2)(iii)).

(iv) On August 12, 2004, Respondent failed to comply with sections 2.100(a), 3.75(a), (c), and 3.80(a)(2)(iii) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.75(a), (c), .80(a)(2)(iii)).

b. On August 28, 2003, and May 26, 2004, Respondent failed to comply with sections 2.100(a) and 3.75(b) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.75(b)) by failing to keep housing facilities and areas used for storing animal food or bedding free of any accumulation of trash, waste material, junk, weeds, and other discarded materials.

c. On May 26, 2004, Respondent failed to comply with sections 2.100(a), 3.75(c), and 3.80(a)(2)(i)-(ii), and (ix) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.75(c), .80(a)(2)(i)-(ii), (ix)) by failing to construct and maintain all surfaces of nonhuman primate facilities in a manner, and of materials, that protect the animals from injury and that allow the surfaces to be readily cleaned and sanitized.

d. On February 25, 2003, February 26, 2003, August 28, 2003, September 29, 2003, and May 26, 2004, Respondent failed to comply with sections 2.100(a), 3.75(c)(3), 3.80(a)(2)(v), and 3.84(a) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.75(c)(3), .80(a)(2)(v), .84(a)) by failing to spot-clean hard surfaces of primary enclosures for nonhuman primates daily to prevent accumulation of excreta or disease hazards.

e. On February 25, 2003, February 26, 2003, and May 26, 2004, Respondent failed to comply with sections 2.100(a) and 3.75(e) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.75(e)) by failing to store supplies of food and bedding in a manner that protected the supplies from spoilage, contamination, and vermin infestation.

f. On February 25, 2003, and February 26, 2003, Respondent failed to comply with sections 2.100(a) and 3.78(a) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.78(a)) by failing to only house nonhuman primates that are acclimated, as determined by the attending veterinarian, to the prevailing temperature and humidity at the outdoor housing facility during the time of year they are at the facility and that

can tolerate the range of temperatures and climatic conditions known to occur at the facility without stress or discomfort.

g. On February 25, 2003, February 26, 2003, and August 12, 2004, Respondent failed to comply with sections 2.100(a), 3.78(b), and 3.80(a)(2)(vi) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.78(b), .80(a)(2)(vi)) by failing to provide nonhuman primates housed outdoors with adequate shelter from the elements at all times.

h. On May 26, 2004, and on or about February 6, 2003, Respondent failed comply with sections 2.100(a), 3.80(a)(xi), (b)(2)(i), and 3.87(e) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.80(a)(xi), (b)(2)(i), .87(e)) by failing to house nonhuman primates in enclosures that provide the minimum space requirements.

i. Respondent 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, and that is available to the Animal and Plant Health Inspection Service upon request, as follows:

(i) On May 23, 2002, and May 26, 2004, Respondent failed to comply with sections 2.100(a), 2.126(a)(2), 3.81, and 3.81(b) of the Regulations and Standards (9 C.F.R. §§ 2.100(a), .126(a)(2); 3.81, .81(b)).

(ii) On or about February 6, 2003, Respondent failed to comply with sections 2.100(a), 2.126(a)(2), 3.81, and 3.81(c)(1) of the Regulations and Standards (9 C.F.R. §§ 2.100(a), .126(a)(2); 3.81, .81(c)(1)).

(iii) On August 28, 2003, Respondent failed to comply with sections 2.100(a), 2.126(a)(2), and 3.81 of the Regulations and Standards (9 C.F.R. §§ 2.100(a), .126(a)(2); 3.81).

7. 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 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), as follows:

a. On February 26, 2003, and August 12, 2004, Respondent 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)) by failing to construct indoor and outdoor housing facilities so that they were structurally sound and failed to maintain indoor and outdoor housing facilities in good repair to protect the animals from injury and to contain the animals.

b. On or about February 6, 2003, Respondent 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)) by failing to make provisions for the removal and disposal of animal and food wastes, bedding, dead animals, trash, and debris and to provide and operate disposal facilities as to minimize vermin infestation, odors, and disease hazards.

c. On February 25, 2003, and February 26, 2003, Respondent failed to comply with sections 2.100(a) and 3.127(d) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.127(d)) by failing to construct a perimeter fence that restricts animals and unauthorized persons from going through or under it and having contact with the animals in the facility, and that acts as a secondary containment system for animals in the facility.

d. On May 26, 2004, and on or about February 6, 2003, Respondent 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)) by failing to provide animals with food that is wholesome, palatable, free from contamination, and of sufficient quantity and nutritive value to maintain good animal health, that is prepared with consideration for the age, species, condition, size, and type of animal, and that is located so as to be accessible to all animals in the enclosure and placed so as to minimize contamination.

e. On or about February 6, 2003, Respondent 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) by failing 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.

f. On February 25, 2003, and February 26, 2003, and on or about February 6, 2003, Respondent 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)) by failing to remove excreta from primary enclosures as often as necessary to prevent contamination of animals, minimize disease hazards, and reduce odors.

g. On February 25, 2003, and February 26, 2003, and on or about February 6, 2003, Respondent failed to comply with sections 2.100(a), 3.85, and 3.132 of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.85, .132) by failing to utilize a sufficient number of adequately-trained employees to maintain the professionally acceptable level of husbandry practices, under a supervisor who has a background in animal care.

Respondent's Appeal Petition

Respondent raises three issues in her "Appeal of Decision of Administrative Law Judge" [hereinafter Respondent's Appeal Petition]. First, Respondent asserts she filed a timely response to the Complaint in which she denied the material allegations of the Complaint (Respondent's Appeal Pet. at 1-4).

The record does not support Respondent's assertion that she filed a timely response to the Complaint. The Hearing Clerk, by certified mail, sent Respondent the Complaint, the Rules of Practice, and the Hearing Clerk's service letter dated September 9, 2005. The United States Postal Service marked the envelope containing the Complaint, the Rules of Practice, and the Hearing Clerk's September 9, 2005, service letter "unclaimed" and returned it to the Hearing Clerk. On November 9, 2005, the Hearing Clerk, by ordinary mail, sent the Complaint, the Rules of Practice, and the Hearing Clerk's September 9, 2005, service letter to Respondent at the same address as the Hearing Clerk used for the September 9, 2005, certified mailing.[3] Section 1.147(c)(1) of the Rules of Practice (7 C.F.R. § 1.147(c)(1)) provides, if the Hearing Clerk sends a document by certified mail and it is returned by the United States Postal Service marked "unclaimed," the document shall be deemed to be received by the party on the date of remailing by ordinary mail to the same address. Thus, the Hearing Clerk is deemed to have served Respondent with the Complaint, the Rules of Practice, and the Hearing Clerk's September 9, 2005, service letter on November 9, 2005.

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

[3]See note 1.

> 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 15.

Respondent's answer was due no later than November 29, 2005. Respondent's first filing in this proceeding is dated and was filed December 28, 2005, 29 days after Respondent's answer was due.

On December 6, 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. On December 28, 2005, in her first filing in this proceeding, Respondent requested an extension of time within which "to solve this misunderstanding." The Acting Chief ALJ issued an order granting Respondent an extension to January 31, 2006, within which to file a response to Complainant's Motion for Default Decision, as follows:

> By letter dated December 28, 2005, Respondent Cheryl Morgan requested an extension "to solve this misunderstanding." I hereby grant Respondent Cheryl Morgan an extension through **Tuesday, January 31, 2006**, to file her response to Complainant's Motion for Adoption of Proposed Decision and Order. I grant the extension in my capacity as acting chief administrative law judge; the case has not yet been assigned to an administrative law judge.
>
> Respondent Cheryl Morgan failed to file a request for additional time by November 29, 2005, the deadline for filing an answer. It is not clear to me whether Respondent Cheryl Morgan recognizes how far this case has progressed. Respondent Cheryl Morgan is in default, having failed to file an answer by November 29, 2005. I wholeheartedly encourage Respondent Cheryl Morgan to contact the Attorney for APHIS, Bernadette R. Juarez, telephone number 202.720.2633 and FAX 202.690.4299, to try to settle the case.

Order Granting Additional Time to Respond to Complainant's Motion for Adoption of Proposed Decision and Order at 1. On January 31, 2006, 2 months 2 days after Respondent's answer was due, Respondent filed a letter generally denying the allegations of the Complaint.

On March 29, 2006, the ALJ issued an Initial Decision]: (1) concluding Respondent willfully violated the Regulations and Standards as alleged in the Complaint; (2) ordering Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; (3) assessing Respondent a $16,280 civil penalty; and (4) revoking Respondent's Animal Welfare Act licenses (Animal

Welfare Act license number 74-C-0406 and Animal Welfare Act license number 74-B-0530) (Initial Decision at 2-3, 22).

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,[4] generally there is no basis for setting aside a default decision that is based upon a respondent's failure to file a timely answer.[5]

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[4]*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).

[5]*See generally In re Mary Jean Williams* (Decision as to Mary Jean Williams) 64 Agric. Dec. 1347 (2005) (holding the default decision was properly issued where the respondent's first filing in the proceeding was filed almost 8 months after her 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 Mary Jean Williams* (Decision as to Deborah Ann Milette) 64 Agric. Dec. 364 (2005) (holding the default decision was properly issued where the respondent filed her answer 1 month 4 days after her 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

(continued...)

[5](...continued)
in the complaint); *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 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...)

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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) (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*
(continued...)

Respondent's first filing in this proceeding was filed with the Hearing Clerk 29 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 deemed Respondent to have admitted the allegations of the Complaint.

Moreover, 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.[6]

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[5](...continued)
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).

[6]*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).

Second, Respondent contends, under the circumstances in this proceeding, revocation of her Animal Welfare Act licenses and assessment of a $16,280 civil penalty are too harsh. Respondent identifies the following circumstances as bases for Respondent's contention that her Animal Welfare Act licenses should not be revoked and a $16,280 civil penalty should not be assessed: (1) the alleged violations occurred over the course of 2 years; (2) Respondent has corrected the alleged violations; (3) many of the alleged violations did not occur; (4) many of the alleged violations did not occur when Respondent was in possession or control of the facility; (5) other Animal Welfare Act licensees have violated the Animal Welfare Act and the Regulations and Standards on more numerous occasions than Respondent and have not had their Animal Welfare Act licenses revoked; (6) Respondent has had a good record with the United States Department of Agriculture; and (7) Respondent cares about her animals and the safety of the public. (Respondent's Appeal Pet. at 4.)

I reject Respondent's contention that the lengthy period during which Respondent violated the Regulations and Standards is a basis for reducing the sanction imposed by the ALJ. To the contrary, generally, a respondent who violates the Regulations and Standards over a long period of time warrants a more stringent sanction than a respondent who commits the same violations over a short period of time. Violations over a long period of time often demonstrate continued disregard of the Animal Welfare Act and the Regulations and Standards.

There is no evidence before me to support Respondent's assertions that she corrected many of the alleged violations, that many of the alleged violations did not occur when Respondent was in possession or control of the facility, and that Respondent cares about her animals and the safety of the public. Moreover, I reject Respondent's assertions that many of the alleged violations did not occur and that Respondent has had a good record with the United States Department of Agriculture. Respondent is deemed by her failure to file a timely answer to have admitted, for the purposes of this proceeding, the violations alleged in the Complaint and the history of previous violations alleged in the Complaint.

Finally, I reject Respondent's contention that the ALJ's revocation of her Animal Welfare Act licenses is error because other Animal Welfare Act licensees have violated the Animal Welfare Act and the Regulations and Standards on more numerous occasions than Respondent and have not had their Animal Welfare Act licenses revoked. Even if the sanction imposed against Respondent were more severe than the sanctions imposed against offenders in similar cases, the

sanction in this proceeding would not be rendered invalid. A sanction by an administrative agency is not rendered invalid in a particular case merely because it is more severe than sanctions imposed in other cases. The Secretary of Agriculture has broad authority to fashion appropriate sanctions under the Animal Welfare Act, and the Animal Welfare Act has no requirement that there be uniformity in sanctions among violators.

A sanction by an administrative agency must be warranted in law and justified in fact.[7] The Secretary of Agriculture has authority to revoke the Animal Welfare Act license of any person who has violated the Animal Welfare Act or the Regulations and Standards[8] and to assess a civil penalty of $2,750 for each violation of the Animal Welfare Act or

[7]*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); *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 M. Trombetta & Sons, Inc.*, 64 Agric. Dec.1869, 1900 (2005); *In re Mary Jean Williams* (Decision as to Deborah Ann Milette), 64 Agric. Dec. 364, 388 (2005); *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).

[8]7 U.S.C. § 2149(a).

the Regulations and Standards.[9] Respondent committed hundreds of willful violations of the Regulations and Standards. Therefore, the ALJ's revocation of Respondent's Animal Welfare Act licenses and assessment of a $16,280 civil penalty are warranted in law. Moreover, I find revocation of Respondent's Animal Welfare Act licenses and assessment of a $16,280 civil penalty are justified in fact.

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.[10]

Respondent is deemed to have admitted she has a medium-size business, the gravity of Respondent's violations of the Regulations and Standards is great, and Respondent has a history of violations of the Regulations and Standards.[11]

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 recommends revocation of Respondent's Animal Welfare Act licenses, assessment of a $16,280 civil penalty, and the issuance of an order

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[9]7 U.S.C. § 2149(b); 28 U.S.C. § 2461 (note); 7 C.F.R. § 3.91(b)(2)(v).

[10]7 U.S.C. § 2149(b).

[11]Compl. ¶¶ 3-5.

requiring Respondent to cease and desist violations of the Animal Welfare Act and the Regulations and Standards.

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 a cease and desist order, assessment of a $16,280 civil penalty against Respondent, and revocation of Respondent's Animal Welfare Act licenses are 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 appeals the Acting Chief ALJ's December 29, 2005, Order Granting Additional Time to Respond to Complainant's Motion for Adoption of Proposed Decision and Order; however, Respondent states her appeal of the Acting Chief ALJ's December 29, 2005, Order is contingent upon the Order being a decision (Respondent's Appeal Pet. at 5).

Section 1.132 of the Rules of Practice defines the word *decision*, as follows:

> **1.132 Definitions.**
>
> As used in this subpart, the terms as defined in the statute under which the proceeding is conducted and in the regulations, standards, instructions, or orders issued thereunder, shall apply with equal force and effect. In addition and except as may be provided otherwise in this subpart:
>
> . . . .
>
> *Decision* means: (1) The Judge's initial decision made in accordance with the provisions of 5 U.S.C. 556 and 557, and includes the Judge's (i) findings and conclusions and the reasons or basis therefor on all material issues of fact, law or discretion, (ii) order, and (iii) rulings on proposed findings, conclusions and orders submitted by the parties; and
>
> (2) The decision and order by the Judicial Officer upon appeal of the Judge's decision.

7 C.F.R. § 1.132. The Acting Chief ALJ's December 29, 2005, Order Granting Additional Time to Respond to Complainant's Motion for Adoption of Proposed Decision and Order is not an initial decision made in accordance with the provisions of 5 U.S.C. §§ 556 and 557. Therefore, as Respondent's appeal of the Acting Chief ALJ's December 29, 2005, Order is contingent upon the Order being a decision, I do not address the merits of Respondent's appeal of the Acting Chief ALJ's December 29, 2005, Order.

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

ORDER

1. Respondent, her agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards.

Paragraph 1 of this Order shall become effective on the day after service of this Order on Respondent.

2. Respondent is assessed a $16,280 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

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. Respondent shall state on the certified check or money order that payment is in reference to AWA Docket No. 05-0032.

3. Respondent's Animal Welfare Act licenses (Animal Welfare Act license number 74-C-0406 and Animal Welfare Act license number 74-B-0530) are revoked.

Paragraph 3 of this Order shall become effective on the 60th day after service of this Order on Respondent.

RIGHT TO JUDICIAL REVIEW

Respondent has the right to seek judicial review of the Order in this Decision and 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 the Order in this Decision and Order. Respondent must seek judicial review within 60 days after entry of the Order in this Decision and Order.[12] The date of entry of the Order in this Decision and Order is July 6, 2006.

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In re: SAVAGE KINGDOM, INC., A FLORIDA CORPORATION; RARE FELINE BREEDING CENTER, INC., A FLORIDA CORPORATION; AND ROBERT E. BAUDY, AN INDIVIDUAL
AWA Docket No. 02-0003.
Decision and Order.
Filed July 6, 2006.

AWA – VMO – Public exhibition – General public – Volunteers – Employees, adequately trained – Euthanization – Veterinary care, program of – Squeeze cage – Foreseeability – Handling, definition of – Unnecessary discomfort – Trauma.

CoLleen A. Carroll for Complainant.
Charles B. Mayer for Respondent.
Decision and Order by Administrative Law Judge Jill S. Clifton.

Decision Summary

[1] In this Decision, I determine that the Respondents, on July 31, 2001, failed to handle the adult male tiger Tijik (Ti)[1] in accordance with the requirements of the Animal Welfare Act regulation then found at 9 C.F.R. § 2.131(a)(1). Numerous additional violations of the Animal Welfare Act regulations and standards were also proved at the hearing. I conclude that Animal Welfare Act license revocation and the related

[12] 7 U.S.C. § 2149(c).

[1] Ti, full name "Tijick", was a 318-pound male tiger who measured 72 inches from nose to rump, and 35 inches estimated height at the fore-shoulder. CX 13.

remedies that APHIS requested are necessary, and that any lesser remedies would not be adequate. Consequently, I order Respondent Savage Kingdom, Inc.'s Animal Welfare Act license revoked, and I order that Respondent Rare Feline Breeding Center, Inc. and Respondent Robert E. Baudy not be licensed during the revocation. Revocation under the Animal Welfare Act is a permanent remedy.

The Complaint

[2] The Complainant is the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture (APHIS). APHIS initiated this case under the Animal Welfare Act, as amended, 7 U.S.C. § 2131 *et seq*. (the AWA or the Act); the regulations, 9 C.F.R. § 1.1 *et seq*. (the Regulations); and the standards, 9 C.F.R. § 3.1 *et seq*. (the Standards). APHIS seeks license revocation and related remedies from three "persons", Respondent Savage Kingdom, Inc. (Savage Kingdom), Respondent Rare Feline Breeding Center, Inc. (Rare Feline Breeding), and Respondent Robert E. Baudy (Mr. Baudy). "The Respondents" refers to all three Respondents (Savage Kingdom, Rare Feline Breeding, and Mr. Baudy), collectively.

[3] Specifically, APHIS seeks (a) an order that the Respondents cease and desist from violating the AWA and the Regulations and Standards; (b) an order revoking Savage Kingdom's AWA license, number 58-A-0106; and (c) an order pursuant to 9 C.F.R. § 2.9 that Mr. Baudy and Rare Feline Breeding "will not be licensed within the period during which the order of revocation is in effect" based on the finding that Mr. Baudy was an officer and agent of Savage Kingdom and that Rare Feline Breeding was an agent of Savage Kingdom, and that both Mr. Baudy and Rare Feline Breeding were responsible for or participated in the violations upon which the license revocation is based.

Introduction

[4] Savage Kingdom, Inc. is a Florida domestic stock corporation that breeds exotic and wild felines and sells them to institutions, zoos, and circuses.[2] Savage Kingdom holds Animal Welfare Act license number

[2] Tr. 1043:23, 1047:18, CX 2.

58-A-0106, issued to "SAVAGE KINGDOM, INC."[3] Rare Feline Breeding Center, Inc. is a Florida nonprofit corporation that breeds exotic and wild felines and sells them to institutions, zoos and circuses.[4] [5] Savage Kingdom uses the name Rare Feline Breeding on its own correspondence, invoices and forms.[6] Robert E. Baudy is an individual who breeds exotic and wild felines and sells them to institutions, zoos and circuses.[7] Mr. Baudy was the President and "owner" of both Savage Kingdom and Rare Feline Breeding.[8]

[5] When APHIS inspected the Respondents' compound on Tuesday, July 24, 2001, the Respondents' inventory included approximately 24 tigers, 5 leopards, 7 Florida panthers, and 3 bobcats. CX 4. The APHIS Veterinary Medical Officer ("VMO") inspecting the Respondents' compound, Tom Callahan, D.V.M., noted inadequacies on July 24, 2001, especially regarding repairs (general deterioration of the wood throughout the facility, rotting, causing structural strength problems), housekeeping (cleaning), some pest control, and the perimeter fence. Tr. 928, 1584, 1598; CX 4, CX 5.

[6] The Respondents' volunteer general manager, Paul D. Brandolini ("Mr. Brandolini"), accompanied Dr. Callahan on July 24, 2001, taking

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[3] CX 2, 12.

[4] Tr. 1043:23, 1047:18, CX

[5] Tr. 788:25 - 790:16 (Mr. Brandolini) (actual business of Rare Feline Breeding is to breed animals).

[6] CX 10a, 10b, 29, 30, 32, Tr. 982:10-21 (Mr. Brandolini was the general manager of Savage Kingdom and was the general manager of Rare Feline Breeding; both used the same tigers and the same property); Tr.1395:18-25, 1396:14-17, 1397:3-8.

[7] Tr. 1043:11 - 1044:7 (since 1977, Mr. Baudy has been engaged exclusively in breeding); 1050:20 - 1051:4 ("leasing" tigers to zoos for exhibition); 1114:19 - 1115:6 (sales of animals to circus performers).

[8] CX 2, 12, 21; Tr. 1219:11 - 1221:3; 982:22 - 985:15 (Mr. Brandolini) (Mr. Baudy is the "owner" of Savage Kingdom and Rare Feline Breeding); 1039:8 - 1040:6; 1043:11 - 1044:7; 1036:2-19 (Mr. Baudy owns the land where Savage Kingdom and Rare Feline Breeding do business); 982:6-21 (Mr. Brandolini) (both Savage Kingdom and Rare Feline Breeding use the same property and the same tigers).

notes on things Dr. Callahan said needed attention. Tr. 928, CX 6. Repairing and replacing wood and wire were constant at the Respondents' compound (Florida's climate and the urinating by the cats took their toll), and Mr. Brandolini took notes also regarding needed repairs that were not mentioned by Dr. Callahan.

[7] In 1995 Mr. Brandolini had begun working as a volunteer at the Respondents' compound, but was soon being paid as an independent contractor. In late 1996 Mr. Brandolini became the Respondents' general manager. In approximately January 2000 when Mr. Brandolini began his full-time job as a field appraiser for the Property Appraiser's Office, Sumter County, Florida, Mr. Brandolini was still general manager for the Respondents and still regarded himself as an independent contractor but he was no longer being paid (a volunteer). Tr. 981-86, 1003-05.

[8] Dr. Callahan had not specified a deficiency in the guillotine doors within Tijik's enclosure on July 24, 2001. Tr. 1599. Rather, Mr. Brandolini specified the guillotine doors within Tijik's enclosure on his own list. Within Ti's enclosure, the guillotine doors connected Ti's paddock (exercise yard) to each of four dens (also called "lock-downs"). That repair job, fixing the guillotine doors within Tijik's enclosure on July 31, 2001, led to disaster.

[9] Mr. Brandolini had noticed from outside Ti's enclosure that the guillotine doors from Ti's paddock (exercise yard) into Ti's dens had been gnawed from the bottom. Tr. 934, 936-37. Neither Dr. Callahan nor Mr. Brandolini had been inside any of the four dens. Neither of them knew the condition inside any of the four dens. Tr. 937, 1583.

[10] Mr. Brandolini had prepared a work plan from his notes, and on Thursday, July 26, 2001, Mr. Brandolini got together three others who did work at the Respondents' compound and gave each of them a list of things that needed to be repaired and talked with them about the list. Tr. 96, 103, 934-35; CX 7 (the list), CX 6.

[11] The three others were Mr. Vincent Lowe, a volunteer handyman worker at the compound ("Mr. Lowe"); Ms. Lesa Lucas, a teammate volunteer worker of Mr. Lowe's ("Ms. Lucas"), and Ms. Candace Amelia "Candy" Watson (Ms. Watson), a paid worker at the compound who fed and watered the cats and cleaned their cages. Tr. 935.

[12] Mr. Brandolini told the three that they should not do anything to Ti's cage; that he, Mr. Brandolini, would not be at the compound that Saturday (July 28, 2001); that they should wait until the next Saturday (August 4) when he and other volunteers would be there; that he would then "put Ti up" (put Ti in a transfer cage), and then they would work on Ti's enclosure. Tr. 933-935. CX 6. Mr. Brandolini "didn't go into details on which doors or anything, because [he] was going to be there". Tr. 936.

[13] The next thing Mr. Brandolini knew, he got a phone call that Mr. Lowe was dead. CX 6.

[14] Mr. Lowe was killed by Ti on July 31, 2001. Mr. Baudy realized that neither he nor anyone else could reach Mr. Lowe where he lay in Den 2 without being vulnerable to attack from Ti, and he did not know whether Ti could get out of his enclosure through the Den 1 walk-in door that Ms. Lucas had left open, so Mr. Baudy destroyed Ti. As Mr. Baudy put it, I lost two friends that day. I conclude that both deaths were caused by what Mr. Lowe did and the Respondents' failure to stop him.

[15] The Respondents' duties under the Animal Welfare Act, to handle Ti properly and to supervise Mr. Lowe adequately, were so seriously breached on July 31, 2001, that nothing less than license revocation and related remedies suffice.

Procedural History

[16] APHIS filed the complaint on October 3, 2001. The Respondents timely filed their answer and requested an hearing. The case was reassigned to me, U.S. Administrative Law Judge Jill S. Clifton, on October 16, 2002, in view of the pending retirement of U.S. Administrative Law Judge Dorothea A. Baker.

[17] The hearing was held in Orlando, Florida during nine days in 2003 (January 15-17, May 28-30, June 30, and July 1-2, 2003). APHIS was represented by Colleen A. Carroll, Esq. and Bernadette R. Juarez, Esq., both with the Office of the General Counsel, Marketing Division, United States Department of Agriculture, Washington, D.C. 20250-1417. The Respondents were represented by Charles R. Mayer,

Esq., P.O. Box 267, Highland City, Florida 33846. The transcript is cited as "Tr." The proposed transcript corrections filed by Complainant on February 2, 2004, are accepted. Additional transcript corrections, on my own motion, are reflected in quotations from the transcript found in this Decision.

[18] APHIS called 13 witnesses: Ms. Charmain M. Zordan (Tr. 24-64, 451-514, 1691-1700); Dr. Sam Gulino (M.D.) (Tr. 65-77); Ms. Lesa Michelle Lucas (Tr. 79-209, 370-449); Ms. Victoria Elston (Tr. 210-240); Ms. Mary Christine ("Christine") Lowe (Tr. 241-272); Mr. John Raymond Lehnhardt (Tr. 278-342); Dr. John Victor Mounger (D.V.M.) (Tr. 342-365); Baron Julius von Uhl (Tr. 525-558); Dr. Robert Brandes (D.V.M.) (Tr. 558-629); Dr. Elizabeth Goldentyer (D.V.M.) (Tr. 646-680); Dr. Ronald Zaidlicz (D.V.M.) (Tr. 718-765); Dr. Thomas Callahan (D.V.M.) (Tr. 1581-1609, 1655-1682); and Lt. Richard Kenneth Brown (Tr. 1611-1651).

[19] The Respondents called two witnesses: Mr. Paul D. Brandolini (Tr. 770-863, 872-1015); and Mr. Robert E. Baudy (Tr. 1015-1070, 1098-1175, 1218-1351, 1371-1402, 1411-1489, 1498-1545, 1702-1705).

[20] The following Complainant's (APHIS's) exhibits were admitted into evidence:
CX 1-CX 2; CX 3a-d; CX 4-CX 9 (*see* Tr. 1701-02); CX 10a-b (both color and black-and-white, Tr. 1558); CX 11 (both color and black-and-white, Tr. 1558, Tr. 1566-67); CX 12-CX 14; CX 15a-k; CX 16a-t; CX 17a-e; CX 18a-g; CX 19; CX 20 (*but see* CX 38, which is more complete, Tr. 1568, 1701); CX 21; CX 22A (the notes dated January 4, 1998; *see* Tr. 347-49); CX 23a-b (*but see* Tr. 682-87 regarding CX 23b depicting Ti on the day that he died but after changes were probably made to the position of the table or to Ti's position); CX 24; CX 25 (admitted in part, *see* Tr. 1552-60); CX 26 (admitted in part, *see* Tr. 1552-60); CX 27-CX 32; CX 33 (admitted in part, including first and last pages, and including pages 32-36, page 78 line 20 through page 79 line 15, and page 18 line 12 through page 21 line 8, Tr. 1552-60); CX 34 (admitted in part, the only thing I excluded is that letter about the insurance, *see* Tr. 1552-60); CX 35 (admitted in part, including first and last pages and other pages covered in testimony, Tr. 1552-60); CX 36a-b (CX 36b is partially redacted, *see* Tr. 1562); CX 37; CX 37A (Tr. 1565), CX 37B (Tr. 1564); CX 38 (more complete than CX 20, Tr. 1567-73); CX 39; and CX 40.

[21] The following Respondents' exhibits were admitted into evidence: RX 2 through RX 8. Tr. 977-79. (RX-1, a publication by Safe-Capture International, Inc.; and RX 9, a book authored by Mr. Baudy, were not admitted into evidence but remain part of the record.)

[22] The Transcript is contained in nine volumes, Volumes I - IX (January 15-17, May 28-30, June 30, and July 1-2, 2003):

Volume	2003	Pages	rec'd by Hearing Clerk
I	January 15	1-274	February 7, 2003
II	January 16	275-521	August 13, 2003
III	January 17	522-692	August 13, 2003
IV	May 28	693-865	June 16, 2003
V	May 29	866-1080	June 16, 2003
VI	May 30	1081-1203	June 16, 2003
VII	June 30	1204-1353	July 18, 2003
VIII	July 1	1354-1492	July 18, 2003
IX	July 2	1493-1707	July 18, 2003.

[23] Both parties submitted briefs. APHIS's opening brief was filed February 2, 2004. The Respondents' response ("Reply Brief") was filed August 3, 2004. APHIS's Reply Brief was filed November 5, 2004.

[24] APHIS's Notice re: Animal Death was filed on January 27, 2006. The contents of this Notice I have disregarded for purposes of this Decision. I regard this Notice as APHIS's counsel's encouragement to me to issue a Decision. I apologize to the parties that this Decision is about a year-and-a-half overdue.

Discussion

[25] APHIS argued that the deaths of Vincent Lowe and Ti on July 31, 2001 were the inevitable result of the Respondents' actions. Opening brief at p. 6.

[26] This Discussion begins with the Respondents' most serious failures to comply with the Regulations. *See* paragraph [1].

HANDLING REGULATIONS

[27] **The Respondents' Failures on July 31, 2001, Caused the Tiger Ti to Suffer Trauma, Behavioral Stress, Physical Harm, and Unnecessary Discomfort. The Respondents were Required Under the Regulations to Handle Ti as Carefully as Possible in a Manner that Did Not Cause Ti Trauma, Behavioral Stress, Physical Harm, or Unnecessary Discomfort. 9 C.F.R. § 2.131(a)(1).**

[28] With a crowbar, the Respondents' volunteer Mr. Lowe struck in the vicinity of Ti's head at the wire and wood barriers separating him from Ti, in an attempt to intimidate Ti and get him to back off. Mr. Lowe thereby caused trauma, behavioral stress, physical harm, and unnecessary discomfort to Ti, in violation of 9 C.F.R. § 2.131(a)(1).

[29] Mr. Lowe was hard working, self-sufficient, and a get-the-job-done type of man, but he was ill-prepared for, and not properly suited for, the task he undertook, accompanied by Ms. Lucas, on the morning of July 31, 2001. This was the task of making repairs within Ti's enclosure while Ti was still within his enclosure. Mr. Lowe made mistake after mistake. For the purposes of the Animal Welfare Act, what Mr. Lowe did wrong, the Respondents are responsible for. He was their volunteer. The Respondents left him unsupervised.

[30] Mr. Baudy authorized and instructed Mr. Lowe, accompanied by Ms. Lucas, to make the repairs, without providing adequate supervision.[9] The Respondents had made no meaningful safety inspection of the interior of the enclosures before Mr. Lowe, accompanied by Ms. Lucas, commenced working.[10]

[31] John Raymond Lehnhardt, an impressive expert regarding big cats, testified that a person should never be in a situation repairing the very barrier that separates and protects him from a tiger.[11] The Respondents did not isolate Ti from the enclosure during the repairs, but

[9] Tr. 1517-1518 (Mr. Baudy testified, ". . . the cat was supposed to be penned up. About an hour later (around noon) I went to smoke a cigarette outside my apartment, and from a distance I could see the tiger in the lock down (den 3 or 4) on the south side, but from 100 yards. And so I said well he did what he could, and then I went back to my paperwork.") *See also* Tr. 391-392, 1140, 1520-1521.

[10] Tr. 119:23 - 120:3, 938:2-13; 1397:14 - 1398:25 ("I did not check the cage"); 1514:14 - 1515:8.

[11] Tr. 295:2-14, 301:22 - 302:7 (Lehnhardt).

allowed, permitted, and acquiesced in Mr. Lowe making repairs as he did. Mr. Lowe placed Ti in Den 3, then repaired Den 1,[12] and commenced repairing Den 2.

[32] The Respondents, by letting Mr. Lowe go it alone, failed to handle Ti properly, violating 9 C.F.R. § 2.131(a)(1). *See* paragraph [27].

[33] Lt. Brown's Report of Investigation (CX 37A) provided the most reliable evidence of what Mr. Baudy reported on the day Mr. Lowe was killed. During Lt. Brown's interview of Mr. Baudy during the afternoon of July 31, 2001, Lt. Brown noted what Mr. Baudy said, and Lt. Brown testified that quotation marks in his report show an exact quote of what Mr. Baudy said. Lt. Brown unequivocally was sure that the portion in quotation marks is what Mr. Baudy said to him. Tr. 1641-42. Lt. Brown's Report includes:

> Mr. Robert Baudy. Mr. Baudy advised that he was at his apartment when Lesa (Mrs. Lucas) came running through the door shouting "Call 911, get your gun, Ti (the tiger) just ripped out Vince's throat!" Baudy grabbed his H&K, model HK300, .22 WMR, serial #016672 rifle and climbed into the white pickup truck that Lucas had driven from the attack site. Lucas drove them both back to the cage. Baudy found the tiger inside the exercise paddock. Baudy said that because he was concerned that the tiger might try and attack him and because he could not get to Mr. Lowe, the victim, without risking his own life, he shot the tiger twice, once in the neck and once in the head. He then checked the tiger by touching it with a pipe he had extended through the cage wire. When he was satisfied the tiger was dead, he went to check on Mr. Lowe to see if he had survived the attack. Mr. Baudy advised that it was obvious to him that Mr. Lowe had not survived. Mr. Baudy also stated that he did not understand why the tiger was in the 3rd lock-down, because he had told them "to put the tiger in the 4th one." Mr. Baudy completed a writtten statement.

CX 37A, pp. 1-2.

[12] Tr. 121:13-16; 122:17-24.

[34] Even before Ti killed Mr. Lowe, and Mr. Baudy shortly thereafter killed Ti, Ti had suffered trauma, behavioral stress, physical harm, and unnecessary discomfort while Ti was confined in Den 3 and Mr. Lowe was working in Den 2. Mistake #1: Mr. Lowe should have waited for Mr. Brandolini, who was qualified to handle Ti. Mr. Brandolini was going to use a transfer cage to remove Ti from his enclosure while work was being done within Ti's enclosure. The Respondents permitted Mr. Lowe to proceed on Tuesday, July 31, instead of waiting four more days until Saturday, when Mr. Brandolini would again be at the Respondents' compound. Mr. Brandolini had said not to proceed without him (and other volunteers, who would have been able to help use the transfer cage).

[35] Mistake #2: The Respondents failed to use a transfer cage, to remove Ti from his enclosure altogether. The Respondents had a transfer cage, which Mr. Brandolini knew how to use, Mr. Lowe knew how to use, and Mr. Baudy knew how to use. Mistake #3: Mr. Baudy instead told Mr. Lowe to put Ti in Den 4 (within Ti's enclosure, too near the work to be done).

[36] Not only did the Respondents permit Mr. Lowe to proceed, they permitted him to proceed unsupervised. Mr. Lowe had had exposure at the Respondents' compound for less than two months, part-time. He was not trained to handle a tiger and was not expected to handle a tiger. Mr. Lowe had been observed on the Respondents' compound teasing cats including tigers to get them to lunge at him with only a fence between them. Mistake #4: Mr. Lowe was an inappropriate choice of personnel to interact with Ti.

[37] Not only did Mr. Baudy permit Mr. Lowe to proceed, Mr. Baudy returned to his residence on the compound to do paperwork, instead of watching and advising. Mistake #5: After Mr. Baudy instructed Mr. Lowe to put Ti in Den 4, Mr. Lowe was on his own. Mr. Baudy failed to supervise and so was unaware that Mr. Lowe had put Ti in Den 3 instead, closer to the repair work. Mr. Baudy said he did observe from 100 yards away, outside his apartment, when he paused from his paperwork for a smoke break. From that distance he could see that Ti was in Den 4 or Den 3. Tr. 1517-18.

[38] When Mr. Lowe and Ms. Lucas thought that the guillotine door from Den 4 into the exercise paddock was nailed shut, they thought they could not put Ti into Den 4. [That guillotine door was not actually

nailed shut, but the rain swollen wood kept it from opening. Mr. Baudy opined it could have been pried open with a crowbar.] Mistake #6: Mr. Lowe (and Ms. Lucas) failed to realize that Ti could have been placed in Den 4 from Den 3. Ti could have been brought into Den 3 from the exercise paddock, and then into Den 4 from Den 3; the connecting door between Den 3 and Den 4 did work. CX 37A. There would then have been one empty den, Den 3, between Ti and Mr. Lowe.

[39] Ti was agitated by Mr. Lowe's presence, noise, and threatening behavior (hammering the wood, shouting, and hitting the den dividers with his crowbar).[13] Perhaps Mr. Lowe's aggressive behavior aggravated Ti; perhaps the smell of cougars on Mr. Lowe aggravated Ti; perhaps the smell of marijuana on Mr. Lowe aggravated Ti; at any rate, Ti was not at ease in the presence of Mr. Lowe, never had been. (Ti didn't like Mr. Lowe and had stalked him and charged him. Tr. 95-96, 99-100.) Mistake #7: Mr. Lowe refused Ms. Lucas's offers to do things differently; Ms. Lucas was willing to do the work in place of Mr. Lowe, who obviously upset Ti. Ms. Lucas knew how to calm Ti.

[40] Ms. Lucas's description of how Mr. Lowe struck at or near the tiger with a crowbar (even though Ms. Lucas testified that Mr. Lowe did not hit the tiger but only near the tiger), persuades me that Ti suffered trauma, behavioral stress, physical harm, and unnecessary discomfort, even before he was shot to death by Mr. Baudy, as a result of his improper handling by Mr. Lowe.[14] After Ti was dead, Mr. Baudy observed trauma, not from gunshot, on Ti's head.[15] Mr. Baudy also noted blood and hair on the hammer that lay near Mr. Lowe's body. That blood and hair more probably than not were Ti's. The tiger's necropsy (autopsy) report[16] confirms Mr. Baudy's observations.

[41] I find that the Respondents' unsupervised volunteer, Mr. Lowe, struck the tiger with the crowbar (and probably the hammer) and caused

[13] Tr. 137:25 - 138:7, 138:15-20, 416:19 - 417:22, 419:5-21, 420:10-20.

[14] Tr. 417:12 - 420:23

[15] Tr. 1149:20 - 1150:20, 1154:22-24; CX 13, pp. 3 & 5.

[16] CX 13 at p. 3; Tr. 137:25 - 138:7, 138:15-20; 416:19 - 417:22, 419:5-21, 420:10-20.

trauma and physical harm to the tiger, and behavioral stress and unnecessary discomfort to the tiger, in violation of 9 C.F.R. § 2.131(a)(1).

[42] Mr. Mayer cross examined Ms. Lesa Lucas about her observations while Mr. Vincent Lowe was working in Den 2 on July 31, 2001. The following excerpt is from Tr. 414-36:
Mr. Mayer: And after that you and Vince (Lowe) were in den box two and I guess Vince was attempting to remove the guillotine door frame or unit in den box two, between den box two and the exercise area.
Ms. Lucas: Yes.
Mr. Mayer: I think you testified Ti became upset in some kind of way?
Ms. Lucas: Yes.
Mr. Mayer: You were able to speak to Ti and calm him at least initially?
Ms. Lucas: I went around the outside and called Ti to me and he would come to me and let me pet him. But he was so focused on Vince that I couldn't hold his attention.
Mr. Mayer: Yeah, but you went back into den box two and sat up on the bench?
Ms. Lucas: Yes, I did.
Mr. Mayer: Okay. And Ti was on the bench in den box three?
Ms. Lucas: Yes.
Mr. Mayer: And he was unsettled or Ti was uneasy at that time or was not calm, is that correct?
Ms. Lucas: No, he was calm.
Mr. Mayer: Okay.
Ms. Lucas: With me sitting beside him.
Mr. Mayer: Okay. And you talked to him through the caging material?
Ms. Lucas: Yeah, I usually talked to the cats.
Mr. Mayer: And did you fondle any portion of his fur at that time?
Ms. Lucas: Not from inside two. Only when I was outside. I didn't pet Ti. I don't recall ever petting Ti from two to three.
Mr. Mayer: But you did sit up on the bench on den box two next to den box three?
Ms. Lucas: Yes, I did.
Mr. Mayer: And Ti was on the bench also in den box three?
Ms. Lucas: Yes.
Mr. Mayer: Did you see a hole at that time as you sat there?
Ms. Lucas: No, I did not.
Mr. Mayer: Thereafter, you got off the den box table, true?
Ms. Lucas: Yes.
Mr. Mayer: What happened next?

Ms. Lucas: I got off the table and went to get Vince's crowbar and when I came back he got under the bench and was trying to use the crowbar . . .
Mr. Mayer: Why did you go get the crowbar?
Ms. Lucas: Well, actually we were only in there a few minutes. It happened very fast. We took the cable off, the eye bolt off guillotine door two. And when we raised it it hit the roof, we couldn't get it off because the bench was there. The bottom would not come above the bench. So Vince got under there and was going to try to pull it out the bottom. At that time when he was messing with that I was sitting on the bench with Ti. And then he told me to, when he was trying to lift it and it would not come out. So he told me to get his crowbar and when I did I got down, went and got his crowbar out of his truck and gave it to him and that's when he got under the bench. And then he started to remove the frame.
Mr. Mayer: And Ti became more restless at that point?
Ms. Lucas: Ti got down off the bench and started pacing the floor again like he was earlier, passing back and forth.
Mr. Mayer: Okay. Restless and upset?
Ms. Lucas: Just very restless. Just stalking Vince. He was stalking back and forth.
Mr. Mayer: And it got to the point where Vince came out from under the front table, correct? And said nein to Ti and struck at the fencing material, is that correct?
Ms. Lucas: When Vince was on the floor in a crouch position, Ti had already been passing him for a minute or so, pacing back and forth, stalking him. He went under the back bench, Ti did in his cage, where the wire separates the two and three and grabbed the wire at the floor and started to pull it into him, cracking the board attached to the wire. And that's when Vince got up and hit the wire beside Ti saying nein. Look Ti was underneath and that's when Vince hit the wire and said nein to him as Robert instructed to do.
Mr. Mayer: And he hit the wire with the crowbar, is that correct?
Ms. Lucas: Yes, he did.
Mr. Mayer: And that was above or below the bench?
Ms. Lucas: I believe it was below the bench.
Mr. Mayer: Okay.
Ms. Lucas: Where Ti was at.
Mr. Mayer: Okay. And were you able to see that blow?
Ms. Lucas: I was still in the cage. I saw it.

Mr. Mayer: And in fact, the tiger was up against the fence at the time?
Ms. Lucas: He had the fence in his mouth, underneath the bench. . . .
Mr. Mayer: But he hit the fence where the tiger was pulling at it, isn't that true?
Ms. Lucas: Beside where he was pulling at it.
Mr. Mayer: And said nein, correct?
Ms. Lucas: Yes.
Mr. Mayer: And did the tiger back off at that point?
Ms. Lucas: Yes.
Mr. Mayer: But came again?
Ms. Lucas: Yes, he did.
Mr. Mayer: And Vince struck it again?
Ms. Lucas: Ti hit the interlocking door. And Vince dropped the wooden door.
Mr. Mayer: Is the interlocking door, when you say interlocking door there is a regular door between two and three and there's also a guillotine door there, is that correct?
Ms. Lucas: Yes.
Mr. Mayer: If you say interlocking door, which do you mean?
Ms. Lucas: The interlocking door. The regular door. A tall, regular door that a human can walk through.
Mr. Mayer: And he struck at the door?
Ms. Lucas: Yes, he did. Ti hit that side of the door. Vince hit our side of the door with the crowbar. . . . .
Mr. Mayer: Then I think you testified the tiger made another rush at or toward the guillotine door between two and three.
Ms. Lucas: Yes, he did.
Mr. Mayer: And Vince struck again a third time?
Ms. Lucas: Yes, he did, the side of the guillotine door. He didn't hit the wooden door, guillotine door. And when he hit the interlocking door all the wood fell off the top of the door. And there was wire there. But when the tiger hit the interlocking door, he hit the guillotine door, he hit the side of the guillotine door.
Mr. Mayer: The interlocking door had wire on it also, didn't it?
Ms. Lucas: I know the top portion did. I didn't know it did. Because when the wood fell off I thought Ti was coming through and then I saw it had wire on it. The whole door, I don't know if it does. I just know the upper part, probably this much of it. I don't know how much. I'm guessing, maybe, this much fell down, of wood.
[witness demonstrates the size with her hands; Judge says witness is showing roughly two feet by three feet; Mr. Mayer says witness is showing approximately a one-and-a-half foot by two foot area]

Mr. Mayer: After that third strike what specifically happened?
Ms. Lucas: Vince hit the side of the guillotine door telling Ti nein and he went and laid up on the bench. His bench in the back, Ti did.
Mr. Mayer: And where were you at that time?
Ms. Lucas: Still in the cage.
Mr. Mayer: What were you doing at that time?
Ms. Lucas: I was asking Vince to go out and to let me take the guillotine door off because Ti doesn't have a problem with me. And he was pushing me to go out of the cage. And stating that he didn't want me to be in there.
Mr. Mayer: He apparently appreciated some danger.
Ms. Lucas: We knew there was danger.
Mr. Mayer: I'm sorry.
Ms. Lucas: Yes, in precaution I would say.
Mr. Mayer: And he asked you to leave and did you?
Ms. Lucas: Yes, I did.
Mr. Mayer: And what did he do?
Ms. Lucas: I stepped out and pushed the door shut and he went back under the bench. . . . .
Mr. Mayer: And you closed the door between den box one and two?
Ms. Lucas: Yes, I did.
Mr. Mayer: And did you see what Vince did then?
Ms. Lucas: Yes, I did.
Mr. Mayer: What did he do?
Ms. Lucas: Got back under the bench, continued to take the guillotine track off.
Mr. Mayer: And was it that point that you noticed a hole in the fencing material between den box three and two?
Ms. Lucas: When I stepped out Vince went to go under the bench again. I looked over at Ti to see his temperament, just to check on Ti and that's when I got a quick glimpse of what appeared to be possibly a hole, maybe this big. That melon sized hole, somewhere in his neck or face area. I only saw it for a quick second.
Mr. Mayer: That is above the bench or below the bench?
Ms. Lucas: Above the bench.
Mr. Mayer: Okay. So it was definitely above and not intersecting the bench?
Ms. Lucas: It's above the bench. Ti's laying on the bench. It's chest high, face high to Ti. So it's above the bench.
Mr. Mayer: But you'd never seen that hole before?

Ms. Lucas: No.
Mr. Mayer: Even when you were sitting on that bench?
Ms. Lucas: No.
Mr. Mayer: Didn't in fact that hole, wasn't that hole in fact created when Vince slammed that fencing material with the crowbar?
Ms. Lucas: No. . . . .
Ms. Lucas: I would not know that.. . . .
Ms. Lucas: That the hole was created, I don't know that.
Mr. Mayer: And after you said there's a hole what did Vincent do? Was he still in a crouch when you said it?
Ms. Lucas: Yes, he was. He was still under the bench.
Mr. Mayer: Well, is the bench in the back and a table in the front?
Ms. Lucas: They appear to be the same to me.
Mr. Mayer: The same height?
Ms. Lucas: I believe so.
Mr. Mayer: But he was in a crouch under the front table or bench?
Ms. Lucas: Yes, sir.
Mr. Mayer: Okay. And what did he do when you said there's a hole?
Ms. Lucas: He pulled the guillotine door off and . . .
Mr. Mayer: Let me just stop you there. He had been trying to get the guillotine door off, right? . . . .
Ms. Lucas: Yes.
Mr. Mayer: And was having some difficulty with it?
Ms. Lucas: Yes. . . . .
Mr. Mayer: Suddenly got the guillotine door off.
Ms. Lucas: After he had pried part of the framing off with a crowbar. Yes, it came off. . . . .
Mr. Mayer: Okay. When he pushed you out the door into den box one, Ti was up on the bench in den box three.
Ms. Lucas: Yes, he was.
Mr. Mayer: You were in den box one or did you leave the cage entirely?
Ms. Lucas: No, I stayed in den box one up against the wire to the left of the interlocking door between one and two.
Mr. Mayer: All right.
Ms. Lucas: On the left side.
Mr. Mayer: And from that position you could only see Mr. Lowe in so far as that he was not under the table or bench in that area?
Ms. Lucas: I didn't get the last part of that.
Mr. Mayer: If he was under the table in front of the den box . . .
Ms. Lucas: I could see him under the bench still.
Mr. Mayer: Well, the bench was covering a good portion of him, wasn't it? Ms. Lucas: Yes, it was. I could see his back. I probably couldn't

see his hands on the guillotine door itself but I could see Vince was working on the door.
Mr. Mayer: You close the door and then you stood at den box one and looked into den box two? Ms. Lucas: Yes.
Mr. Mayer: And you saw Vince do what? After he pushed you out the door?
Ms. Lucas: After he pushed me out the door, I had just shut the door and he told me to lock the door, it just has like a little clip. Robert used a little, push button, the little clips like you hang your keys or whatever on. I don't know, anyway, and the clip was broke on it. So there was no way to lock that door. And he said lock the door. You couldn't lock that door. I looked up at Ti and all this happened within seconds. I don't know how long a period of time but I just happened to see that there appeared to be a hole in the fence and maybe this area, maybe his high chest, face, maybe neck, face, arm area, I think. And that's the area, when I said Vince, there's a hole in the fence and he pulled the guillotine door off, just ripped it off the wall underneath the bench and went over and put it over the hole.
Mr. Mayer: And asked you to get a hammer?
Ms. Lucas: And asked, yes. As soon as he put it up there. He had to lean over because the bench is there. It's like in the center and he put the board over it, the guillotine door over it and said get my hammer.
Mr. Mayer: At that point then was the tiger anyway through that hole?
Ms. Lucas: At what point?
Mr. Mayer: At the point when he placed the guillotine door up against the area, which you indicated somehow that there was a hole there.
Ms. Lucas: No, the tiger wasn't . . .
Mr. Mayer: Did you tell him where the hole was?
Ms. Carroll: I believe he cut off the witness's answer.
Administrative Law Judge: I agree. You said no, there wasn't. And if you'd go ahead and finish.
Ms. Lucas: Okay. I'd like to explain that. Vince placed the board on the hole and said get my hammer. Ti was not in the cage or even trying to come through the cage when Vince put the board over the hole. As soon as he said get my hammer, I didn't even have time to move to get the hammer when Ti pushed on the board and instantly I saw his head and neck was like that quick through the cage. And so no, he was not any part of him through the cage when he put the board up, if that was your question.
Mr. Mayer: How did Vince know where the hole was?

Ms. Lucas: I don't know how he knew.
Mr. Mayer: You simply said there's a hole?
Ms. Lucas: That's it.
Mr. Mayer: After the tiger attacked, you left den box one and went all the way out, correct?
Ms. Lucas: Say that again. I'm sorry, I missed the beginning of that.
Mr. Mayer: After the tiger came partly through you described that he was lifted up by the tiger and down and you saw the tiger injury or other maul or do damage to Vince, correct?
Ms. Lucas: Yes.
Mr. Mayer: You then did not attempt to get into that den box two, did you? Ms. Lucas: Yes. When Ti dropped Vince and walked out and laid down beside the guillotine door on the outside, yes, that was in the door to go in to get the gun.
Mr. Mayer: Did you go in?
Ms. Lucas: I believe I took a step inside and it was the sunlight that caught my attention, although I just saw Vince rip the guillotine door off, I still opened the door and stepped in and it didn't become apparently, even though I saw the tiger walk out, I believe that it was the sunlight that caught my attention that was coming through the guillotine door under the bench and realized Ti can come back in. And stepped back out because the gun was probably four feet away.
Mr. Mayer: And you closed the door between one and two?
Ms. Lucas: Yes, I did.
Mr. Mayer: And then what did you do?
Ms. Lucas: I went out of den box one leaving the external door open, not thinking to close it and got in the truck and drove to get Robert (Mr. Baudy).
Mr. Mayer: And when you got there you were highly excited? Actually you were near hysterical, wasn't that true?
Ms. Lucas: No, I wouldn't say I was, I'm never hysterical. I wasn't hysterical ever on the compound, until the police arrived and I started crying. But no, I'm not a hysterical person. But would you like me to explain? . . . .
Ms. Lucas: . . . . I already had gone through the screen porch area and burst through Robert's main door to his house that he uses as a main door, when his dog, Yellow Dog, went hysterical, from me just barging in the house so suddenly and I said Robert, call 911, Ti ripped Vincent's throat out. I wasn't screaming but I'm sure there was some tone to my voice. And I'm sure I was excited.
. . . .

Ms. Lucas: When I burst through the door I told Robert call 911, Ti just ripped Vincent's throat out. Robert replied let's go see. And I told him that I believed he needed to bring his gun because the cat can get out. And Robert went over and got two guns and said let's walk. And I asked him to let's drive because Vince was bleeding out. And then we got in the truck and he said drive slow because the guns were loaded. Tr. 414-36.

[43] I rely on Ms. Lucas and Mr. Baudy for the narrative of what I consider to be the essential core of this case, the conditions and happenings of July 31, 2001. The conditions and happenings of July 31, 2001 are critically important because they are the basis for revocation and related remedies. If the Respondents had not failed so totally on July 31, 2001, I likely would not find revocation necessary.

[44] Both Ms. Lucas and Mr. Baudy are credible witnesses, as was each witness who testified before me. At times Ms. Lucas's testimony was mistaken, and at times Mr. Baudy's testimony was mistaken. At times Ms. Lucas's testimony conflicts with Mr. Baudy's testimony. The conclusions I reach are unaffected by these discrepancies, because the bottom line for me is that the Respondents allowed and contributed to the horrible mishandling of Ti in violation of 9 C.F.R. § 2.131(a)(1); and the Respondents utterly failed to supervise Mr. Lowe, in violation of 9 C.F.R. § 2.40(b)(1), which requires appropriate personnel; and of 9 C.F.R. § 2.100(a) incorporating 9 C.F.R. § 3.132, which requires a sufficient number of adequately trained employees under a supervisor who has a background in animal care. Mr. Baudy could have been that supervisor, who could have prevented Mr. Lowe's inadequacies from causing his own death and that of Ti, but Mr. Baudy was 100 yards away doing paperwork.

[45] Mr. Baudy's first language is French, and his ability to hear (during our hearing) was not always adequate. At times I (and others) had some difficulty understanding Mr. Baudy during the hearing, and at times during the hearing Mr. Baudy had some difficulty understanding others or with recall. Mr. Baudy was able to correct his erroneous testimony that Ti had been skinned before the necropsy. Tr. 1509-11. Mr. Baudy was able to correct the mistaken assertion from Ms. Zordan's interview that he shot Ti "blank" in the head - - "blank" was not what he meant. Tr. 1698. Mr. Baudy testified both that he had to shoot Ti

because Mr. Lowe might still be alive (Tr. 1142) and that when he shot Ti he knew Mr. Lowe was dead (Tr. 1544). [Both statements have some truth in them, 'though they are apparently conflicting.]

[46] Mr. Mayer: You explained that the tiger was raging back and forth along the south side of the . . .
Mr. Baudy: The acre size cage.
Mr. Mayer: Okay. What else did you observe at that time?
Mr. Baudy: Well, I observed a door opened up, a walk-in door. And I otherwise was very, very concerned about that tiger escaping or coming back through the open door and attacking me or attacking the girl.
Mr. Mayer: Were you able to observe Mr. Lowe at all?
Mr. Baudy: From a distance.
Mr. Mayer: And what did you observe from a distance?
Mr. Baudy: He was laying down but I couldn't see any wound, you know, from where I was standing there.
Mr. Mayer: And based on your observations, what did you conclude?
Mr. Baudy: I concluded that I should euthanize this animal.
Mr. Mayer: Why?
Mr. Baudy: Because there was no way to quickly get to Mr. Lowe, and he was down and obviously in bad shape.
Mr. Mayer: And so what did you then do to euthanize the animal?
Mr. Baudy: I shot the animal with the Magnum rifle.
Tr. 1142.

[47] Mr. Baudy: "As soon I realized that Mr. Lowe was dead, the only way I could get to him, by then I realized he was dead. But I had to destroy the tiger, because I didn't know if the tiger could get out of the cage, attack Lesa, attack me, and it didn't make me happy to destroy this animal, not at all. But it is something that I had to do in my own conscience."
Tr. 1544.

[48] Ms. Lucas's testimony contained some mistakes. Ms. Lucas was mistaken when she thought the guillotine doors within Ti's enclosure had to be repaired right away to meet an APHIS deadline; APHIS had not specified any requirement regarding those guillotine doors. Ms. Lucas was mistaken when she thought the guillotine door from Den 4 to the exercise paddock was nailed shut; it is true that Mr. Lowe failed to get it to open.

[49] Lt. Brown's testimony persuades me that Mr. Baudy did report to Lt. Brown on July 31, 2001, that after Ms. Lucas drove to Mr. Baudy's apartment on the compound to get him, Lesa (Mrs. Lucas) came running through the door shouting "Call 911, get your gun, Ti (the tiger) just ripped out Vince's throat!"

[50] Throughout this Decision I have chosen not to rely on portions of the record that I consider to be flawed or unreliable. Selective perception and selective memory are inherent in anyone's recounting of events, and traumatic events affect what a person focuses on and which memories predominate. Neither Ms. Lucas nor Mr. Baudy gave entirely accurate testimony, and neither had entirely accurate recall. At times, their testimony conflicts with their own prior statements. Nevertheless, each was a reliable and valuable witness.

[51] When Mr. Lowe failed to heed Mr. Brandolini's request to wait until Mr. Brandolini could be there, Mr. Baudy knew that Mr. Lowe was proceeding with the repairs of the tiger's habitat with the tiger in the immediate vicinity.[17] John Lehnhardt,[18] a person experienced with and expert in zoology, stated that captive tigers may react negatively to over stimulus or stimulus that's new by becoming aggressive, harming themselves or other animals.

[52] The following is an excerpt from JOHN LEHNHARDT's testimony:
A. . . . two animals that have gotten along absolutely normally will suddenly go at each other because there's a disturbance, something that is really scaring them or disturbing them and they will act aggressively. . . . either hurting themselves in some way, attacking the bars, you know, attacking the enclosure, attacking a cage mate, increases with new stimulus and changes of environment . . .
Tr. 291:11-25.

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[17] Tr. 1521:5-10.

[18] Tr. 295:2-14, 301:22 - 302:7. Mr. Lehnhardt is "responsible for animal care, welfare and safety and maintenance of the animal enclosures and structures for Disney's Animal Kingdom." Id., 280:8-16. He was a zoo keeper at Lincoln Park Zoo in Chicago, Illinois, for four years, was an elephant trainer at the Calgary Zoo in Western Canada, Calgary Alberta for eight years, and was a supervisory biologist and collection manager at the National Zoo in Washington, D.C., for nine years. Id., 279:10 - 280:6.

Q. . . you talked about, . . . to minimize the effect of changes in their environment. And can you explain what you mean by that?
A. . . . We (may) need to remove the animals from this area. . . Or we can say, well, this isn't going to be as great, we think they'll be fine, we will move them down x-number of enclosures away from whenever the disturbance is going to occur.
Tr. 292:1-17.

[53] The Respondents through their volunteer Mr. Lowe, failed to handle the tiger Ti carefully, in a manner that did not cause Ti trauma, behavioral stress, physical harm, or unnecessary discomfort. Further, the resulting destruction of Ti by gunshot caused Ti trauma and physical harm (and a quick death, that I conclude did not cause Ti pain. *See* paragraphs [94] through [110] regarding euthanization).

VETERINARY CARE REGULATIONS

[54] **The Respondents Failed to Establish and Maintain a Program of Veterinary Care that Included the Availability of Appropriate Facilities. 9 C.F.R. § 2.40(b)(1).**

[55] The Respondents admitted that on July 24 and July 31, 2001, they failed to adequately maintain an enclosure used to house one of several tigers, in violation of 9 C.F.R. § 2.40(b)(1). Brief filed August 3, 2004, at page 17. (After July 31, 2001, the Respondents no longer used Ti's enclosure.) Mr. Baudy testified that Ti's enclosure was originally designed to hold clouded leopards with a weight of approximately 65 pounds.[19] The cage was not originally built for tigers,[20] but Mr. Baudy testified that the wire had been reinforced, several times. The weight of the tiger it contained on July 31, 2001 was 318 pounds.[21]

[56] APHIS Veterinary Medical Officer ("VMO") Robert Brandes inspected Ti's enclosure on August 2, 2001 (2 days after the fatal injuries) and observed deteriorated chain-link fencing, decayed wood, a hole in the metal roof caused by rust, and improperly installed

[19] Tr. 1254:17-23.

[20] Tr. 1254: 7.

[21] CX 13, 38.

fencing.[22] There were breaks in the chain link fence.[23] The lock down area (Den 3) immediately next to Den 2 where Mr. Lowe was working had a break in the chain link fence between the exercise yard and the Den 3 outer wall.[24]

[57] The Respondents contended that the wire barrier between Dens 2 and 3 separating the tiger and Mr. Lowe was weakened by Mr. Lowe repeatedly hitting on it with a hammer or crowbar.[25] The Respondents did not contend that Mr. Lowe struck the outside facing wire on Den 3 and had no explanation for the broken enclosure wire for the outside facing wire of Den 3.

[58] If the tiger used the same techniques that allowed him to breech the wire barrier between Den 2 and Den 3, the tiger could have breeched the Den 3 wire (where he was being held) to the exercise area, circled around and back into Den 2 and easily have attacked Mr. Lowe through the Den 2 shift (guillotine) door that Mr. Lowe had removed for repair. Considering the testimony of Dr. Brandes, I conclude that the Den 3 wire was weakened and/or broken by deterioration and lack of proper maintenance, in violation of the Regulations.

[59] **The Respondents Failed to Establish and Maintain a Program of Veterinary Care that Included the Availability of Appropriate Personnel. 9 C.F.R. § 2.40(b)(1).**

[60] The Respondents are required to have suitable personnel on hand to perform the necessary tasks related to the care of the animals covered by AWA license 58-A-0106. On July 31, 2001, when the tiger Ti's enclosure was undergoing repair, Mr. Lowe intended to repair a

[22] CX 1, Tr. 562:11-16, 565:14-21, 567:11-15.

[23] Tr. 568:6-10.

[24] CX 16p.

[25] Tr. 417:13-18.

guillotine door (shift door) in Den 2.[26] Mr. Lowe and Ms. Lucas had been given a typed repair list which included the repair of the guillotine type of shift door in Den 2.[27] At the time of the repairs on July 31, 2001, Mr. Lowe and Ms. Lucas had no direct supervision and were left to plan and execute the work themselves.[28]

[61] APHIS's witnesses, John Lehnhardt and Baron Julius von Uhl, said that maintenance should always be performed by supervised maintenance personnel and never near big cats.[29]

[62] The Respondents contended that Mr. Lowe and Ms. Lucas "ignored the specific instructions of Paul Brandolini to defer the repairs necessary or desirable for Ti's den boxes in Ti's enclosure until he, Mr. Brandolini, was present."[30] The Respondents argue that Mr. Lowe and Ms. Lucas were specifically instructed to wait for Mr. Brandolini to be physically present to help move and contain the tiger during repairs. Mr. Brandolini said the Respondents owned or had ready access to a "transfer cage" or "squeeze cage" - - a durable device to humanely immobilize the tiger for various maintenance and veterinarian activities.[31] The Respondents argue that they can not be responsible or liable for workers who intentionally disregard safety rules, fail to use appropriate equipment, and/or fail to follow instructions in a manner which is unforeseen.

[63] The requirement to comply with 9 C.F.R. § 2.40(b)(1) does not rest upon the common law of torts, but foreseeability is a factor worth considering. I conclude that, for the purpose of the Animal Welfare Act, the Respondents are required to assume that their volunteers may make foolish choices, foolish moves. Tigers in particular are so dangerous that even experienced tiger handlers are vulnerable to attack. The

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[26] Tr. 381:22 - 382:11.

[27] CX 7, Tr. 382:19 - 383:3, 384:24 - 385:4, 1416:23 - 1417:6.

[28] Tr. 391:22 - 392:4

[29] Tr. 291:16-25, 313: 23-25, 539:14-17, 539:2-5.

[30] Respondents' brief at pp. 6-7.

[31] Tr. 802:23 - 803:17.

Respondents, consequently, are required to protect their animals from foreseeable danger such as resulted from allowing their volunteer Mr. Lowe to proceed as he did, unsupervised as he was, on July 31, 2001.

[64] The Respondents' opinions of Mr. Lowe's "foolhardy," "reckless" behavior[32] may have been enhanced after the events of July 31, 2001, but Mr. Lowe had antagonized the cats on the Respondents' compound before July 31. Further, Mr. Baudy knew that Mr. Lowe and Ms. Lucas were working on repairs to the tiger's enclosure on July 31, 2001 without any direct supervision, and he knew that Mr. Brandolini had told them to wait until he could be there. Yet he let them proceed.

[65] Mr. Baudy knew on July 31, 2001 that the Respondents' volunteer Mr. Lowe had chosen to disobey Mr. Brandolini's earlier instructions not to perform the repair of Ti's den enclosures until there was additional help.[33] Mr. Baudy further knew or should have known that to work around the tiger Ti when he would be under stress enhanced the danger to both the tiger and his handlers.

[66] The following is an excerpt from ROBERT BAUDY's testimony:

Q. Okay. Mr. Baudy, you testified that you instructed -- this is -- you testified that you instructed Vince Lowe on July 31, 2001 to shift the cat into lockdown number four. Is that correct?
[Note: the "cat" is the tiger Ti and lockdown number four is Den 4 of Ti's enclosure.[34]]
A. Yes.
Tr. 1397:9-13.
A. . . . .And later on they told me they could not - - that the guillotine door was not working. I said, look you get a crowbar. You get a hammer. You free this guillotine door. . . .
Tr. 1397:21-24.

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[32] Respondents' brief at 5.

[33] Tr. 1193:3-14.

[34] *See* RX 8.

Q. Why on the day that Vince Lowe died, why did you not insist that he wait?
A. They (Mr. Lowe and Ms. Lucas) had a list of things to do and the three or four repairs were suggested, but they tell me this is being taken care we will do that tomorrow and we are going to work on it. I said why do you want to work on that cage at this time. They said we already cut the guillotine door. So I let them go, but I double checked from a distance which I do all the time. And the cat was cool, and I didn't hear no screaming, so I went back to my paperwork.
Tr. 1520-21.

[67] Mr. Baudy contemplated that there was potential danger to his workers, Mr. Lowe and Ms. Lucas. In anticipation of a potential tiger - man confrontation, Mr. Baudy apparently advised Mr. Lowe to take his gun with him to do the repair work.

[68] The following is from LESA LUCAS's testimony:
A. Well he told Vince to bring his gun and that if Tijik [Ti] came in to shoot to kill. He didn't -- we weren't really -- we weren't going to move the cat. I know we talked about it and he really didn't want to move the cat. And I know Vince talked to him about hitting him with some Ropum (ph) or Valium, but he just told him to bring his gun, you know, and if he came in just shoot to kill so we did. I mean Vince has a gun anyway, but he brought his 357 I think. That's what he brought this time and made sure he had extra bullets. . . . . And I know that when we were in the cage had it holstered but he had the holster unsnapped and had it half out already pulled up so he was ready in case Ti did come through.
Tr. 126:22 - 127:12.

[69] The following is from ROBERT BAUDY's testimony:
Q. Prior in the day did you tell Vincent Lowe to take the gun with him?
A. He carried a gun all the time, several guns.
Tr. 1157:3-7.

[70] Mr. Baudy as the owner of Savage Kingdom and Rare Feling Breeding had the authority to stop the progress of the repair work before the fatal injury occurred, but he did not.

[71] from ROBERT BAUDY's testimony:

Q. And if during 2001, you saw someone doing something at the compound that you didn't like, you had the power to say, stop. Is that right?
A. Yes.
Q. And in 2001, if there was a person on the compound doing something that you didn't like, and you told them to stop, and they didn't, you have the power to kick them off the property. Didn't you?
A. That is right.
Tr. 1226:15-23.
Q. Were you in charge --- in 2001, were you in charge of Vince Lowe?
Mr. Baudy: Yes, I am.
Q. And were you his boss, b-o-s-s, in 2001 when he was on your compound?
A. Yes.
Tr. 1228:1-6.

[72] I find that on July 31, 2001, the Respondents allowed Mr. Lowe and Ms. Lucas to proceed in the repair of Dens 1 and 2 of Ti's enclosure without supervision and thereby failed to have appropriate personnel available, in violation of 9 C.F.R. § 2.40(b)(1).

[73] Although I have already found the Respondents in violation of 9 C.F.R. § 2.40(b)(1) on two grounds, failure to have appropriate facilities available, and failure to have appropriate personnel available, I do not find that the Respondents failed to have appropriate equipment available. Consequently, I find that one aspect of APHIS's allegations of violation of 9 C.F.R. § 2.40(b)(1) not sustained by a preponderance of the evidence.

[74] I conclude that APHIS did not sustain by a preponderance of the evidence the allegation of a violation of 9 C.F.R. § 2.40(b)(1) relating to availability of appropriate equipment on July 31, 2001. APHIS alleges that the Respondents failed to have available a squeeze cage, a dart gun, and working telephones.[35]

[75] Regarding a squeeze cage (transfer cage), Paul Brandolini, the manager at the Respondents' facility, testified that the transfer cage was

[35] APHIS's brief at page 14.

on the premises[36] and that it was in compliance with the [Florida] Fish and Game Commission.[37] He testified that Mr. Lowe and Ms. Lucas assisted with and were familiar with the animal transfer process.[38]

[76] No squeeze cage was used, and Ti entered Den 2 through a hole in the wire dividing Den 3 from Den 2, killed Mr. Lowe,[39] then left the dens and sat quietly in the exercise paddock.[40] The Respondents had no protocol or equipment (such as a immediately available telephone or Walkie-Talkie) in place in case of an emergency (other than to "tell Mr. Baudy").[41] After Ti attacked Mr. Lowe, Ms. Lucas drove to Mr. Baudy's residence to tell him of the attack. Mr. Baudy got his 22 caliber – Magnum gun, and they returned to Ti's enclosure.

[77] Regarding a dart gun, Mr. Brandolini testified that the Respondents had a dart gun at the compound.[42] He stated that because the tranquilizing drugs are Federally regulated it would take approximately a half-hour to get the drugs to the compound to immobilize the cat.[43] Regarding working telephones, after the tiger and Mr. Lowe were dead[44] Ms. Lucas and Mr. Baudy did make calls from the Respondents' land based telephone line(s) to the local 911 dispatch or sheriff. The regulations do not identify a requirement for immediate telephone access from each animal enclosure or describe the nature or location of communication equipment.

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[36] Tr. 803:23-25.

[37] Tr. 811:2-4.

[38] Tr. 805:13-24.

[39]Tr. 139:11 - 141:13.

[40] Tr. 141:15-17.

[41] Tr. 212:3-10.

[42] Tr. 811: 23 - 25.

[43] Tr. 811:24 - 812:3.

[44] CX 36b, Answer # 6.

[78] **On July 31, 2001, the Respondents willfully violated 9 C.F.R. § 2.40(b)(2) by failing to establish and maintain programs of adequate veterinary care that included the use of appropriate methods to prevent injuries (specifically, the Respondents allowed inadequately trained volunteers with inadequate supervision to handle the adult male tiger called Ti)**.

[79] Both Mr. Lowe and the tiger Ti sustained fatal injuries. It is not clear to me that humans are protected under the provisions of the Animal Welfare Act Regulation 9 C.F.R. § 2.40(b)(2). Humans of course are not included in the definition of animals whose care is regulated under the Animal Welfare Act. 9 C.F.R. § 1.1. The definition of "animal" includes nonhuman primates and intentionally avoids humans.

[80] The necropsy (autopsy) of the tiger Ti indicates to me that he was injured other than by gunshot by Mr. Baudy. I am persuaded by the preponderance of the evidence that Ti was injured by Mr. Lowe during Mr. Lowe's efforts to repair of the guillotine door.

[81] The autopsy of Ti reported under OTHER EVIDENCE OF INJURY: A 2 centimeter linear shallow laceration lies 2 inches left of the lateral canthus of the left eye. Irregular abrasions involve the nose, and shallow linear lacerations extend along the skin superior to the nose. A 9 x 4.5 centimeter abrasion lies on the left side of the torso, anterior to the left forelimb. Within this area of abrasion are three parallel linear areas of abrasion.
CX 13 at page 3. 38 REF Lab No:21343-01-R.

[82] The ultimate injury to Ti here was his fatal injury. It is predictable that if a tiger may leave its normal confinement area and begin to endanger humans, the animal can be subjected to harsh disciplinary measures or even death.

[83] The Regulations contemplate that if humans are protected from the animals, then the risk is lessened that the animals will be severely disciplined or even destroyed. Here, Mr. Baudy killed the tiger so that Mr. Lowe could be rescued or retrieved at the earliest possible moment, and also to ensure the safety of Ms. Lucas and himself (given the open walk-in door, Tr. 433.).

[84] I conclude that the tiger Ti's death resulted from the Respondents' failure on July 31, 2001, to utilize the proper methods to prevent injuries to the tiger; the Respondents failed to safely contain the tiger Ti during a period when routine maintenance on the tiger's habitat was required. 9 C.F.R. § 2.40(b)(2).

[85] **On July 31, 2001, the Respondents willfully violated 9 C.F.R. § 2.40(b)(4) by failing to establish and maintain programs of adequate veterinary care that included adequate guidance to personnel involved in the care and use of animals regarding handling, tranquilization, and euthanasia (concerning adult male tigers such as Ti).**

[86] The Respondents agree that there is no written safety manual on the handling of tigers at Savage Kingdom, Inc.[45] There is no evidence that the Respondents had an active training program in place for animal handlers at or near the time of the incident on July 31, 2001.[46]

[87] The Respondents presented no evidence that they "trained" Mr. Lowe or Ms. Lucas in the handling of animals. Handling means: Petting, feeding, watering, cleaning, manipulating, loading, crating, shifting, transferring, immobilizing, restraining, treating, training, working and moving, or similar activity with respect to any animal.[47]

[88] Paul Brandolini was Respondents' manager, but he was an unpaid volunteer[48] who did his volunteer work "when needed" by the Respondents ("It could be one time a month, and it could be three times a month, or it could be three times a day. I never kept track, because I volunteered. It was just when I worked.") Tr. 1003. *See also* Tr. 1004-05. Mr. Brandolini was not on duty on July 31, 2001.[49]

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[45] Tr. 1373:22-24.

[46] Tr. 656:5-24.

[47] 9 C.F.R. § 1.1.

[48] Tr. 981:7, 986:1-4.

[49] Tr. 992:13 - 993:13.

[89] I conclude that the Respondents failed to provide adequate guidance to personnel in the handling of tigers, in violation of 9 C.F.R. § 2.40(b)(4).

[90] APHIS alleged that the Respondents did not give adequate guidance regarding the tranquilization of animals.

[91] The Respondents' Program of Veterinary Care dated June 11, 2001 and prepared by John V. Mounger, D.V.M., includes:
C.2. DESCRIBE CAPTURE AND RESTRAINT METHOD(S)
Squeeze cage with valium-ketamine is usual method. We sometimes transfer to clinic and administer isoflurane. Dart gun and Telazol are kept available.
CX 22.

[92] Neither the Respondents nor their Veterinary Care Program stated that any volunteer was trained to administer tranquilizers. Paul Brandolini stated that Mr. Lowe and Ms. Lucas did have some experience in the use of squeeze cages. When the Respondents acquiesced to allow Mr. Lowe and Ms. Lucas to work on Dens 1 and 2 on July 31, 2001, it was the Respondents' duty to supervise the relocation or tranquilization of the tiger, if necessary, during that period of construction, to relieve the stress on the animal. The Respondents did not follow their own Veterinary Care Plan regarding the tranquilization of animals during the repair of their habitat.

[93] The Respondents' failure to relocate or to tranquilize the tiger during the repair work was a violation of 9 C.F.R. § 2.40(b)(4).

[94] The Respondents' Program of Veterinary Care dated June 11, 2001 and prepared by John V. Mounger, D.V.M. states:
D. EUTHANASIA
I. SICK DISEASED, INJURED OR LAME ANIMALS SHALL BE PROVIDED WITH VETERINARY CARE OR EUTHANIZED. EUTHANSIA WILL BE IN ACCORDANCE WITH THE AVMA RECOMMENDATIONS AND WILL BE CARRIED OUT BY THE FOLLOWING:
Veterinarian ☑ Licensee/Registrant ☑
CX 22.

[95] American Veterinarian Medical Association ("AVMA") Guidelines on Euthanasia include:
"[f]or the gunshot to the head as a method of euthanasia in captive animals, the firearm should be aimed so that the projectile enters the brain, causing instant loss of consciousness."

[96] from PAUL BRANDOLINI's testimony:
Q. Was euthanasia apart of the training that you received from Mr. Baudy?
A. We never had anything like that. Euthanasia, you mean for cats?
Q. In general.
Q. Mr. Brandolini, the question was whether euthanasia was part of the training you received from Mr. Baudy.
A. No.
Tr. 1014:24 - 1015:10.

[97] APHIS alleges that the method of euthanasia chosen by the Respondents was (a) not required and unnecessary because the emergency of Mr. Lowe's injury had passed; and (b) if euthanasia was necessary, it was improperly administered.

[98] The Respondents did not contend that its volunteers received training in euthanasia.

[99] I find the following conditions to be true on July 31, 2001 at the time Mr. Baudy arrived at Ti's cage after Ms. Lucas came to get him.
(a) Ms. Lucas had said Mr. Lowe was in the cage with his throat ripped out.
(b) Mr. Lowe's condition was dying or dead.
(c) The normal time for emergency personnel and/or police to arrive was known to be many minutes away.
(d) Mr. Baudy knew that Ti had been in the proximity of Mr. Lowe while the repair work on the den was proceeding.
(e) Ti was in his enclosure when Mr. Baudy arrived, but instead of being in one of his lock-down dens, was in his exercise paddock.
(f) Mr. Baudy knew that Ti was previously inside one of his lock-down dens and from his exercise paddock was free to re-enter the den where Mr. Lowe lay.[50]
(g) The walk-in door to Den 1 was open. Tr. 433.

[50] Tr. 1142:6-9.

(h) Still confined in his exercise paddock, Ti began galloping toward Mr. Baudy.

[100] Motivated to reach Mr. Lowe[51] and being unsure whether Ti could breech his enclosure, Mr. Baudy decided to kill Ti. The tiger got up from his position and started moving fast (galloping)[52] toward Mr. Baudy and Ms. Lucas. Mr. Baudy shot Ti twice from a distance of 30 feet and killed Ti.[53] Mr. Baudy determined that Mr. Lowe was dead.[54]

[101] Mr. Brandolini explained the emergency circumstances when Mr. Baudy arrived with Ms. Lucas and had to assess quickly whether to destroy Ti: Mr. Brandolini explained why tranquilizing Ti was not a option where a man's life was in peril or jeopardy at that time. Tr. 811-812. Mr. Brandolini explained why getting Ti into another cage was not an option at that point. Tr. 812.

[102] Mr. Brandolini: I mean you know you use what you have available at the time. There is no way to put the cat back up into another cage because, you know, if a cat's excited, one, he's not going to go into the cage and in that instance there, from what I read of Lesa's (Ms. Lucas's) statement, they put him in #3 because they couldn't get him in #4. Well, if they couldn't get him in #4, #3 had a hole in the cage, it would not matter if the cat went inside. He'd come right back on top of Vince again. You know it's just a complete circle around. And if they put it in #1, it's not necessarily that -- the door was supposedly broke at that time between 1 and 2 -- then there was no way to contain the cat. Tr. 812:5-18.

[103] Mr. Baudy's decision to fire his rifle to kill Ti, in order to access Mr. Lowe without being exposed to attack by Ti, was reasonable and appropriate. Mr. Baudy was a skilled marksman and could expect to shoot accurately from that distance to kill Ti without causing Ti to

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[51] Tr. 1501:22.

[52] Tr. 1501:24 - 1503:10-16.

[53] Tr. 1504:9-12; CX 8, 9; Tr. 1150:18-19.

[54] Tr. 1544:19-23; 437:9-13.

suffer. [It goes without saying that the situation Mr. Baudy confronted should never have happened in the first place.]

[104] In hindsight, Ti could have been left alive. Mr. Lowe was already dead, and access to his body could have been achieved by spending enough time to contain or immobilize Ti. Ms. Lucas had left the walk-in door to Den 1 open, but that door could have been closed. (The walk-in door between Den 2 and Den 1 was closed.) Tr. 433.

[105] Mr. Baudy had no opportunity to puzzle through all those factors, which were not clear upon his arrival. Consequently, under the circumstances, I find that Mr. Baudy's decision to use a gun to kill Ti was reasonable and appropriate.

[106] Respondents' Veterinarian Plan dated June 11, 2001 provided for Mr. Baudy to euthanize.[55]

[107] The necropsy (autopsy) of the tiger revealed that the second 22 Magnum bullet had penetrated Ti's cranial skull and fragmented inside achieving the desired result of instantaneous unconsciousness of the tiger.[56] The second shot penetrated the skull about one and one-half inches above the right eye.[57]

[108] APHIS is concerned with the first shot with the 22 Magnum, the non-fatal shot, fired from a distance of up to 30 feet according to Mr. Baudy, aimed at Ti's neck (spinal cord).

[109] Mr. Baudy described the details of the shooting variously, and I include here what I regard as reliable:
ROBERT BAUDY
A. . . .I had to pick very carefully and very quickly because the animal was in fast motion. And so I waited until he turned to my right and went to the left, and made sure there was no traffic on [route] 48, and I had to do that in seconds, and then I shot.
Tr. 1143:3-7.
Q. How long between shots?

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[55] CX 22, page 3, D.

[56] CX 13, page 3 ". . .extensively fragmented projectiles within the head"

[57] CX 13, 38. Tr. 65:24 – 67:22, 71:17-23.

A. It was the same fraction of a second. The gun is a semi-automatic.
Tr. 1143:17-19.
Q. When Ti was shot and dropped, do you have an opinion as to whether the tiger felt any pain from those two bullet wounds?
A. Not at all. It lasted a fraction of a second, and the tiger dropped just like a switch, on, off. Lying dead.
Tr. 1162:12-17.
A. Well, he dropped dead in his tracks. I mean there was no convulsion or nothing, no reaction. And we must keep in mind I've destroyed lots of animals always, and normally one single brain shot for 40 years.
Tr. 1163:3-7.
A. . . . the tiger was in the exercise cage and was moving quickly toward me. I was standing outside the cage, approximately 30 feet from the animal. I immediately fired a neck shot first, and the tiger moved about 40 feet from the first shot and was coming at me when I dropped him with a brain shot.
Tr. 1308:4-9.
Q. . . . is it your testimony here today that the tiger did not move after you fired the first shot? Yes or no?
A. There was a slight motion, you know. . .
Tr. 1312: 16-20.
Q. How much motion was there?
A. I would say, in distance, about 3 feet.
Tr. 1313:7-11.
Q. Mr. Baudy, was the tiger coming at you when you fired the second shot --- yes or no?
A. No. The tiger was in a profile position when I shot him.
Tr. 1314:10-13
A. The tiger was very excited, and in a killing mood. I got the first shot into the neck. He did not fall. He got more aggravated, and came around. I then I shot him . . . Both shots were less than two seconds. He dropped and was dead.
CX 8, Tr. 1324:19-21.
A. My intention was to have the neck shot because a neck shot, if it is done right in the spine would have basically the same effect as a brain shot.
Q. But the first shot had that effect?
A. It happened in a fraction of a second.
Q. And so was there movement of the animal from profile to head on between the shots?

A. No, the tiger was coming extremely erratic, he was galloping with the head towards me, that when he would move to the end of the run he had to turn. And so I had to very quickly make up my mind when I would destroy and where I would destroy the animal.
Tr. 1503:2-14.

[110] Considering the various versions of the timing and aiming point of the first shot, I find that Mr. Baudy intended that his first shot be a neck shot when the tiger was in profile at a distance of approximately 30 feet. The first shot was not fatal and the tiger was then killed with a second shot to the brain. The time between the two shots was very fast, perhaps a fraction of a second, up to two seconds. Mr. Baudy's testimony was that after the first shot, and before the second shot, the tiger, which was at a distance from him of - variously from 3 feet to 40 feet, continued to move toward him. I believe the testimony of those witnesses who opined that Ti probably felt no pain from the bullets. While Mr. Baudy was an extremely proficient marksman, I must conclude that during the interval between the two shots, brief as it was, Ti was wounded, not euthanized. Consequently, I find that the Respondents were in violation of 9 C.F.R. § 2.40(b)(4) for failure to follow the Veterinary Plan for euthanization.

HANDLING DURING PUBLIC EXHIBITION

[111] APHIS asks me to find that there was "public exhibition" and a "general viewing public" at Respondents' compound on July 31, 2001. Taking the evidence as a whole, I do not so find.

[112] Consequently, there are four alleged violations that I conclude were **not** proved by a preponderance of the evidence:

the alleged violation of 9 C.F.R. § 2.131(b)(1) on July 31, 2001 regarding handling during public exhibition (requiring sufficient distance or barriers between the general viewing public and the adult male tiger called Ti);

the alleged violation of 9 C.F.R. § 2.131(c)(1) on July 31, 2001 regarding exhibiting (requiring conditions consistent with the good health and well-being of the adult male tiger called Ti);

the alleged violation of 9 C.F.R. § 2.131(c)(2) on July 31, 2001 regarding exhibiting the adult male tiger called Ti (requiring a responsible, knowledgeable, and readily identifiable employee or attendant present at all times during public contact); and

the alleged violation of 9 C.F.R. § 2.131(c)(3) on July 31, 2001 regarding publicly exhibiting the adult male tiger called Ti (requiring the direct control and supervision of a knowledgeable and experienced animal handler).

MR. LOWE AND MS. LUCAS WERE VOLUNTEERS AT RESPONDENTS' COMPOUND

[113] APHIS argues that Mr. Lowe and Ms. Lucas were members of the public.[58] During public exhibition of the animal, 9 C.F.R. § 2.131(b)(1) provides, and the Judicial Officer of USDA has held, that the "exhibited animals must be handled in a manner that assures not only their safety but also the safety of the public."[59]

[114] The Respondents are responsible for supervising their visitors, volunteers, employees, and sub-contractors to the degree necessary to ensure that they utilize the proper equipment and tiger handling procedures as required to protect the animals from unnecessary harm. To the extent that an employee or unpaid volunteer does not follow instructions or has in the past not followed instructions, the employer's duty to closely supervise the work increases.[60] Mr. Lucas, a volunteer, was under Mr. Baudy's control.[61] The Respondents had some awareness that Mr. Lowe was careless,[62] reckless, and disobedient.[63]

[115] The Respondents contend that Mr. Lowe and Ms. Lucas were not members of the public. I agree. The evidence proves that they were

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[58] APHIS's brief at p. 15.

[59] *The International Siberian Tiger Foundation, et al*. 61 Agric. Dec. 53, 77.

[60] *See* Tr. 126:22 - 127:12, 1157:3-7, 1226:15-23, 1228:1-6, 1397:9-13, 1397:21-24, 1521:5-10.

[61] Tr. 1228:1-6.

[62] Tr. 129:3-10.

[63] Tr. 1230:15-20, 1231:5-6, 1231:17-20, 1232:9-20, 1233:6-10, 1235:3-14, 1237:6 - 1238:7, 1238:19-24, 1239:9 - 1241:25, 1243:13 - 1244:17.

unpaid volunteers[64] who had access to Respondents' compound and to Respondents' animals including Ti in a way that the general public did not have access. Mr. Lowe and Ms. Lucas were in a relationship with the Respondents that is different from that of the general public.

[116] As volunteer workers on Respondents' compound, Mr. Lowe and Ms. Lucas had responsibilities and knowledge that members of the public did not have. There were expectations of Mr. Lowe and Ms. Lucas that would not have been appropriate for the general public.

[117] Prior to May 2001, Mr. Baudy was acquainted with Mr. Lowe, who held a Florida Fish and Game Commission Class II license[65] and owned cougars.

[118] Mr. Lowe and Ms. Lucas came to the Respondents' compound to borrow a "squeeze" cage or transfer cage (a large durable device used for the containment of a animal). Ms. Lucas wanted to apply for a Class I license from the Florida Fish and Game Commission.[66] Mr. Lowe and Ms. Lucas requested the opportunity to perform volunteer work at Respondents' compound, in expectation of the Respondents' certification that Ms. Lucas had acquired 1000 hours of handling large cats. They began coming to the Respondents' compound in approximately June of 2001 to perform various tasks, including facilities maintenance.[67]

[119] Both Mr. Lowe and Ms. Lucas signed "Visitor Liability Release Forms".[68] Entry onto the Respondents' compound was limited and required completion of such a waiver form[69] (and to answer

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[64] Tr. 1228:8-11.

[65] Tr. 85:21.

[66] Tr. 86:24-25.

[67] CX 10a, 10b; Tr. 82:2 - 84:3.

[68] CX 10a, 10b. Mr. Lowe's form (CX 10a) is signed by Vincent Lowe, even though the form is filled out "Vincent T. Williams" and "Vincent T. William."

[69] Tr. 212:6-9. (Vicki Elston) (There is "a document to be signed -- everybody has to sign whether they're a visitor or whether they're a friend or coming for business or (continued...)

questions posed by Mr. Baudy about one's use of alcohol and/or drugs, and criminal record).[70]

[120] The Respondents have used various waiver forms that seek virtually identical information,[71] and the forms are not varied to distinguish visiting members of the public from volunteers or sub-contractors.[72]

[121] APHIS introduced evidence that at least 90 persons have visited, volunteered, or contracted to work at the Respondents' facility since 1994.[73] Here, the volunteers Mr. Lowe and Ms. Lucas were performing services for the Respondents in part in expectation of Ms. Lucas acquiring a Class I certification statement by the Respondents that she had worked 1000 hours with large cats.[74]

[122] Mr. Baudy testified that he has personally instructed over 400 people to handle dangerous animals.[75] Mr. Baudy admitted that the purpose of the waiver forms is not to screen people, but to limit the Respondents' liability.[76] The Respondents had no specific qualifications

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[69](...continued)
whatever.")

[70] Tr. 1372:2-11, 1373:14-16, 1375:2-8.

[71] CX 10a, 10b; Cf. CX 32. *See* Tr. 1382:6 - 1383:18. The driver's license number and the state of driver's license only appear on more recent forms.

[72] The "Volunteer and/or Subcontractor Agreement" and the "Visitor Liability Release Form" are essentially identical, seeking the person's full name, address, phone number, social security number, driver's license, and the state of drivers license. Tr. 1372:22-24, 1289:22 - 1290:15.

[73] CX 32.

[74] Tr. 86:12-23, Tr. 791:-11.

[75] Tr. 1112:11-13.

[76] Tr. 1388:24 - 1389:14.

for entry onto the compound and had no safety training manual, according to Mr. Baudy.[77]

FACILITIES AND OPERATING STANDARDS

[123] **On July 24, 2001 and July 31, 2001, the Respondents willfully violated 9 C.F.R. § 2.100(a), by failing to construct their facilities of such material and of such strength as appropriate for the adult male tiger called Ti, and by failing to ensure that their housing facility for the adult male tiger called Ti was structurally sound and maintained in good repair to protect the Ti from injury and to contain Ti (9 C.F.R. 3.125(a)).**

[124] Section 3.125 of the Standards, in part, provides:

> (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 contain the animals.[78]

[125] The Respondents failed to construct Ti's enclosure with appropriate materials of adequate strength. APHIS Veterinary Medical Officer ("VMO") Robert Brandes testified that he inspected Ti's enclosure on August 2, 2001, and observed, among other things, deteriorated chain-link fencing, decayed wood, a hole in the metal roof caused by rust, and improperly-installed fencing.[79] Dr. Brandes observed "general deterioration of the enclosure and the den holding areas" evidenced by: "deteriorating wood and rotting wood. The portions of the chain link were rotted. The wooden surfaces were not structurally sound any more. They seemed to have discoloration and a general rotting."[80]

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[77] Tr. 1373:5 - 1374:15.

[78] 9 C.F.R. § 3.125(a).

[79] CX 1; Tr. 562:5-7, 562:12-16, 565:21-566:4, 604:7 - 605:3. Dr. Brandes has been an APHIS veterinarian for approximately 11 and a half years, was previously a VMO with the USDA's Food Safety Inspection Service, and was in private practice. Id., 559:18 - 560:9.

[80] Tr. 562:5-7, 562:12-16, CX 1.

[126] The fencing in the enclosure was "severely pitted and rusty," with "holes in the chain link" caused by "metal fatigue due to the deteriorating rust."[81] Dr. Brandes concluded that the hole that Ti came through into Den 2 "was a long-standing hole. . . . It may have not been that big, but it was certainly a hole there, because the integrity of the metal . . . was compromised."[82] Both Dr. Brandes and Ms. Zordan testified that the wire ends were rusty, not newly-broken.[83] The metal roof in Ti's enclosure was "rusted so bad that it just has a hole in it."[84] The enclosure's wooden frames, resting surfaces, and doors were also deteriorated.[85] There were areas of likely wood fungus, the door hinge was rusted and pitted, and the door was rotted.[86] Ti was able to crack a board between Den 2 and Den 3 with his teeth.[87]

[127] APHIS VMO Thomas Callahan had inspected the Respondents' facility on July 24, 2001 and also observed a lack of structural strength.[88]

[128] John Lehnhardt testified that he designs and maintains his animal enclosures to be functional and to provide safety options to shift animals. In contrast, Ti's enclosure did not function because it was not structurally-sound or well-maintained. The enclosure consisted of four

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[81] Tr. 565:15-21, CX 1.

[82] Tr. 566:14-19. CX 16h-16n, 16p (broken chainlink fencing on the left and right side of the wood panel); CX 16t (broken chainlink fencing above and to the right of the cracked wood panel). APHIS Investigator Charmain Zordan accompanied Dr. Brandes during the August 2, 2001, inspection and photographed Ti's enclosure. Tr. 481:21 - 487:6.

[83] Tr. 566:4-14, 482:19-23, 482:7-9.

[84] Tr. 565:21-24, 569:2-5, CX 1, 16o, 16r, 37a at 4.

[85] Tr. 565:24 - 566:4; CX 1, CX 16b -16g.

[86] Tr. 570:23 - 571:9; 571:15-21, CX 16c - 16d.

[87] Tr. 417:8-12, 125:22 - 126:2; CX 16n.

[88] CX 4, 5; Tr. 1582:6 - 1586:16; 1598:2-8, 1598:12-19

"lock down" dens, numbered 1, 2, 3 and 4 (from south to north), plus an outdoor, circular fenced paddock.[89] Each den led directly into its neighboring dens. Mr. Baudy admitted that it was not originally-designed to accommodate tigers.[90] Ti's enclosure was the oldest enclosure at the Respondents' facility.[91] It was made of wood and wire, which had deteriorated over time.

[129] The Respondents failed to maintain Ti's enclosure in good repair to protect Ti from injuries and contain him. The den enclosures were so deteriorated that they could not keep Ti contained. The structural strength of the enclosure was compromised with broken chain link, because "for chain link to work properly, it has to be interwoven. Once you ruin that locking mechanism, it can spread very easily."[92] Dr. Brandes also identified gaps between the paddock fence and the ground footers, which could permit escape.[93] Mr. Brandolini agreed that there were gaps.[94] Dr. Brandes concluded that the paddock could not adequately contain a tiger.[95]

[130] Respondents' compound lacked appropriate facilities because it was inadequately maintained, non-functional for effective containment of large felines (tigers) and lacked adequate structural strength to contain the tiger Ti.

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[89] CX 15, 16; Tr. 461:23 - 491:9.

[90] Tr. 1246:21-24; 1254:7-8; 1254:17-19, 22-23.

[91] Tr. 1251:22 - 1252:1.

[92] CX 1, 15; Tr. 568:6-10, 567:12-15, 567:22 - 568:3; *see also* CX 17d; Tr. 604:7 - 605:3 (improperly installed cattle panel).

[93] CX 17a - 17c, Tr. 572:6-9, CX 1.

[94] Tr. 95:23 - 96:5; 97:16; CX 17e (Lucas) (Ti grabbed and lifted the paddock fencing with his claw).

[95] Tr. 572:22 - 573:1.

[131] APHIS argues that even Mr. Baudy considered the paddock fence insufficient to contain Ti.[96] I believe APHIS's counsel misunderstood Mr. Baudy's testimony. The walk-in door that Ms. Lucas left open, to Den 1, was the reason for Mr. Baudy's concern that Ti might get out, as I understand the evidence.[97] [98] With the evidence presented by the APHIS VMOs, APHIS did prove that the paddock area of Ti's enclosure was enclosed by a structurally-unsound fence.

[132] **On July 24, 2001, July 31, 2001, and August 2, 2001, the Respondents willfully violated 9 C.F.R. § 2.100(a), by failing to enclose their outdoor housing facilities by a perimeter fence of sufficient height (eight feet high) to keep animals and unauthorized persons out, and to serve as a secondary containment system for animals housed inside the facility (9 C.F.R. § 3.127(d))**.

[133] Section 3.127 of the Standards, in part, provides:

> (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 person 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

[96] Tr. 1544. (Mr. Baudy testified, "As soon I realized that Mr. Lowe was dead, the only way I could get to him, by then I realized he was dead. But I had to destroy the tiger, because I didn't know if the tiger could get out of the cage, attack Lesa, attack me, and it didn't make me happy to destroy this animal, not at all. But it is something that I had to do in my own conscience.")

[97] Tr. 1544:19-23, 437:9-13, 1541:7-9, 1341:18 - 1342:19; S*ee also* Answer, at ¶ 9.

[98] Tr. 1544:19-23. Dr. Brandes identified broken chain link and gaps between the paddock fence and the ground footers which could permit escape. Tr. 572:6-9, 568:6-10, 567:12-15, 567:22 - 568:3; 604:7 - 605:3 (providing an example of improperly installed cattle panel); CX 1, 15, 17c - 17d.

> in the facility and so that it can function as a secondary containment system for the animals in the facility....[99]

[134] The Respondents failed to enclose their outdoor facilities with a perimeter fence of sufficient height to keep animals and unauthorized persons out and to serve as secondary containment system for animals inside the facility. Dr. Brandes identified numerous areas of deteriorated, rusted, and broken perimeter fencing, and testified that it would not contain a 300-pound tiger. Tr. 575-76, CX 1. Both Dr. Brandes and Ms. Zordan testified that the portions of the fencing that they photographed on August 2, 2001 were representative of the overall, long-term deterioration.[100]

ANIMAL HEALTH AND HUSBANDRY STANDARDS

[135] **On July 24, 2001, the Respondents willfully violated 9 C.F.R. § 2.100(a), by failing to keep premises clean and in good repair in order to protect the animals contained therein and to facilitate the prescribed husbandry practices set forth in subpart F of the Standards (9 C.F.R. § 3.131(c))**.

[136] Section 3.131 of the Standards, in part, provides:

> (c) *Housekeeping*. Premises (buildings and grounds) shall be kept clean and in good repair in order to protect the animals from

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[99] 9 C.F.R. § 3.127(d).

[100] *Id.*; Tr. 508:21 - 509:1, 575:23 - 576:4. The Respondents assert that they were given a correct date and corrected the perimeter fence problem after July 31, 2001. Tr. 1137:15-19; 842:1 - 863:17; 892:20 - 897:9, 898:25 - 906:8; 925:17 - 926:17, 584:3-18, 910:4-6. That an inspection report contains a correction date, and the Respondents may have taken remedial action, does not mean that there was no violation.
A correction date does not exculpate a Respondent from the violation, and while corrections are to be encouraged and may be taken into account when determining the sanction to be imposed, a correction does not eliminate the fact that a violation occurred and does not provide a basis for dismissal of the alleged violation. *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 274 (1998); *In re John D. Davenport*, 57 Agric. Dec. 189, 219 (1998); *In re Samuel Zimmerman*, 56 Agric. Dec. 1419, 1456 n.8 (1997), *aff'd*, 173 F.3d 422 (1998); *In re David M. Zimmerman*, 56 Agric. Dec. 433, 466 (1997), *review denied*, 156 F.3d 1227 (1988), *In re Volpe Vito, Inc.*, 56 Agric. Dec. 269, 272-73 (1997) (Order Denying Pet. for Recons.), *aff'd*, 172 F.3d 51 (1999) (unpublished); *In re John Walker*, 56 Agric. Dec. 350, 367 (1997); *In re Mary Meyers*, 56 Agric. Dec. 322, 348 (1997); *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 (7th Cir. 1995) (not to be cited per 7th Circuit Rule 53(b)(2)); *In re George Russell*, 60 Agric. Dec. 41 (2001).

> 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.[101]

[137] The Respondents failed to keep their premises clean and in good repair. The photographs of the facility taken on August 2, 2001 reveal, among other things, that the enclosure in which the Respondents housed Ti was neither clean nor in good repair.[102] Dr. Callahan noted that there were "many ants" in the food preparation room,[103] a problem that the Respondents concede.[104]

[138] **On July 31, 2001, the Respondents willfully violated 9 C.F.R. § 2.100(a), by failing to use a sufficient number of adequately trained employees to maintain the professionally acceptable level of husbandry practices set forth in subpart F of the Standards, under a supervisor who has a background in animal care (9 C.F.R. § 3.132)**.

[139] By allowing Mr. Lowe to proceed with the work inside Ti's enclosure on July 31, 2001, when Mr. Brandolini was not there, the Respondents lost the opportunity to have Mr. Brandolini supervise. The Respondents lost their other opportunity for supervision when Mr. Baudy failed to supervise. The Respondents had no other potential supervisors with a background in animal care.

[140] Mr. Lowe was not adequately trained for the task he undertook, of making repairs within Ti's enclosure while Ti was still within his enclosure.

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[101] 9 C.F.R. § 3.131(c).

[102] CX 16.

[103] CX 4.

[104] Tr. 884:15-21; 818:5-7, 877:16 - 878:7, CX 7. *Compare In re Volpe Vito, Inc.*, 56 Agric. Dec. 116, 211-12 (1997) (where items similar to those described in Mr. Brandolini's list, including the presence of paper and wood around the facility, constituted a violation of section 3.131(c) of the Regulations).

[141] The Respondents failed to use a sufficient number of adequately trained employees to maintain the professionally acceptable level of husbandry practices. This is evidenced by how much work there was to be done and by how few people, paid or volunteer, were on the Respondents' compound to do the work. Candy Watson and a butcher were the only paid employees in July 2001. Tr. 89:20 - 90:3, 1014:5-18, 1074. While Candy Watson may have been adequately trained for the work she did, feeding and watering and cleaning, there was so much more to be done. Neither Candy Watson nor the butcher testified at the hearing. (On the ninth day of the hearing, the Respondents considering calling Ms. Watson as a witness, but she was not present, and a delay would have resulted. At that point, I could not accommodate a delay. Tr. 1545-47.)

PRIOR ENFORCEMENT ACTION RESULTED IN CONSENT DECISION

[142] This is the second enforcement action brought against Respondents Robert E. Baudy and Rare Feline Breeding for failing to comply with the Act, the Regulations and the Standards. Respondents Robert E. Baudy and Rare Feline Breeding were the respondents in In re Rare Feline Breeding Center, Inc., and Robert E. Baudy.[105]

[143] At the hearing in this case, Mr. Baudy contended that the earlier case concerned "some dirty water bowl[s], what I call minor things."[106] Mr. Baudy minimized the alleged violations in that case. The complaint alleged serious, multiple violations of the veterinary care and record-keeping requirements[107] and noncompliance with the minimum standards for housing and providing environmental enrichment for non-human primates, and for housing, feeding, watering, sanitation, and minimum employees for felines.[108]

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[105] 53 Agric. Dec. 635 (March 14, 1994) (Animal Welfare Act Docket No. 93-36) (consent decision).

[106] Tr. 1120-1121.

[107] 9 C.F.R. § 2.40, 2.75.

[108] 9 C.F.R. § 2.100, 3.78, 3.81, 3.84, 3.125, 3.127, 3.129, 3.130, 3.131, 3.132). *See* CX 31 (complaint and consent decision).

[144] The consent decision signed by Mr. Baudy for himself and on behalf of Rare Feline Breeding Center, Inc. required Mr. Baudy and Rare Feline Breeding to construct and maintain structurally sound housing facilities for animals to protect the animals from injury and contain them securely, to keep the premises clean and in good repair, to employ a sufficient number of adequately-trained employees and to establish and maintain programs of disease control and prevention and euthanasia.[109] Mr. Baudy and Rare Feling Breeding had not fully complied with that order, and remained in partial non-compliance with the Regulations and Standards, as of Dr. Callahan's inspection March 21, 2002.[110]

Findings of Fact and Conclusions

[145] The Secretary of Agriculture has jurisdiction.

[146] Respondent Savage Kingdom, Inc., is a Florida domestic stock corporation that has the business address of Post Office Box 100, Center Hill, Florida 33514, and that has as its agent for service of process (Respondent) Robert E. Baudy, State Highway 48, Post Office Box 100, Center Hill, Florida 33514. At all times mentioned herein, said Respondent was operating as a dealer, as that term is defined in the Act and the Regulations, under AWA license number 58-A-0106, issued to "SAVAGE KINGDOM, INC."

[147] Respondent Rare Feline Breeding Center, Inc., is an inactive Florida nonprofit corporation that has the business address of Post Office Box 100, Center Hill, Florida 33514, and that has as its agent for service of process Respondent Robert E. Baudy, State Highway 48, Post Office Box 100, Center Hill, Florida 33514. At all times mentioned herein, said Respondent was operating as a dealer (CX 29, Tr. 1549, CX 30), as that term is defined in the Act and the Regulations.

[148] Respondent Robert E. Baudy is an individual whose business address is Post Office Box 100, Center Hill, Florida 33514. At all times mentioned herein, said Respondent was operating as a dealer, as that

[109] Id.

[110] Tr. 1604:16-21.

term is defined in the Act and the Regulations, and was a principal in or proprietor of Respondents Savage Kingdom, Inc., and Rare Feline Breeding Center, Inc.

[149] On **July 31, 2001**, the Respondents willfully violated 9 C.F.R. § 2.131(a)(1) by failing to **handle the adult male tiger called Ti carefully, causing Ti trauma, physical harm, behavioral stress, and unnecessary discomfort**, and placing Ti in a position where Ti was able to attack and kill Vincent Lowe, and where Ti was killed shortly thereafter. *See* paragraphs [27] through [53].

[150] On **July 31, 2001**, the Respondents willfully violated 9 C.F.R. § 2.40(b)(1) by failing to establish and maintain programs of adequate veterinary care that included the availability of **appropriate facilities** (specifically, the Respondents housed the adult male tiger called Ti in inadequately maintained enclosures), and **appropriate personnel** (specifically, the Respondents allowed unqualified persons to handle the adult male tiger called Ti), to comply with the Regulations and Standards. *See* paragraphs [54] through [77].

[151] On **July 31, 2001**, the Respondents willfully violated 9 C.F.R. § 2.40(b)(2) by failing to establish and maintain programs of adequate veterinary care that included the use of **appropriate methods to prevent injuries** (specifically, the Respondents allowed inadequately trained volunteers with inadequate supervision to handle the adult male tiger called Ti). *See* paragraphs [78] through [84].

[152] On **July 31, 2001**, the Respondents willfully violated 9 C.F.R. § 2.40(b)(4) by failing to establish and maintain programs of adequate veterinary care that included adequate guidance to personnel involved in the care and use of animals regarding **handling, tranquilization, and euthanasia**, each concerning adult male tigers such as Ti. *See* paragraphs [85] through [110].

[153] On **July 24, 2001 and July 31, 2001**, the Respondents willfully violated 9 C.F.R. § 2.100(a), by failing to **construct their facilities of such material and of such strength** as appropriate for the adult male tiger called Ti, and by failing to ensure that their housing facility for the adult male tiger called Ti was **structurally sound and maintained in good repair** to protect the Ti from injury and to contain Ti (9 C.F.R. 3.125(a)). *See* paragraphs [123] through [131].

[154] On **July 24, 2001, July 31, 2001, and August 2, 2001**, the Respondents willfully violated 9 C.F.R. § 2.100(a), by failing to enclose their outdoor housing facilities by a **perimeter fence** of sufficient height (eight feet high) to keep animals and unauthorized persons out, and to serve as a secondary containment system for animals housed inside the facility (9 C.F.R. § 3.127(d)). *See* paragraphs [132] through [134].

[155] On **July 24, 2001**, the Respondents willfully violated 9 C.F.R. § 2.100(a), by failing to **keep premises clean and in good repair** in order to protect the animals contained therein and to facilitate the prescribed husbandry practices set forth in subpart F of the Standards (9 C.F.R. § 3.131(c)). *See* paragraphs [135] through [137].

[156] On **July 31, 2001**, the Respondents willfully violated 9 C.F.R. § 2.100(a), by failing to use a **sufficient number of adequately trained employees to maintain the professionally acceptable level of husbandry practices** set forth in subpart F of the Standards, **under a supervisor who has a background in animal care** (9 C.F.R. § 3.132). *See* paragraphs [138] through [141].

[157] Respondents Robert E. Baudy and Rare Feline Breeding Center, Inc. were respondents in *In re Rare Feline Breeding Center, Inc., and Robert E. Baudy,* 53 Agric. Dec. 635 (March 14, 1994) (Animal Welfare Act Docket No. 93-36) (consent decision). Pursuant to the consent decision and order, Mr. Baudy and Rare Feline Breeding were specifically ordered to cease and desist from, among other things, "[f]ailing to construct and maintain housing facilities for animals so that they are structurally sound and in good repair in order to protect the animals from injury, contain them securely, and restrict other animals from entering," "[f]ailing to keep the premises clean and in good repair . . .," "[f]ailing to utilize a sufficient number of trained employees to maintain the prescribed level of husbandry practices," and "[f]ailing to establish and maintain programs of disease control and prevention, euthanasia . . . ." *See* paragraphs [142] through [144].

[158] During the hearing it was clear that the Respondents had invested much time and money in improving the enclosures at their compound, including the perimeter fence. *See* Mr. Brandolini's testimony. During Mr. Brandolini's years at Respondents' compound, he had never experienced any escape from Respondents' compound.

The affection and respect shown Mr. Baudy by volunteers such as Mr. Brandolini and Ms. Elston, and by big cat handling expert Baron Julius von Uhl, were evident at the hearing. What outweighs all other evidence, though, is all that happened on July 31, 2001. For the purpose of the Animal Welfare Act, I find the Respondents responsible for all that happened on July 31, 2001, and I conclude that Animal Welfare Act license revocation and the related remedies that APHIS requested are necessary, and any lesser remedies would not be adequate.

Order

[159] Animal Welfare Act license number 58-A-0106, issued to Respondent "SAVAGE KINGDOM, INC." is **revoked** effective on the day after this Decision becomes final. *See* paragraph [165].

[160] Respondent Rare Feline Breeding Center, Inc. will not be licensed during the revocation described in paragraph [159], because Respondent Rare Feline Breeding Center, Inc. was Respondent Savage Kingdom, Inc.'s agent that was responsible for or participated in the violations upon which Savage Kingdom, Inc.'s license revocation is based. *See* section 2.9 of the Regulations (9 C.F.R. § 2.9).

[161] Respondent Robert E. Baudy will not be licensed during the revocation described in paragraph [159], because Respondent Robert E. Baudy was Respondent Savage Kingdom, Inc.'s officer and agent who was responsible for or participated in the violations upon which Savage Kingdom, Inc.'s license revocation is based. *See* section 2.9 of the Regulations (9 C.F.R. § 2.9).

[162] The following **cease and desist** provisions of this Order (paragraphs
[163] and [164]) shall be effective on the day after this Decision becomes final. *See* paragraph [165].

[163] Respondent Savage Kingdom, Inc., Respondent Rare Feline Breeding Center, Inc., and Respondent Robert E. Baudy, their 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.

[164] Respondent Savage Kingdom, Inc., Respondent Rare Feline Breeding Center, Inc., and Respondent Robert E. Baudy, their agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from engaging in any activity for which a license is required under the Act or Regulations without being licensed as required.

Finality

[165] This Decision and Order shall be final without further proceedings 35 days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk 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.

* * *

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

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In re: MARJORIE WALKER, d/b/a LINN CREEK KENNEL.
AWA Docket No. 04-0021.
Decision and Order.
Filed August 10, 2006.

AWA – Animal Welfare Act – Failure to file timely answer – Default decision – Operative pleading – Ability to pay civil penalty – Cease and desist order – Civil penalty – License revocation.

The Judicial Officer affirmed Administrative Law Judge Peter M. Davenport's (ALJ) decision concluding Marjorie Walker (Respondent) violated the regulations and standards issued under the Animal Welfare Act (Regulations and Standards). The Judicial Officer found Respondent failed to file a timely answer to the Amended Complaint and held, under the Rules of Practice (7 C.F.R. §§ 1.136(c), .139), Respondent was deemed to have admitted the allegations of the Amended Complaint and waived opportunity for hearing. The Judicial Officer rejected Respondent's request for a reduction of the civil penalty assessed by the ALJ based on her inability to pay the civil penalty. The Judicial Officer stated the Animal Welfare Act (7 U.S.C. § 2149(b)) sets forth factors that must be considered when determining the amount of the civil penalty to be assessed against a respondent for violations of the Animal Welfare Act and the Regulations and Standards, and a respondent's ability to pay the civil penalty is not one of those factors. Therefore, Respondent's inability to pay the civil penalty was not a basis for reducing the civil penalty. The Judicial Officer ordered Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards, assessed Respondent a $14,300 civil penalty, and revoked Respondent's Animal Welfare Act license.

Sharlene Deskins for Complainant.
Respondent, 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 July 23, 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]. On February 6, 2006, Complainant filed an Amended Complaint.

Complainant alleges Marjorie Walker, d/b/a Linn Creek Kennel [hereinafter Respondent], willfully violated the Regulations and Standards on March 6, 2001, November 5, 2001, November 15, 2001, November 27, 2001, January 16, 2002, March 18, 2002, April 1, 2002, July 18, 2002, January 21, 2004, July 29, 2004, August 19, 2004, February 4, 2005, March 10, 2005, August 31, 2005, October 13, 2005, November 18, 2005, and December 1, 2005 (Amended Compl. ¶¶ II-XVIII). The Hearing Clerk served Respondent with the Amended Complaint and a service letter on February 16, 2006.[1] Respondent 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 April 11, 2006, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed Complainant's Second Motion for Adoption of Proposed Decision and Order [hereinafter Motion for Default Decision] and Proposed Decision and Order by Reason of Default [hereinafter Proposed Default Decision]. The Hearing Clerk served Respondent with Complainant's Motion for Default Decision, Complainant's Proposed Default Decision, and a service letter on April 19, 2006.[2] Respondent failed to file objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision within 20 days after service, as required by section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

On May 25, 2006, Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] issued a Decision and Order Upon Admission of Facts by Reason of Default [hereinafter Initial Decision]: (1) concluding Respondent willfully violated the Animal Welfare Act and the Regulations and Standards, as alleged in the Amended Complaint; (2) ordering Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; (3) assessing Respondent a $15,000 civil penalty; and (4) revoking Respondent's Animal Welfare Act license (Initial Decision at 2-13).

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[1]United States Postal Service Domestic Return Receipt for Article Number 7003 1010 0003 0642 2421.

[2]United States Postal Service Domestic Return Receipt for Article Number 7003 3110 0003 7112 2762.

On June 30, 2006, Respondent appealed the ALJ's Initial Decision to the Judicial Officer. On July 19, 2006, Complainant filed a response to Respondent's appeal petition. On July 24, 2006, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision. Based upon a careful review of the record, I affirm the ALJ's Initial Decision, except for two of the ALJ's conclusions, which I discuss in this Decision and Order, *infra*.

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[.]

§ 2146. Administration and enforcement by Secretary

(a) Investigations and inspections

The Secretary shall make such investigations or inspections as he deems necessary to determine whether any dealer, exhibitor, intermediate handler, carrier, research facility, or operator of an auction sale subject to section 2142 of this title, has violated or is violating any provision of this chapter or any regulation or standard issued thereunder, and for such purposes, the Secretary shall, at all reasonable times, have access to the places of business and the facilities, animals, and those records required to be kept pursuant to section 2140 of this title of any such dealer, exhibitor, intermediate handler, carrier, research facility, or operator of an auction sale. The Secretary shall inspect each research facility at least once each year and, in the case of deficiencies or deviations from the standards promulgated under this chapter, shall conduct such follow-up inspections as may be necessary until all deficiencies or deviations from such standards are corrected. The Secretary shall promulgate such rules and regulations as he deems

necessary to permit inspectors to confiscate or destroy in a humane manner any animal found to be suffering as a result of a failure to comply with any provision of this chapter or any regulation or standard issued thereunder if (1) such animal is held by a dealer, (2) such animal is held by an exhibitor, (3) such animal is held by a research facility and is no longer required by such research facility to carry out the research, test, or experiment for which such animal has been utilized, (4) such animal is held by an operator of an auction sale, or (5) such animal is held by an intermediate handler or a carrier.

§ 2149. Violations by licensees

(a) Temporary license suspension; notice and hearing; revocation

If the Secretary has reason to believe that any person licensed as a dealer, exhibitor, or operator of an auction sale subject to section 2142 of this title, has violated or is violating any provision of this chapter, or any of the rules or regulations or standards promulgated by the Secretary hereunder, he may suspend such person's license temporarily, but not to exceed 21 days, and after notice and opportunity for hearing, may suspend for such additional period as he may specify, or revoke such license, if such violation is determined to have occurred.

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

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

given notice and opportunity for a hearing with respect to the alleged violation, and the order of the Secretary assessing a penalty and making a cease and desist order shall be final and conclusive unless the affected person files an appeal from the Secretary's order with the appropriate United States Court of Appeals. The Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations. 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), 2146(a), 2149(a)-(c), 2151.

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:

(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 E—IDENTIFICATION OF ANIMALS

§ 2.50 Time and method of identification.

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

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

. . . .

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

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

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

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

. . . .

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

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

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

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

SUBPART G—RECORDS

§ 2.75 Records: Dealers and exhibitors.

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

(i) The name and address of the person from whom a dog or cat was purchased or otherwise acquired whether or not the person is required to be licensed or registered under the Act;

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

(iii) The vehicle license number and State, and the driver's license number (or photographic identification card for nondrivers issued by a State) and State of the person, if he or she is not licensed or registered under the Act;

(iv) The name and address of the person to whom a dog or cat was sold or given and that person's license or registration number if he or she is licensed or registered under the Act;

(v) The date a dog or cat was acquired or disposed of, including by euthanasia;

(vi) The official USDA tag number or tattoo assigned to a dog or cat under §§ 2.50 and 2.54;

(vii) A description of each dog or cat which shall include:

(A) The species and breed or type;

(B) The sex;

(C) The date of birth or approximate age; and

(D) The color and any distinctive markings;

(viii) The method of transportation including the name of the initial carrier or intermediate handler or, if a privately owned vehicle is used to transport a dog or cat, the name of the owner of the privately owned vehicle;

(ix) The date and method of disposition of a dog or cat, e.g., sale, death, euthanasia, or donation.

. . . .

§ 2.78 Health certification and identification.

(a) No dealer, exhibitor, operator of an auction sale, broker, or department, agency, or instrumentality of the United States or of any State or local government shall deliver to any intermediate handler or carrier for transportation, in commerce, or shall transport in commerce any dog, cat, or nonhuman primate unless the dog, cat, or nonhuman primate is accompanied by a health certificate executed and issued by a licensed veterinarian. The health certificate shall state that:

(1) The licensed veterinarian inspected the dog, cat, or nonhuman primate on a specified date which shall not be more than 10 days prior to the delivery of the dog, cat, or nonhuman primate for transportation; and

(2) when so inspected, the dog, cat, or nonhuman primate appeared to the licensed veterinarian to be free of any infectious disease or physical abnormality which would endanger the animal(s) or other animals or endanger public health.

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.

. . . .

§ 2.130 Minimum age requirements.

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

PART 3—STANDARDS

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

FACILITIES AND OPERATING STANDARDS

§ 3.1 Housing facilities, general.

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

. . . .

(c) Surfaces–(1) *General requirements*. The surfaces of housing facilities–including houses, dens, and other furniture-type fixtures and objects within the facility–must be constructed in a manner and made of materials that allow them to be readily cleaned and sanitized, or removed or replaced when worn or soiled. Interior surfaces and any surfaces that come in contact with dogs or cats must:

. . . .

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

. . . .

(3) *Cleaning*. Hard surfaces with which the dogs or cats come in contact must be spot-cleaned daily and sanitized in accordance with § 3.11(b) of this subpart to prevent accumulation of excreta and reduce disease hazards. Floors made of dirt, absorbent bedding, sand, gravel, grass, or other similar material must be raked or spot-cleaned with sufficient frequency to ensure all animals the freedom to avoid contact with excreta. Contaminated material must be replaced whenever this raking and spot-cleaning is not sufficient to prevent or eliminate odors, insects, pests, or vermin infestation. All other surfaces of housing facilities must be cleaned and sanitized when necessary to satisfy generally accepted husbandry standards and practices. Sanitization may be done using any of the methods provided in § 3.11(b)(3) for primary enclosures.

. . . .

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

. . . .

§ 3.3 Sheltered housing facilities.

(a) *Heating, cooling, and temperature*. The sheltered part of sheltered housing facilities for dogs and cats must be sufficiently heated and cooled when necessary to protect the dogs and cats from temperature or humidity extremes and to provide for their health and well-being. The ambient temperature in the sheltered part of the facility must not fall below 50 °F (10 °C) for dogs and

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

. . . .

§ 3.4 Outdoor housing facilities.

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

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

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

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

. . . .

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

. . . .

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

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

. . . .

§ 3.6 Primary enclosures.

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

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

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

. . . .

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

(xii) Primary enclosures constructed on or after February 20, 1998 and floors replaced on or after that date, must comply with the requirements in this paragraph (a)(2). If the suspended floor of a primary enclosure is constructed of metal strands, the strands must either be greater than 1/8 of an inch in diameter (9 gauge) or coated with a material such as plastic or fiberglass. The suspended floor of any primary enclosure must be strong enough so that the floor does not sag or bend between the structural supports.

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ANIMAL AND HUSBANDRY STANDARDS

. . . .

§ 3.9 Feeding.

(a) Dogs and cats must be fed at least once each day, except as otherwise might be required to provide adequate veterinary care. The food must be uncontaminated, wholesome, palatable, and of sufficient quantity and nutritive value to maintain the

normal condition and weight of the animal. The diet must be appropriate for the individual animal's age and condition.

§ 3.10 Watering.

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

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

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

(b) *Sanitization of primary enclosures and food and water receptacles. . . .*

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

9 C.F.R. §§ 1.1; 2.40(a)-(b), .50(a)(1), (b)(1), (3), .75(a)(1), .78(a), .100(a), .126(a), .130; 3.1(a), (c)(1)(ii), (3), (e), .3(a), .4(a)(1), (b)(3)-(4), .6(a)(2)(xi), (xii), .9(a), .10, .11(a), (b)(2) (footnotes omitted).

DECISION

Statement of the Case

Respondent 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 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 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 is an individual doing business as Linn Creek Kennel whose address is P.O. Box 107, Gentry, Missouri 64453.

2. Respondent, at all times material to this proceeding, had an Animal Welfare Act license and operated as a "dealer," as defined in the Animal Welfare Act and the Regulations and Standards. As of the date of the issuance of the Amended Complaint, January 12, 2006, Respondent's Animal Welfare Act license was listed as being held in the name of Harold and Marjorie Walker.

3. On December 1, 2005, the United States Department of Agriculture, Animal and Plant Health Inspection Service, inspected Respondent's premises and records and found Respondent had failed to provide adequate veterinary care to several dogs, including, but not limited to:

a. A 6-week old puppy that was observed bumping into walls and that had not had its eyes examined by a veterinarian;

b. Nine dogs that were observed to be visibly thin with visible ribs, prominent pelvic bones, and obvious waist and abdominal tuck

(seven of these dogs also had coats that were thin and patchy and none of the nine dogs had been examined by a veterinarian);

c. Two dogs that had matted coats caked with mud and fecal matter; and

d. Twenty-seven dogs that had excessively long toenails that were affecting the dogs' normal stance. (9 C.F.R. § 2.40(b).)

4. On December 1, 2005, the United States Department of Agriculture, Animal and Plant Health Inspection Service, inspected Respondent's premises and records and found Respondent had failed to identify all dogs on the premises with an official tag or legible tattoo marking acceptable to, and approved by, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture (9 C.F.R. § 2.50(a)(1)).

5. On December 1, 2005, the United States Department of Agriculture, Animal and Plant Health Inspection Service, inspected Respondent's facility and found the following:

a. 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. §§ 2.100(a); 3.1(c)(1)(ii));

b. Hard surfaces with which the dogs come in contact were not spot-cleaned daily to prevent accumulation of excreta and debris and to reduce disease hazards (9 C.F.R. §§ 2.100(a); 3.1(c)(3));

c. Toxic substances, including, but not limited to, bleach and cleaning supplies, were improperly stored in the food preparation area (9 C.F.R. §§ 2.100(a); 3.1(e));

d. The sheltered parts of sheltered housing facilities for dogs were not sufficiently heated to protect the dogs from temperature extremes and to provide for their health and well-being since the heating unit was not working and the temperature inside the building at the time of inspection was 23 °F (9 C.F.R. §§ 2.100(a); 3.3(a));

e. Breeds of dogs that cannot tolerate the prevalent temperatures of the area without stress or discomfort were kept in outdoor facilities without specific approval by the attending veterinarian (9 C.F.R. §§ 2.100(a); 3.4(a)(1));

f.Dogs in outdoor housing facilities were not provided with adequate protection from the elements since wind breaks were not provided for at least 30 outdoor enclosures containing approximately 70 dogs (9 C.F.R. §§ 2.100(a); 3.4(b)(3));

g. 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 °F

and additional bedding when the temperature is below 35 °F (9 C.F.R. §§ 2.100(a); 3.4(b)(4));

h. Dogs in outdoor housing facilities were not provided with adequate protection from the elements since the structures available were either too small to hold all of the dogs or not sufficient in number to allow all dogs to move inside in a normal manner (9 C.F.R. §§ 2.100(a); 3.4(b));

i. Dogs were not provided with food of sufficient quantity and nutritive value to maintain the normal condition and weight of the animals since the amount of food available would only last for another day and no arrangements were made to bring more food to the facility (9 C.F.R. §§ 2.100(a); 3.9(a));

j. Dogs were not provided with potable water since the water in their dishes in all outdoor enclosures and one of the sheltered facilities was frozen and the dogs were not offered water as often as necessary to ensure their health and well-being (9 C.F.R. §§ 2.100(a); 3.10); and

k. Primary enclosures for dogs were not kept clean since the majority of outdoor and sheltered facilities had an accumulation of fecal matter that was estimated to be more than the amount of fecal matter that accumulates in 24 hours (9 C.F.R. §§ 2.100(a); 3.11(a)).

6. On November 18, 2005, Respondent refused to permit a United States Department of Agriculture, Animal and Plant Health Inspection Service, employee to conduct a complete inspection of her animal facility, since no facility representative was available to allow a United States Department of Agriculture, Animal and Plant Health Inspection Service, employee to enter Respondent's facility (7 U.S.C. § 2146(a); 9 C.F.R. § 2.126(a)).

7. On October 13, 2005, Respondent refused to permit a United States Department of Agriculture, Animal and Plant Health Inspection Service, employee to conduct a complete inspection of her animal facility, since no facility representative was available to allow a United States Department of Agriculture, Animal and Plant Health Inspection Service, employee to enter Respondent's facility (7 U.S.C. § 2146(a); 9 C.F.R. § 2.126(a)).

8. On August 31, 2005, Respondent refused to permit a United States Department of Agriculture, Animal and Plant Health Inspection Service, employee to conduct a complete inspection of her animal facility, since no facility representative was available to allow a United States Department of Agriculture, Animal and Plant Health Inspection Service, employee to enter Respondent's facility (7 U.S.C. § 2146(a); 9 C.F.R. § 2.126(a)).

9. On March 10, 2005, the United States Department of Agriculture, Animal and Plant Health Inspection Service, inspected Respondent's premises and records and found Respondent could not locate the program of veterinary care or establish the last date that a veterinarian had visited Respondent's facility (9 C.F.R. § 2.40(a)).

10. On March 10, 2005, the United States Department of Agriculture, Animal and Plant Health Inspection Service, inspected Respondent's facility and found primary enclosures for dogs were not constructed so that they provide sufficient space to allow each animal to turn about freely, to stand, sit, and lie in a comfortable, normal position, and to walk in a normal manner (9 C.F.R. §§ 2.100(a); 3.6(a)(2)(xi)).

11. On February 4, 2005, Respondent refused to permit a United States Department of Agriculture, Animal and Plant Health Inspection Service, employee to conduct a complete inspection of her animal facility, since no facility representative was available to allow a United States Department of Agriculture, Animal and Plant Health Inspection Service, employee to enter Respondent's facility (7 U.S.C. § 2146(a); 9 C.F.R. § 2.126(a)).

12. On August 19, 2004, the United States Department of Agriculture, Animal and Plant Health Inspection Service, inspected Respondent's facility and found the dogs in outdoor housing facilities were not provided with adequate protection from the elements since wind and rain breaks were not provided for outdoor enclosures (9 C.F.R. §§ 2.100(a); 3.4(b)(3)).

13. On July 29, 2004, Respondent refused to permit a United States Department of Agriculture, Animal and Plant Health Inspection Service, employee to conduct a complete inspection of her animal facility, since no facility representative was available to allow a United States Department of Agriculture, Animal and Plant Health Inspection Service, employee to enter Respondent's facility (7 U.S.C. § 2146(a); 9 C.F.R. § 2.126(a)).

14. On January 21, 2004, the United States Department of Agriculture, Animal and Plant Health Inspection Service, inspected Respondent's facility and found the dogs in outdoor housing facilities were not provided with adequate protection from the elements since wind and rain breaks were not provided for outdoor enclosures (9 C.F.R. §§ 2.100(a); 3.4(b)(3)).

15. On March 6, 2001, the United States Department of Agriculture, Animal and Plant Health Inspection Service, inspected Respondent's premises and records and found Respondent had transported puppies in

interstate commerce without valid health certificates (9 C.F.R. § 2.78(a)).

16.On November 5, 2001, the United States Department of Agriculture, Animal and Plant Health Inspection Service, inspected Respondent's premises and records and found Respondent had transported puppies in interstate commerce that were not at least 8 weeks of age (9 C.F.R. § 2.130).

17.On November 15, 2001, the United States Department of Agriculture, Animal and Plant Health Inspection Service, inspected Respondent's premises and records and found Respondent had failed to identify dogs that were over 16 weeks of age (9 C.F.R. § 2.50(b)(1)).

18.On November 15, 2001, the United States Department of Agriculture, Animal and Plant Health Inspection Service, inspected Respondent's premises and records and found Respondent had failed to make and maintain records which correctly disclosed the required information for dogs held at Respondent's facility (9 C.F.R. § 2.75(a)(1)).

19.On November 15, 2001, the United States Department of Agriculture, Animal and Plant Health Inspection Service, inspected Respondent's facility and found Respondent failed to provide housing facilities for dogs which were in good repair and which protected the dogs from injury (9 C.F.R. §§ 2.100(a); 3.1(a)).

20.On January 16, 2002, the United States Department of Agriculture, Animal and Plant Health Inspection Service, inspected Respondent's premises and records and found Respondent had failed to identify dogs that were over 16 weeks of age (9 C.F.R. § 2.50(b)(1)).

21.On January 16, 2002, the United States Department of Agriculture, Animal and Plant Health Inspection Service, inspected Respondent's premises and records and found Respondent had failed to identify dogs that were under 16 weeks of age (9 C.F.R. § 2.50(b)(3)).

22.On January 16, 2002, the United States Department of Agriculture, Animal and Plant Health Inspection Service, inspected Respondent's facility and found the following:

a. Respondent failed to provide clean, dry bedding for dogs (9 C.F.R. §§ 2.100(a); 3.4(b)(4)); and

b. Respondent failed to remove excreta from primary enclosures on a daily basis (9 C.F.R. §§ 2.100(a); 3.11(a)).

23.On March 18, 2002, the United States Department of Agriculture, Animal and Plant Health Inspection Service, inspected Respondent's premises and records and found Respondent had transported puppies in interstate commerce that were not at least 8 weeks of age (9 C.F.R. § 2.130).

24. On April 1, 2002, the United States Department of Agriculture, Animal and Plant Health Inspection Service, inspected Respondent's premises and records and found Respondent had transported puppies in interstate commerce that were not at least 8 weeks of age (9 C.F.R. § 2.130).

25. On April 1, 2002, the United States Department of Agriculture, Animal and Plant Health Inspection Service, inspected Respondent's premises and records and found Respondent had transported puppies in interstate commerce without valid health certificates (9 C.F.R. § 2.78(a)).

26. On July 18, 2002, the United States Department of Agriculture, Animal and Plant Health Inspection Service, inspected Respondent's premises and records and found Respondent had failed to provide adequate veterinary care (9 C.F.R. § 2.40(b)).

27. On July 18, 2002, the United States Department of Agriculture, Animal and Plant Health Inspection Service, inspected Respondent's premises and records and found Respondent had failed to identify dogs that were over 16 weeks of age (9 C.F.R. § 2.50(b)(1)).

28. On July 18, 2002, the United States Department of Agriculture, Animal and Plant Health Inspection Service, inspected Respondent's premises and records and found Respondent had failed to identify dogs that were under 16 weeks of age (9 C.F.R. § 2.50(b)(3)).

29. On July 18, 2002, the United States Department of Agriculture, Animal and Plant Health Inspection Service, inspected Respondent's premises and records and found Respondent had failed to make and maintain records which correctly disclosed the required information for dogs held at Respondent's facility (9 C.F.R. § 2.75(a)(1)).

30. On July 18, 2002, the United States Department of Agriculture, Animal and Plant Health Inspection Service, inspected the Respondent's facility and found the following:

a. Respondent failed to provide housing facilities that were structurally sound and maintained to secure the dogs and to protect them from injury (9 C.F.R. §§ 2.100(a); 3.1(a));

b. Respondent failed to provide outdoor housing that provided shelter from the elements (9 C.F.R. §§ 2.100(a); 3.4(b));

c. Respondent failed to provide dog enclosures that had suspended floors constructed of metal strands with strands that either were greater than one-eighth of an inch in diameter or were coated with a material such as plastic or fiberglass (9 C.F.R. §§ 2.100(a); 3.6(a)(2)(xii));

d. Respondent failed to remove excreta and food waste from primary enclosures on a daily basis (9 C.F.R. §§ 2.100(a); 3.11(a)); and

e. Respondent failed to properly clean and sanitize water and food receptacles and primary enclosures (9 C.F.R. §§ 2.100(a); 3.11(b)(2)).

Conclusions of Law

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

2. On December 1, 2005, Respondent failed to provide adequate veterinary care to several dogs, in willful violation of section 2.40(b) of the Regulations and Standards (9 C.F.R. § 2.40(b)).

3. On December 1, 2005, Respondent failed to identify all dogs on the premises with an official tag or legible tattoo marking acceptable to, and approved by, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, in willful violation of section 2.50(a)(1) of the Regulations and Standards (9 C.F.R. § 2.50(a)(1)).

4. On December 1, 2005, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to keep interior surfaces of housing facilities and surfaces that come in contact with dogs free of jagged edges and sharp points that might injure the animals, as required by section 3.1(c)(1)(ii) of the Regulations and Standards (9 C.F.R. § 3.1(c)(1)(ii)).

5. On December 1, 2005, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to spot-clean hard surfaces with which the dogs come in contact to prevent accumulation of excreta and debris and to reduce disease hazards, as required by section 3.1(c)(3) of the Regulations and Standards (9 C.F.R. § 3.1(c)(3)).

6. On December 1, 2005, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by storing toxic substances, including, but not limited to, bleach and cleaning supplies, in the food preparation area, as prohibited by section 3.1(e) of the Regulations and Standards (9 C.F.R. § 3.1(e)).

7. On December 1, 2005, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to sufficiently heat the sheltered parts of sheltered housing facilities for dogs to protect the dogs from temperature extremes and to provide for their health and well-being, as required by section 3.3(a) of the Regulations and Standards (9 C.F.R. § 3.3(a)).

8. On December 1, 2005, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by keeping breeds of dogs that cannot tolerate the prevalent temperatures of the area without stress or discomfort in outdoor facilities without specific approval by the attending veterinarian, as required by section 3.4(a)(1) of the Regulations and Standards (9 C.F.R. § 3.4(a)(1)).

9. On January 21, 2004, August 19, 2004, and December 1, 2005, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to provide dogs in outdoor housing facilities with adequate protection from the elements, as required by section 3.4(b)(3) of the Regulations and Standards (9 C.F.R. § 3.4(b)(3)).

10.On December 1, 2005, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to provide dogs in outdoor housing facilities with adequate protection from the elements and with clean, dry bedding material when the ambient temperature was below 50 °F and additional bedding when the temperature is below 35 °F, as required by section 3.4(b)(4) of the Regulations and Standards (9 C.F.R. § 3.4(b)(4)).

11.On December 1, 2005, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to provide dogs in outdoor housing facilities with adequate protection from the elements, since the structures available were either too small to hold all of the dogs or not sufficient in number to allow all dogs to move inside in a normal manner, as required by section 3.4(b) of the Regulations and Standards (9 C.F.R. § 3.4(b)).

12.On December 1, 2005, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to provide dogs with food of sufficient quantity and nutritive value to maintain the normal condition and weight of the animals, since the amount of food available would only last for another day and no arrangements were made to bring more food to the facility, as required by section 3.9(a) of the Regulations and Standards (9 C.F.R. § 3.9(a)).

13.On December 1, 2005, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to provide dogs with potable water, as required by section 3.10 of the Regulations and Standards (9 C.F.R. § 3.10).

14.On December 1, 2005, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to keep primary enclosures for dogs clean, as required by section 3.11(a) of the Regulations and Standards (9 C.F.R. § 3.11(a)).

15.On July 29, 2004, February 4, 2005, August 31, 2005, October 13, 2005, and November 18, 2005, Respondent refused to permit a United States Department of Agriculture, Animal and Plant Health Inspection Service, employee to conduct a complete inspection of her animal facility, in willful violation of section 16(a) of the Animal Welfare Act (7 U.S.C. § 2146(a)) and section 2.126(a) of the Regulations and Standards (9 C.F.R. § 2.126(a)), since no facility representative was available to allow a United States Department of Agriculture, Animal and Plant Health Inspection Service, employee to enter Respondent's facility.

16.On March 10, 2005, Respondent could not locate the program of veterinary care or establish the last date that a veterinarian had visited Respondent's facility, in willful violation of section 2.40(a) of the Regulations and Standards (9 C.F.R. § 2.40(a)).

17.On March 10, 2005, Respondent willfully violated of section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to construct primary enclosures for dogs so that they provide sufficient space to allow each animal to turn about freely, to stand, sit, and lie in a comfortable, normal position, and to walk in a normal manner, as required by section 3.6(a)(2)(xi) of the Regulations and Standards (9 C.F.R. § 3.6(a)(2)(xi)).

18.On March 6, 2001, and April 1, 2002, the United States Department of Agriculture, Animal and Plant Health Inspection Service, found Respondent had transported puppies in interstate commerce without valid health certificates, in willful violation of section 2.78(a) of the Regulations and Standards (9 C.F.R. § 2.78(a)).

19.On November 5, 2001, March 18, 2002, and April 1, 2002, the United States Department of Agriculture, Animal and Plant Health Inspection Service, found Respondent had transported puppies in interstate commerce that were not at least 8 weeks of age, in willful violation of section 2.130 of the Regulations and Standards (9 C.F.R. § 2.130).

20.On November 15, 2001, January 16, 2002, and July 18, 2002, the United States Department of Agriculture, Animal and Plant Health Inspection Service, found Respondent had failed to identify dogs that were over 16 weeks of age, in willful violation of section 2.50(b)(1) of the Regulations and Standards (9 C.F.R. § 2.50(b)(1)).

21.On November 15, 2001, and July 18, 2002, the United States Department of Agriculture, Animal and Plant Health Inspection Service, found Respondent had failed to make and maintain records which correctly disclosed the required information for dogs held at

Respondent's facility, in willful violation of section 2.75(a)(1) of the Regulations and Standards (9 C.F.R. § 2.75(a)(1)).

22.On November 15, 2001, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to provide housing facilities for dogs which were in good repair and which protected the dogs from injury, as required by section 3.1(a) of the Regulations and Standards (9 C.F.R. § 3.1(a)).

23.On January 16, 2002, and July 18, 2002, the United States Department of Agriculture, Animal and Plant Health Inspection Service, found Respondent had failed to identify dogs that were under 16 weeks of age, in willful violation of section 2.50(b)(3) of the Regulations and Standards (9 C.F.R. § 2.50(b)(3)).

24.On January 16, 2002, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to provide clean, dry bedding for dogs, as required by section 3.4(b)(4) of the Regulations and Standards (9 C.F.R. § 3.4(b)(4)).

25.On January 16, 2002, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to remove excreta from primary enclosures on a daily basis, as required by section 3.11(a) of the Regulations and Standards (9 C.F.R. § 3.11(a)).

26.On July 18, 2002, the United States Department of Agriculture, Animal and Plant Health Inspection Service, found Respondent had failed to provide adequate veterinary care, in willful violation of section 2.40(b) of the Regulations and Standards (9 C.F.R. § 2.40(b)).

27.On July 18, 2002, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to provide housing facilities that were structurally sound and maintained to secure the dogs and to protect them from injury, as required by section 3.1(a) of the Regulations and Standards (9 C.F.R. § 3.1(a)).

28.On July 18, 2002, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to provide outdoor housing that provided shelter from the elements, as required by section 3.4(b) of the Regulations and Standards (9 C.F.R. § 3.4(b)).

29.On July 18, 2002, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to provide dog enclosures that had suspended floors constructed of metal strands with strands that either were greater than one-eighth of an inch in diameter or were coated with a material such as plastic or fiberglass,

as required by section 3.6(a)(2)(xii) of the Regulations and Standards (9 C.F.R. § 3.6(a)(2)(xii)).

30. On July 18, 2002, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to remove excreta and food waste from primary enclosures on a daily basis, as required by section 3.11(a) of the Regulations and Standards (9 C.F.R. § 3.11(a)).

31. On July 18, 2002, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to properly clean and sanitize water and food receptacles and primary enclosures, as required by section 3.11(b)(2) of the Regulations and Standards (9 C.F.R. § 3.11(b)(2)).

Respondent's Appeal Petition

Respondent raises three issues in her June 30, 2006, filing [hereinafter Appeal Petition]. First, Respondent denies some of the material allegations of the Amended Complaint.

Respondent's denial of the allegations in the Amended Complaint comes far too late to be considered. Respondent is deemed, for purposes of this proceeding, to have admitted the allegations in the Amended Complaint because she failed to file an answer to the Amended Complaint within 20 days after the Hearing Clerk served her with the Amended Complaint. 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 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 Respondent of the consequences of failing to file a timely answer, as follows:

[T]his complaint shall be served upon the respondents [sic]. The respondents [sic] 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 13.

Similarly, the Hearing Clerk informed Respondent in a service letter transmitting the Amended Complaint 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:

CERTIFIED RECEIPT REQUESTED

February 7, 2006

Ms. Marjorie Walker d/b/a
Linn Creek Kennel
P. O. Box 107
Gentry, Missouri 64453

Dear Ms. Walker:

Subject: In re: Marjorie Walker d/b/a Linn Creek Kennel - Respondent
AWA Docket No. 04-0021

Enclosed is a copy of Complainant's Amended Complaint and Notice of Filing of Amended Complaint which have been filed with this office in the above-captioned proceeding.

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 1031, 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

The Hearing Clerk served Respondent with the Amended Complaint and the Hearing Clerk's service letter on February 16, 2006;[3] therefore, Respondent's answer to the Amended Complaint was due no later than March 8, 2006. Respondent failed to file a timely response to the Amended Complaint. Respondent's 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, .141(a)).

On April 11, 2006, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed Complainant's Motion for Default Decision and Complainant's Proposed Default Decision. The Hearing Clerk served Respondent with Complainant's Motion for Default Decision, Complainant's Proposed Default Decision, and a service letter on April 19, 2006.[4] Respondent failed to file objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision within 20 days after service, as required by section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

On May 25, 2006, the ALJ issued an Initial Decision: (1) concluding Respondent willfully violated the Animal Welfare Act and the Regulations and Standards as alleged in the Amended Complaint; (2) ordering Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; (3) assessing Respondent a $15,000 civil penalty; and (4) revoking Respondent's Animal Welfare Act license (Initial Decision at 2-13).

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,[5] generally there is no

[3]See note 1.

[4]See note 2.

[5]*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 (continued...)

basis for setting aside a default decision that is based upon a respondent's failure to file a timely answer.[6]

[5](...continued)
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).

[6]*See generally In re Cheryl Morgan*, __ Agric. Dec. ___ (July 6, 2006) (holding the default decision was properly issued where the respondent's first filing in the proceeding was filed 29 days after her 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 Mary Jean Williams* (Decision as to Mary Jean Williams) 64 Agric. Dec. 1347 (2005) (holding the default decision was properly issued where the respondent's first filing in the proceeding was filed almost 8 months after her 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 Mary Jean Williams* (Decision as to Deborah Ann Milette) 64 Agric. Dec. 364 (2005) (holding the default decision was properly issued where the respondent filed her answer 1 month 4 days after her 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 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 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
(continued...)

[6](...continued)
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 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
(continued...)

[6](...continued)
Act and the Regulations and Standards alleged in the complaint); *In re James J. Everhart*, 56 Agric. Dec. 1400 (1997) (holding the default decision was properly issued where the respondent's first filing was more than 8 months after service of the complaint on the respondent and holding the respondent is deemed, by his failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations alleged in the complaint); *In re John Walker*, 56 Agric. Dec. 350 (1997) (holding the default decision was properly issued where the respondent's first filing was 126 days after service of the complaint on the respondent and holding the respondent is deemed, by his failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re Mary Meyers*, 56 Agric. Dec. 322 (1997) (holding the default decision was properly issued where the respondent's first filing was 117 days after the respondent's answer was due and holding the respondent is deemed, by her failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re Dora Hampton*, 56 Agric. Dec. 301 (1997) (holding the default decision was properly issued where the respondent's first filing was 135 days after the respondent's answer was due and holding the respondent is deemed, by her failure to file a timely answer, to have admitted the violations of the Regulations and Standards alleged in the complaint); *In re City of Orange*, 55 Agric. Dec. 1081 (1996) (holding the default decision was properly issued where the respondent's first filing was 70 days after the respondent's answer was due and holding the respondent is deemed, by its failure to file a timely answer, to have admitted the violations of the Regulations and Standards alleged in the complaint); *In re Ronald DeBruin*, 54 Agric. Dec. 876 (1995) (holding the default decision was properly issued where the respondent failed to file an answer and holding the respondent is deemed, by his failure to file an answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re James Joseph Hickey, Jr.*, 53 Agric. Dec. 1087 (1994) (holding the default decision was properly issued where the respondent failed to file an answer and holding the respondent is deemed, by his failure to file an answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged the complaint); *In re Ron Morrow*, 53 Agric. Dec. 144 (1994) (holding the default decision was properly issued where the respondent was given an extension of time until March 22, 1994, to file an answer, but 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
(continued...)

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 deemed Respondent to have admitted the allegations of the Complaint.

Moreover, 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.[7]

Second, Respondent contends she "filed a response to the earlier violation allegations in triplicate plus an original." (Respondent's Appeal Pet. at first unnumbered page.) I infer Respondent contends her response to the Complaint operates as a response to the Amended Complaint.

I disagree with Respondent's contention that her response to the Complaint operates as a response to the Amended Complaint. Complainant instituted this proceeding by filing a Complaint on July 23, 2004. The Hearing Clerk served Respondent with the Complaint on

[6](...continued)
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).

[7]*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).

August 3, 2004.[8] 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 May 26, 2005, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed Complainant's Motion for Adoption of Proposed Decision and Order and a Proposed Decision and Order. The Hearing Clerk served Respondent with Complainant's Motion for Adoption of Proposed Decision and Order, Complainant's Proposed Decision and Order, and a service letter on June 6, 2005.[9] On June 27, 2005, Respondent filed objections to Complainant's Motion for Adoption of Proposed Decision and Order and Complainant's Proposed Decision and Order. On November 30, 2005, the ALJ denied Complainant's Motion for Adoption of Proposed Decision, stating Respondent's "objections, while untimely filed, deny the allegations of the complaint and the circumstances of the death of one of the Respondents[10] and the resulting period of turmoil following his death will be found to be good cause for the failure to file an Answer in a timely manner." (Order filed Nov. 30, 2005, at 1.)

On January 12, 2006, Complainant filed a Motion to Amend Complaint. On January 17, 2006, the ALJ issued an Order granting Complainant's Motion to Amend Complaint, requiring Respondent to answer the Amended Complaint, and stating "[i]n the event no such Answer is filed, the Complainant may file an appropriate Motion for Decision Without Hearing By Reason of Default." (Order filed Jan. 17, 2006, at 2.) On February 6, 2006, Complainant filed the Amended Complaint. The Hearing Clerk served Respondent with the Amended Complaint on February 16, 2006.[11] Respondent 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)).

Thus, the record clearly establishes that the operative pleading in this proceeding is the Amended Complaint, not the Complaint, and

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[8]United States Postal Service Domestic Return Receipt for Article Number 7003 0500 0000 1056 0885.

[9]United States Postal Service Domestic Return Receipt for Article Number 7000 1670 0011 8902 6046.

[10]The Complaint was filed against "Marjorie & Harold Walker, d/b/a Linn Creek Kennel."

[11]See note 1.

Respondent's response to the Complaint does not operate as a response to the Amended Complaint.

Third, Respondent contends she is not able to pay the $15,000 civil penalty assessed by the ALJ (Respondent's Appeal Pet. at third unnumbered page).

Section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) sets forth factors that must be considered when determining the amount of the civil penalty to be assessed against a respondent for violations of the Animal Welfare Act and the Regulations and Standards, and a respondent's ability to pay the civil penalty is not one of those factors. Therefore, Respondent's inability to pay the $15,000 civil penalty is not a basis for reducing the $15,000 civil penalty.[12]

[12]The Judicial Officer did give consideration to ability to pay when determining the amount of the civil penalty to assess under the Animal Welfare Act in *In re Gus White, III*, 49 Agric. Dec. 123, 152 (1990). The Judicial Officer subsequently held that consideration of ability to pay in *In re Gus White, III*, was inadvertent error and that ability to pay would not be considered in determining the amount of civil penalties assessed under the Animal Welfare Act in the future. *See In re Jewel Bond* (Order Denying Pet. to Reconsider), 65 Agric. Dec. ___, slip op. at 7-8 (July 6, 2006) (stating section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) sets forth factors that must be considered when determining the amount of the civil penalty to be assessed against a respondent for violations of the Animal Welfare Act and the Regulations and a respondent's ability to pay the civil penalty is not one of those factors); *In re Mary Jean Williams* (Decision as to Mary Jean Williams), 64 Agric. Dec. 1347, 1372 (2005) (stating section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) sets forth factors that must be considered when determining the amount of the civil penalty to be assessed against a respondent for violations of the Animal Welfare Act and the Regulations and a respondent's ability to pay the civil penalty is not one of those factors); *In re Mary Jean Williams* (Order Denying Pet. to Reconsider as to Deborah Ann Milette), 64 Agric. Dec. 1673, 1679-80, (2005) (stating section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) sets forth factors that must be considered when determining the amount of the civil penalty to be assessed against a respondent for violations of the Animal Welfare Act and the Regulations and a respondent's ability to pay the civil penalty is not one of those factors); *In re J. Wayne Shaffer*, 60 Agric. Dec. 444, 475-76 (2001) (stating section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) sets forth factors that must be considered when determining the amount of the civil penalty to be assessed against a respondent for violations of the Animal Welfare Act and the Regulations and a respondent's ability to pay the civil penalty is not one of those factors); *In re Nancy M. Kutz* (Decision and Order as to Nancy M. Kutz), 58 Agric. Dec. 744, 757 (1999) (stating section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) sets forth factors that must be considered when determining the amount of the civil penalty to be assessed against a respondent for violations of the Animal Welfare Act, the Regulations, and the Standards, and a respondent's ability to pay the civil penalty is not one of those factors); *In re James E. Stephens*, 58 Agric. Dec. 149, 199 (1999) (stating the respondents' financial state is not relevant to the amount of the civil penalty assessed against the (continued...)

The ALJ's Conclusions That Respondent Violated 9 C.F.R. §§ 3.1(b)(2) and 3.11(f)

Complainant alleges that Respondent violated section 3.1(b)(2) of the Regulations and Standards (9 C.F.R. § 3.1(b)(2)) on November 15, 2001, and section 3.11(f) of the Regulations and Standards (9 C.F.R. § 3.11(f)) on November 27, 2001 (Amended Compl. ¶¶ XIII(C)(2), XIV(A)(1)). Respondent, by her failure to answer the Amended Complaint is deemed, for the purpose of this proceeding, to have admitted these violations, and the ALJ concluded Respondent committed these violations (Initial Decision at 9). However, I am not able to locate section 3.1(b)(2) or section 3.11(f) of the Regulations and Standards (9 C.F.R. §§ 3.1(b)(2), .11(f)) in the Code of Federal Regulations. Therefore, while Respondent is deemed to have admitted violating these apparently non-existent provisions of the Code of Federal Regulations, I decline to conclude that she violated section 3.1(b)(2) of the Regulations and Standards (9 C.F.R. § 3.1(b)(2)) on November 15, 2001, or section 3.11(f) of the Regulations and Standards (9 C.F.R. § 3.11(f)) on November 27, 2001, as alleged in the Amended Complaint. Further, I reduce the civil penalty assessed against Respondent from $15,000 to $14,300 to reflect my conclusion that Respondent did not

[12](...continued)
respondents for violations of the Animal Welfare Act, the Regulations, and the Standards); *In re Judie Hansen*, 57 Agric. Dec. 1072, 1143 (1998) (stating a respondent's ability to pay a civil penalty is not considered in determining the amount of the civil penalty to be assessed), *appeal dismissed*, 221 F.3d 1342 (Table), 2000 WL 1010575 (8th Cir. 2000) (per curiam); *In re David M. Zimmerman*, 57 Agric. Dec. 1038, 1050 n.1 (1998) (stating the Judicial Officer has pointed out that when determining the amount of a civil penalty to be assessed under the Animal Welfare Act, consideration need not be given to a respondent's ability to pay the civil penalty); *In re James J. Everhart*, 56 Agric. Dec. 1401, 1416 (1997) (stating a respondent's inability to pay the civil penalty is not a consideration in determining civil penalties assessed under the Animal Welfare Act); *In re Mr. & Mrs. Stan Kopunec*, 52 Agric. Dec. 1016, 1023 (1993) (stating the ability to pay a civil penalty is not a relevant consideration in Animal Welfare Act cases); *In re Micheal McCall*, 52 Agric. Dec. 986, 1008 (1993) (stating the ability or inability to pay is not a criterion in Animal Welfare Act cases); *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1071 (1992) (stating the Judicial Officer once gave consideration to the ability of respondents to pay a civil penalty, but that the Judicial Officer has removed the ability to pay as a criterion, since the Animal Welfare Act does not require it), *aff'd*, 61 F.3d 907, 1995 WL 309637 (7th Cir. 1995) (not to be cited per 7th Circuit Rule 53(b)(2)); *In re Jerome A. Johnson*, 51 Agric. Dec. 209, 216 (1992) (stating the holding in *In re Gus White, III*, 49 Agric. Dec. 123 (1990), as to consideration of ability to pay, was an inadvertent error; ability to pay is not a factor specified in the Animal Welfare Act and it will not be considered in determining future civil penalties under the Animal Welfare Act).

violate section 3.1(b)(2) or section 3.11(f) of the Regulations and Standards (9 C.F.R. §§ 3.1(b)(2), .11(f)).

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

ORDER

1. Respondent, her agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards, and, in particular, shall cease and desist from:

(a) Failing to provide adequate veterinary care to dogs;

(b) Failing to identify all dogs, as required;

(c) Failing to keep interior surfaces of housing facilities and surfaces that come in contact with dogs free of jagged edges and sharp points that might injure the animals;

(d) Failing to spot-clean hard surfaces with which the dogs come in contact to prevent accumulation of excreta and debris and to reduce disease hazards;

(e) Failing to store toxic substances separate from food preparation areas;

(f) Failing to provide dogs in outdoor housing facilities with adequate protection from the elements;

(g) Failing to provide dogs in outdoor housing facilities with clean, dry bedding material, as required;

(h) Failing to provide dogs with food of sufficient quantity and nutritive value to maintain the normal condition and weight of the animals;

(i) Failing to provide dogs with potable water;

(j) Failing to keep primary enclosures for dogs clean;

(k) Failing to permit United States Department of Agriculture, Animal and Plant Health Inspection Service, employees to conduct inspections;

(l) Failing to have a program of veterinary care and regularly scheduled visits by a veterinarian;

(m) Failing to construct primary enclosures for dogs so that they provide sufficient space to allow each animal to turn about freely, to stand, sit, and lie in a comfortable, normal position, and to walk in a normal manner;

(n) Failing to transport puppies in interstate commerce with valid health certificates;

(o) Transporting puppies in interstate commerce that are not at least 8 weeks of age;

(p) Failing to make and maintain records which correctly disclose the required information for dogs held at the facility;

(q) Failing to provide housing facilities for dogs which are in good repair and structurally sound and which protect the dogs from injury;

(r) Failing to remove excreta from primary enclosures on a daily basis;

(s) Failing to ensure, if a suspended floor of a primary enclosure for dogs is constructed of metal strands, the strands either are greater than one-eighth of an inch in diameter or are coated with a material such as plastic or fiberglass; and

(t) Failing to properly clean and sanitize water and food receptacles and primary enclosures.

Paragraph 1 of this Order shall become effective on the day after service of this Order on Respondent.

2. Respondent is assessed a $14,300 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:

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

Payment of the civil penalty shall be sent to, and received by, Sharlene Deskins within 60 days after service of this Order on Respondent. Respondent shall state on the certified check or money order that payment is in reference to AWA Docket No. 04-0021.

3. Respondent's Animal Welfare Act license is revoked.

Paragraph 3 of this Order shall become effective on the 60th day after service of this Order on Respondent.

RIGHT TO JUDICIAL REVIEW

Respondent has the right to seek judicial review of the Order in this Decision and 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 the Order in this Decision and Order. Respondent must seek judicial review within 60 days after entry of the Order in this Decision and Order.[13] The date of entry of the Order in this Decision and Order is August 10, 2006.

In re: KAREN SCHMIDT, d/b/a SCR KENNELS.
AWA Docket No. 03-0024.
Decision and Order.
Filed August 30, 2006.

AWA – Animal Welfare Act – Government misconduct – Timing of initial decision – Sixth amendment right to speedy trial.

The Judicial Officer affirmed Chief Administrative Law Judge Marc R. Hillson's decision (1) finding Karen Schmidt (Respondent) committed seven violations of the regulations and standards issued under the Animal Welfare Act (Regulations and Standards), (2) ordering Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards, and (3) assessing Respondent a $2,500 civil penalty. The Judicial Officer rejected Respondent's contention that her allegations of inspector misconduct constituted a basis for dismissing the Complaint. The Judicial Officer also held that the 16-month period between the hearing and the Chief ALJ's issuance of the Initial Decision was not relevant to the disposition of the proceeding and did not violate the right to a speedy trial in the Sixth Amendment to the Constitution of the United States. The Judicial Officer also rejected Respondent's contentions that willfulness was an issue in the proceeding and that she did not commit three of the violations found by the Chief ALJ.

Robert A. Ertman, for Complainant.
Respondent, Pro se.
Initial Decision by Chief Administrative Law Judge Marc R. Hillson.
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 April 17, 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)

[13] 7 U.S.C. § 2149(c).

[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 January 24, 2000, July 18, 2000, May 8, 2001, October 24, 2001, and January 9, 2003, Karen Schmidt, d/b/a SCR Kennels [hereinafter Respondent], committed 33 willful violations of the Regulations and Standards (Compl. ¶¶ II-VII). On May 12, 2003, Respondent filed an answer denying the material allegations of the Complaint.

On November 3 and 4, 2004, Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] conducted a hearing in Springfield, Missouri. Robert A. Ertman, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented Complainant. Respondent appeared pro se and was assisted by Dr. Jerome Schmidt.

On March 7, 2006, after Complainant and Respondent filed post-hearing briefs, the Chief ALJ filed a Decision [hereinafter Initial Decision] concluding Respondent committed seven violations of the Regulations and Standards and assessing Respondent a $2,500 civil penalty (Initial Decision at 1, 22, 24).

On April 4, 2006, Respondent appealed to the Judicial Officer. On June 30, 2006, Complainant filed a response to Respondent's appeal petition. On July 10, 2006, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful review of the record, I affirm the Chief ALJ's Initial Decision. Complainant's exhibits are designated by "CX." The transcript is divided into two volumes, one volume for each day of the 2-day hearing. References to "Tr. I" are to the volume of the transcript that relates to the November 3, 2004, segment of the hearing and references to "Tr. II" are to the volume of the transcript that relates to the November 4, 2004, segment of the hearing.

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[.]

§ 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), 2149(a)-(c), 2151.

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 H–COMPLIANCE WITH STANDARDS AND HOLDING PERIOD

§ 2.100 Compliance with standards.

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

. . . .

PART 3—STANDARDS

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

FACILITIES AND OPERATING STANDARDS

§ 3.1 Housing facilities, general.

. . . .

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

. . . .

§ 3.4 Outdoor housing facilities.

. . . .

(c) *Construction*. Building surfaces in contact with animals in outdoor housing facilities must be impervious to moisture. Metal barrels, cars, refrigerators or freezers, and the like must not be used as shelter structures. The floors of outdoor housing

facilities may be of compacted earth, absorbent bedding, sand, gravel, or grass, and must be replaced if there are any prevalent odors, diseases, insects, pests, or vermin. All surfaces must be maintained on a regular basis. Surfaces of outdoor housing facilities—including houses, dens, etc.—that cannot be readily cleaned and sanitized, must be replaced when worn or soiled.

. . . .

§ 3.6 Primary enclosures.

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

(a) *General requirements*. . . .

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

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

. . . .

ANIMAL AND HUSBANDRY STANDARDS

. . . .

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

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

> and food waste and to reduce disease hazards pests, insects and odors.
>
> . . . .
>
> (c) *Housekeeping for premises.* Premises where housing facilities are located, including buildings and surrounding grounds, must be kept clean and in good repair to protect the animals from injury, to facilitate the husbandry practices required in this subpart, and to reduce or eliminate breeding and living areas for rodents and other pests and vermin. Premises must be kept free of accumulations of trash, junk, waste products, and discarded matter. Weeds, grasses, and bushes must be controlled so as to facilitate cleaning of the premises and pest control, and to protect the health and well-being of the animals.
>
> (d) *Pest control.* An effective program for the control of insects, external parasites affecting dogs and cats, and birds and mammals that are pests, must be established and maintained so as to promote the health and well-being of the animals and reduce contamination by pests in animal areas.

9 C.F.R. §§ 1.1; 2.100(a); 3.1(e), .4(c) .6(a)(2)(i), .11(a), (c)-(d).

DECISION

Decision Summary

Complainant alleges Respondent committed 33 willful violations of the Regulations and Standards on January 24, 2000, July 18, 2000, May 8, 2001, October 24, 2001, and January 9, 2003 (Compl. ¶¶ II-VII). Complainant withdrew the allegations that Respondent violated the Regulations and Standards on January 24, 2000, and July 18, 2000 (Complainant's Reply Memorandum at 3; Complainant's Response to Appeal at 2), leaving 26 alleged violations at issue. The Chief ALJ found Respondent committed seven violations of the Regulations and Standards and dismissed the remaining 19 alleged violations. Complainant does not appeal the Chief ALJ's dismissal of 19 of the violations alleged in the Complaint; therefore, the only violations at issue are the seven violations found by the Chief ALJ. I affirm the Chief ALJ's conclusion that Respondent committed seven violations of the Regulations and Standards and the Chief ALJ's assessment of a $2,500 civil penalty against Respondent.

Discussion

Respondent

Respondent is an individual doing business as SCR Kennels, located at 6740 Highway F, Hartville, Missouri. Respondent holds Animal Welfare Act Class A Dealer License number 43A2135. SCR Kennels is a breeding dog kennel, and, at the time of the most recent United States Department of Agriculture inspection that is the subject of this proceeding, January 9, 2003, SCR Kennels had 150 breeding female dogs, over 20 breeding male dogs, and a number of puppies. The primary function of SCR Kennels is to sell puppies in commerce, and SCR Kennels sold 442 puppies in 2001. (CX 6 at 1.)

The October 24, 2001, Inspection

Animal and Plant Health Inspection Service, Animal Care, inspectors Sandra Meek and Jan Feldman inspected Respondent's facility on October 24, 2001. Respondent and Dr. Schmidt accompanied the two inspectors. Sandra Meek and Jan Feldman memorialized their findings in an inspection report (CX 17). In addition to the narrative in the inspection report, Jan Feldman took a number of photographs to document their observations (CX 18-CX 27). Complainant proved by a preponderance of the evidence one of the nine violations alleged as a result of the October 24, 2001, inspection.

Complainant alleges that on October 24, 2001, Respondent did not maintain primary enclosures in such a manner as to protect the animals from injury in violation of sections 2.100(a) and 3.6(a)(2)(i) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.6(a)(2)(i)) (Compl. ¶ V(F)). Complainant documented a number of incidences in which broken wires or sharp edges in the enclosures presented potential injury hazards to the dogs sheltered in the enclosures. Sandra Meek testified that the six photographs which comprise CX 23 demonstrate that several enclosures had broken wires, which were protruding in a manner which could cause harm to the dogs (Tr. I at 36-38). In her inspection report, Sandra Meek stated 18 primary enclosures posed safety threats to the dogs as a result of broken wires or side/bottom panels (CX 17 at 2), but her testimony and the photographs only document two enclosures which posed safety threats to the dogs (Tr. I at 66-67).

From Dr. Schmidt's testimony, it appears that repair of enclosures is a constant activity at Respondent's facility, particularly with dachshunds, which have a tendency to chew or claw at the enclosures.

It is evident from CX 23 that there were many shiny clips on the enclosures indicating repairs were made not long before the inspection, i.e., Respondent appeared to be fairly diligent in monitoring and repairing broken wires. On the other hand, it is uncontroverted that at least two enclosures had broken wires which could cause injury to the dogs; thus, I conclude Complainant proved by a preponderance of the evidence a violation of sections 2.100(a) and 3.6(a)(2)(i) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.6(a)(2(i)) existed at the time of the October 24, 2001, inspection.

The January 9, 2003, Inspection

On January 9, 2003, Sandra Meek once again inspected Respondent's facility. On this occasion, Sandra Meek was accompanied by Animal and Plant Health Inspection Service senior inspector Daniel Hutchings. Sandra Meek prepared an inspection report (CX 33), and Daniel Hutchings took photographs (CX 34-43). Respondent and Dr. Schmidt accompanied the two inspectors. Complainant proved by a preponderance of the evidence 6 of the 11 violations alleged as a result of the January 9, 2003, inspection.

Complainant alleges that on January 9, 2003, Respondent stored chemicals, cleaning substances, and food supplies in an unsafe manner in violation of sections 2.100(a) and 3.1(e) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.1(e)) (Compl. ¶ VII(B)). Sandra Meek testified that she observed an open bag of chemical insecticide near the bulk food (Tr. I at 42-43). Complainant introduced two photographs which document this observation (CX 34).

Respondent did not deny that the open bag of insecticide was located as described by Sandra Meek, but rather downplayed the significance of the location of the insecticide. Dr. Schmidt identified the insecticide as Rotenone and emphasized that it was a safe insecticide for dogs and humans and was commonly used in gardening. He stated there were no open food containers near the Rotenone and it presented no danger. (Tr. II at 124-27.)

Complainant has sustained its burden in regard to this allegation. While an insecticide may be safe to use under certain conditions, the Regulations and Standards clearly provide that insecticide must be stored either in an area separate from the food storage and preparation areas or in a cabinet in the animal areas.

Complainant alleges that on January 9, 2003, Respondent failed to maintain building surfaces in good repair in violation of sections

2.100(a) and 3.4(c) of the Regulations and Standards (9 C.F.R. §§ 2.100(a), 3.4(c)) (Compl. ¶ VII(G)). Animal and Plant Health Inspection Service inspectors cited Respondent for having a broken hinge on a single door in one of the outdoor enclosures, causing the door to hang at an angle (CX 33 at 3). A photograph confirms that the door to a shelter is indeed hanging by its top hinge (CX 38). Respondent admits that the hinge was broken, but points out that the different color of the door where the hinge is missing indicates that the hinge could not have been broken for a very long time (Respondent's Post-Hearing Brief at 33-34; Tr. I at 74). In addition, Sandra Meek testified that the missing hinge did not prevent animals from entering or leaving the shelter (Tr. I at 74). Nevertheless, the hinge is missing, and I find Complainant proved by a preponderance of the evidence a violation of sections 2.100(a) and 3.4(c) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.4(c)).

Complainant alleges that on January 9, 2003, Respondent failed to maintain building surfaces in good repair in violation of sections 2.100(a) and 3.6(a)(2)(i)-(iii) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.6(a)(2)(i)-(iii)) (Compl. ¶ VII(H)). Animal and Plant Health Inspection Service inspectors cited Respondent for allowing primary enclosures to present sharp points or edges which could injure the dogs. Sandra Meek testified that a number of enclosures had broken or protruding wires and one enclosure had a sheet of tin with sharp edges (Tr. I at 46-47).

Testimony on the broken wires was a bit hazy, as were the photographs that purported to show the wires. The sheet of tin does appear to have sharp edges (CX 39 at 2-4). Respondent contends no dogs were in the enclosure at the time of the inspection; however, the Regulations and Standards make no exception for primary enclosures that do not contain dogs at the time of inspection. I find the sheet of tin in the enclosure constitutes a violation of sections 2.100(a) and 3.6(a)(2)(i) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.6(a)(2)(i)).

Complainant alleges that on January 9, 2003, Respondent failed "to clean and sanitize enclosures as often as necessary to prevent an excessive accumulation of dirt, hair and fecal and food wastes" in violation of sections 2.100(a) and 3.11(a) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.11(a)) (Compl. ¶ VII(I)). An outdoor enclosure (identified as enclosure 13) had a substantial accumulation of waste material (CX 33 at 4). Respondent stated the enclosure had not been used for nearly 1 year before the inspection. Nevertheless, it is clear that an animal had been using the enclosure, since the amount of

waste in the enclosure was excessive (CX 41 at 9). Len Clayton, a Missouri Department of Agriculture animal health officer called by Respondent, admitted on cross-examination that the enclosure in question appeared not to be in compliance with Missouri regulations (Tr. II at 15). Tom Jacques, also an animal health officer with the Missouri Department of Agriculture, testified similarly (Tr. II at 31-32). If an animal had not used the enclosure, it is reasonable to surmise that the excessive waste observed by the inspectors and documented photographically would not have accumulated. I find Complainant proved by a preponderance of the evidence Respondent has not complied with sections 2.100(a) and 3.11(a) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.11(a)).

Complainant also alleges that on January 9, 2003, Respondent failed to maintain housing premises free of accumulations of dirt, fecal matter, hair, and debris in violation of sections 2.100(a) and 3.11(c) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.11(c)) (Compl. ¶ VII(J)). Complainant introduced photographs and testimony relating to conditions caused by a broken drainage pipe in Respondent's sewage system. The record clearly establishes that one of the pipes of the sewage system that served the kennel broke and, as a result of this break, waste matter accumulated in quantities that normally would not be present in a kennel complying with the requirements of the Regulations and Standards regarding sanitation and cleanliness (CX 42; Tr. I at 51-52). Although the violation was the result of an accident, the fact remains that Respondent committed a violation of sections 2.100(a) and 3.11(c) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.11(c)) caused by the sewage problem.

Finally, Complainant alleges that on January 9, 2003, Respondent failed to provide an effective program of pest control in violation of sections 2.100(a) and 3.11(d) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.11(d)) (Compl. ¶ VII(K)). Complainant introduced evidence of rodent holes on the premises near the outdoor pens (CX 43). The allegation was that these were active rodent dens, but no rodents were actually seen entering or exiting these dens during the course of the inspection. However, Daniel Hutchings, who is an experienced trapper, as well as an inspector for the United States Department of Agriculture, testified that the two rodent holes depicted in CX 43 were being used on a regular basis on January 9, 2003 (Tr. I at 11-12). In addition, Sandra Meek indicated that rodents were living in the rodent holes depicted in CX 43 (Tr. I at 52-53). I find Complainant proved by a preponderance of the evidence that Respondent failed to have an effective program of

pest control on January 9, 2003, in violation of sections 2.100(a) and 3.11(d) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.11(d)).

Sanctions

Section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) requires, when considering the amount of a civil penalty, the Secretary of Agriculture to give due consideration to four factors: (1) the size of the business of the person involved in the violations; (2) the gravity of the violations; (3) the violator's good faith; and (4) the violator's history of previous violations.

On January 9, 2003, Respondent had 150 breeding female dogs, over 20 breeding male dogs, and a number of puppies. In 2001, Respondent sold 442 puppies. (CX 6 at 1.) Based on the number of dogs held by Respondent on January 9, 2003, and the number of puppies sold in 2001, I find Respondent operates a large business.

Many of Respondent's violations are minor. Respondent's ongoing pattern of violations on October 24, 2001, and January 9, 2003, 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. However, Respondent's history of previous violations and lack of good faith is, to some extent, mitigated by the evidence of Respondent's correction of violations.[1]

[1]Corrections of violations do not eliminate the fact that the violations occurred, but corrections are commendable and can be taken into account when determining the sanction to be imposed. *In re Jewel Bond* (Order Denying Pet. to Reconsider), __ Agric. Dec. ___, slip op. at 6 (July 6, 2006); *In re Eric John Drogosch*, 63 Agric. Dec. 623, 643 (2004); *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, (continued...)

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 $2,500 civil penalty against Respondent and a cease and desist order (Complainant's Response to Appeal at 1).

Respondent could be assessed a maximum civil penalty of $19,250 for her seven violations of the Regulations and Standards.[2] 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 a cease and desist order and assessment of a $2,500 civil penalty are appropriate and

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[1](...continued)
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)).

[2]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)).

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.

Respondent's Appeal Petition

Respondent raises seven issues in Respondent's Petition of Appeal [hereinafter Appeal Petition] and "Defendant's Proposed Findings of Fact & Evidence to Appeal the March 7, 2006 Decision & Dismiss All Charges Against Karen Schmidt d/b/a SCR Kennel" [hereinafter Brief in Support of Appeal Petition]. First, Respondent contends the Chief ALJ erroneously failed to dismiss the Complaint based upon his finding that the United States Department of Agriculture engaged in misconduct in the instant proceeding, *In re Jerome Schmidt*, AWA Docket No. 05-0019, and *In re Marilyn Shepard*, 61 Agric. Dec. 478 (2002), and with respect to Dr. Jerome Schmidt's business (Respondent's Appeal Pet. at 1; Respondent's Brief in Support of Appeal Pet. ¶ I).

The Chief ALJ did not find the United States Department of Agriculture engaged in misconduct. Instead, the Chief ALJ described Respondent's allegations of inappropriate United States Department of Agriculture conduct; referred Respondent's allegations to the United States Department of Agriculture, Office of Inspector General; and made his determination of whether Respondent violated the Regulations and Standards as alleged in the Complaint based upon the evidence (Initial Decision at 3-4). I agree with the manner in which the Chief ALJ handled Respondent's allegations of misconduct, and I agree with the Chief ALJ that the evidence supports his findings that Respondent committed seven violations of the Regulations and Standards. Therefore, I find no basis to dismiss the Complaint based on Respondent's allegations of misconduct.

Second, Respondent contends the 16-month period between the close of the November 3-4, 2004, hearing and the issuance of the Initial Decision had a direct relationship to the United States Department of Agriculture's agenda against Dr. Jerome Schmidt and caused Respondent to sell many of her dogs (Respondent's Appeal Pet. at 1; Respondent's Brief in Support of Appeal Pet. ¶ II).

I have carefully examined the arguments in Respondent's Brief in Support of Appeal Petition. I find no relationship between the date of the issuance of the Initial Decision in the instant proceeding and the proceeding instituted under the Animal Welfare Act against Dr. Jerome Schmidt, *In re Jerome Schmidt*, AWA Docket No. 05-0019. The instant

proceeding and *In re Jerome Schmidt*, AWA Docket No. 05-0019, are two distinct proceedings. The disposition of the instant proceeding is not affected by *In re Jerome Schmidt*, AWA Docket No. 05-0019, and Respondent's position in the instant proceeding is not disadvantaged by the 16-month period between the close of the November 3-4, 2004, hearing and the issuance of the Initial Decision. Moreover, while Respondent's decision to sell many of her dogs may have been influenced by the instant proceeding, Respondent was not required to sell her dogs because the Initial Decision was pending and Respondent's decision to sell her dogs is not relevant to the disposition of this proceeding.

Third, Respondent contends the 16-month period between the close of the November 3-4, 2004, hearing and the issuance of the Initial Decision violated Respondent's right to a speedy trial under the Sixth Amendment to the Constitution of the United States (Respondent's Appeal Pet. at 1; Respondent's Brief in Support of Appeal Pet. ¶ II).

The Sixth Amendment right to a speedy trial is explicitly confined to criminal prosecutions, as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Const. amend. VI.

The instant proceeding is not a criminal prosecution. Instead, the instant proceeding is a disciplinary administrative proceeding conducted under the Animal Welfare Act, in accordance with the Administrative Procedure Act, and the sanction imposed against Respondent is a civil penalty. It is well settled that the Sixth Amendment to the Constitution of the United States is only applicable to criminal proceedings and is not applicable to civil proceedings.[3] Thus, I conclude Respondent's rights

[3]*See Austin v. United States*, 509 U.S. 602, 609 (1993) (stating the protections provided by the Sixth Amendment are explicitly confined to criminal prosecutions); (continued...)

under the Sixth Amendment to the Constitution of the United States are not implicated in this administrative proceeding.

Fourth, Respondent contends her violations of section 3.6(a)(2)(i) of the Regulations and Standards (9 C.F.R. § 3.6(a)(2)(i)) on October 24, 2001, and sections 3.1(e), 3.4(c), and 3.11(c) of the Regulations and Standards (9 C.F.R. §§ 3.1(e), .4(c), .11(c)) on January 9, 2003, were not willful (Respondent's Appeal Pet. at 1; Respondent's Brief in Support of Appeal Pet. ¶ III).

The Chief ALJ does not identify which, if any, of Respondent's violations of the Regulations and Standards he concluded were willful, but states "many of [Respondent's] violations were minor or non-willful." (Initial Decision at 23.) Moreover, my disposition of the instant proceeding is not based upon Respondent's willfulness; therefore, I find no purpose would be served by my determining whether Respondent's violations of section 3.6(a)(2)(i) of the Regulations and Standards (9 C.F.R. § 3.6(a)(2)(i)) on October 24, 2001, and sections 3.1(e), 3.4(c), and 3.11(c) of the Regulations and Standards (9 C.F.R. §§ 3.1(e), .4(c), .11(c)) on January 9, 2003, were willful.

Fifth, Respondent contends the Chief ALJ erroneously concluded that she violated section 3.6(a)(2) of the Regulations and Standards (9 C.F.R. § 3.6(a)(2)) on January 9, 2003 (Respondent's Appeal Pet. at 1; Respondent's Brief in Support of Appeal Pet. ¶ III). Complainant alleges Respondent failed to construct and maintain a primary structure so that it had no sharp points or edges that could injure dogs in violation of section 3.6(a)(2) of the Regulations and Standards (9 C.F.R. § 3.6(a)(2)) (Compl. ¶ VII(H)). The Chief ALJ found that, on January 9, 2003, a primary enclosure contained a sheet of tin with sharp edges which could injure Respondent's dogs and concluded Respondent

[3](...continued)
United States v. Ward, 448 U.S. 242, 248 (1980) (stating the protections provided by the Sixth Amendment are explicitly confined to criminal prosecutions); *United States v. Zucker*, 161 U.S. 475, 481 (1895) (stating the Sixth Amendment relates to prosecution of an accused person which is technically criminal in nature); *United States v. Plumman*, 409 F.3d 919, 927 (8th Cir. 2004) (stating the protections provided by the Sixth Amendment are explicitly confined to criminal prosecutions); *Williams v. State of Missouri*, 640 F.2d 140, 144 (8th Cir.) (stating the Sixth Amendment applies only during the pendency of the criminal case), *cert. denied*, 451 U.S. 990 (1981); *In re Judie Hansen*, 57 Agric. Dec. 1072, 1132 (1998) (concluding the Sixth Amendment is not applicable to administrative proceedings instituted under the Animal Welfare Act), *appeal dismissed*, 221 F.3d 1342 (Table), 2000 WL 1010575 (8th Cir. 2000) (per curiam), *printed in* 59 Agric. Dec. 533 (2000); *In re Conrad Payne*, 57 Agric. Dec. 921, 931 (1998) (concluding the respondent's rights under the Sixth Amendment are not implicated in an administrative proceeding instituted under section 2 of the Act of February 2, 1903, as amended).

violated section 3.6(a)(2) of the Regulations and Standards (9 C.F.R. § 3.6(a)(2)) (Initial Decision at 19-20). Respondent contends, because no dogs had been in the primary enclosure since December 25, 2001, Respondent did not violate section 3.6(a)(2) of the Regulations and Standards (9 C.F.R. § 3.6(a)(2)) on January 9, 2003 (Respondent's Brief in Support of Appeal Pet. ¶ III). I disagree with Respondent. Section 3.6(a)(2)(i) of the Regulations and Standards (9 C.F.R. § 3.6(a)(2)(i)) provides that primary enclosures must be *maintained* so that they have no sharp points that *could* injure dogs. The Regulations and Standards make no exception for primary enclosures that do not contain dogs at the time of inspection. Instead, at all times, primary enclosures must be maintained so that they have no sharp points that could possibly injure dogs.

Sixth, Respondent contends the Chief ALJ erroneously concluded she violated section 3.11(a) of the Regulations and Standards (9 C.F.R. § 3.11(a)) on January 9, 2003 (Respondent's Appeal Pet. at 1; Respondent's Brief in Support of Appeal Pet. ¶ III).

Complainant alleges Respondent failed to clean and sanitize enclosures as often as necessary to prevent an excessive accumulation of dirt, hair, excreta, and food waste in violation of section 3.11(a) of the Regulations and Standards (9 C.F.R. § 3.11(a)) (Compl. ¶ VII(I)). The Chief ALJ found that, on January 9, 2003, an outdoor enclosure had a substantial accumulation of waste material and concluded Respondent violated section 3.11(a) of the Regulations and Standards (9 C.F.R. § 3.11(a)) (Initial Decision at 20-21). Respondent asserts three stock dogs that are not subject to the Animal Welfare Act defecate in the enclosure and no dogs subject to the Animal Welfare Act had been in the enclosure since February 2002. Respondent argues, under these circumstances, Respondent did not violate section 3.11(a) of the Regulations and Standards (9 C.F.R. § 3.11(a)) on January 9, 2003 (Respondent's Brief in Support of Appeal Pet. ¶ III). I disagree with Respondent. Section 3.11(a) of the Regulations and Standards (9 C.F.R. § 3.11(a)) provides that excreta must be removed from primary enclosures daily to reduce disease hazards, insects, pests, and odors. The Regulations and Standards make no exception for primary enclosures that do not contain dogs at the time of inspection or that contain waste only from dogs that are not subject to the Animal Welfare Act.

Seventh, Respondent contends the Chief ALJ erroneously concluded she violated section 3.11(d) of the Regulations and Standards (9 C.F.R.

§ 3.11(d)) on January 9, 2003 (Respondent's Appeal Pet. at 1; Respondent's Brief in Support of Appeal Pet. ¶ III).

Complainant alleges Respondent failed to provide an effective program of pest control in violation of section 3.11(d) of the Regulations and Standards (9 C.F.R. § 3.11(d)) (Compl. ¶ VII(J)). The Chief ALJ found the presence of several rodent holes on January 9, 2003, was well documented and concluded Respondent violated section 3.11(d) of the Regulations and Standards (9 C.F.R. § 3.11(d)), although no rodents were actually seen entering or exiting these holes during the inspection of Respondent's premises (Initial Decision at 22). Respondent asserts the lack of any rodent activity and the condition of the rodent holes and the ground around the rodent holes establish that Respondent had an effective program of pest control, and Respondent did not violate section 3.11(d) of the Regulations and Standards (9 C.F.R. § 3.11(d)) on January 9, 2003 (Respondent's Brief in Support of Appeal Pet. ¶ III). I disagree with Respondent. Daniel Hutchings, who is an experienced trapper, as well as an inspector for the United States Department of Agriculture, testified that the two rodent holes depicted in CX 43 were being used on a regular basis on January 9, 2003 (Tr. I at 11-12). In addition, Sandra Meek indicated that rodents were living in the rodent holes depicted in CX 43 (Tr. I at 52-53). I find Complainant proved by a preponderance of the evidence that Respondent failed to have an effective program of pest control on January 9, 2003.

Findings of Fact

1. Respondent is an individual doing business as SCR Kennels, located at 6740 Highway F, Hartville, Missouri (CX 6 at 1).

2. Respondent holds Animal Welfare Act Class A Dealer License number 43A2135 (CX 6 at 1).

3. SCR Kennels is a breeding dog kennel. On January 9, 2003, SCR Kennels had 150 breeding female dogs, over 20 breeding male dogs, and a number of puppies. In 2001, SCR Kennels sold 442 puppies. (CX 6 at 1.)

4. On October 24, 2001, Respondent failed to maintain primary enclosures in such a manner as to protect all Respondent's dogs from injury. Specifically, two of Respondent's enclosures had broken wires or sharp edges in the enclosures that presented potential injury hazards to the dogs sheltered in those enclosures. (CX 17 at 2, CX 23; Tr. I at 36-38, 66-67.) (9 C.F.R. §§ 2.100(a); 3.6(a)(2)(i).)

5. On January 9, 2003, Respondent failed to store chemicals and food supplies in a safe manner. Specifically, Respondent stored an open

bag of chemical insecticide near the bulk food. (CX 34; Tr. I at 42-43.) (9 C.F.R. §§ 2.100(a); 3.1(e).)

6. On January 9, 2003, Respondent failed to keep an outdoor housing facility in good repair. Specifically, one of Respondent's outdoor enclosures had a broken hinge on a single door, causing the door to hang at an angle. (CX 33 at 3, CX 38.) (9 C.F.R. §§ 2.100(a); 3.4(c).)

7. On January 9, 2003, Respondent failed to construct and maintain a primary enclosure so that it had no sharp points or edges that could injure dogs. Specifically, one enclosure had a sheet of tin with sharp edges. (CX 39 at 2-4; Tr. I at 46-47.) (9 C.F.R. §§ 2.100(a); 3.6(a)(2)(i).)

8. On January 9, 2003, Respondent failed to clean an enclosure as often as necessary to prevent an excessive accumulation of waste and dirt. Specifically, an outdoor enclosure (identified as enclosure 13) had a substantial accumulation of waste material. (CX 33 at 4, CX 41 at 9; Tr. II at 15, 31-32.) (9 C.F.R. §§ 2.100(a); 3.11(a).)

9. On January 9, 2003, Respondent failed to maintain housing facilities free of accumulations of dirt, fecal matter, hair, and debris. Specifically, one of the pipes of the sewage system that served the kennel broke and resulted in accumulations of waste matter in excessive amounts. (CX 42; Tr. I at 51-52.) (9 C.F.R. §§ 2.100(a); 3.11(c).)

10. On January 9, 2003, Respondent failed to provide an effective program of pest control. Specifically, rodent holes were on Respondent's premises near the outdoor pens. (CX 43; Tr. I at 11-12, 52-53.) (9 C.F.R. §§ 2.100(a); 3.11(d).)

Conclusions of Law

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

2. On October 24, 2001, Respondent violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to maintain primary enclosures in such a manner as to protect all Respondent's dogs from injury, as required by section 3.6(a)(2)(i) of the Regulations and Standards (9 C.F.R. § 3.6(a)(2)(i)).

3. On January 9, 2003, Respondent violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to store chemicals and food supplies in a safe manner, as required by section 3.1(e) of the Regulations and Standards (9 C.F.R. § 3.1(e)).

4. On January 9, 2003, Respondent violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to keep an

outdoor housing facility in good repair, as required by section 3.4(c) of the Regulations and Standards (9 C.F.R. § 3.4(c)).

5. On January 9, 2003, Respondent violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to construct and maintain a primary enclosure so that it had no sharp points or edges that could injure dogs, as required by section 3.6(a)(2)(i) of the Regulations and Standards (9 C.F.R. § 3.6(a)(2)(i)).

6. On January 9, 2003, Respondent violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to clean an enclosure as often as necessary to prevent an excessive accumulation of waste and dirt, as required by section 3.11(a) of the Regulations and Standards (9 C.F.R. § 3.11(a)).

7. On January 9, 2003, Respondent violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to maintain housing facilities free of accumulations of dirt, fecal matter, hair, and debris, as required by section 3.11(c) of the Regulations and Standards (9 C.F.R. § 3.11(c)).

8. On January 9, 2003, Respondent violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to provide an effective program of pest control, as required by section 3.11(d) of the Regulations and Standards (9 C.F.R. § 3.11(d)).

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

ORDER

1. Respondent, her agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards, and, in particular, shall cease and desist from:

(a) Failing to maintain primary enclosures in a manner to protect dogs from injury;

(b) Failing to store chemicals and food supplies in a safe manner;

(c) Failing to maintain outdoor housing facilities in good repair;

(d) Failing to ensure that primary enclosures have no sharp points or edges which could injure dogs;

(e) Failing to keep the enclosures free of excessive accumulations of waste and dirt;

(f) Failing to keep premises clean; and

(g) Failing to have an adequate program of pest control.

Paragraph 1 of this Order shall become effective on the day after service of this Order on Respondent.

2. Respondent 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:

Robert A. Ertman
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, Robert A. Ertman within 60 days after service of this Order on Respondent. Respondent shall state on the certified check or money order that payment is in reference to AWA Docket No. 03-0024.

RIGHT TO JUDICIAL REVIEW

Respondent has the right to seek judicial review of the Order in this Decision and 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 the Order in this Decision and Order. Respondent must seek judicial review within 60 days after entry of the Order in this Decision and Order.[4] The date of entry of the Order in this Decision and Order is August 30, 2006.

In re: COASTAL BEND ZOOLOGICAL ASSOCIATION, FORMERLY KNOWN AS CORPUS CHRISTI ZOOLOGICAL ASSOCIATION, A TEXAS CORPORATION DOING BUSINESS AS CORPUS CHRISTI ZOO; ROBERT BROCK, AN INDIVIDUAL; MICHELLE BROCK, AN INDIVIDUAL; BODIE KNAPP, AN INDIVIDUAL DOING BUSINESS AS WAYNE'S WORLD SAFARI; AND CHARLES KNAPP, AN INDIVIDUAL. AWA Docket No. 04-0015.

[4] 7 U.S.C. § 2149(c).

Decision and Order.
Filed August 31, 2006.

AWA – VMO –Dealer, unlicensed Euthanize – Veterinary care – Immobizing drugs – Volunteers.

Coleen Carroll for Complainant.
Roland Garcia Jr. for Respondent.
Decision and Order by Administrative Law Judge, Victor W. Palmer.

DECISION AND ORDER

This is an administrative disciplinary proceeding initiated by a complaint filed on March 17, 2004, by the United States Department of Agriculture's Animal and Plant Health Inspection Service ("APHIS"). The complaint essentially alleges that each of the respondents, between October 13 and December 17, 2003, violated the Animal Welfare Act (7 U.S.C. §§2131-2159; "the AWA", or "the Act") and the regulations under the AWA (9 C.F.R. §§ 1.1-3.142; "the regulations"), by mishandling animals, failing to provide animals with requisite veterinary care, and failing to make, keep and maintain requisite records. Corpus Christi Zoological Association ("the Association", or "the Corpus Christi Zoo", or the CC Zoo, or "the zoo"), Robert Brock and Michelle Brock, are also alleged to have failed to obey a consent decision and order, and to have further violated the AWA by engaging in activities for which a license is required while unlicensed.

The violations charged took place subsequent to the issuance of a consent decision and order on October 17, 2003, against Corpus Christi Zoological Association that it "place all of its animals…by donation or sale, with persons who have demonstrated the ability to provide proper care for said animals in accordance with the Act and the Regulations, and as approved by the complainant". The consent decree imposed cease and desist requirements and, effective December 15, 2003, revoked the exhibitor's license Corpus Christi Zoological Association held under the AWA.

The most egregious of the violations alleged by the complaint pertain to the handling of two lions and two tigers that Bodie Knapp moved on December 11 and December 17, 2003, from the premises of the Corpus Christi Zoological Association's zoo. All four of the animals were shown to have died soon after Bodie Knapp, using a dart gun, injected them with immobilizing drugs to facilitate their physical handling for transport from the zoo's premises. Charles Knapp, Bodie's

Knapp's father, has also been charged on the basis that he accompanied Bodie Knapp when the lions and tigers were darted, and helped Bodie physically move them to the transport truck. Both of them have been charged with failing to have a veterinarian provide adequate advice and assistance at the time of the incidents; failing to handle transferred animals in a manner that does not cause trauma, stress, harm or unnecessary discomfort; and failing to comply with transportation standards. Bodie Knapp has been further charged with failing to file requisite reports in respect to these and other animals acquired from the Corpus Christi Zoological Association.

Respondents Robert Brock and Michelle Brock have been charged individually and as agents of the Corpus Christi Zoological Association. Their alleged violations include acting as animal dealers without having required licenses; failing to record requisite information respecting the animals that were transferred; failing to provide needed veterinary care to animals; failing to handle transferred animals in a manner that does not cause trauma, stress, harm or unnecessary discomfort; and failing to establish and maintain adequate programs of veterinary care that gave animal care guidance to personnel.

The Corpus Christi Zoological Association was charged with violating the consent degree, the AWA and the regulations by engaging in activities for which a license is required after its license was revoked; failing to make, keep and maintain requisite records of all animals transported, sold, euthanized, or otherwise disposed of; exhibiting or acting as an animal dealer when no longer licensed; failing to provide needed veterinary care to animals; failing to handle transferred animals in a manner that does not cause trauma, stress, harm or unnecessary discomfort; and failing to establish and maintain adequate programs of veterinary care that gave animal care guidance to personnel.

The Respondents filed answers denying all of the charges asserted against them. Moreover, Robert Brock and Michelle Brock have specifically denied that any of their actions were anything more than those of volunteers assisting Corpus Christi Zoological Association, a non-profit corporation. They further allege that the charges are frivolous and ask that they be awarded attorneys fees. Charles Knapp states that he was merely helping his son and that he has no legal liability under the AWA or the regulations for the way in which the lions and tigers were darted or transported.

I conducted a transcribed oral hearing on April 19-22, 2005 (Transcript 1) and August 30-31, 2005 (Transcript 2), in Corpus Christi,

TX. Complainant, APHIS, was represented by Colleen A. Carroll, Attorney, Office of the General Counsel, United States Department of Agriculture, Washington, D.C. Respondent Corpus Christi Zoological Association was unrepresented and did not participate. Respondents Robert Brock and Michelle Brock were represented by Robert Garcia, Attorney, Greenberg Traurig, LLP, Houston, TX. Respondents Bodie Knapp and Charles Knapp were represented by Phillip Westergren, Attorney, Corpus Christi, TX. Briefing was completed on April 3, 2006.

For the reasons that follow, I have found and concluded that the Corpus Christi Zoological Association and Robert and Michelle Brock violated the AWA and the regulations on December 17, 2003, when the Brocks as the Association's agent and on their own behalf, acted as a dealer without a requisite license under the AWA. A cease and desist order should be issued against the Association and the Brocks. The Brocks should also be assessed a civil penalty of $2,750.00; and disqualified from being issued a license under the AWA for ten years. In light of the fact that the Brocks violated the Act, their attorney should not be awarded fees as he has requested. I have further found and concluded that Bodie Knapp violated the AWA and the regulations on or about December 11 and 17, 2003, and should be made subject to a cease and desist order and assessed a civil penalty of $5,000.00. The complaint's charges that Charles Knapp violated the AWA and is subject to disciplinary sanctions such as the denial of a license if he should apply in the future, are unsubstantiated and should be dismissed.

Findings of Fact

1. In May of 1996, Robert Brock and Michelle Brock purchased 145.5 acres of land and formed a corporation named Corpus Christi Zoo, Inc. They were the corporation's officers and directors. On August 6, 1996, Robert and Michelle Brock applied for an AWA exhibitor's license stating that they had 2 rabbits and 160 farm animals and used the business name "The Corpus Christi Zoo, Inc." (CX 56, CX 24, CX 88, Tr. 832 and Tr. 835).

2. On August 27, 1996, Corpus Christi Zoological Association was formed as a Texas non-profit corporation and filed its Articles of Incorporation with the Texas Secretary of State. (CX 25). The Brocks were listed as directors on the Articles of Incorporation, but at the organizational meeting of the Board of Directors held on November 1, 1996, five persons other than the Brocks became the directors. (RX 154). The Brocks decided not to serve as directors because their attorney

explained to them that they could not serve on the Board and also be paid employees. (Transcript 1 at 928). The Board elected Annie M. Garcia as Chairman, Kay Mrazek as Treasurer and Alice Rodriguiez as Secretary. The other two directors were Dr. Antonio Fuentes and Lita Fuentes. The Board resolved to enter into a lease with the Brocks and another with Roland Garcia, Sr., Michelle Brock's father, and to purchase the assets and assume the liabilities of The Corpus Christi, Zoo, Inc. (RX 154). The Corpus Christi Zoological Association assumed the name "The Corpus Christi Zoo" as its trade name and did business in that name.(Transcript 1 at 946: CX 2: Consent Decision at 1).

3. The Brocks failed to make the payments on the 145.5 acres of the land they had purchased for building a zoo. In a letter dated May 6, 1997, Annie M. Garcia, as the Chairman of the Board, responded to a request for information by the Internal Revenue Service, and stated that Roland Garcia assumed the land payments on January 21, 1997, with the agreement that the zoo would lease the land from him for the value of the note payment plus taxes.(CX 56). However, there is also testimony that the land reverted back to it original owners, Walter and Betty Camp. (Transcript 1 at 835). At any rate, on July 24, 1997, the Camps donated 15 acres of the land to the Corpus Christi Zoological Association with a stipulation that it was to be used as a zoological garden and, if not, it would revert back to the Camps.(RX 139; Transcript 1 at 835). It is found that, at all times material herein, the land on which the zoo facilities actually stood was owned by the Corpus Christi Zoological Association. (Transcript 1 at 831-835).

4. On April 15, 1997, the Board of Directors of the Corpus Christi Zoological Association appointed Robert Brock as General Manager and Michelle Brock as Assistant Manager of the zoo. At this meeting the zoo's gate prices and Robert Brock's procedure for soliciting sponsorships were discussed.CX 63).

5. On June 12, 1997, the zoo's Board of Directors again met. In attendance were Annie Garcia, Lita Fuentes, Maxine Duis, Kay Mrazek, Tony Fuentes, Maria Siller, Michelle Brock and Roland Garcia. Upon motion, Greg Perks, Dr. Graham Hickman and Maxine Duis were approved by the Board as new directors. The Brocks reported to the Board, among other things, that the operation of the zoo was slow but on schedule, and there was a need for more volunteers who would only

be paid reimbursement of their expenses. It was further reported that Robert Brock had made arrangements with Steve Dornin who owned tigers, to rent a small area behind the zoo's fenced area as a temporary holding caged area for the tigers until the zoo could find a sponsor for a permanent structure. The responsibility for building cages and the maintenance and feeding of the tigers would stay with Mr. Dornin who would also provide a $1,000,000.00 liability insurance policy. Annie Garcia reported that application for the IRS 5013-C (recognition as a non-profit for federal tax purposes) was being processed and was pending. Dr. Hickman reported that he had agreed to chair the African Committee, and he believed the zoo needed professional landscaping and an improvement of its image. Lita Fuentes reported that one of her Dr. friends may be willing to have a fund raiser for the zoo parking area.(CX 102).

6. On November 12, 1997, there was another Board of Directors meeting. Noted as present were Roland Garcia, Sr., Annie Garcia, Cruz Colombo, Michelle Brock, Sue Fordtran, Graham Hickman, Darlene Gregory, Gilda Garcia, Faith Farias, Kay Mrazek and Rusty Beck. A motion by Michelle Brock to amend the minutes of a meeting held the week before passed. The minutes show an extensive discussion of many topics that included the holding of a Zoobilee, identifying persons in the community who wished to donate money or construction materials to the zoo; the making of a one hour video of the zoo maintaining animals; seeking large corporate donors; holding CCZA meetings monthly or weekly; Darlene Gregory marketing calendars to raise funds; Cruz Columbo handling future dealings with Spanish media and Darlene Gregory covering English; the requirement that any future purchases by Darlene Gregory must be authorized by Annie Garcia or Kay Mrazek; Sue Fordtran pursuing the idea of making Zoo T-shirts; a motion by Kay Mrazek to give a 15% commission to anyone who does a grant for the CCZA; and in respect to a lawsuit against the Zoo concerning the housing of the big cats, Michelle Brock announcing that Steve Dornin wants to sell the big cats to the Zoo for $800.00---"She said this was a good price considering the regular price of $2,000.00".(CX 103).

7. Under the terms of an employment contract that began on February 4, 1999, the Board of Directors hired Michelle Brock as Executive Director to perform its management duties at a salary of $36,000.00 per year. At that time, Annie M. Garcia was still the Chairman of the Board, Kay Mrazek was the Treasurer and Sue Fordtran was the Secretary. (CX 65).

8. At a Board of Directors meeting held in March 2001, attended by David Bern, Sue Fortran, Annie Garcia, Faith Ferias, Michelle Brock and Graham Hickman, it was reported that Robert and Michelle Brock were not renewing their management contract due to Robert having other work and Michelle taking care of her grandmother full time. Michelle told the Board she couldn't do the tours that were booked, but that she and Robert would continue to volunteer their time and money whenever they were able to do so, but they were broke. The minutes further reported that David Bern and Al Bolin would replace the Brocks and a new contract was needed. (RX 146).

9. Chronologically, the managers of the Corpus Christi Zoo were as follows:

(a) Robert Brock worked at the Corpus Christi Zoo in 1997-1999. He ran out of money in 1999, and went back to work as a stockbroker. (Transcript 1 at 941, 946 and 951).

(b) Michelle Brock followed Robert Brock as the zoo's manager in 1999, and ended her management duties in 2000/2001. At a meeting of the Corpus Christi Zoological Association in March, 2001, the minutes show that the Brocks "will not be renewing the management contact due to Robert is working and Michelle is taking care of her grandmother full time. David Bern and Al Bolin will replace them…." (RX 146; Transcript 1 at 960).

(c) After the Brocks stopped managing the Corpus Christi Zoo, David Bern became the Manager and Al Bolin the Assistant Manager. "Al Bolin lived on site like a night watchman, and he did construction." (Transcript 1 at 959; RX 146). Al Bolin started at the Corpus Christi Zoo in 1998; first started handling inspections in late 2000; and last signed an inspection report on May 22, 2002. (Transcript 1 at 960, 961).

(d) By 2002, management by both David Bern and Al Bolin ended. David Bern left first, and Al Bolin left in 2002, after he had a heart attack. Thereupon, Ron Robinson who had been helping Al Bolin, took over the park and became the manager. Ron Robinson's management of the zoo was pursuant to a written document in the form of a commercial lease. Under the lease, he paid the Association $50 per month rent for which he was provided use and occupancy of the zoo's premises and housing as the "onsite zookeeper available 24 hours a day at the zoo". The lease noted that: "All expense purchase orders incurred by the Zoological Association must be approved by a Board of Directors quorum. All purchase orders between $500 and $1,000 must be

approved by the Chairman of the Board of Directors". It was signed on behalf of the Association by Faith Farias, President and Alex Rodriguez, Secretary. The lease was dated June 17, 2002. Copies were sent to Sue Fordtran, Michelle Garcia, Dr. Graham Hickman and Gregory T. Perkes. (RX 145). Ron Robinson had an assistant named James Hubbard or James Hubbell, who moved on-site as the Assistant Manager. Robinson managed the Corpus Christi Zoo through the end of 2002. (Transcript at 964-966; RX 145).

(e) At the end of 2002, Steve Verno and Kathy Hostetler took over management and maintenance of security at the Corpus Christi Zoo and moved on-site. (RX 140; RX 141; RX 147; RX 148). In 2003, Steve Verno became President of the Corpus Christi Zoo, and Kathy Hostetler became its corporate secretary and manager. (RX 140; RX 141; RX 147; RX 148; CX 79 at 2; Transcript 1 at 967). The inspection reports respecting the Corpus Christi Zoo in 2003, show that the responsible person present at each inspection was Steve Verno, Kathy Hostetler, or Sherri Watkins. The APHIS official who conducted the 2003 inspections testified that neither of the Brocks were present at any of the 2003 inspections and did not sign any of the inspection reports. (RX 150; Transcript 1 at 772-773).

10.In 2002, Sonny Kelm, an investigator for APHIS, conducted interviews with Robert Brock, Michelle Brock and Al Bolin and was on the zoo's premises at various times. (CX 81; CX 82; CX 95; Transcript 2 at 737-781). The memoranda Mr. Kelm prepared of these interviews and his testimony respecting his observations, indicate that even though Al Bolin was responsible for the on-site management of the zoo, Robert Brock took an active leadership role in the overall conduct of the zoo. Mr. Brock was the person who obtained legal counsel to defend the zoo from the complaint (AWA Docket No. 02-0016) APHIS had filed against it. When Mr. Kelm observed Robert Brock and Al Bolin together at the zoo, Robert Brock was the one giving the orders. (Transcript 2 at 780). Mr. Kelm also stated that both of the Brocks "did a pretty good job" when they managed the zoo, whereas Bolin was "below standards". (Transcript 2 at 776-777). When Mr. Kelm interviewed Al Bolin on May 9, 2002, respecting inspections at the zoo on March 12, 2002, March 13, 2002 and April 25, 2002, Mr. Bolin attributed most of the problems at the zoo to a shut off of power by the electric company, on 12-3-01, that caused a power surge that burnt out the refrigerators, freezers and the water purification system. In response, Robert or Michelle Brock brought out jugs of water every day that Al Bolin used to water the animals; and Robert Brock purchased a 7000 watt generator that

provided the zoo with power to run the refrigerators, freezers, water well, and lights. (CX 95; Transcript 2 at 776).

11.On October 10, 2003, there was a Zoo Meeting attended by Michelle Brock, Kathy Hostetler, Sherri Green and Steven Verno. (CX 71 at 1).The following notes were made at the meeting:

> Voted to take the USDA's offer to surrender the license..
> The agreements are that we keep our license until USDA finds homes for the big cats. They have until December 15.

12.On October 13, 2003, Colleen A. Carroll, attorney for APHIS, sent a facsimile transmission, to Roland A. Garcia, attorney, "to memorialize our conversations regarding settlement…." (CX 62; RX 96). In her concluding paragraph, Ms. Carroll stated:

> I also write to reconfirm APHIS's agreement to assist your client in the placement of its existing regulated animals by December 15, 2003. In the event that such animals are not able to be placed by December 15, 2003, despite the best efforts of respondent, and with APHIS's assistance, APHIS agrees to move for issuance by December 14, 2003, of an order modifying paragraphs 2 and 3 of the Order (providing for the effective date of revocation and deadline for placement of animals) to provide for an appropriate later effective date and deadline, and to move for additional such orders as necessary.

13.On October 17, 2003, a consent decision and order was issued in resolution of the complaint filed by APHIS that had alleged the Corpus Christi Zoological Association violated the AWA and the regulations on March 12, March 13, April 25, May 7, May 22, and September 24, 2002. (AWA Docket 02-0016; CX 2). The consent decision and order was signed on behalf of the Corpus Christi Zoological Association, a Texas corporation doing business as Corpus Christi Zoo, by Steven Verno its President on October 14, 2003. (CX 2 at 23). It was signed on behalf of APHIS by Colleen A. Carroll, Attorney for Complainant. The Order required that:

> [1.] Respondent, its agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the Regulations and Standards.

[2.] Respondent's Animal Welfare Act license (number 74-C-0407) is revoked, effective December 15, 2003.

[3.] By December 15, 2003, respondent shall place all of its animals, as that term is defined in the Act and the Regulations, by donation or sale, with persons who have demonstrated the ability to provide proper care for said animals in accordance with the Act and the Regulations, and as approved by the complainant.

14.Neither Robert Brock nor Michelle Brock signed the consent decision and order. Neither of them was a named party subject to the terms of the consent decision and order. (CX 2).

15.Efforts to place the animals were undertaken by Kathy Hostetler, the zoo's manager, but no one would take its big cats, i.e., its two lions and four tigers. (Transcript 1 at 986 and 998; RX 95). The difficulty in placing the big cats was made known to Ms. Carroll by Mr. Garcia in an e-mail he sent to her on October 16, 2003. (RX 95). Everyone involved with the zoo made calls trying to find homes for the animals, including Robert Brock. (Transcript 1 at 984).

16.In seeking placements for the big cats, Bodie Knapp was approached in late October, 2003 about taking them, and Robert Brock discussed this possibility with Bodie Knapp. (Transcript 1 at 988-989). The zoo had previously placed three lions and two snow macagues with Mr. Knapp on February 3, 2002. (Transcript 1 at 983). A report of the February 3, 2002 placement had been made by the zoo to APHIS and APHIS did not assert any objections. (Transcript 1 at 750-751, 1042-1044).

17.On November 15, 2003, a Zoo Meeting was held that was attended by Michelle Brock, Sherrie Green and Kathy Hostetler.(CX 72). The following notes were made at the meeting:

Haven't heard from USDA. Still have big cats & all other animals
Discussed what we can do after USDA is gone. Talked about doing birds & reptiles. Discussed moving to Alice.
Talked about placing some of the animals
Told CJ to move the bush babies.

18.On November 18, 2003, Bodie Knapp sent a fax to "Robert & Michelle" responding to an agreement sent him for taking over the zoo and its animals. (RX 86 at 1). It read as follows:

The following is the agreement you sent us:

> $12,000 Mortgage to Roland Garcia, rated at 0% interest, $250/mo payment for 36 months, balance due at 36 months.
>
> Papers would be from Seller (Corpus Christi Zoological Association) to buyer (Titled, Corpus Christi Zoological Association)
>
> Clean out one building per month/Sunday, except Thanksgiving, 3 buildings, (i.e. cleaned out before Christmas)
>
> Carousel belongs to Brocks
>
> Michelle's agreement for Lynx & Skunk
>
> Meet to do Board Papers & Taxes
>
> Michelle promote park, maybe have you guys bring animals (Good)

The following are clarifiers I would like to see added.

> Mortgage – I understand that the Corpus Christi Zoological Association (CCZA), is in debt to Roland Garcia for $12,000. Bodie & Jennifer Knapp (Personally) will agree to accept and pay this debt for the association, in turn the association agrees to turnover deed ownership of the real estate to Bodie & Jennifer Knapp (Personally) the terms of the $12,000 debt payment to Roland Garcia are as follows: rated at 0% interest, $250/mo payment for 36 months, balance due at 36 months.
>
> Papers – I do not understand the papers statement, perhaps it is included in the above.
>
> Clean Out - Cleaning the inside of the buildings would be beneficial, but I was more concerned with the costs associated with removing the larger amounts of debris. I would prefer to have large dumpsters spotted each week for three weeks, and some plan to remove the larger pieces (roof sections etc.) I would like the same timeline, before Christmas.
>
> Carousel – I would like to discuss keeping carousel in the park, we have some ideas for it.
>
> Michelle's Agreement, I have no problem giving Michelle free access to the park and I plan to keep the lynx. However, this is the first I've heard of the Skunk. I do not have the permits to keep Texas Species and I am….. (the fax evidently continued to another page that was not supplied as part of this exhibit)

.

19.On November 20, 2003, a Zoo Meeting was held that was attended by Robert Brock, Steven Verno, Kathy Hostetler and Arnold Garcia. (CX 73). The following notes were made at the meeting:

> The board held a meeting and decided to sign the two mobile homes over to Michelle Brock for back wages owed to her. She is willing to trade out due to the fact the zoo is not open to the public & does not have the money to pay her.

20.On November 25, 2003, Bodie Knapp faxed a signed version of the same proposal that he had sent on November 18, 2003. (RX 86 at 2).

21.On November 28, 2003, the Board of the Corpus Christi Zoo met and agreed to accept Mr. Knapp's offer. At this meeting, the Corpus Christi Zoo Board members resigned and agreed to let Mr. Knapp assume the responsibilities of the Corpus Christi Zoo. Within a day or two of the date that the Corpus Christi Zoo Board accepted Mr. Knapp's offer and resigned, Mr. Knapp gave notice that Kathy Hostetler and Steve Verno were to vacate the premises within two weeks. The time to vacate was later extended and they stayed through the end of December, 2003. (Transcript 1 at 995-996; RX 140 at 2). In purported minutes of a December 15, 2003 Zoo Meeting (RX 87), that Bodie Knapp testified are bogus (Transcript 2 at 612-613), the resignation of the prior board was noted as well as the fact that:

> They will no longer be responsible for the property located on the Cr33 CC Zoo. or its animals
>
> New officers are:
>
> Bodie Knapp, president 11344 hwy Mathis TX 78368
> Jennifer Knapp vice president
> Janet Young treasurer 3226 Brownsville rd Pittsburgh PA 15227
> Dave Farence 318 sheetz road Halifax pa 17032 ph 717 896 3267
> Elenor Noel sectary hcri box 560 sandia TX 78383 ph 361 547 1296
>
> Steven Verno and Kathy Hostetler were given 2 weeks notice to vacate by Bodie and Jennifer Knapp and were asked to move immediately.

22. Ms. Carroll sent Mr. Garcia an e-mail on December 2, 2003 (CX 76 at 1 and 2), which listed "approved persons and facilities" located by APHIS that:

> …will accept all but three of the respondent's animals (three of its four tigers) that are required to be placed by donation or sale, by December 15, 2003, pursuant to the consent decision and order issued on October 17, 2003…. The respondent should contact these persons and facilities directly to make arrangements for the animals' transfer, and must make the required records of the disposition of each animal (Form 7020).

23. Mr. Garcia, on December 2, 2003, e-mailed the following reply to Ms. Carroll (CX 76 at 2):

> Thanks for the update. I will pass this information to the Corpus Christi Zoo. Pursuant to our previous discussions, I assume that either the exhibitors or APHIS will provide for transportation, or pay for the relocation. The CC Zoo has no funds for the transfers. Thanks.

24. In response to Mr. Garcia's e-mail, Ms. Carroll, sent him the following e-mail on December 2, 2003 (CX 67 at 5):

> You're welcome
> Although we discussed APHIS's agreement to assist in securing facilities for the placement of existing animals (and APHIS has found homes or potential homes for all of the animals), your assumption that APHIS would also transport or provide transportation for those animals is incorrect. I know of no "previous discussions" in which I participated that could have left you with that assumption. The arrangements for the transfer of the animals in this case are between the Corpus Christi Zoo and the facilities, and do not involve APHIS, In fact, APHIS does not provide or arrange for any animal transportation except in confiscation cases pursuant to section 2.129 of the AWA regulations. Moreover, in those cases, all costs are borne by the dealer or exhibitor from whom the animals were confiscated.

25. On December 6, 2003, Bodie Knapp picked up and transported a vervet from the Corpus Christi Zoo.

26.On December 11, 2003, Bodie Knapp picked up and transported two lions from the Corpus Christi Zoo.

27.On December 13, 2003, Mr. Garcia e-mailed Ms. Carroll as follows (CX 76 at 1 and 2):

> As an update please be advised that none of the exhibitors you identified were willing or able to accept the big cats. (The small animals are no problem, and all are gone except the wolf and skunk as I understand it, which are anticipated to be picked up in the next two or three weeks).
>
> Specifically, Mr. Pardon stated that he was interested, but that he needed to speak with a third party (unnamed) and that he would get back to the CC Zoo. He never did. Ms. Hart said that she is interested but would have to get back to the CC Zoo. She never did. Ms. Swett was not contacted because the lynx and the monkey have already been placed. Mr. Boller was not contacted because the goat and the sheep have been placed. Mr. Moas was not contacted because the skunk has been claimed by a refuge in Rockport (I cannot recall the name). Mr. Cruz was not interested because according to Mr. Cruz, Mr. Curer (sic) told Mr. Cruz that the tiger had been de-clawed (it had not). In other words, Mr. Cruz only wants a de-clawed tiger, which the CC Zoo does not have. Mr. Gilgreth is not able to take the tigers because he does not have a facility for them, and would need to build a facility and he has no funding to build one. Ms. Keahy stated that she could take any of the cats, but needs $10,000 per cat. Ms. Asvestes stated that she needs about $5000 to $10,000 per cat to house the cats. The CC Zoo called and left messages with the Colorado facility, but never heard back.
>
> Two of the lions and one tiger have been picked up. Mr. Napp (sic) stated that he could pick up the remaining animals in the next two to three weeks, depending on the weather and his schedule.
>
> I request that the court extend the order by three weeks to allow for the pick-up of the remaining animals. Please prepare the order and submit it to the court. I do not need to see it before you submit it. If you prefer another course of action, please let me know. Thanks.

28.On December 15, 2003, Ms. Carroll sent Mr. Garcia this e-mail reply (CX 76 at 9):

> I am dismayed to learn that your client has placed animals without adhering to the terms of the consent decision – to wit: "with persons who have demonstrated the ability to provide proper care for said animals in accordance with the Act and the Regulations, and as approved by the complainant." Please immediately provide the identities of those individuals and persons to whom your client has placed the various animals. I look forward to hearing from you soon.
>
> Very truly yours,

29.On December 17, 2003, Bodie Knapp picked up and transported a fox, two sheep, a pony and two tigers. Charles Knapp who is Bodie Knapp's father was with him on December 11 and 17, 2003, and assisted him in moving the animals as an unpaid helper who followed his son's instructions. (Transcript 2 at 456-463; 496-500; 572-573). December 17, 2003 was the first time Charles Knapp saw tigers being darted and tranquilized with drugs. (Transcript 2 at 483).

30. Prior to picking up the two lions on December 11, 2003, Bodie Knapp arranged for their sale for $1,500.00 to Marshall Fabacher, a licensed animal dealer in Pipe Creek, Texas, who had found two other buyers for them.(Transcript 1 at 382-386; CX 11).

31.When Bodie Knapp picked up the two lions in the afternoon of December 11, 2003, from the Corpus Christi Zoo, he first darted them with Xylazine also known as Rompum, a drug that depresses respiration so as to immobilize the animals to facilitate their movement from the zoo premises to his truck for transport. Mr. Knapp delivered the two lions to Mr. Fabacher, Pipe Creek, Texas, on December 11, 2003, at about 10:00 PM. When the truck was opened, Mr. Fabacher saw two dead lions that were still soft indicating they had died fairly recently. He nonetheless paid Mr. Knapp the agreed price of $1,500.00 because "it is standard that if you are purchasing an animal and it dies during transport that you still pay for it". Mr. Knapp gave Mr. Fabacher a Record of Acquisition Form for the two lions that Mr. Fabacher signed without reading. The form incorrectly showed the lions having been delivered in good condition and as a donation when in fact they were

dead when delivered and Mr. Fabacher had paid for them as shown by his December 11, 2003 check to Bodie Knapp for $1,500.00. Mr. Fabacher "caped out" the lions and sold them for rugs at a price that recouped the $1,500.00 he had paid Mr. Knapp. (Transcript 1 at 382-385; 388-389; CX 11; CX 51; CX 53). In making this finding I have decided that Mr. Fabacher's testimony is more credible than that given by Bodie Knapp who testified that both lions were alive when he delivered them. I have however, accepted Mr. Knapp's testimony that he darted the lions with Xylazine, and not Succostrin which Mr. Fabacher thought Mr. Knapp may have said he used. (Transcript 2, at 602-611).

32. On December 17, 2003, when Bodie Knapp picked up two tigers, together with two sheep, a pony and a fox, he again used Xylazine (Rompum) to facilitate the movement of the tigers from the zoo premises to his truck. He did not retain the services of a veterinarian to sedate the animals for him, nor did he seek the assistance, advice or supervision of a veterinarian. His veterinarian, Gary Lee Williams, had provided him with Xylazine to dart animals for immobilization and transport. (Transcript 1 at 421). Dr. Williams also supplied Bodie Knapp with Ketamine, a drug that is often used in combination with Xylazine for better results, but he did not use Ketamine when he darted the lions on December 11, 2003, or the tigers on December 17, 2003. (Transcript 1 at 421-422; 137-138; Transcript 2 at 575, 602).

33. When he darted the tigers on December 17, 2003, Bodie Knapp used a dart gun that has the capacity to carry a 4cc dart. He darted the male tiger that he estimated to weigh 750-800 pounds, with two darts. The first dart contained 4 ccs of Xylazine. He left it in the tiger while he then mixed up a dart with 3 ccs of Xylazine that he fired as soon as mixed. (Transcript 2 at 576-578). Cheryl Watkins, a volunteer at the zoo, observed that after the second darting, Bodie Knapp waited ten or fifteen minutes and then went up to the tiger and injected the tiger with a syringe. After this third injection, the tiger started having convulsions and foamed at the mouth. (Transcript 1 at 274-275). After loading this tiger on his truck, Bodie Knapp then darted the female tiger that he estimated to weigh 425-450 pounds. This tiger was even more hyperactive and aggressive than the other. "She was really wound up". Bodie Knapp darted her with 10 ccs. of Xylazine and then injected her three times more with 3ccs of the drug being injected each time for a total dosage of 19 ccs, or 1900 milligrams, of Xylazine administered to the female tiger before she was loaded onto the truck. (CX 11).

34. The doses of Xylazine administered to each of the tigers were excessive in the opinion of Dr. Randall Sullivan, a highly qualified veterinarian who for the past 15 years has treated large felids (lions and tigers) on behalf of several establishments, and has developed expertise from darting over 200 felids. His testimony was impressive, credible and persuasive. Working with Texas A&M University, he has developed a procedure for sedating felids by using a combination of Xylazine and Ketamine. Once an animal is sedated enough to approach, he accesses the depth of the anesthesia and if the animal appears to be in duress, he reverses the effects of the drugs administered by injecting another drug, either Tolazine or Yohimbine, to block the neuro receptors which the Xylazine is attacking and render the Xylazine ineffective. He also testified that one must wait a sufficient time between administering doses or "it can go too deep on you". Dr. Gary Williams, the veterinarian from whom Bodie Knapp obtained his drugs, likewise testified that he would not recommend using straight Xylazine on a large carnivore, and he only uses it in combination with Ketamine. Bodie Knapp used Xylazine exclusively, and did not follow the procedures that Dr. Sullivan would have used to safely sedate the tigers. (Transcript 1 at 42-45; 140-142; 154-155; 424; CX 11; Transcript 2 at 574-578).

35. The tigers died. Initially, Bodie Knapp told his veterinarian, Gary Williams, that the tigers had been killed in a fight with other tigers at his facility who had gotten through a hole in a partition separating them. Mr. Williams then wrote a letter to that effect at Bodie Knapp's request to explain their deaths. (CX 17; CX 18; Transcript 1 at 406 -415) Bodie Knapp repeated this false story to Fred David Rich, who took the dead tigers and skinned them to be made into exhibits for a museum he operates. (CX 10). On December 18, 2003, when Charles Currer, Sonny Kelm, and a supervisor of the Nueces County Animal Control Department, Ramon Herrera, came to Bodie Knapp's facility, he repeated the story stating he had repaired the hole in the partition, but the investigators found no evidence of such a fight or a recently repaired hole. (CX 1; CX 42; Transcript 1 at 530-531). Bodie Knapp called Dr. Williams and told them that he lied about the way the tigers died. This time he said he used drugs to euthanize them because he couldn't find anyone who would take them, and he didn't want to lose his deal that included taking the tigers. (Transcript 1 at 418-420). At the hearing, Bodie Knapp testified that his statement to Dr. Williams was also made up because he felt Dr. Williams would better understand his euthanizing

the animals than being negligent in some way. (Transcript 2 at 566-567). He next stated that he found the tigers dead when he entered his trailer upon arrival at his facility and that the female tiger had injuries that were not present when he loaded them. (CX 12) At the hearing, Bodie Knapp denied that he intentionally killed the tigers and testified that when he opened the trailer, the tigers were dead with wounds showing they had gotten into a fight. (Transcript 2 at 560-564).

36. Bodie Knapp, operating as a sole proprietorship, did business as Wayne's World, a safari park that primarily exhibited animals to school children and their families. In addition to Bodie Knapp and his wife, Jennifer Knapp, the park had anywhere from three to five employees that fluctuated season to season. As of April, 2005, Wayne's World had been in business for four years. Bodie Knapp also earned income from buying and selling animals and transporting animals for other individuals. Bodie Knapp has a bachelor degree in animal science with a minor in business. Jennifer Knapp has a degree in elementary education. After the Knapps closed the doors to Wayne's World in anticipation of their loss of their AWA exhibitor's license, they lost their main source of income; have experienced severe financial hardship; have had to give up their house and her car; have filed Chapter Seven bankruptcy; and now live in a small trailer with their six children. (Transcript 2 at 510-512; 517; 541- 546).

Conclusions

1. On December 17, 2003, Robert Brock and Michelle Brock, both as agent for the Corpus Christi Zoological Association and on their own behalf, without a requisite license under the AWA, acted as a dealer, as defined in 7 U.S.C. § 2132 and 9 C.F.R. § 1.1, in that they, in commerce, for compensation or profit, delivered for transportation or negotiated the sale of a fox, two sheep and two tigers for exhibition in violation of 7 U.S.C. § 2134 and 9 C.F.R. § 2.1. For this violation:

(a) The Corpus Christi Zoological Association and Robert and Michelle Brock should be ordered to cease and desist from violating the Act and the Regulations as authorized under 7 U.S.C. § 2149 (b).

(b) Robert and Michelle Brock should be jointly assessed a civil penalty of $2,750 as authorized under 7 U.S.C. § 2149 (b), and as amended by 28 U.S.C. § 2461 and implemented by 7 C.F.R. § 3.91(a), (b)(2)(v).

(c) Robert and Michelle Brock should be denied licenses under the AWA for a period of ten years as authorized under 9 C.F.R. § 2.1 (e).

Robert and Michelle Brock thwarted effective administration of the AWA by APHIS by placing the animals owned by the Corpus Christi Zoological Association with Bodie Knapp without obtaining APHIS approval as the consent decision and order required. They did so largely because they had negotiated favorable terms with him that would lessen the adverse economic impact of the consent decision and order on themselves and Michelle's father. APHIS first learned on December 13, 2003, just two days before the zoo's license revocation was to take effect, that animals had been placed with unapproved persons. In an e-mail sent by its attorney on December 15, 2003, APHIS expressed dismay that the zoo was not adhering to the terms of the consent decision and order and asked for the complete identities of the persons with whom the zoo's animals had been placed. Despite this warning by APHIS that the zoo was not in compliance with the terms of the consent decision, two days later, on December 17, 2003, the placement of animals with Bodie Knapp was completed at a time when neither the zoo nor the Brocks had a valid license as required by the AWA. The Brocks had arranged the deal with Bodie Knapp. (Findings 16, 18, and 20). It was to their benefit, and during the months of October, November and December, 2003, the Brocks were in obvious control of the meetings that approved the deal. Whether they had official status as members of the Board of Directors is uncertain, but they were the ones who negotiated the deal with Mr. Knapp and at least one of the Brocks participated at each of the Zoo Meetings where the deal and its terms were approved. The only others in attendance and voting at these meetings were the zoo's onsite caretakers and occasionally a volunteer. As a result of the deal, the two caretakers were made to vacate the premises. The Brocks on the other hand obtained a commitment that Michelle would keep a carousel, would be allowed to continue to house animals she personally owned at the zoo, and that a loan her father had made to the zoo would be repaid. The Brocks also benefited from a Zoo Meeting on November 20, 2003, in which two mobile homes were signed over to them for back wages owed Michelle (Finding 19). The fact that the two caretakers voted for these results raises a strong inference that they recognized themselves to be subordinates of the Brocks. At any rate, when the remaining zoo animals were transferred to Bodie Knapp, on December 17, 2003, it was the culmination of the

deal the Brocks had made with him; a deal the Brocks took no steps to stop after being warned that their arrangements for animal transfers were not in compliance with the consent decision. They allowed the final transfer of animals to Bodie Knapp to go forward after the revocation of the zoo's AWA license. They thereby, together with the zoo, became subject to sanction for acting as a dealer while unlicensed.

APHIS has chosen not to request the imposition of a civil penalty against the now defunct Corpus Christi Zoological Association for its violation of the Act and the regulations, ostensibly because such a monetary penalty would be meaningless. Instead, APHIS has requested that the Corpus Christi Zoological Association and the Brocks be made subject to a cease and desist order, that civil penalties be assessed against the Brocks as the alter egos or agents of the Association, and that the Brocks be disqualified for ten years from becoming licensed under the AWA.

I agree with APHIS that the zoo and the Brocks should be made subject to a cease and desist order, and that the Brocks should be assessed civil penalties and disqualified from future licensing. However, I am basing this result wholly on the fact that, on December 17, 2003, the Brocks acted as a dealer while unlicensed and did so not merely as the zoo's agent, but as a way to lessen adverse personal consequences to themselves due to the zoo's closing and to secure payment of a loan the zoo still owed to Michelle's father. The record evidence and applicable legal precedent do not support the imposition of sanctions against the Brocks on the basis of the various other grounds advanced by complainant.

The record evidence does not support Complainant's assertion that the Association and the Brocks violated the regulations that require the making and keeping of records concerning the disposition of animals. Respondents have provided exhibits showing such records were in fact made (RX 157 and RX 158). The person responsible for their preparation was Kathy Hostetler who has sworn she had supplied them in the past (RX 147), and had prepared transfer documents on December 17, 2003 that Bodie Knapp refused to sign (RX 141). The APHIS investigator who testified at the hearing could not recall citing the records kept by Ms. Hostetler, during 2003, as deficient. Moreover, when he went to the zoo facility on December 17, 2003, there were some records and he did not again have any dealings with the Corpus Christi Zoo to attempt to acquire or see records of the disposition of the animals. (Transcript 1 at 670; 504; 506-507). Complainant's proposed conclusions of law respecting deficient animal disposition records therefore lack evidentiary support and are rejected.

Complainant also asserts that the Association and the Brocks violated regulations governing the provision of veterinary care to animals, their transportation in proper enclosures, and their careful handling so as not to cause them behavioral stress, physical harm or unnecessary discomfort. Under the arrangements for and the circumstances of the transfer of the zoo's animals to Bodie Knapp, he had assumed each of these responsibilities. He was the one who darted the lions and tigers. He personally removed them from the zoo's premises in his enclosures and placed them in his truck for transportation. Therefore, to the extent proven, these proposed conclusions have application to Bodie Knapp and not to the Association or the Brocks.

Complainant has argued that both the Corpus Christi Zoological Association and a predecessor corporation, The Corpus Christi Zoo, Inc, were alter egos of Robert and Michelle Brock. The record evidence, however, fails to adequately substantiate these alter ego arguments. The minutes of the Corpus Christi Zoological Association show that although the Brocks formed this non-profit corporation, and were listed as directors on its Articles of Incorporation, they were replaced at the very first organizational meeting by a very active Board of Directors who conducted frequent meetings that, prior to the end of 2003, were well attended with extensive discussions and decision-making respecting the zoo's promotion, funding and operation. Officers other than the Brocks were elected that included a treasurer who kept and spent the Association's funds in an account separate and apart from any belonging to or controlled by the Brocks. The predecessor for-profit corporation, The Corpus Christi Zoo, Inc., was not operated by the Brocks after the not-for-profit Association purchased its assets and liabilities and assumed its name as is shown in the minutes of the Association's August 27, 1996 organizational meeting.

In re Marysville Enterprises, Inc., 59 Agric. Dec. 299, 315 (2000), upon which complainant relies, lists six factors to be examined before the corporate form may be ignored. When those six factors are examined in the light of the present facts, there is an insufficient showing that the Brocks were the alter egos of the Association.

1. Though the Corpus Christi Association was initially formed at the direction of the Brocks, they turned over its control at the initial organizational meeting to a Board of directors that did not include them.

2. The Brocks appear to have been under the direction and control of the Association's officers and Board of Directors until late 2003, and therefore the Brocks could not be said to have controlled the corporation until late 2003.

3. The corporate funds were not commingled with individual funds belonging to the Brocks.

4. Persons other than the Brocks functioned as the Association's directors and officers.

5. Corporate formalities, such as keeping minutes and corporate records appear to have been observed.

6. Evidence that the corporate entity was a façade for operations of the Brocks is limited to the time just before and after the issuance of the consent decision and order in late 2003.

Under these circumstances, the corporate form of the licensee cannot be disregarded. APHIS respected it at the time it entered into the consent decision and order with the Association. The Brocks were not asked to either sign or be included as parties subject to the order's terms.

However, 7 U.S.C. § 2139 provides that when construing violations of the AWA, acts of an agent shall be deemed acts of the licensee "as well as such person". In other words, an agent's act will be construed to be a violation of the AWA and the regulations by the licensee for whom the agent acts, and may also be a personal violation by the agent that can subject him to the imposition of civil penalties under the AWA. On December 17, 2003, it was a violation of the AWA and the regulations for both the Association and the Brocks to engage in conduct encompassed by the dealer definition when neither had a valid license.

Therefore, I conclude that both the Association and Robert and Michelle Brock violated the Act and the regulations on that date when the Brocks, as the Association's agent and on their own behalf, acted in the capacity of a dealer while unlicensed. Under these circumstances both the Association and the Brocks should be made subject to a cease and desist order; and the Brocks should be assessed appropriate civil penalties, and disqualified for ten years from obtaining a license under the AWA. The maximum penalty for a single violation is $2,750 under 7 U.S.C. § 2149 (b), as amended by 28 U.S.C. § 2461 and implemented by 7 C.F.R. § 3.91(a),(b)(2)(v). The entry of an order to cease and desist from continuing the violation is also authorized. Both sanctions are appropriate under the circumstances of this violation by the Brocks.

Moreover, a violation of the AWA, or the regulations constitutes grounds for denial of a license, and the recommendation by APHIS that both Brocks should be denied a license for ten years is also concluded to be appropriate.

In assessing the penalty, I have given due consideration to the fact that a small business was involved and there is no prior history of violations by the Brocks. On the other hand, I have also considered the fact that they have shown a lack of good faith, and that the circumstances of their conduct make the violation grave in nature. Though the failure of the Brocks to comply with the provisions of the consent decision and order that did not name them as parties and was unsigned by them, is not itself a ground for holding them to have violated the AWA, nonetheless it shows their lack of good faith and the willful nature of their violation of the AWA when they transferred animals while unlicensed. Their lack of good faith is also shown by their testimony at the hearing. Robert Brock attempted to bolster his testimony that he sought to place the animals with the persons approved by APHIS by introducing a list with notations he testified he made in December 2003. On cross examination he came to admit that the list was a photo copy of a portion of the complaint that he first received after its filing in March 2004. When Michelle Brock testified, she accused an APHIS investigator of seeking bribes and being the subject of an investigation concerning his conduct. Cross examination showed her accusations to be without factual basis.

The Brocks deliberately confounded the objectives of the governing consent decree and order to lessen its adverse economic consequences for themselves and a family member. They also did not respect the oath they gave to give only truthful testimony at the hearing. It is necessary to impose the maximum civil penalty of $2,750.00 for their joint violation of the AWA, together with the other sanctions, to adequately deter them and others from engaging in similar conduct in the future so that the ability of APHIS to achieve the objectives of the Animal Welfare Act is maintained.

2. When Bodie Knapp handled and immobilized two lions on December 11, 2003 and two tigers on December 17, 2003, he violated the regulations and thereby the Animal Welfare Act, in that he failed to obtain adequate veterinary guidance on the handling, immobilization, anesthesia, tranquilization and euthanasia of the animals in violation of 9 C.F.R. § 2.40(b)(4); and he failed to handle

the animals as carefully and expeditiously as possible so as to not cause them behavioral stress, physical harm or unnecessary discomfort in violation of 9 C.F.R. § 2.131(b)(1). Furthermore, he failed to make, keep, and maintain records or forms that fully and correctly disclosed required information concerning his purchase and disposition of the animals in violation of 9 C.F.R. § 2.75(b)(1). For these violations:

(a) Bodie Knapp should be ordered to cease and desist from violating the Act and the regulations pursuant to 7 U.S.C. § 2149 (b).

(b) Bodie Knapp should be assessed a civil penalty of $5,000.00 pursuant to 7 U.S.C. § 2149 (b), as amended by 28 U.S.C. § 2461 and implemented by 7 C.F.R. 3.91(a), (b)(2)(v).

When Bodie Knapp picked up animals from the Corpus Christi Zoological Association on December 11 and 17, 2003, he handled them in the most expeditious and convenient way for their transportation without paying sufficient regard to the needs and safety of the animals.

Bodie Knapp did not first consult a veterinarian with expertise in the use of immobilizing drugs on lions and tigers. The veterinarian that he employed admitted that he had less experience than Bodie in the darting of big cats with drugs. But this veterinarian did testify that he would not have used Xylazine alone to dart a lion or tiger. Instead he would have used it in combination with Ketamine. Dr. Randall Sullivan who does possess expertise in the use of these drugs on big cats (felids), explained why the two drugs should be used in combination. (Transcript 1 at 137-138). Xylazine slows an animal's heart rate whereas Ketamine does not. Used together in combination, the desired effect is still achieved, and the lower amount of Xylazine that is used lessens the potential of causing the animal's death. In his opinion, which I accept as credible and persuasive proof, the doses of Xylazine administered by Bodie Knapp to each of the tigers on December 17, 2003, were excessive. Bodie Knapp did not wait a sufficient time between his injections of additional amounts of Xylazine to the tigers to properly observe their reactions to it in order to assure that the animals did not go too deep. He also did not possess and did not administer drugs such as Tolazine or Yohimbine, that are used to reverse the effects of excessive doses of Xylazine. (*see* finding 35, *supra*)

The week before he darted the tigers with excessive doses of Xylazine, Bodie Knapp had darted two lions that also then died. Bodie

Knapp denies that he caused their deaths, but his testimony is not credible. He has given three different versions of why and how they died. In his last version, he testified that he used Xylazine alone to tranquilize them and that he used a small dose on each. But he has also insisted that he used proper dosages on the tigers. I am persuaded that he probably overdosed them as well, and did not observe the procedures he would have been advised to observe if he had consulted a veterinarian with expertise on the use of drugs to immobilize big cats.

On both December 11 and December 17, 2003, Bodie Knapp did not handle the animals as carefully as possible to save them from behavioral stress, physical harm and unnecessary discomfort as required by the regulations. The fact that he overdosed the tigers on December 17, 12003, is made even more egregious by the fact that he had killed two lions just the week before by overdoses. He committed further violations of the regulations by making false reports of the condition and disposition of the animals to conceal their deaths. In light of these circumstances, the imposition of a civil penalty in addition to the issuance of a cease and desist order is fully warranted.

I have not concluded, however, as complainant asserts, that he violated section 2.4 of the regulations (9 C.F.R. § 2.4) by interference with an APHIS official in the course of carrying out his or her duties. This regulation has application when a licensee threatens, harasses or abuses an official. There is no evidence of such conduct by Bodie Knapp. The complainant also has charged Bodie Knapp with violating section 2.100 of the regulations (9 C.F.R. § 2.100) by failing to comply with the transportation standards pertaining to space and structural requirements for primary enclosures used to transport animals, and failing to observe the animals while they were being transported as set forth at sections 3.137 and 3.140 (C.F.R. § 3.137 and §3.140). These alleged violations are subsumed within his violation of 9 C.F.R. § 2.131(b((1) that required his careful and expeditious handling of the animals so as not to cause them stress, harm or unnecessary discomfort. Moreover, the available proof that he violated the transportation standards is largely speculative and inferential. Accordingly, I have not concluded that he committed those violations.

The gravity and willful nature of the violations that I have concluded Bodie Knapp committed, together with his demonstrated lack of good faith, make the assessment of a civil penalty necessary. Under the Act, I am not required to consider the respondent's ability to pay a civil penalty when determining the appropriate amount to assess. But it would

be unconscionable to ignore his loss of his business, his need to file a Chapter Seven bankruptcy, and the loss of his house that has resulted in his wife and six children now living in a small trailer. I have concluded that $5,000.00, under all of these circumstances, is the appropriate amount that should be assessed to act as a deterrent to future violations of this type by him and others

3. Charles Knapp is not subject to sanction under the AWA.
As set forth in finding 29, *supra*, Charles Knapp, was an unpaid helper who followed his son's instructions when he assisted him in moving animals on December 11 and 17, 2003. Though an agent of a principal may also be held liable for acts performed on behalf of a principal under 7 U.S.C. § 2139, this provision does not, in and of itself, subject one to sanctions under the AWA. Only persons requiring licenses are subject to the Act's sanctions.

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….and…may (be made subject to an order)…that such person shall cease and desist from continuing such violation….

7 U.S.C. § 2149

Charles Knapp never acted as either an exhibitor or a dealer who required a license. None of Charles Knapp's actions on December 11 and 17, 2003, were for his personal benefit. He was helping his son and followed his directions as to the handling and transportation of the animals. He acted in reliance on Bodie Knapp's knowledge and assumed Bodie's compliance with the Act, the regulations and the standards. Charles Knapp had no reason to believe that Bodie was not complying with them, and it cannot be said that Charles Knapp acted in knowing or careless disregard of them. Accordingly, it cannot be said that he failed to comply with the Act, the regulations or the standards, and he may not, for that reason, be denied a license in the future under 9 C.F.R. § 2.1 (e). Therefore, the complaint's charges against him should be dismissed, and Complainant' request that Charles Knapp be disqualified for a period of one year from becoming licensed under the Act should be denied.

ORDER

It is hereby **ORDERED**:

1. Coastal Bend Zoological Association (formerly known as Corpus Christi Zoological Association, doing business as Corpus Christi Zoo), Robert Brock, Michelle Brock, and Bodie Knapp shall cease and desist from violating the Animal Welfare Act and the regulations and standards issued pursuant to the Animal Welfare Act.

2. Robert Brock and Michelle Brock are jointly assessed a civil penalty of $2,750.00. The civil penalty shall be paid by certified check or money order made payable to the Treasurer of the United States and sent as instructed by Colleen A. Carroll, attorney for APHIS.

3. Robert Brock and Michelle Brock are disqualified from receiving licenses under the Animal Welfare Act for a period of ten years from the effective date of this order.

4. Bodie Knapp is assessed a civil penalty of $5,000.00. The civil penalty shall be paid by certified check or money order made payable to the Treasurer of the United States and sent as instructed by Colleen A. Carroll, attorney for APHIS.

5. All charges alleged in the complaint against Charles Knapp are hereby dismissed.

This decision and order shall become effective without further proceedings, 35 days after the date of service, unless there is an appeal to the Judicial Officer by a party to the proceeding within 30 days after receiving this decision and order.

In re: MARILYN SHEPHERD.
AWA Docket No. 05-0005.
Decision and Order.
Filed August 31, 2006.

AWA – Dealer – Interstate commerce, affecting – Intrastate activities – License, failure to acquire – License, operating without – Violations, prior.

Robert Ertman for Complainant.
Respondent Pro se.
Decision and Order by Chief Administrative Law Judge Marc. R. Hillson.

Decision

In this decision, I find that Respondent Marilyn Shepherd willfully violated the Animal Welfare Act (the "Act") on at least 165 occasions by operating as a dealer without obtaining the required license from the Administrator of the Animal Plant and Health Inspection Service (APHIS). I am imposing a civil penalty of $25,000 and a permanent disqualification from receiving a dealer's license, and am issuing a cease and desist order against future violations.

Procedural Background

Following an investigation, a complaint was issued by Kevin Shea, Administrator of APHIS on November 23, 2004, alleging that Respondent Marilyn Shepherd was operating in violation of the Animal Welfare Act by selling at least 165 dogs on at least 26 occasions, without the required dealer's license, between April and December 2002. The complaint alleges that these transactions were "in commerce" and as such were subject to the licensing requirements of the Act. The complaint sought civil penalties, issuance of a cease and desist order from future violations, and permanent disqualification from obtaining licensing under the Act.

Respondent filed a timely answer to the complaint denying that she was a "dealer" under the Act, and denying that any violations took place. Respondent requested an oral hearing on the allegations.

On May 2, 2006, I conducted an oral hearing in this matter in Springfield, Missouri. Robert A. Ertman, Esq., represented Complainant, and Ronnie Williams, Ms. Shepherd's spouse, represented Respondent. Complainant called four witnesses (including one, Sandra Rottinghous, who testified by telephone) and introduced exhibits CX 1 through CX 7. Respondent called one witness, Dr. Jerome Schmidt, and introduced exhibits RX 2, 3 and 4 into evidence. Both parties filed initial and reply briefs by July 12 and August 2, respectively.

Factual Background

There are few, if any, pertinent facts in dispute in this matter. Respondent Marilyn Shepherd owns and operates a kennel in Ava, Missouri. CX 3, CX 4, CX 7, Answer. At the time the alleged violations were committed, the kennel did not have a license issued under the Animal Welfare Act, but was licensed by the State of Missouri. Respondent has previously been licensed under the Act, but

in two previous enforcement actions initiated by APHIS, the license had been suspended.

APHIS investigators determined that on at least 26 occasions during calendar year 2002, Marilyn Shepherd sold a total of at least 165 dogs to NVK Kennels, a licensed dealer located in Seneca, Kansas and owned by Sandra Rottinghous. CX 1, CX 3. The dogs in question were picked up by Deborah Hubbard, a buyer-driver for NVK who lives in Sparta, Missouri. CX 2, CX 4, CX 7. Ms. Hubbard considered herself an employee of NVK, and her job was "to contact dog breeders and book puppies for purchase for NVK Kennels." CX 7, p. 1. When she first contacted Marilyn Shepherd to inquire about the availability of dogs for purchase, she explained to Respondent that she was employed by NVK and that NVK would be the purchaser of the puppies. CX 7, p. 1. When Respondent found out that Ms. Hubbard lived in Kansas but was soon planning to move to Missouri, Respondent told her to call back when she moved and that Respondent would then begin selling her puppies. CX 7, p. 2.

Soon after Ms. Hubbard moved she begin dealing with Respondent who would contact her by email or otherwise when she had puppies she wanted to sell. CX 7, p. 2. She picked up the puppies at Respondent's kennel in the NVK Kennel van. CX 2, CX 7. Ms. Hubbard accepted physical custody and signed for the puppies, but never paid Respondent for them. CX 7. Rather, all payments for the puppies would be made by NVK Kennels. CX 1, CX 7. However, on picking up the puppies, Ms. Hubbard would then have them checked out by a veterinarian so they could get health certificates before transporting the puppies across the state border to Kansas and NVK. Tr. 21. When obtaining the health certificate the owner of the puppies was either listed as NVK or Ms. Hubbard. Tr. 21.

Daniel Hutchings, a senior investigator for APHIS, testified that Respondent confirmed to him that she had around 200 dogs in her kennel. CX 4. Respondent further acknowledged that she sold all of the 165 puppies at issue to Ms. Hubbard, even though she also confirmed that the checks paying for the puppies all came from NVK Kennels. CX 4, p. 1.

Dr. Jerome Schmidt, an experienced veterinarian, testified that in his auction business, dogs belong to the new owner at the moment the dogs are sold, notwithstanding the fact that they have yet to be paid for. Tr. 64-65. This apparently follows the policy of the American Kennel Club.

Discussion

The Animal Welfare Act regulates "animals and activities" that "are either in interstate or foreign commerce or substantially affect such commerce or the free flow thereof." 7 U.S.C. § 2131. The Act requires that dealers, including those who "sell or offer to sell or transport or offer for transportation, in commerce . . . for use as a pet any animal . . . unless and until such dealer . . . shall have obtained a license from the Secretary and such license shall not have been suspended or revoked." 7 U.S.C. § 2134.

It is undisputed that Respondent did not have a license during the period that the violations were alleged to have occurred. Respondent's primary contention is that she did not need a license, as she was not engaged in interstate commerce, nor was she involved "in commerce" within the meaning of the statute. Respondent contends that because she delivered the dogs in question to Deborah Hubbard, NVK's employee, within the state of Missouri, that she could not be found to be engaged in commerce, even though it is undisputed that Respondent and Ms. Hubbard were both aware that the dogs were clearly intended to be taken to NVK's Kansas location. Complainant contends, with ample support, that the sale of these 165 dogs was in commerce, and that Respondent's sale of these dogs without a dealer's license was a violation of the Act.

Two prior cases involving Complainant and Respondent are particularly relevant to this discussion. In In re *Marilyn Shepherd*, 57 Agric. Dec. 242 (1998), Respondent had been licensed as a dealer, but the license expired when APHIS refused to re-license her. *Id.*, at 257. Finding a number of violations, the Judicial Officer imposed a civil penalty and a cease and desist order against Respondent. Additionally, he suspended her dealer's license for seven days, stating that if she was not licensed at the time of the decision, then she would be disqualified from obtaining her license for 7 days and the disqualification period would continue until the $2000 civil penalty was paid. There is evidence that the civil penalty was eventually paid (Respondent attached a copy of a check to her reply brief indicating that $2202.09 dollars was paid to the U.S. Treasury on October 4, 1999)[1] but there is no evidence that Respondent applied for or received a new dealer's license pursuant to the Act.

After a subsequent inspection of Respondent's kennel, she was cited for a number of regulatory violations, as well as for operating without the required dealer's license. In that matter, *In re Marilyn Shepherd*, 61 Agric. Dec. 478 (2002), Judge Dorothea Baker, while finding in favor of Ms. Shepherd on the regulatory counts, ruled that she was in violation

[1] Presumably the additional $202.09 was late fees, interest and/or penalties.

of the licensing requirement. "The fact that all of the puppies were bred, born and sold in the State of Missouri and that while Respondent had title, the puppies did not leave Missouri but were sold to an individual within the State of Missouri who subsequently sold over State lines, and who paid for the puppies from a Missouri bank, does not preclude the jurisdiction of the Secretary of Agriculture." 61 Agric. Dec. at 482. There is no indication that this decision was ever appealed, nor that the civil penalty assessed by Judge Baker was ever paid by Respondent.

If anything, the facts in the instant case are even more compelling in favor of Complainant. Ms. Hubbard made it extremely clear that she was not buying the puppies in her own right, and that she was only an employee of NVK. Further, the checks in payment for the puppies were all issued by NVK, while in the prior matter the checks were apparently drawn on a Missouri bank and initially the dogs were sold to someone in Missouri. There is no question in this case that Respondent knew that the dogs were being sold to and delivered to an entity in Kansas.

Judge Baker also cited an opinion of the Attorney General of the United States' Office of Legal Counsel, issued in response to a request for an opinion from the Secretary of Agriculture. In that opinion, 3 Op. O.L.C. 326 (August 22, 1979), the Department of Justice's Office of Legal Counsel stated that the Animal Welfare Act even applied to "purely intrastate activities" as long as these activities "affect such [interstate] commerce." By expanding the definition of "commerce" to include "trade, traffic, transportation, or other commerce—(2) which affects trade, traffic transportation and commerce," 7 U.S.C. § 2131(c), Congress determined "that certain specified activities have a sufficient effect on commerce among the States to require regulation, even if they take place entirely within one State." *Id.*, at 327. Thus, the actions of Respondent in selling dogs to NVK via Ms. Hubbard without a dealer's license would be a violation of the Act even if the transactions did take place solely in Missouri. The evidence overwhelmingly shows that the true purchaser was located in Kansas, and that the arrangements of having the dogs picked up in Missouri and "sold" to Ms. Hubbard (even though she was unequivocally acting on behalf of NVK) were little more than a cynical attempt to bypass the requirements of the Animal Welfare Act.

That the AKC considers dogs sold at the time and point of delivery does not help Respondent's case here. The dogs were clearly sold to NVK Kennels and Respondent was well aware that they were going to be transported from Missouri to Kansas—in the NVK Kennels van—after issuance of a veterinary health certificate. According to the

Office of Legal Counsel opinion, even if the sale of the dogs was completely within the State of Missouri, and the dogs never even subsequently crossed state lines, the sales would be subject to the jurisdiction of the Secretary of Agriculture. Under the facts of this case, where the transactions involved sales to an out of state company through their in-state agent/employee and were paid for after delivery directly by that out of state company, I find that not only was Respondent engaged in activities that were in commerce or affecting interstate commerce, but that she was directly engaged in interstate commerce.

Respondent mentions several constitutional claims in passing. Without citing any authority, Respondent states that licensing requirements must be voluntary to be constitutional. While I do not have the authority to declare an Act of Congress unconstitutional, it is clear that no one is forcing Respondent to enter the business of breeding and selling dogs. Congress specifically required those who engage in this business to obtain a license. I find no valid constitutional challenge here.

Respondent also contends, citing *Marshall v. Barlows*, 436 U.S. 307 (1978), that warrantless inspections are unconstitutional. In *Barlows,* the Supreme Court did not outlaw, but rather established guidelines for, civil administrative warrantless inspections, and for the obtaining of civil administrative search warrants. There is not even an inspection of Respondent's facility at issue here. This case was generated by investigative interviews of Ms. Rottinghous, Ms. Hubbard and Ms. Shepherd and the review of documents generated by NVK Kennels. While Ms. Shepherd was interviewed at her residence, which was at the kennel site, there was no inspection undertaken. Thus, there is no basis for this constitutional challenge.

Findings of Fact

1. Respondent Marilyn Shepherd is a breeder and dealer of dogs who operates a kennel in Ava, Missouri.

2. Although Respondent previously held a dealer's license issued under the Animal Welfare Act, she was not licensed during calendar year 2002.

3. Between April 10, 2002 and December 18, 2002, Respondent on 26 occasions sold a total of165 puppies to NVK Kennels, located in Seneca, Kansas.

Conclusions of Law

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

2. Each of the transactions mentioned in Finding 3 was, at the least, "in commerce" and required Respondent to have a valid dealer's license under the Act.

3. Respondent violated the Act, by operating as a dealer without a license, in willful violation of 7 U.S.C. § 2134. Each of the 165 transactions constitutes a separate violation of the Act.

Appropriate Sanctions

Complainant has requested that, due to the seriousness of these violations, I issue a cease and desist order, assess a civil penalty of $50,000 and permanently disqualify Respondent from obtaining a dealer's license. As serious as these sanctions are, I am not convinced that they would accomplish the purposes intended, given that Respondent apparently feels free to blithely ignore the prior imposition of harsh civil sanctions, and continue doing business illegally.

As Respondent stated to Senior Investigator Daniel Hutchings, "she did not agree" with the ruling of Judge Baker "and would fight the Government on this issue again if the Government charged her with this violation." CX 4, p. 2. Refusing to comply with a lawful final order such as that issued by Judge Baker is unacceptable, to say the least. While I can, and will, issue a more serious sanction, Complainant may need to take further action to assure that Respondent complies with my order.

Although I have heard no information regarding Respondent's financial condition, her kennel is not small. It appears that shortly after the time of these violations, she maintained 150 female dogs and 50 male dogs. CX 5. Looking at the other statutory factors, including the gravity of the violations, her utter lack of good faith, and her history of violations, I believe a civil penalty of $25,000 would satisfy the Act's requirements. In addition, I am issuing a cease and desist order directing Respondent to stop violating the Animal Welfare Act. Finally, I agree that Respondent should be permanently disqualified from being licensed, given the repeated nature of the violations, and her apparent disregard for the law.

Order

1. Respondent Marilyn Shepherd, her agents and employees, successor 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 operating as a dealer as defined in the Act and regulations without being licensed as required.

2. Respondent Marilyn Shepherd is assessed a civil penalty of $25,000, which shall be paid by a certified check or money order made payable to the Treasurer of the United States and which will be sent to counsel for Complainant at the following address:

Robert A. Ertman, Esq.
USDA/OGC/Marketing Division
1400 Independence Avenue, S.W.
Room 2343-South, Stop 1417
Washington, D.C. 20250-1417

3. Respondent Marilyn Shepherd is permanently disqualified from becoming licensed under the Animal Welfare Act.

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: MARK LEVINSON.
AWA Docket No. D-06-0005.
Decision and Order.
Filed September 11, 2006.

AWA – Animal Welfare Act – Denial of license application – Violation of state law pertaining to animals – Unfit for AWA license.

The Judicial Officer affirmed Administrative Law Judge Peter M. Davenport's (ALJ) decision concluding the Animal Care, Animal and Plant Health Inspection Service, Regional Director's, denial of Mark Levinson's (Petitioner) application for an Animal Welfare Act license was in accordance with 9 C.F.R. § 2.11(a)(6) and reasonable under the circumstances. The Judicial Officer rejected Petitioner's contention that the ALJ found 9 C.F.R. § 2.11(a)(6) mandates denial of Petitioner's license application and Petitioner's contention that his violations of state laws pertaining to animals were

inadvertent. The Judicial Officer held there is no requirement that once an applicant's license application has been terminated, the Regional Director is prohibited from denying the applicant's subsequent application on grounds different from the grounds for termination of the earlier application. Finally, the Judicial Officer characterized as speculative Petitioner's claim that, if the Regional Director's denial of his application were not reversed, Petitioner would be permanently banned from obtaining an Animal Welfare Act license.

Bernadette Juarez, for Respondent.
William P. Horn, Washington, DC, for Petitioner.
Initial Decision by Administrative Law Judge Peter M. Davenport.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

On March 10, 2006, Mark Levinson [hereinafter Petitioner] applied for an Animal Welfare Act license. On April 10, 2006, Elizabeth Goldentyer, Regional Director, Animal Care, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Regional Director], denied Petitioner's application based on her determination that Petitioner was unfit to be licensed as a result of his violations of New York State laws pertaining to the transportation and ownership of animals. On May 9, 2006, Petitioner filed a request for a hearing pursuant to 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]. Petitioner seeks an order reversing the Regional Director's April 10, 2006, denial of his application for an Animal Welfare Act license and directing the United States Department of Agriculture to grant Petitioner an Animal Welfare Act license.[1]

On May 26, 2006, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Respondent], filed Respondent's Response to Petitioner's Request for Hearing asserting that a hearing is unnecessary inasmuch as there is no issue of material fact.

On June 7, 2006, Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] issued a Decision and Order Affirming

[1]Petitioner's letter to the Office of the Hearing Clerk, dated and filed May 9, 2006 [hereinafter Petitioner's Request for Hearing].

Respondent's Denial of Petitioner's License Application [hereinafter Initial Decision]: (1) finding a hearing would serve no useful purpose; (2) affirming the Regional Director's April 10, 2006, denial of Petitioner's application for an Animal Welfare Act license; and (3) providing Petitioner may again apply for an Animal Welfare Act license 1 year from the date of the Initial Decision.[2]

On June 20, 2006, Petitioner appealed to, and sought oral argument before, the Judicial Officer. On July 11, 2006, Respondent filed a response to Petitioner's appeal petition and request for oral argument. On July 14, 2006, 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; therefore, I affirm the Regional Director's April 10, 2006, denial of Petitioner's application for an Animal Welfare Act license.

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]Initial Decision at 2-3.

(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.

§ 2133. Licensing of dealers and exhibitors

The Secretary shall issue licenses to dealers and exhibitors upon application therefor in such form and manner as he may prescribe and upon payment of such fee established pursuant to 2153 of this title: *Provided*, That no such license shall be issued until the dealer or exhibitor shall have demonstrated that his facilities comply with the standards promulgated by the Secretary pursuant to section 2143 of this title: *Provided, however*, That any retail pet store or other person who derives less than a substantial portion of his income (as determined by the Secretary) from the breeding and raising of dogs or cats on his own premises and sells any such dog or cat to a dealer or research facility shall not be required to obtain a license as a dealer or exhibitor under this chapter. The Secretary is further authorized to license, as dealers or exhibitors, persons who do not qualify as dealers or exhibitors within the meaning of this chapter upon such persons' complying with the requirements specified above and agreeing, in writing, to comply with all the requirements of this chapter and the regulations promulgated by the Secretary hereunder.

§ 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.

§ 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, 2133, 2134, 2151.

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 2—REGULATIONS

Subpart A—Licensing

. . . .

§ 2.3 Demonstration of compliance with standards and regulations.

. . . .

(b) Each applicant for an initial license must be inspected by APHIS and demonstrate compliance with the regulations and standards, as required in paragraph (a) of this section, before APHIS will issue a license. If the first inspection reveals that the applicant's animals, premises, facilities, vehicles, equipment, other premises, or records do not meet the requirements of this subchapter, APHIS will advise the applicant of existing deficiencies and the corrective measures that must be completed to come into compliance with the regulations and standards. An applicant who fails the first inspection will have two additional

chances to demonstrate his or her compliance with the regulations and standards through a second inspection by APHIS. The applicant must request the second inspection, and if applicable, the third inspection, within 90 days following the first inspection. If the applicant fails inspection or fails to request reinspections within the 90-day period, he or she will forfeit the application fee and cannot reapply for a license for a period of 6 months from the date of the failed third inspection or the expiration of the time to request a third inspection. Issuance of a license will be denied until the applicant demonstrates upon inspection that the animals, premises, facilities, vehicles, equipment, other premises, and records are in compliance with all regulations and standards in this subchapter.

. . . .

§ 2.11 Denial of initial license application.

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

. . . .

(6) Has made any false or fraudulent statements or provided any false or fraudulent records to the Department or other government agencies, or has pled *nolo contendere* (no contest) or has been found to have violated any Federal, State, or local laws or regulations pertaining to the transportation, ownership, neglect, or welfare of animals, or is otherwise unfit to be licensed and the Administrator determines that the issuance of a license would be contrary to the purposes of the Act.

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

9 C.F.R. §§ 2.3(b), .11(a)(6), (b).

MCKINNEY'S CONSOLIDATED LAWS OF NEW YORK ANNOTATED ENVIRONMENTAL CONSERVATION LAW

CHAPTER 43-B OF THE CONSOLIDATED LAWS
ARTICLE 11–FISH AND WILDLIFE

Title 5–Fish and Wildlife Management Practices Cooperative Program; Prohibitions; Taking of Fish, Wildlife, Shellfish and Crustacea for Scientific or Propagation Purposes; Destructive Wildlife; Rabies Control; Guides; Endangered Species

§ 11-0511. Possession and transportation of wildlife

Subject to the provisions of section 11-0512 of this article, no person shall, except under a license or permit first obtained from the department containing the prominent warning notice specified in subdivision nine of section 11-0917 of this article, possess, transport or cause to be transported, imported or exported any live wolf, wolfdog, coyote, coydog, fox, skunk, venomous reptile or raccoon, endangered species designated pursuant to section 11-0535 of this title, species named in section 11-0536 of this title or other species of native or non-native live wildlife or fish where the department finds that possession, transportation, importation or exportation of such species of wildlife or fish would present a danger to the health or welfare of the people of the state, an individual resident or indigenous fish or wildlife population. Environmental conservation officers, forest rangers and members of the state police may seize every such animal possessed without such license or permit. No action for damages shall lie for such seizure, and disposition of seized animals shall be at the discretion of the department.

§ 11-0512. Possession, sale, barter, transfer, exchange and import of wild animals as pets prohibited

1. No person shall knowingly possess, harbor, sell, barter, transfer, exchange or import any wild animal for use as a pet in New York state, except as provided in subdivision three of this section.

. . . .

3. Any person who possesses or harbors a wild animal for use as a pet at the time that this section takes effect may retain possession of such animal for the remainder of its life, provided that such person:

a. Has not been convicted of any offense relating to cruelty to animals or under a judicial order prohibiting possession of animals;

b. Applies to the department within six months of the effective date of this section, and obtains from the department, a license pursuant to subdivision four of this section; and

c. Complies with all applicable federal, state, or local laws, including any ordinance, rule or regulation adopted by a local board of health, or any rules and regulations established by the department as requisites for ownership of such wild animal.

N.Y. Envtl. Conserv. Law §§ 11-0511, 11-0512.1, .3 (McKinney 2005).

DECISION

Discussion

The Secretary of Agriculture is authorized to promulgate regulations as the Secretary deems necessary in order to effectuate the purposes of the Animal Welfare Act, to require exhibitors to obtain Animal Welfare Act licenses, and to issue Animal Welfare Act licenses to exhibitors.[3] The Secretary of Agriculture's power to require and issue licenses under the Animal Welfare Act includes the power to deny licenses to applicants.[4]

Section 2.11(a)(6) of the Regulations and Standards (9 C.F.R. § 2.11(a)(6)) provides that an Animal Welfare Act license will not be issued to any applicant who has been found to have violated any federal, state, or local laws or regulations pertaining to the transportation, ownership, neglect, or welfare of animals. Petitioner admits he was convicted of, and paid fines for, his violations of New York State laws pertaining to the transportation and ownership of animals.[5] In addition, Respondent supplied certified copies of New York State Department of Environmental Conservation, Division of Law Enforcement, documents

[3] 7 U.S.C. §§ 2133, 2134, 2151.

[4] *In re Mary Bradshaw*, 50 Agric. Dec. 499, 507 (1991).

[5] Petitioner's Request for Hearing at 5-6; Petitioner's Brief in Support of Petition for Appeal at 3.

which corroborate Petitioner's admissions.[6] I conclude the Regional Director's April 10, 2006, denial of Petitioner's application for an Animal Welfare Act license is warranted in law and justified in fact.

Petitioner's Request for Oral Argument

Petitioner's request for oral argument before the Judicial Officer, which the Judicial Officer may grant, refuse, or limit,[7] is refused because the issues are not complex and oral argument would appear to serve no useful purpose.

Petitioner's Appeal Petition

Petitioner raises five issues in Petitioner's Petition for Appeal of Administrative Law Judge's Decision Upholding the Denial of Class C Animal Exhibitors License Application [hereinafter Appeal Petition] and Brief in Support of Petition for Appeal. First, Petitioner contends "[t]he agency misconstrued and misapplied [s]ection 2.11(a)(6) [of the Regulations and Standards (9 C.F.R. § 2.11(a)(6))] by claiming that it mandates the denial of [Petitioner's] license application."[8]

Petitioner does not cite, and I cannot locate, the portion of the Initial Decision in which the ALJ states section 2.11(a)(6) of the Regulations and Standards (9 C.F.R. § 2.11(a)(6)) mandates denial of Petitioner's March 10, 2006, Animal Welfare Act license application. The ALJ states the Regional Director's denial of Petitioner's Animal Welfare Act license application is based upon a determination that Petitioner is unfit to be licensed as a result of having been found to have violated New York State laws pertaining to the transportation and ownership of animals. The ALJ does not conclude that denial of Petitioner's application for an Animal Welfare Act license is mandated by section 2.11(a)(6) of the Regulations and Standards (9 C.F.R. § 2.11(a)(6)), but, instead, concludes the Secretary of Agriculture is authorized under the Animal Welfare Act to deny Petitioner's application for an Animal

[6]Respondent's Response to Petitioner's Request for Hearing, Attach. A, which indicates Petitioner was convicted of, and was fined for, importing bobcats into New York State and possessing bobcats within New York State without a license, in violation of N.Y. Envtl. Conserv. Law §§ 11-0511, 11-0512.1 (McKinney 2005).

[7]7 C.F.R. § 1.145(d).

[8]Petitioner's Appeal Pet. at 1-2; Petitioner's Brief in Support of Pet. for Appeal at 4-5.

Welfare Act license and finds the denial reasonable under the circumstances.[9]

Second, Petitioner, relying on *In re Eric John Drogosch*, 63 Agric. Dec. 623 (2004); *In re Otto Berosini*, 54 Agric. Dec. 886 (1995); and *In re Mary Bradshaw*, 50 Agric. Dec. 499 (1991), asserts his violations of New York State laws do not prevent him from being licensed under the Animal Welfare Act because the United States Department of Agriculture has issued Animal Welfare Act licenses to applicants who have previously violated federal regulations.[10]

None of the cases cited by Petitioner, *Drogosch*, *Berosini*, and *Bradshaw*, supports Petitioner's contention that the United States Department of Agriculture issues Animal Welfare Act licenses to applicants who have been determined to have previously violated federal regulations. In *Drogosch*, the United States Department of Agriculture issued Mr. Drogosch an Animal Welfare Act license in November 2001, after citing Mr. Drogosch in June 2001, for exhibiting animals without an Animal Welfare Act license. However, I find nothing in *Drogosch* to indicate that the United States Department of Agriculture actually determined that Mr. Drogosch had violated the Regulations and Standards prior to granting his application for an Animal Welfare Act license. To the contrary, the date of the agency decision in *Drogosch* is October 28, 2004, almost 3 years after the United States Department of Agriculture issued Mr. Drogosch an Animal Welfare Act license.

In *Berosini*, the United States Department of Agriculture issued Mr. Berosini an Animal Welfare Act license on April 26, 1993, after citing Mr. Berosini for violating the Regulations and Standards. However, I find nothing in *Berosini* to indicate that the United States Department of Agriculture actually determined that Mr. Berosini had violated the Regulations and Standards prior to granting his application for an Animal Welfare Act license. To the contrary, the date of the agency decision in *Berosini* is September 11, 1995, more than 2 years 4 months after the United States Department of Agriculture issued Mr. Berosini an Animal Welfare Act license.

Finally, in *Bradshaw*, the United States Department of Agriculture issued Ms. Bradshaw an Animal Welfare Act license on August 24, 1988, after citing Ms. Bradshaw for violating the Animal Welfare Act and the Regulations and Standards. However, I find nothing in

[9]Initial Decision at 2-3.

[10]Petitioner's Appeal Pet. at 2; Petitioner's Brief in Support of Pet. for Appeal at 5.

Bradshaw to indicate that the United States Department of Agriculture actually determined that Ms. Bradshaw had violated the Animal Welfare Act and the Regulations and Standards prior to granting her application for an Animal Welfare Act license. To the contrary, the date of the agency decision in *Bradshaw* is May 17, 1991, more than 2 years 8 months after the United States Department of Agriculture issued Ms. Bradshaw an Animal Welfare Act license.

Drogosch, *Berosini*, and *Bradshaw* were disciplinary proceedings instituted pursuant to section 19 of the Animal Welfare Act (7 U.S.C. § 2149) against respondents who were alleged to have failed to comply with the Animal Welfare Act and the Regulations and Standards. *Drogosch*, *Berosini*, and *Bradshaw* do not involve applications for Animal Welfare Act licenses granted after the United States Department of Agriculture determined the applicants had previously violated the Animal Welfare Act or the Regulations and Standards. In the instant proceeding, the Regional Director denied Petitioner's Animal Welfare Act license application pursuant to sections 3 and 21 of the Animal Welfare Act (7 U.S.C. §§ 2133, 2151) and section 2.11(a)(6) of the Regulations and Standards (9 C.F.R. § 2.11(a)(6)) based upon her determination that Petitioner is unfit to be licensed as a result of his violations of New York State laws pertaining to the transportation and ownership of animals. I find *Drogosch*, *Berosini*, and *Bradshaw* inapposite.

Third, Petitioner asserts that, prior to submitting the March 10, 2006, application for an Animal Welfare Act license that is the subject of this proceeding, he had previously applied for an Animal Welfare Act license, which the United States Department of Agriculture denied in September 2005. Petitioner contends he addressed all of the United States Department of Agriculture's concerns in connection with his previous license application and the United States Department of Agriculture "played 'bait and switch' and denied the [March 10, 2006,] re-application on different grounds."[11]

Respondent submitted a copy of Petitioner's August 25, 2004, application for an Animal Welfare Act license, corroborating Petitioner's assertion that he applied for an Animal Welfare Act license prior to submitting the March 10, 2006, application, which is the subject

[11]Petitioner's Appeal Pet. at 2-3; Petitioner's Brief in Support of Pet. for Appeal at 6-8.

of this proceeding.[12] The record indicates the parties do not dispute that on September 7, 2005, the Regional Director, pursuant to section 2.3(b) of the Regulations and Standards (9 C.F.R. § 2.3(b)), terminated Petitioner's August 25, 2004, application for an Animal Welfare Act license because Petitioner failed three pre-licensing inspections and the licensing process had not been completed within 90 days following the first pre-licensing inspection.[13]

As Petitioner asserts, the grounds for the Regional Director's denial of Petitioner's March 10, 2006, application for an Animal Welfare Act license are different from the grounds for the Regional Director's termination of Petitioner's August 25, 2004, application for an Animal Welfare Act license. However, I find no requirement that once an application has been terminated, the Regional Director is prohibited from denying the applicant's subsequent application on grounds different from the grounds for termination of the earlier application.

Fourth, Petitioner asserts his violations of New York State laws were inadvertent; therefore, his violations do not form a sufficient basis for the Regional Director's denial of his March 10, 2006, application for an Animal Welfare Act license.[14]

Petitioner is presumed to know the law;[15] therefore, when Petitioner acquired bobcats, he was presumed to know that he was required by New York State law to obtain a license from the New York State Department of Environmental Conservation for the transportation and possession of bobcats. Moreover, it appears that in June and July 2004, Dr. Deborah Bayazit, Petitioner's veterinarian, and New York State Environmental Conservation Officer John C. Billotto informed Petitioner that possession of bobcats in New York State without a

[12]Respondent's Response to Petitioner's Appeal Pet. and Request for Oral Argument, Attach. J at 1.

[13]Petitioner's Request for Hearing, Attach. 4; Respondent's Response to Petitioner's Appeal Pet. and Request for Oral Argument, Attach. J at 9.

[14]Petitioner's Brief in Support of Pet. for Appeal at 8.

[15]*See Atkins v. Parker*, 472 U.S. 115, 130 (1985); *North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 283 (1925).

license is illegal.[16] Nevertheless, in August 2005, Petitioner imported two bobcats into New York State without obtaining the required license.[17] Under these circumstances, I reject Petitioner's assertion that his violations of New York State laws were inadvertent.

Fifth, Petitioner asserts, unless I reverse the Regional Director's April 10, 2006, denial of Petitioner's application for an Animal Welfare Act license, Petitioner will be permanently banned from obtaining an Animal Welfare Act license.[18]

Nothing in the ALJ's Initial Decision suggests that Petitioner is permanently banned from obtaining an Animal Welfare Act license. To the contrary, the ALJ states "Petitioner may again apply for a license one year from the day of this Order."[19] Moreover, I find Petitioner's claim that he will be permanently banned from obtaining an Animal Welfare Act license mere speculation.

Findings of Fact

1. Petitioner is an individual whose mailing address is 89 Gerard Drive, East Hampton, New York 11937.

2. On January 4, 2006, Petitioner was convicted of violating sections 11-0511 and 11-0512.1 of the laws of the State of New York pertaining to the transportation and ownership of animals, and was fined $1,000.

3. In March 2006, Petitioner submitted an application for an Animal Welfare Act license to the United States Department of Agriculture.

4. On April 10, 2006, pursuant to section 2.11(a)(6) of the Regulations and Standards (9 C.F.R. § 2.11(a)(6)), the Regional Director denied Petitioner's March 2006, application for an Animal Welfare Act license based upon Petitioner's conviction of violating New York State laws pertaining to the transportation and ownership of animals.

Conclusions of Law

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

[16]Respondent's Response to Petitioner's Appeal Pet. and Request for Oral Argument, Attach. C at 1-3, 5; Attach. E at 1.

[17]Respondent's Response to Petitioner's Appeal Pet. and Request for Oral Argument, Attach. D at 10-11; Attach. G; Attach. H at 2.

[18]Petitioner's Brief in Support of Pet. for Appeal at 8.

[19]Initial Decision at 3.

2. Denial of Petitioner's application for an Animal Welfare Act license is in accordance with section 2.11(a)(6) of the Regulations and Standards (9 C.F.R. § 2.11(a)(6)) and is reasonable.

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

ORDER

1. I affirm the Regional Director's April 10, 2006, denial of Petitioner's March 2006, Animal Welfare Act license application.

2. Petitioner may again apply for an Animal Welfare Act license 1 year from the date of this Order. The date of this Order is September 11, 2006.

In re: BRIDGEPORT NATURE CENTER, INC.,HEIDI M. BERRY RIGGS, AND JAMES LEE RIGGS, d/b/a GREAT CATS OF THE WORLD.
AWA Docket No. 00-0032.
Decision and Order.
Filed November 1, 2006.

AWA – Exotic animals – Exhibitor – General public – Viewing public – Volunteer – Exhibition, what is – Direct control – Minimal risk – Transfer form – Non Agricultural animals – Trainee.

Colleen Carroll for Complainant.
S. Cass Weiland for Respondent
Decision and Order by Administrative Law Judge Jill S. Clifton.

Decision

Decision Summary

1. The principal issue is whether the Respondents, who were exhibiting their exotic cats at fairs during July through September 1999, were ***safely*** exhibiting their tigers during "close encounter" photo opportunities. I decide that there were occasions at the Iowa State Fair on August 20, 1999, when the Respondents permitted more than minimal risk of harm to the tiger and to the public; and that consequently the Respondents did, on those several occasions, violate

9 C.F.R. § 2.131(b)(1). With regard to the Northern Wisconsin State Fair on July 10, 1999, I decide that the risk of harm to Ms. Kristina ("Kris") Sniedze and the public and the tiger was minimal or less; and that consequently there was no violation of 9 C.F.R. § 2.131(b)(1). With regard to the York Fair on September 10, 1999, I decide that the risk of harm to Mr. Kevin Johns and the public and the tigers was minimal or less; and that consequently there was no violation of 9 C.F.R. § 2.131(b)(1). I decide that the Respondents did maintain sufficient distance and/or barriers between their animals and the general viewing public at all their exhibitions at issue; and that consequently there were no violations of 9 C.F.R. § 2.131(b)(1) on that ground. I decide that on all occasions at issue, the Respondents kept their tigers under the direct control and supervision of a knowledgeable and experienced animal handler; and that consequently there were no violations of 9 C.F.R. § 2.131(c)(3). I decide that there was no record-keeping violation at the Dutchess County Fair on August 28, 1999; and that consequently there was no violation of 9 C.F.R. § 2.75(b).

Introduction

2. The Complainant is the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture (frequently herein "APHIS" or the "Complainant"). The Complaint and Order to Show Cause (frequently herein the "Complaint"), filed on May 5, 2000, alleged violations of the Animal Welfare Act, as amended, 7 U.S.C. § 2131 *et seq.* (frequently herein the "AWA" or the "Act"); the regulations, 9 C.F.R. § 1.1 *et seq*. (frequently herein the "Regulations"); and the standards, 9 C.F.R. § 3.1 *et seq*. (frequently herein the "Standards").

3. The three Respondents are Respondent Bridgeport Nature Center, Inc. (frequently herein "Bridgeport"), Respondent Heidi M. Berry Riggs (frequently herein "Ms. Riggs"), and Respondent James Lee ("Jay") Riggs (frequently herein "Mr. Riggs"). The "Respondents" refers to all three Respondents (Bridgeport, Ms. Riggs, and Mr. Riggs), collectively. The Respondents' Answer timely filed on May 25, 2000, generally denied the allegations of the Complaint and asserted affirmative defenses.

4. The Respondents exhibited tigers and other exotic cats as Great Cats of the World during the summer of 1999, at fairs, in a traveling exhibit.

No one was hurt; there were no accidents or incidents. Still, APHIS did not trust the Respondents' exhibitions:

(a) The Respondents appeared to be violating the terms of a Consent Decision[1] entered just the summer before, in August 1998 (CX 3). The Consent Decision required, among other things,[2] that during photographic sessions with members of the public, Respondents' tigers were to be less than **six months** in age, **and** less than **seventy-five pounds** in weight, **and collared, and on a leash** no longer than 18 inches in length **at all times**. CX 3. The **general public** was to be kept away by a **barrier at least fifteen feet** from the exhibit. CX 3.

(b) The Respondents' handler did not hold onto the tiger, or a leash attached to the tiger's collar, **at all times** during photo shoots. Such **direct contact**, according to APHIS,[3] was required in order to have "direct control" (*see* 9 C.F.R. §§ 2.100(a) and 2.131(c)(3)), in addition to all other safeguards.

(c) In some situations the Respondents allowed small children to be in close proximity to a photo opportunity tiger; allowed a photo opportunity tiger to be draped across people's laps, including children's laps; allowed large numbers of people to be seated in the same enclosure with a photo opportunity tiger, within 10 to 20 feet from that tiger while waiting their turn; allowed a photo opportunity tiger to be draped across people's laps in the midst of the large number of people seated waiting their turn; and allowed their worker to be inside a tigers' enclosure that held multiple tigers, including tigers larger and older than the photo opportunity tigers, with no other worker watching to assist if needed.

(d) APHIS's concept of safety during photo shoots of human(s) with a tiger had evolved, to require more than had been delineated in the Consent Decision and more than had been required of the Respondents in the past. APHIS had come to prefer separating

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[1] Only two of the Respondents were parties to the Consent Decision, Heidi Berry Riggs and Bridgeport Nature Center, Inc.

[2] including compliance with the Animal Welfare Act and its regulations and standards,

[3] *See* especially the testimony of APHIS Animal Care Inspector Dr. Steven I. Bellin (Ph.D., D.V.M.). Tr. 371-461. *See also* the APHIS Brief, pp. 12-13

the tiger, by bullet-proof glass or plexiglas or another barrier, or distance, from the human(s) who would have their picture taken with the tiger.

5. The Respondents are alleged to have committed violations at four fairs, during the summer of 1999:

Northern Wisconsin State Fair, Chippewa Falls - July 10, 1999,
Iowa State Fair, Des Moines - August 20, 1999,
Dutchess County Fair, Rhinebeck, New York - August 28, 1999, and
York Fair, York, Pennsylvania - September 10, 1999.

Special Issues

6. During the Respondents' photo shoots, when a tiger's actions and behavior were controlled by a number of factors including the tiger's fixation on a bottle, and the handler was in close proximity to the tiger's head and the bottle, and a human being photographed (or videoed) was the one holding the bottle - - was the tiger under "direct control and supervision" of the handler for purposes of 9 C.F.R. §§ 2.100(a) and 2.131(c)(3)?

7. During the Respondents' photo shoots, was direct contact (touching/holding) by the handler of a tiger or its leash required to keep a tiger under "direct control and supervision" for purposes of 9 C.F.R. §§ 2.100(a) and 2.131(c)(3)?

8. To comply with 9 C.F.R. §§ 2.100(a) and 2.131(b)(1)), were the Respondents required during their photo shoots to "have sufficient distance and/or barriers" between the photo shoot tiger and the human(s) posing with the tiger? Or between the photo shoot tiger and the large group of humans seated within the photo shoot tiger's enclosure, waiting their turn to pose?

9. What is the meaning of the terms "the general viewing public" and "the public," as used in 9 C.F.R. §§ 2.100(a) and § 2.131(b)(1)?

10. When the animal being exhibited is a tiger, does the term "minimal risk" mean no risk at all, for purposes of 9 C.F.R. §§ 2.100(a) and § 2.131(b)(1)? Even if so with an adult tiger, would the term "minimal risk" mean no risk at all, no matter the age and weight of the tiger?

11. Was news reporter Kevin Johns a member of the public while he was promoting the York Fair, on location at the Respondents' traveling exhibit?

12. If there were no violations of the Animal Welfare Act or its Regulations and Standards, what consequences if any flow from violating the provisions of the Consent Decision described above in paragraph 4.(a) ?

13. Were the Respondents "participating in State and county fairs" and thereby excluded from being an "exhibitor," under 7 U.S.C. § 2132(h) and 9 C.F.R. § 1.1?

Procedural History

14. For the six handling violations and one record-keeping violation alleged in the Complaint, APHIS sought license revocation, permanent disqualification from being licensed, civil penalties, and related remedies from the three Respondents, doing business as Great Cats of the World.

15. The hearing was held in Dallas, Texas on four days, February 25-28, 2002.

16. The transcript is referred to as "Tr." APHIS filed proposed corrections on October 21, 2002, all of which are accepted and the transcript is ordered corrected accordingly, except that Tr. 98:17, 227:16, and 329:12 shall remain unchanged. I have physically marked all changes on the transcript accordingly. On my own motion, I order the additional corrections listed on Appendix C, and I have physically marked those changes on the transcript as well.

17. APHIS called ten witnesses: Ms. Jan Baltrush (Tr. 35-79); Mr. Charles Frank Willey (Tr. 79-92); Mr. William John Swartz (Tr. 94-169, 488-508); Mr. David Baird Green (Tr. 174-219, 461-488); Mr. Robert Gerard Markmann (Tr. 220-258, 538-571); Mr. Julius Olson ("Pinky") Lee (Tr. 264-278); Ms. Kristina ("Kris") Sniedze (Tr. 279-311); Mr. Gregory C. Houghton (Tr. 312-361); Ms. Patricia Martin Lesko (Tr. 362-370); and Dr. Steven I. Bellin (Ph.D., D.V.M.) (Tr. 371-461).

18. The Respondents called three witnesses: Ms. Heidi M. Berry Riggs (Tr. 573-685); Mr. Marcus Cook (Tr. 686-744); and Mr. James Lee ("Jay") Riggs (Tr. 745-916).

19. The following Complainant's or Government's (APHIS's) exhibits were admitted into evidence: CX 1 through CX 45 (except that CX 37 p. 15 was rejected). Tr. 537, 918. A chart referring to the transcript page(s) where each Complainant's exhibit was admitted is Appendix A.

20. The following Respondents' exhibits were admitted into evidence: RX 4 (admitted Tr. 683-84); RX 5 (admitted Tr. 918); and RX 17, which was admitted for whatever limited purpose it might serve (Tr. 821).

21. One Administrative Law Judge exhibit was admitted into evidence: ALJX 1 (admitted Tr. 905).

22. The record also includes, in a sealed envelope, Mr. Swartz's report. Tr. 906. *See* Tr. 919, "responsive to Rule 1.141(h)," and Tr. 920. Over Complainant's objection, I ordered a two-page memo of Mr. Swartz's, plus attachments, released to the Respondents. *See* Tr. 514-26. Over the Respondents' objections, I did not order other materials disclosed. *See also* Tr. 526-36, 138-42.

23. When the hearing began, I pondered whether there were "evolving . . . requirements," "where things that are understood now to be dangerous were not so clearly understood in 1999." Tr. 25. As the hearing ended, I said that if the Government wants to begin to have a "no contact with the public" policy (for tigers and other "great cats"), this is not a good case for such a beginning, because this case deals with what happened in 1999. Tr. 927. I mentioned that in 1999, the Judicial Officer's decision was not in existence in *The International Siberian Tiger Foundation, et al.*, 61 Agric. Dec. 53 (2002). Notice of requirements is, of course, an essential component of fairness.

24. Only the issues related to whether any of the Respondents violated the regulations, as alleged, have been heard - - that is, the "liability" portion of the hearing. Consideration of the license application and denial was deferred; also deferred was consideration of any consequences that would flow if any of the Respondents did violate the regulations, such as what the appropriate sanction would be. Tr. 8-11, 21-25.

25. The Complainant timely filed the Complainant's Proposed Findings of Fact and Conclusions of Law, and Brief in Support Thereof ("APHIS's Brief") on October 23, 2002. The Respondents timely filed the Respondents' Proposed Findings of Fact and Conclusions of Law and Brief in Support ("the Respondents' Brief") on February 5, 2003. The Complainant filed no Reply.

26. Colleen A. Carroll, Esq., Office of the General Counsel, Marketing Division, United States Department of Agriculture, 1400 Independence Avenue SW, Washington, D.C. 20250-1417, represents the Complainant (APHIS). Robert A. Ertman, Esq. (with the same office), represented the Complainant through the filing of the Complaint and until November 14, 2000.

27. S. (Stephen) Cass Weiland, Esq., Patton Boggs, LLP, 2001 Ross Avenue, Suite 3000, Dallas, Texas 75201, represents all the Respondents.

28. The litigators did excellent work; the trial was hard-fought and the briefs well-written. This Decision is three-and-a-half years overdue, for which I apologize to the parties and counsel.

29. This Decision is ready for review by the Judicial Officer, if either party appeals, before we reconvene to address the remedies, if any, to be imposed. Tr. 920.

Analysis

30. The Respondents' violations allegedly occurred during two months of the summer of 1999 (July 10 through September 10), in their "Great Cats of the World" exhibit. Dr. Christensen, APHIS Animal Care Regional Director, had seen a copy of the photograph of Ms. Sniedze with a tiger (CX 8), had a copy of the Consent Decision (CX 3), and asked APHIS Senior Investigator David Green to look into it. Tr. 174-75, 188-89, 190-92.

Mr. Weiland: And in fact, the Consent Decision, was a - - as we say in Texas, was a burr under the saddle of the animal care people, wasn't it?
. . . .
(objections, overruled)

Mr. Green: I would not characterize the Consent Decision as a burr under their saddle. I'm - -
Dr. Christensen had the Consent, apparently had seen the photograph that was sent in and based on that information, requested that I look into it, which I did at that particular time.
Mr. Weiland: Was that consent agreement a burr under your saddle?
. . . .
(objection, overruled)
Mr. Green: From the standpoint I'm not sure what we mean here, I - - I think it was a step in the right direction as far as the agency was concerned to indicate what could be - - that you should not have large cats with people. Okay? And the Consent Decision, if anything, I would think, would give an indication that there's some parameters here we have to look at.
Mr. Weiland: Okay. Well, it was a step in the right direction, is the way you've characterized the Consent Decision. It was a step in the right direction to what? Putting these folks out of business or what?
Ms. Carroll: Objection.
Administrative Law Judge: I don't like the tone of voice either, but I'd like to hear the witness' response to that question, so you may answer.

Mr. Weiland: Excuse me for - - Your Honor and also Mr. Green, if my tone was offensive, I didn't mean it to be.
Mr. Green: From the Agency stand point, I think they (APHIS personnel) wanted to attempt to protect the animals and to protect the public.
Tr. 190-92.

31. The Respondents are alleged to have violated sections 2.100(a) and 2.131(b)(1) of the Regulations and Standards (9 C.F.R. §§ 2.100(a), 2.131(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. § 2.131(b)(1).

32. Tigers, the largest land-based predators, are quick and powerful and are recognized as "dangerous animals" by the Regulations and Standards. The Respondents are alleged to have violated sections

2.100(a) and 2.131(c)(3) of the Regulations and Standards (9 C.F.R. §§ 2.100(a), 2.131(c)(3)):

> During public exhibition, dangerous animals such as lions, tigers, wolves, bears, or elephants must be under the direct control and supervision of a knowledgeable and experienced animal handler.

9 C.F.R. § 2.131(c)(3).

Direct Control

33. During public exhibition of a dangerous animal such as a tiger, Dr. Bellin testified and APHIS argues (APHIS Brief, pp. 12-16) that the "direct control and supervision" by the handler required by 9 C.F.R. §§ 2.100(a), 2.131(c)(3), means that the handler is holding onto the animal. Based upon the facts of this case only, I disagree. I'll begin by presenting Dr. Bellin's testimony, and then APHIS's argument.

34. Dr. Bellin testified that direct control requires direct contact. This excerpt is from Tr. 419-421.

Administrative Law Judge: And then, Dr. Bellin, before Mr. Weiland asks cross examination questions, I need clarification of a couple of phrases that you have used. And the first one is direct contact. What do you believe that means?

Dr. Bellin: My use of it is somebody who has their physical being on the animal's physical being.

Administrative Law Judge: All right. Is that different from direct control?

Dr. Bellin: In my opinion, no.

Administrative Law Judge: You think they mean the same thing?

Dr. Bellin: Yes, under direct control of an animal means you have direct contact. If the animal starts moving, you can immediately pull them in another direction if you have to. I consider that the same.

Administrative Law Judge: Do you think the meaning is any different if the phrase is direct control and supervision?

Dr. Bellin: Not really, no.

Administrative Law Judge: So you think all three of those things require touching of the animal itself?

Dr. Bellin: I think that is the intent of Congress under the Animal Welfare Act, yes. That is my understanding of the intent of Congress is to have dangerous wild animals under direct control/contact, which make the supervision. I don't think they envision, this is my opinion, I

don't believe Congress envisioned somebody standing 30 feet away and watching the animal as being a safety issue.
Administrative Law Judge: Well, how about standing three feet away and watching the animal?
Dr. Bellin: The same difference as far as I'm concerned with the large cat.
Administrative Law Judge: Even a young, large cat?
Dr. Bellin: Yes, ma'am.
Administrative Law Judge: Even a 40-pound cat?
Dr. Bellin: Yes, ma'am.
Administrative Law Judge: And to what extent does the distraction, whether it's the bottle or some other distraction, alleviate the requirement for physical contact, either with the animal's body or through a leash?
Dr. Bellin: None.
Administrative Law Judge: Okay. Mr. Weiland, you may cross examine.
Mr. Weiland: Doctor, is it your opinion that these tigers are dangerous from the day they're born?
Dr. Bellin: Could you be more specific?
Mr. Weiland: I was trying to follow up on the Judge's question. Do you believe that a tiger is dangerous to a human from the day it's born?
Dr. Bellin: Yes.
Tr. 419-21.

35. According to APHIS, Respondents failed to have the animals under their direct control and supervision. Instead (according to APHIS), "the respondents' customer handled the animal" (while the customer was holding the bottle), while "respondents and/or their employee observed the interaction." APHIS Brief, p. 12.

36. APHIS continues, "First, the Regulation requires that dangerous animals be under the handler's "direct control," not simply some form of remote control. Contrary to Mr. Riggs' belief, direct control entails some physical connection to the animal. 'Direct' means 'with nothing between.' Webster's New World Dictionary . . . ."

37. APHIS's Brief continues, after describing Complainant's evidence, "There is no restraint on the animal at all. The safety of the animal and the person depend entirely on the animal's own self-control." APHIS Brief, p. 13.

38.Unlike Dr. Bellin, and unlike APHIS, I do not conclude that the handler must have direct contact with the tiger, no matter what the age of the tiger, to exercise "direct control and supervision." Further, I find that the bottle as used by Respondents was an effective means of "direct control and supervision" but only under certain circumstances. The whole of Respondents' practices and methods must be considered to understand their use of the bottle.

39.The Respondents had control of the tigers' training from a young age, and the Respondents were able to choose those tigers whose dispositions were well-suited to the photo shoots. Although Ms. Riggs was not at the shows that gave rise to the allegations, her management role from the Respondents' home site is important.

40.Ms. Riggs has a bachelors degree in psychology and a masters degree in child psychology. Tr. 574. Ms. Riggs had used small animals in therapy with children, including "children that are schizophrenic, autistic, that don't make real good connections with humans," and had "had some wonderful breakthroughs with children and animals." Tr. 576. At the time of the hearing, the Respondents owned about 70 exotic cats (tigers, lions, leopards, and cougars) that Ms. Riggs was responsible for. Tr. 580, 586.

41.The following excerpt is from Tr. 586.
Mr. Weiland: . . . . has the USDA ever suggested to you at all that your show is so inherently dangerous that you should shut down the entire photo shoot aspect to it?
Ms. Riggs: Not until the last couple days in here.
Tr. 586.

42.Ms. Riggs elaborated on the Respondents' use of the bottle as the principal means of control of the tigers used in the photo shoots, at Tr. 596-600.
Mr. Weiland: . . . . In your experience, describe to the Judge, just how the bottle is used and why it's a control mechanism for these small animals.
Ms. Riggs: Because the tigers are mammals, they nurse their mother. We - - if the animals are born on our facility, we let them nurse for two weeks, if possible, if the mother takes care of them. They still need to be fed for a long period after that. We take a lot of time in bottle feeding and the care of the animals during that time period. They think of the

human, the primary care giver, whoever is bottle feeding them, basically as their mother.
Mr. Weiland: Now during a show, would the personnel who are handling the photo shoot typically have several baby bottles full and ready for use?
Ms. Riggs: Every show I have ever attended or put on or seen of Jay's, there was always bottles. There's always back-up bottles. Before your photo shoot begins, you fill your bottles and you have them ready.
Mr. Weiland: Now you heard Dr. Bellin testify yesterday, didn't you?
Ms. Riggs: Uh-hum.
Mr. Weiland: I believe he testified somehow from his vantage he could tell the bottle was empty after a few minutes but the photo shoot continued. Do you recall that testimony?
Ms. Riggs: Yes, I do.
Mr. Weiland: Now in your experience, let's just assume that the - - that this - - a particular baby bottle runs out of milk. Will a baby cub continue to suck on the bottle?
Ms. Riggs: Yes, sir. Now wait - - let me - - can I kind of - - box myself in here? They may not. But they - - most of the time, they will continue to suck the bottle. They like that pacifying action of sucking the bottle, even if it's empty. I have full grown tigers that will still drink a baby bottle. And you put it in their mouth and when they're done after they suck it for ten minutes there may be this much milk gone, so obviously, the whole time that they've got that bottle in their mouth, they're not drinking and not taking in anything. They are simply pacifying on the bottle. And so I - - it doesn't necessarily mean that they will get up and that's it, they're done, because they don't have any milk in the bottle. They can pacify. It just all depends. A tiger can be disinterested - - become disinterested in a full bottle as easy as they can become disinterested in an empty bottle.
Mr. Weiland: Okay. Have you ever...
Administrative Law Judge: Now I would like the record to reflect the size of the amount of milk that was gone that the witness showed us...
Ms. Riggs: A half an inch?
Administrative Law Judge: About a half inch...
Ms. Riggs: Let me rephrase - - a half an ounce. After ten minutes.
Administrative Law Judge: Gone out of the bottle?
Ms. Riggs: Gone out of the bottle. With an adult cat. Baby cats won't let that happen. But adult cats just like to...
Mr. Weiland: Just so - - so in your experience with these animals, even adult cats will continue
- - at least some of them - - continue to have interest in this bottle.

Ms. Riggs: Most of them will.
Mr. Weiland: Have you ever seen them sleep with a bottle?
Ms. Riggs: Sleep with a bottle?
Mr. Weiland: Right. Continue like...
Ms. Riggs: Oh, after they fall asleep?
Mr. Weiland: Right.
Ms. Riggs: Oh yeah. Sure. Babies fall asleep all the time when you're feeding them.
Mr. Weiland: And they'll continue to have the bottle in their mouth like a human baby would?
Ms. Riggs: Uh-hum.
Mr. Weiland: In your professional opinion, as a experienced handler of these animals, is the bottle a sufficient control device in order to prevent anything more than minimal risk to the public in exhibiting these animals?
Ms. Carroll: Object on foundation. Any -- all ages and sizes of tigers?
Mr. Weiland: I'm talking about...
Administrative Law Judge: Let's see. We've been talking about babies, which are less than six months[4] this whole time, I believe. Is that correct, Mr. Weiland?
Mr. Weiland: That's what I meant, Judge.
Administrative Law Judge: Okay.
Ms. Riggs: Yes, it's the best, the absolute best thing that we can find. Tr. 596-600.

43. As Ms. Carroll brought out during her cross examination of Ms. Riggs, Ms. Riggs believes that using a bottle with a tiger is a way of having direct control over the animal only under certain circumstances. Tr. 623-29. Ms. Riggs' testimony is persuasive: so long as the bottle is being controlled, the cat is being controlled, so long as the tiger has been reared and trained by the Respondents and selected by the Respondents for photo shoots, and an experienced handler is in close proximity, to read the cat, being alert for any signs of change, close enough to grab the bottle to make sure that it stays stable. Each cat is different, just as each person is different. Tr. 623-29. *See also* Tr. 631, 640-41.

44. The tiger's young age is essential. Ms. Riggs testified on cross examination about the photo shoot tigers, who are less than six months of age. Tr. 646-47.

[4] *See* footnote 5.

Ms. Riggs: . . . . Their instinct is to love at that age. It's not attack.
Ms. Carroll: That's there for all - - that applies to all the tigers that you train and send on photo shoots?
Ms. Riggs: I have never seen a cat under six months age try to kill someone.
Ms. Carroll: Okay. Have you seen a cat under six months of age try to play with someone?
Ms. Riggs: Sure.
Ms. Carroll: Have you seen a cat under six months age try to scratch someone?
Ms. Riggs: Yes.
Ms. Carroll: And have you seen a cat under six months of age try and bite someone?
Ms. Riggs: Yes.
Ms. Carroll: And do you believe that tigers can outgrow their wildness or be trained out of their wildness?
Ms. Riggs: Never.
Tr. 646-47.

45.Ms. Riggs testified on cross examination that feeding on a platform begins at home, before the young tigers go on the road. Tr. 644.
Ms. Riggs: . . . . they stay at home for awhile. And they are taught at that time to get on a platform, they are taught to drink their bottle, because they have to drink their bottle four times a day. They love their bottle. So it's good training to start them in putting the bottle in their mouth as soon as they start walking. If you don't do that pretty young and they get eight, ten weeks old and then you try to do it it's more difficult for the cat to do.
Tr. 644.

46.Ms. Riggs testified on cross examination that the tigers the Respondents have trained and use in photo shoots that are less than six months old "are a minimal risk." "I do not believe they're likely to hurt anyone." Tr. 670.

47.Ms. Riggs testified about the tigers used in Respondents' photo shoots. "The ones that we use in the show have - - that are either born in our facility or we've taken them from somebody that doesn't know what to do with them or needs to dump them or you know. When I say dump, that's their term, not mine." Tr. 588. Ms. Riggs has had experience with exotic cats since 1988, first with other people's exotic cats, then her own. Tr. 587. Ms. Riggs testified that taking the tigers on

the road helps them adapt to being in captivity; that when they are adults, they will be better behaved.

48. This excerpt is from Tr. 588-91.
Mr. Weiland: Yeah. Do you know how to handle tigers who are six months of age or less?
Ms. Riggs: Yes.
Mr. Weiland: Okay. And one of the things that you have done with your - - I'll call that group baby tigers[5] - - if you understand what I'm referring to if I say a baby tiger? I mean six months of age or less.
Ms. Riggs: Okay.
Mr. Weiland: For the purpose of my questions.
Ms. Riggs: Okay.
Mr. Weiland: Now when you're dealing with these baby tigers, has it been your experience that having them travel with the Bridgeport Nature Center show is beneficial to the tigers?
Ms. Riggs: I believe it's very important in their development.
Mr. Weiland: Why do you say that? Tell the Judge - - explain why you believe that's true.
Ms. Riggs: Because I've tried to take care of cubs just myself and keep them in my own little world, which I would love to do with each one of them and be selfish and keep them to myself. I know that animals that have contact with people and a lot of people, are much better adapted to life in captivity and we have nowhere to put them in the wild, so they are in captivity. We do have to keep them at the facility and as an adult tiger, which is dangerous, I do not want to have an adult cat at the facility, that is extremely aggressive and a greater risk than what they produce at, you know, just being a tiger in itself as an adult. So I would want to have cats that are better behaved and Jay (Mr. Riggs) does the best job of anybody that I know in taking care of animals and giving them the love and interacting with the public, too. Because the public's an important part. It's the whole interaction, it's the whole process of being around people, of being around - - being loved. Having the constant positive reinforcement. Having that bottle, which is positive

[5] This footnote is NOT part of the transcript and contains my observation: the characterization of all tigers aged six months or less as "baby tigers" is actually not helpful. The majority of the tigers involved in the allegations here are better characterized as "juvenile tigers." Dr. Bellin testified that, in his opinion, juvenile tigers include tigers beginning at about four or five months of age. Tr. 381. Mr. Markmann testified that, in his opinion, juvenile tigers include tigers beginning at about four months of age. Tr. 552-53.

reinforcement, that's their love. They love the bottle. They love to be held. They're like children in a lot of ways. They need all of those things.
Mr. Weiland: If a tiger - - a tiger cub loves to be held like a child loves to be held?
Ms. Riggs: Of course it's on their terms. Yes, they do like that if they - - they're also a cat. They like to be off to themselves sometimes but when they do want love, yes they do want love. And 90 percent of the time -- 99 percent of the time, they are wanting love.
Mr. Weiland: Do they react to positive reinforcement?
Ms. Riggs: Absolutely.
Mr. Weiland: Like a dog trainer might pat a dog, a puppy, on the head if it performs its sit or stand properly? I mean, a cat, a baby cat will also respond to positive reinforcement like that?
Ms. Riggs: Yes.
Mr. Weiland: And it's your experience that having these baby cats on the road like that, where they're in constant proximity to people, is good for them?
Ms. Riggs: Yes.
Mr. Weiland: Do you - - you mentioned the bottle and their attention to the bottle or whatever reference it was. Would you explain to Judge Clifton why the bottle - - well, first of all, if the bottle is a control device that you all use?
Ms. Riggs: The bottle is a control device that we do use.
Mr. Weiland: Now how - - would you characterize the bottle as the primary control device during the course of public contact with the baby tigers?
Ms. Riggs: Yes.
Tr. 588-591.

Minimal Risk of Harm to the Animal and to the Public

49. How risky were the Respondents' photo shoots of members of the public with tigers during the summer of 1999? 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. §§ 2.100(a), 2.131(b)(1).

50. Dr. Bellin testified and other APHIS employees testified and APHIS argues (APHIS Brief, pp. 6-9) that when tigers are involved, "minimal risk" means all risk must be eliminated. APHIS employees are aware of

grave consequences of tiger bites or even scratches, of how powerful and quick tigers are.

51. The Respondents are likewise well aware that there are dangers of allowing tigers, even juvenile tigers and even cubs, to be in close proximity with humans, to be touched and held by humans, and the Respondents' practices and methods during the summer of 1999 were formulated to minimize the risk. Mr. and Ms. Riggs had developed good practices and methods for preventing harm to the animals and to the public during their photo shoots and throughout their entire exhibition.

52. Both Dr. Bellin and Mr. Swartz acknowledged that Mr. Riggs was an expert in handling exotic cats:
Dr. Bellin: We have training opportunities at national conferences, regional conferences, where experts are brought in, experts such as Mr. Riggs, or a James Fowler[6] type of individual, if you will, people who have expertise with the type of animals that we're going to be covering, and these people have given us the benefit of their knowledge, their education, their training, writings. Tr. 396.
Dr. Bellin: I don't purport to be an expert in the care and handling of these animals because I don't do it on a full-time basis like Mr. Riggs may do. Tr. 396-97.
Mr. Swartz: I have experience in the knowledge of how to handle the animals for safety for the public. I would defer to Mr. Riggs as being the expert as to handling, on-hands handling, of the animal. Tr. 508.

53. Ms. Riggs confirmed her husband's expertise: "Jay (Mr. Riggs) does the best job of anybody that I know in taking care of animals and giving them the love and interacting with the public, too." Tr. 590. *See also* Tr. 632-33, regarding limitations that include (but are not limited to) no plastic bags, no balloons, no screaming children, no intoxicated or inebriated people; and children are accompanied by an adult there that can hold a bottle.

54. When the Respondents' handler moved a photo opportunity (photo shoot) tiger from cage to feeding platform or back to cage, the Respondents' handler customarily used a leash (or carried the tiger, if it was small). Once the tiger was in place on the tiger's feeding platform,

[6] *See* footnote 14.

the Respondents' handler on some occasions removed the tiger's leash, so that there would be no leash showing in the photo. The Respondents' handler then stood at the head of the tiger just out of range of the camera.

55. The Respondents' handler was alert to the tiger's behavior. On cross examination, Mr. Riggs explained. Tr. 842-44.
Ms. Carroll: Let me ask you about what your procedures are in the event of an animal attack during a photo shoot.
. . . .
Mr. Riggs: Okay. First of all, I have never seen during any photo shoot any aggressive behavior ever, and that is ever in my years of doing this during the actual photo shoot. The . . .
Ms. Carroll: And that's when the photograph is being taken is what you're referring to?
Mr. Riggs: That ten, 12-second period in which the photo's taken, the public hops up, and moves on, and we take the next photo. What is my plan if things, if you will, go south? I, the handler, first thing I would do if, if the cat begins to show signs of losing interest, I would ask the public to hop up and try switching bottles. If that didn't work, I would end the photo set, put the cat up, and retrieve another cat. My job as a handler is to read this animal and anticipate and judge if he's focusing and staying focused on this bottle, and it's my contention I've done that and done that very well.
Tr. 842-44.

56. The Respondents' practices and methods required Mr. Riggs'[7] close attention to the exotic cat and the ability to remove the cat quickly from the vicinity of humans if the cat were to behave unexpectedly, such as could occur if the cat were startled or upset. Removing the cat would be accomplished via use of the bottle, or if that failed, the leash, or if that failed, the fire extinguisher.

57. There is no prophylactic regulation that requires licensees to separate the public[8] from a dangerous animal by a bullet-proof glass or plexiglas barrier, or other barrier, or distance, or to prevent the public from having

[7] (and anyone else the Respondents permitted to be in charge when exotic cats were in the vicinity of humans)

[8] The term "public" is not synonymous with the term "the general public." *See* paragraph 9

a "close encounter" with a dangerous animal, or from being in close proximity to a dangerous animal, or from touching a dangerous animal.

58. So long as the Respondents adhered to their own practices and methods of preventing harm, I conclude that there was minimal risk of harm to the tiger and to the public during the Respondents' Great Cats of the World photographic sessions with members of the public during the summer of 1999. I reach this conclusion based in large part on the Respondents' extraordinary dedication to, and impressive knowledge of, their exotic cats, their "big" cats. I do, however, find exceptions to the Respondents' normally responsible photo opportunity methods and practices, situations which did increase the risk of harm to the tiger and to the public to more than minimal at the Iowa State Fair on August 20, 1999. The situations were documented in video footage (CX 41) and were described by Dr. Bellin.

59. There were other situations that are not alleged to be violations in the Complaint, which arguably involved failure to handle the tigers so there was minimal risk of harm to the tigers, when the Respondents allowed their employee to be inside a tiger enclosure with multiple big tigers and no responsible handler watching.

60. Mr. Markmann observed Respondents' employee Craig Rabideau inside the tigers' enclosure at the York Fair on September 10, 1999. Tr. 550-51.
Mr. Markmann: I observed some things when I was inspecting Mr. Riggs where like Craig, would go in, an employee that's been there four months - - he would go into the tiger enclosure with six cats, ranging in age from six months to ten months, weighing anywhere from 100 to 250 pounds and no one was actually watching him. Some people were busy doing other things. And I observed that around - - between eleven and twelve o'clock.
Tr. 550-51. *See also* Tr. 226.

61. At a different time on September 10, Mr. Markmann observed Respondents' employee Eric Drogosch[9] inside that enclosure with the six juvenile tigers ranging from 100 pounds to 250 pounds, aged six

[9] Mr. Markmann misspells Mr. Drogosch's name "Drayosh." Tr. 226-27, CX 25, 26, 28, 31.

months to ten months. Tr. 226, CX 25 (including notes on back), CX 26 (including notes on back), CX 28 (including notes on back), CX 31.

62. The situations described in paragraphs 60. and 61., involving Respondents' employees inside the tigers' enclosure that held multiple tigers, including tigers larger and older than the photo opportunity tigers, were not photo opportunities and caused no risk of harm to the public.

63. Mr. Markmann considered 9 C.F.R. § 2.131(c)(3) applicable, but the Complaint did not include such an allegation. The allegations in the Complaint all (all except the alleged record-keeping violation) specify "during public exhibition in photographic sessions with members of the public . . . "

64. Although the Respondents' employees should not have been in that tiger enclosure in that way, vulnerable, no violation is alleged in the Complaint, and neither 9 C.F.R. § 2.131(c)(3) nor 9 C.F.R. § 2.131(b)(1) was proved applicable. Both 9 C.F.R. § 2.131(c)(3) and 9 C.F.R. § 2.131(b)(1) require the occurrence to have been "during public exhibition," which appears not to have been applicable to the handling that was occurring: "cleaning up excreta," "taking photos with Shawnee," "playing in the enclosures with the same six tigers." CX 23.

65. Under the circumstances here, the employee was not a member of the public. Had the employee been harmed during public exhibition, the risk of resultant harm to the tigers is the focus of 9 C.F.R. § 2.131(b)(1). *See*, *The International Siberian Tiger Foundation, et al.*, 61 Agric. Dec. 53, 92 (2002).

66. There is no prophylactic regulation requiring licensees to maintain minimal risk of harm to the animals and the humans, without regard to whether the occasion is "during public exhibition," and without regard to whether the humans are the public, the general viewing public, the employees, the independent contractors, the volunteers, the trainers, the trainees, the handlers, the inspectors, or are classified in some other manner.

The Four Fair Exhibitions

67. Every allegation arises out of the Respondents' exhibition of animals at State or county fairs during the summer of 1999:

Northern Wisconsin State Fair, Chippewa Falls - July 10, 1999,

Iowa State Fair, Des Moines - August 20, 1999,
Dutchess County Fair, Rhinebeck, New York - August 28, 1999, and
York Fair, York, Pennsylvania - September 10, 1999.

Each of those fair exhibitions led to one or two alleged violations of the Animal Welfare Act (with each photographic session with a member of the public alleged to constitute a separate violation).

Northern Wisconsin State Fair, Chippewa Falls - July 10, 1999

68. At the Northern Wisconsin State Fair on July 10, 1999, Ms. Kristina ("Kris") Sniedze got her picture taken with a tiger. The photograph (CX 8) is unusually fine, and Ms. Sniedze thought it was "cool" to have her picture taken with a tiger. Tr. 284, 289. The Respondents, who made the experience possible at their traveling exhibit, had no incidents at the Northern Wisconsin State Fair, no injuries of any kind. Tr. 768.

69. As the trier of fact, I love the picture, which shows a smiling, suntanned young lady (adult) sitting on the platform where the young tiger is being fed, sitting next to the tiger. The young lady, Ms. Kris Sniedze, has one hand holding the bottle that the tiger is nursing and the other hand near or touching the tiger's fur in the neck area just below the tiger's ear. CX 8. The picture shows most of the tiger from the whiskers to the vividly marked tail.

70. While I enjoy the beauty of that photo (CX 8), I anticipate the concern of the APHIS officials: the tiger's gorgeous face is striking, but so is the nearness of the tiger to Ms. Sniedze; what could happen if the tiger for any reason bit Ms. Sniedze or even scratched her?

71. What was the principal means of control? The juvenile tiger's age and size; the tiger being hungry; the handler's use of the bottle; the handler's attentiveness to any disinterest in the bottle on the part of the tiger; the tiger's training with the bottle from the age of two weeks; the tiger's exposure to the atmosphere of the photo shoots from a very early age, as early as four weeks old; the "weeding out" of any tigers whose disposition was not compatible with photo shoots; the handler's methods and practices not only with the tiger, but also with the public, and the general viewing public; and the nature of the public, and the general viewing public, in these venues - - these, in combination, were the principal means of control. The issue of Ms. Sniedze's safety (and

consequently the tiger's safety) will be addressed more completely, but here are some of the details that matter.

72. Ms. Kris Sniedze testified that she estimated the weight of the tiger in CX 8 to be between 120 and 180 pounds.[10] Tr. 291. Ms. Sniedze testified that her 178 pound dog, a St. Bernard/Great Dane mix, was about the same size. Tr. 289, 291. Ms. Sniedze had lived on a farm and grew up around animals. Tr. 294.

73. Mr. Riggs, the corporate Respondent's Vice President, who was in charge of the traveling exhibit, testified that the tiger depicted in CX 8 weighed 60 to 80 pounds. Tr. 911-12.

74. There is no leash visible and no handler visible in the photo. CX 8.

75. Mr. Riggs testified that he most often was the handler, and that the handler is always positioned at the head of the tiger, just out of range of the photo. Tr. 767, 913, 915.

76. Mr. Weiland examined Mr. Riggs about the photo and Mr. Riggs' customary practices at the time while at the Northern Wisconsin State Fair. The following excerpt is from Tr. 765-68:
Mr. Weiland: . . . . does it appear from the photograph (CX 8) that the tiger does have a collar around its neck?
Mr. Riggs: I can't really tell for sure.
Mr. Weiland: Okay. Do you see a leash anywhere?
Mr. Riggs: I don't see a leash.
Mr. Weiland: Okay. Do you know sitting here today whether there was or was not a leash on this tiger?
Mr. Riggs: I can't answer that for sure.
Mr. Weiland: Let's assume that there was no leash, for the sake of my question. Did you -- was that your practice at the Wisconsin State Fair to allow photographs to be taken with no leash?
Mr. Riggs: No, not at all.
Mr. Weiland: Do you understand the regulations -- which require control to be exerted over these animals, don't you?
Mr. Riggs: Yes.
Mr. Weiland: As you look at this photo, does the animal appear to be under control?
Mr. Riggs: Obviously.

[10] Ms. Sniedze's Affidavit estimated 180 pounds. CX 10, p. 4.

Tr. 765-66.
. . . .
Mr. Weiland: (at Tr. 767) . . . . Do you recall generally the affidavit in which the affiant [ph] indicated that the nearest handler was within two and a half feet?
Mr. Riggs: Yes.
Mr. Weiland: And would that have been your practice at that time, to be within two and a half feet of any of the persons being photographed?
Mr. Riggs: I would say I was probably much closer than that. The photo was cut off, probably within six or eight inches of that bottle.
Mr. Weiland: All right, sir. And is that your customary practice?
Mr. Riggs: Is that my customary practice?
Mr. Weiland: To remain that close to the person who's being - - to the tiger and the bottle?
Mr. Riggs: My practice was to feed this tiger a bottle and to hold this bottle to put her hand under my hand until it was time to actually snap that photo. At that point I would let go of my hand and her hand, back up a little bit to get my hand out of this photo. Our photographer's job was to cut the photo off fairly close beside the bottle so my hand isn't reaching into the photo. But not to get any distance away. Mr. Weiland: All right. And were there any incidents reported to you at the Wisconsin State Fair?
Mr. Riggs: None.
Mr. Weiland: No injuries of any kind?
Mr. Riggs: None.
Mr. Weiland: Did you have to discipline by some kind of physical means any of your cats at the Wisconsin State Fair?
Mr. Riggs: We don't even discipline these animals as - - in the reprimand-type that you're perhaps referring to. These - - this is a positive enrichment in which this animal's put up on a happy note or else it would not come back out the next time. Tr. 765-68.

77. Mr. Julius Olson ("Pinky") Lee, the Vice President and Secretary of the Northern Wisconsin State Fair, confirmed that there were no problems with the exhibit Great Cats of the World, run by Bridgeport and owner/supervisor Mr. Riggs, no reports to him of any incidents with the animals or the public. Tr. 265-75. Mr. Lee had determined to bring that exhibit back to the fair. Tr. 275.

78.Mr. Weiland's examination of Mr. Riggs continued, with an inquiry as to how Mr. Riggs ran Bridgeport's photo sessions. The following excerpt is from Tr. 768-70.

Mr. Weiland: Okay. I think with the photograph in view, it's probably appropriate for you to tell the Judge, just how you maintain one of these photo sessions. How you stage it, how you run it and how you operate it from beginning to end. Would you just take a minute to describe that?

Mr. Riggs: It might take more than a minute, but I would be happy to. Basically, this probably began with a show. The show lasted about 25 to 30 minutes. At one point, toward the end of the show, I'm calling volunteers out of the audience to come bottle feed a baby or something and while they're switching animals, I begin to talk about this photo set. What I do is say basically, following the show, we're going to have a limited photo opportunity. I would like to talk about this for a second, while they're getting the next animal, so I can answer everybody's question at once. Because I get this question, what happens? - - a thousands times a day. So, basically I begin to talk to the folks that basically what we do is we take the tigers out. They hop up on this platform on their own. We feed them with a bottle. The tiger has a very tiny belly and when this belly is full, this photo set is over. It doesn't matter if there's two people in this line or 40 people in this line. When the tiger's full, the tiger has to be put up, and the photo set is ended. Period. At that point, probably the next cat's brought out, I continue the show. At the end of the show, we get everything ready and probably start announcing our photo set will begin in about five minutes. At this point, we're probably bringing the folks in and getting the folks in line. Once I've got the line full and these people in line, I make another announcement. I say, okay folks. We're fixing to get this tiger out. What's going to happen, is this tiger's going to hop up here and we're going to feed him with a bottle. Whoever in your group would like to feed the tiger, come sit over here by the head, everybody else will sit over here by the tail. If you have any small children in your group, please keep them by the tail. We don't want some infant trying to hold this bottle, nor would we let that happen. And I try to explain to these folks that - - exactly how this works, step for step. So when they get up to the front and it's their turn, I don't have to explain how this process is going to work. I have a limited amount of time for this cat. His attention span on that bottle might last five to eight minutes. Either way, I want this to facilitate very quickly. So I tell these people exactly what's required. I tell them that when they sit down with that tiger, whoever is holding the bottle, I want them to hold that bottle very tightly and that we're going to ask them to look up. We want them to look up

and smile. They only have one shot at this photo and we'd really like them to have a nice photo. After they get that photo made, we tell them they can pet that tiger real quick and hop and run for their life. If they live through this process, we'll give them a stick on the way out that says, I touched a tiger. And that's my little spiel before each photo set. Tr. 768-70.

79. Training of the tigers from two weeks of age, training of Respondents' personnel, and other methods and practices of Respondents are important for this fair and each of the fairs.

80. Mr. Riggs testified that it was not his practice at the Northern Wisconsin State Fair to allow photographs to be taken with no leash (Tr. 765); nevertheless, the Respondents' handler used no leash while the photograph of Ms. Sniedze with the tiger was shot. Not only is no leash visible in the photo (CX 8), Ms. Sniedze credibly testified as follows:
Ms. Carroll: . . . . And how was the tiger led out to the platform where you were sitting?
Ms. Sniedze: It was on a leash when they brought it out but then they take it off for the picture.
Tr. 286.

81. Given the Respondents' practice of using the leash to move the tiger to and from its feeding platform, it is more likely than not that the collar remained on the tiger during the photographing of Ms. Sniedze with the tiger, even though the collar was not visible in the photograph. CX 8.

82. The Respondents' handler held the bottle for the tiger until Ms. Sniedze had a good grasp on the bottle; then the handler stepped just out of view of the camera and stood 2-1/2 feet from the bottle and the tiger's head. Tr. 767. [The question and answer at Tr. 282 is misleading, where Ms. Carroll asked: "How long were you and the tiger in close proximity without any handler?" The knowledgeable and experienced animal handler was with Ms. Sniedze at all times, but momentarily he stood back, 2-1/2 feet from the bottle and the tiger's head, with no direct contact with the tiger.]

83. I disagree with the statement in APHIS's Brief, at pp. 10 and 13, that there was no handler; there was a handler; Ms. Sniedze credibly testified as follows:

Ms. Sniedze: There were three people that were standing in front of me when they took the picture. It was the handler who initially gave me the bottle and sat me next to the tiger. There was the person who took the picture, and then there was one other person there. Actually I thought it was a volunteer.
Tr. 306.
. . . .
Ms. Sniedze: And then they put it (the tiger) up on the platform and they put the bottle in his mouth and then they told me where to sit right behind it and then gave me the bottle, and then they stepped back and took the photograph.
Tr. 308.
. . . .
Mr. Weiland: Okay. Now during that time that the cat was on the platform the bottle was in its mouth the whole time?
Ms. Sniedze: Yes.
Tr. 309.

84. The tiger in CX 8 more likely than not was younger than six months of age. Mr. Riggs' testimony was credible that it had been his practice since 1998 to "absolutely" not use cats (tigers) over six months of age for the photo part (photo shoots). Tr. 810. [*See* paragraphs 129. through 150. regarding the use of Shawnee at the York Fair; Shawnee was older than six months, but Mr. Riggs was not thinking of that situation as the "photo part," and he did not think of the Reporter doing the video promotion as a member of the public.] *See also* Tr. 840.

85. Ms. Riggs testified on cross examination that some tigers younger than six months weigh more than 75 pounds. Tr. 651.
Ms. Carroll: Approximately how much does a six month tiger weigh?
Ms. Riggs: It depends on the cat. There's a lot of diff - - a lot of different kinds of tiger. Some
- - a six month old tiger[11] can weigh anywhere from 50 - - this is my "guesstimate" - -50 to 150 pounds or 120 pounds.
Tr. 651.

86. Mr. Riggs estimated the weight of the tiger depicted in CX 8 to be 60 to 80 pounds. Tr. 911-12. I have respect for Mr. Riggs' estimate and find that he was better able to estimate the tiger's weight than Ms.

[11] Likewise, Mr. Marcus Cook estimated that an average weight for a six month old tiger would be 130 pounds, 150 pounds. Tr. 719. *See also* Tr. 720-21.

Sniedze because of his constant handling of tigers, which obviously are built differently from a St. Bernard/Great Dane mix. Nevertheless, based on both Mr. Riggs' and Ms. Sniedze's testimony, taken together, I find that the tiger photographed with Ms. Sniedze at the Northern Wisconsin State Fair more likely than not weighed 75 pounds or more. When the Respondents' handler used a tiger that weighed 75 pounds or more in photographic sessions with members of the public, the Respondents' handler caused the Respondents to violate the Consent Decision, which orders that the tiger be "less than seventy five pounds in weight."

87. On July 10, 1999 at the Northern Wisconsin State Fair, the Respondents violated the Consent Decision: the Respondents' handler did not hold the tiger by a leash at all times during the photo shoot; and during the photo shoot the Respondents' handler used a tiger that weighed 75 pounds or more.

88. Just as "the public" is distinguished from "the general viewing public" in the regulation (9 C.F.R. § 2.131(b)(1)), "members of the public" are distinguished from "the general public" in the pertinent Consent Decision provision.

89. The Consent Decision includes the following requirement:

> Respondents shall not exhibit any exotic cats or other animals in photographic sessions with members of the public unless the general public is kept away from the exhibit by a barrier at least fifteen feet from the exhibit.

CX 3, p. 5.

90. The Judicial Officer held in *The International Siberian Tiger Foundation, et al.*, 61 Agric. Dec. 53, 86-88 (2002), that the terms "the public" and "the general viewing public" do not include exhibitors and do not include the Respondents' trainees ("premium customers" who paid $2,500 and entered into training agreements, to obtain "close encounters" with and "exposure" to Respondents' animals). The Judicial Officer observed:

> The Regulations do not define the term "the public" or the term "the general viewing public." However, generally, the term "the public" does not mean all people, as the Chief ALJ suggests. Instead, the term "the public" is often used to distinguish a large

> group of people from a smaller group of people. For instance, if one were to say "the plumber treats the public fairly," this statement generally would not be interpreted to indicate how the plumber treats his or her employees, apprentices, or himself or herself. Similarly, the term "the general viewing public" is not always used to mean "all people who view an event or object." The term "the general viewing public" is often used in a way that excludes those who are presenting the event or object to an audience."

61 Agric. Dec. 53, 87 (2002).

91. "The general viewing public" and "the public" are not synonymous, as used in 9 C.F.R. § 2.131(b)(1). As applicable here, the people who were admitted inside the Respondents' enclosure that would contain one photo opportunity tiger had left the "the general viewing public." "The general viewing public" were kept outside by the four-foot high perimeter fence. The perimeter fence was a barrier, and there was distance between that barrier and each animal enclosure. The "general viewing public" had not paid $10 for a photo opportunity. Ms. Sniedze remained a member of "the public" while she was inside the exhibition, both while she was waiting her turn and while she was on the platform with the tiger.

92. The regulation requiring "sufficient distance and/or barriers between the animal and the general viewing public" and the Consent Decision provision requiring that the general public be kept away from the exhibit by "a barrier at least fifteen feet from the exhibit" applied to the people outside the exhibit ("passers-by"), but did not require distance or barriers between the photo opportunity tiger and Ms. Sniedze, once she had gained admittance to the photo opportunity enclosure.

93. For purposes of the "Great Cats of the World" exhibit during the two months of the summer of 1999 at issue here, I agree with Ms. Riggs' understanding. Ms. Riggs thinks the general viewing public is the public not having their photo and the public is the people having their photo. Tr. 595-96.

Ms. Riggs: From the way that I understand it general public is the public not having their photo and the other . . . . (t)he public is the people having their photo.

Tr. 595-96.

Ms. Riggs continued, "The general public is kept behind the four foot fence, which is in the foreground. You can see that a girl with the red

shirt is behind that. Then you can see inside the exhibit whether they are volunteers or employees or people getting their photos, I really can't see. It's a dark photo. - - that I would consider public or employees but I don't know which it is at that time. Tr. 596. CX 9.

94. The Respondents' four foot high perimeter fence, plus the "inner perimeter" distance of five to six feet between the perimeter fence and the animals' enclosures, did provide an adequate barrier plus distance to separate the general viewing public from the Respondents' exhibit. Tr. 788-90, ALJX 1.

95. Further, the public waiting their turn once inside the Respondents' exhibit were separated with barriers plus sufficient distance from Respondents' other animals in enclosures other than the one containing the photo opportunity tiger. APHIS seems to have confronted the Respondents for the first time at the hearing with a new requirement, the requirement that the public inside their exhibit, the public who came in for a photo opportunity after paying $10, also need to be separated from the animal with sufficient distance and/or barriers. If "sufficient distance and/or barriers" were required between the animal and the public, then "close encounter" exhibitions of animals (*see* 61 Agric. Dec. 53 at 89) would be eliminated, not just for dangerous animals, such as tigers, but for all animals regulated under the Act. Ms. Sniedze, who was a member of the public, would not have been permitted to sit next to the tiger. The plexiglas or bullet proof glass solution or one like it would become the only means of providing a photo opportunity such as that of Ms. Sniedze. I conclude that the Respondents were not required during their photo shoots to "have sufficient distance and/or barriers" between a tiger and the human(s) posing with the tiger, to comply 9 C.F.R. §§ 2.100(a) and 2.131(b)(1)).
The terms of the Consent Decision show that the plexiglas or bullet proof solution or one like it was not expected, either by APHIS or by the Respondents, to become the Respondents' only means of providing a photo opportunity. APHIS may seek a regulation for tigers that requires the plexiglas or bullet proof solution or one like it, but there was no such requirement during the two months of the summer of 1999 in which the Respondents' violations allegedly occurred.

96. On July 10, 1999, at the Northern Wisconsin State Fair, the Respondents did fulfill their obligation to assure the safety of the photo opportunity tiger and the public through their control over that photo

opportunity tiger. Even without holding the tiger by a leash at all times, and even though the tiger (a juvenile tiger) weighed 75 pounds or more, and even though Ms. Sniedze instead of the Respondents' handler held the bottle for the tiger momentarily, the Respondents handled their tiger during public exhibition so there was minimal risk of harm to the tiger and to the public, including but not limited to Ms. Sniedze. My conclusion is based on all of the Respondents' safeguards, including their dedication to their tigers and their exhibition, and their practices and procedures, and on the credible testimony of Ms. Sniedze.

Iowa State Fair, Des Moines - August 20, 1999

97. Little more than a month later, on August 20, 1999, Respondents' traveling exhibit was inspected by Steven I. Bellin, Ph.D., D.V.M., at the Iowa State Fair, Des Moines, Iowa. Dr. Bellin ("Dr. Dr.", or, as he put it, "pair o' docs"), is an APHIS Veterinary Medical Officer (VMO), field certified in felid and canid nutrition, whose responsibilities are to assure compliance with the Animal Welfare Act.

98. Mr. Riggs testified that Dr. Bellin had done a thorough inspection of records and every aspect of the Respondents' operation at the Iowa State Fair (Tr. 787), and that Dr. Bellin had told him that he was not using leashes and was not in compliance with the Consent Decision. Tr. 787, 792-93. CX 12. Mr. Riggs drew a layout of the Iowa show, in part to show Dr. Bellin's vantage point[12] when taking photos of Respondents' exhibit. ALJX 1. Tr. 787. Mr. Riggs testified that Dr. Bellin was 30 to 34 feet from the photo opportunity tiger when he took the photos.

99. Mr. Riggs testified that he told Dr. Bellin he was flabbergasted that Dr. Bellin did not see the leashes being used. Tr. 794. Mr. Riggs testified that Dr. Bellin said, "Don't worry. I'm saying I didn't see a leash. I am saying that this item was corrected." Tr. 794.

100. Dr. Bellin testified that the non-compliances of animal welfare regulations he observed were primarily in the area of handling of animals. Tr. 378. The animals, as well as the general public, were not being kept safe according to Section 2.131 of the Animal Welfare Act regulations, Dr. Bellin testified. Tr. 378. Dr. Bellin identified his

[12] Passers-by ("the general viewing public"), such as Dr. Bellin, were separated from the exotic cats by four foot high chain link fence

inspection report, CX 12. Tr. 377. Dr. Bellin identified the photos he took, CX 16 through 21. Tr. 378-79.

101. Dr. Bellin's photos are of very poor quality,[13] in part because they were taken from such a distance, about 30 feet, through three sets of fence (Tr. 791-92, ALJX 1), and because the lighting is inadequate. The closest Dr. Bellin got was "maybe within 15 to 20 feet, something like that." Tr. 380. Dr. Bellin's view was not up-close and personal; on direct examination, Dr. Bellin stated he never goes into an enclosure with an exotic cat, if he can help it. Tr. 395-401.

Ms. Carroll: Let me ask you, Dr. Bellin, to describe the training and expertise you have acquired during your career with the U.S. Department of Agriculture in connection with great cats, large cats, and their behavior.

Dr. Bellin: We have training opportunities at national conferences, regional conferences, where experts are brought in, experts such as Mr. Riggs, or a James Fowler[14] type of individual, if you will, people who have expertise with the type of animals that we're going to be covering, and these people have given us the benefit of their knowledge, their education, their training, writings. They've provided us with bibliographies that we can further research if we want to know even more. As an inspector, I would say between 1989 and 1991 or 1992, I actually was responsible for even more exhibitors and then the territory was decreased a bit because we had a third inspector going to Iowa but I had done inspections, I would say, since 1989 at locations numbering well over 500 exhibitors of people who have big cats, be they home exhibitors or traveling exhibitors or people coming into the state from other - - several of my licensees or exhibitors have themselves been mauled by their animals and I've seen the results of that. I have read reports of these incidents. I have seen them physically myself. I have been responsible for the confiscation of large cats that had not been taken care of, successful confiscations. The scope is wide and varied. I don't purport to be an expert in the care and handling of these animals because I don't do it on a full-time basis like Mr. Riggs may do. But I certainly know what a wild animal is. I certainly know what a dangerous animal is, and I certainly know the difference between an

[13]Dr. Bellin's comments on the backs of the photos are informative. Also, the videotape, CX 41, which Dr. Bellin saw and obtained after he left the Respondents' exhibit, augments Dr. Bellin's photos.

[14] Mr. Fowler is a well-known explorer personality appearing on "Wild Animal Kingdom," a television adventure series.

animal that is trained and an animal that is domesticated as well as being trained. There are differences. And a tiger and a lion will always be a wild animal and will always be, always be subject to unpredictability, always.
Ms. Carroll: Do you also have occasion to deal with zoo personnel?
Dr. Bellin: Yes.
Ms. Carroll: And they're also exhibitors - - zoos are also considered exhibitors?
Dr. Bellin: Yes. With my knowledge, I think the last thing I might add is I've been invited several times to partake and join in the fun of going into the cage with these tamed, trained pets that people have, and never on any occasion have I ever done it, and I think there's a reason for that and it's not because I hadn't heard what they had asked me to do.
Administrative Law Judge: If you'd go back now, Ms. Carroll, you had asked about difference the clothing could make and the witness had begun to tell that. I still don't know how he knows those things. If you could go into his background about how he's learned some of these specifics. Perhaps it's in the biographies or bibliographies rather that were provided for reading. Perhaps it's personal experience. If you could just draw some of that out before you return to your questioning.
Ms. Carroll: Okay, because I was trying to go back and find what my question was. Ms. Carroll: Dr. Bellin, I take it you've also had discussions and interactions with the exhibitors that you described including the 500 exhibitors of exotic animals including big cats, is that correct?
Dr. Bellin: Yes, I have.
Ms. Carroll: I guess have you obtained information in your training or in your work and in the dealings that you just described concerning the effect of clothing, perfume, age, and size of the person, et cetera -- strike the et cetera. Have you obtained information specifically concerning those factors and how they play into the risk?
Dr. Bellin: Yes.
Ms. Carroll: And what specifically or from what sources have you derived that information?
Dr. Bellin: From people who have been mauled by these animals, from people that feed and water them every day, from people that write books and make television documentaries on these animals, from people who report on these animals, from people that own these animals as pets, from people that get rid of these animals as pets. Just numerous sources. Things that I've read. Perhaps a lot of hearsay but my wife happens to be the head librarian for Science Cataloging at Iowa State University and usually if I don't know something, I usually ask her to look it up, and if

anybody can find it, she can. So normally if I hear something that sounds weird, I try to find out if it's true or not. I'm not saying everything I've learned is true. What I'm saying is that the sources that I've been exposed to are numerous and varied.
Ms. Carroll: Has there been agreement generally speaking in connection with the, for example, the issue of perfume among the sources that you've consulted?
Dr. Bellin: Yes.
Ms. Carroll: And is that also true in connection with the clothing? I think you had started to answer that various different kinds of clothing can affect animal behavior.
Dr. Bellin: Yes. The bottom line is anything novel is an unpredictable trigger or can be an unpredictable trigger, anything novel to the cat.
Ms. Carroll: And let me just ask you about what difference, if any, it would make as far as the level of risk as to the age of the person coming into contact with the tiger - - with a tiger.
Dr. Bellin: I don't know at what age a tiger learns to hunt necessarily when it's bred and raised in captivity but I would imagine that a smaller child would be a more palatable target if the animal were hungry than say a 6'6", 280-pound man.
Ms. Carroll: In your experience, do tigers - - can tigers cause injury without, I don't want to say meaning to, but while playing?
Dr. Bellin: Absolutely, by way of their canine teeth and large claws, their general size, their quickness.
Ms. Carroll: And you mentioned perfume. In your experience, what is the effect of perfume or lack of perfume on tiger behavior or response?
Dr. Bellin: It's unpredictable. I couldn't tell you. I know that it's novel. I know two people that were wearing perfume, I know personally two people that have been attacked by a large cat that were wearing perfume, so I know that it's not a neutral thing that goes on in the tiger's mind. I mean there was a reason for the attack. It could have been the people doing something and it could have been the perfume. I don't know what the initiating factors were, but I personally know two people who were wearing perfume and had been attacked.
Ms. Carroll: Is it - - in your opinion, are things like type of clothing, perfume, and age of patrons something that should be considered in exhibiting animals like tigers?
Dr. Bellin: Federal law requires minimal risk to animals, and it doesn't really address that much to the public. Federal law and under the Animal Welfare Act when I hear minimal risk if anything poses a

potential risk then obviously the exhibitor is not at the minimal level yet as far as I'm concerned. That's about as specific as I can get.
Tr. 395-401.

102. Dr. Bellin cemented his explanation for not being "up-close" and personal, on cross examination. Tr. 435-47.
Dr. Bellin: There's no way I will get in with a wild animal that belongs to somebody else ever, ever, ever, ever, ever, sir, nor will my wife. They are unpredictable. They're wild. They're dangerous. They carry disease. They can hurt, they can maim, they can kill. Minimize the risk. I get enough risk in my job. I would never think of it. My wife would never think of it. It never crossed our mind.
Mr. Weiland: So you have never had the thrill of touching a tiger in your whole life?
. . . .
Dr. Bellin: Sir, I find no thrill in touching a tiger.
Mr. Weiland: You never had the experience touching a tiger?
Dr. Bellin: That's not true.
Mr. Weiland: You have touched a tiger?
Dr. Bellin: Yes.
. . . .
Dr. Bellin: I was three years old. I have no idea what my thoughts were at that time.
Tr. 436.
. . . .
Mr. Weiland: In fact, the kind of exhibit that the Riggses had in 1999 had become quite unusual in your experience, would you agree with that?
Ms. Carroll: Objection. I think foundation on unusual.
Dr. Bellin: I don't even understand the question. I'm sorry.
Mr. Weiland: Well, you went out to this - - you tried to go to the state fair every year. Maybe I'm wrong. Is there an exhibit where people can come and have their picture taken with baby tigers out there every year?
Dr. Bellin: No.
Mr. Weiland: Had there ever been one in your experience?
Dr. Bellin: Yes.
Mr. Weiland: How frequently have you seen that type of exhibit?
Dr. Bellin: In the 12 years I've been a federal inspector, have I seen that type of exhibit at that state fair?
Mr. Weiland: Yes.
Dr. Bellin: Three times.

Mr. Weiland: Okay. And then the other - - at least two of those times were someone other than Mr. and Mrs. Riggs' show?
Dr. Bellin: Exactly two times, yes.
Mr. Weiland: Two times. Two other times?
Dr. Bellin: Yes. . . . .
Mr. Weiland: You mentioned in your testimony that you thought the bottle was a distraction but the bottle is a distraction. It's not anything you think. It clearly is a distraction to the animal during the course of the exhibit, isn't that correct?
Dr. Bellin: Yes.
. . . .
Dr. Bellin: . . . . Because nobody is harmed or hurt during a particular exhibition doesn't mean that the risk is minimal at that point. It doesn't mean that precautions have been taken. It just means somebody is lucky maybe.
Tr. 446.
. . . .
Mr. Weiland: Well, let me ask you if - - let me ask you hypothetically.
Dr. Bellin: Certainly.
Mr. Weiland: If Mr. Riggs was at Iowa State Fair in August of 1999, and he took 1,000 photographs involving a total of say conservatively 2,000 people, and after that time there was no evidence that the animal or any human had been harmed, would you conclude that his exhibit presented a minimal risk of harm?
Dr. Bellin: No.
Mr. Weiland: Okay. Bear with me. What if Mr. Riggs at the Iowa State Fair had taken 10,000 photographs, and during that period of time no individual had reported any injury whatsoever and no animal had suffered any physical harm that any veterinarian or inspector could determine. At that point would you conclude that the exhibit posed a minimal risk of harm?
Dr. Bellin: No.
Mr. Weiland: What if Mr. Riggs during the course . . .
Dr. Bellin: Sir, you could go to infinity and the answer will be no. I'm just doing this to expedite, if you would. Give me a number, and the answer is no.
Tr. 435-47.

103. Dr. Bellin's inspection is the most significant of the four fairs. At the first fair at issue (Northern Wisconsin), there was no APHIS inspector, and the evidence addresses only one member of the public,

Ms. Sniedze. Dr. Bellin's inspection was at the second fair at issue (Iowa), the first APHIS inspection to follow up on the Consent Decision issues raised by the photograph of Ms. Sniedze with the Respondents' tiger. The closest Dr. Bellin got during his observation of the Respondents' exhibition was "maybe within 15 to 20 feet, something like that." Tr. 380. The length of time Dr. Bellin observed the Respondents' exhibition was 1-1/2 to 1-3/4 hours (Tr. 380), plus he watched the videotape (CX 41). The day of Dr. Bellin's inspection, hundreds of members of the public had photo opportunities with one of Respondents' tigers, perhaps 60-70 people each session, sitting for perhaps 40 photographs each session (one photo would include one or more people, up to as many as seven people). Tr. 382-84. Quite significant is Dr. Bellin's first write-up, CX 12, his Inspection Report. Dr. Bellin wrote one paragraph, and the noncompliance he identified was essentially "Animals are not on a leash and are not under direct control of a handler." CX 12. Dr. Bellin identified Order 1(c) and Order 4 of the Consent Decision. CX 12, CX 3.

104. Dr. Bellin's Affidavit (CX 13) was prepared after he had viewed the videotape (CX 41),[15] and the noncompliance Dr. Bellin identifies from the videotape is " . . . . photo session, with Mr. Riggs in control of the session, posing individuals with his tigers and the absence of any direct control by an experienced handler, or even in direct control of a leash 18 inches or shorter." CX 13, p. 4.

105. Dr. Bellin's Affidavit conclusion states, "In my inspection report,[16] I chose not to reference 9 CFR, Sections 2.131(b)(1) and 2.131(c)(3) under the handling statutes because the AWA Docket #98-34 addressed in it's (sic) orders specifically the issues of "direct control" and leash requirements to be employed by the Bridgeport Nature Center during photo sessions with the public. This[17] is a true statement." CX 13, p. 4.

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[15] The videotape (CX 41) from the PBS station in Iowa, IPTV, shows Respondents' exhibit, Great Cats of the World, much better than Dr. Bellin's photos. The videotape was obtained by APHIS investigator Ms. Patricia Martin Lesko. Tr. 362-64. Dr. Bellin had watched the segment when it aired, and had videotaped it with his VCR. Tr. 413, 416.

[16] CX 12

[17] referring to the entire four-page Affidavit

106. By not holding the tiger by the leash at all times during the photographic sessions with members of the public, the Respondents' handler caused the Respondents to violate the Consent Decision, which orders that the tiger be "collared and on a leash no longer than 18 inches in length at all times." CX 3 pp. 4-5. That the leash will be held by a handler is understood, even though the foregoing Consent Decision provision does not specifically state that the leash shall be "held by a handler." The Consent Decision's clear meaning was that the tiger was to be collared and on a leash held by a handler at all times, the leash to be no longer than 18 inches.

107. The consequences of violating a Consent Decision were addressed by Ms. Carroll at the hearing. *See* APHIS's position, Tr. 169-73. The collar and leash requirement is contained in the Order portion of the Consent Decision, but not in the "cease and desist" portion of the Order, paragraph 1, which forbids future violations of "the Act and the regulations and standards issued thereunder." CX 3, pp. 2-4. Under the Consent Decision, paragraph 7, the Respondents' 30-day license suspension that began on September 19, 1998, would not end until the Respondents demonstrated compliance with the Act, the Regulations, the Standards, and the Order portion of the Consent Decision. CX 3, p. 5. The Consent Decision fails to specify any other consequences of violating the collar and leash requirement. Consequently, the Respondents' violation of the collar and leash requirement will have consequences here only if "the Act and the regulations and standards issued thereunder" are violated. If so, the civil penalties provisions of 7 U.S.C. § 2149(b) apply.

108. Not only APHIS was concerned with the safety of the animals and the humans; the Respondents were also concerned with the safety of the animals and the humans. The Respondents proved themselves very capable in handling their tigers so there was minimal risk of harm to the animal and to the public. The Respondents' practices and methods included in pertinent part, bottle feeding a young hungry tiger on the tiger's feeding platform during the photo opportunities for the public. The young tiger had been fed that way from the age of weeks old.

109. *Handling* means petting, feeding, watering, cleaning, manipulating, loading, crating, shifting, transferring, immobilizing, restraining, treating, training, working and moving, or any similar activity with respect to any animal. 9 C.F.R. § 1.1, Definitions.

110. During a "Great Cats of the World" photo opportunity, the customer holding the bottle for one of the Respondents' tigers was, by definition, handling that tiger - - by feeding the tiger and perhaps by petting the tiger. The Respondents' employee (Mr. Riggs or someone trained by Mr. and Mrs. Riggs) who was supervising the customer's handling of that tiger was also handling that tiger - - feeding and perhaps petting the tiger through the action of the customer, and also working/training/moving/transferring/manipulating that tiger.

111. I disagree with Dr. Bellin on the "direct control" issue; during the Respondents' photo shoots, I conclude that direct contact (touching) of a tiger or its leash by the handler was not required to keep a tiger under "direct control and supervision," for the purposes of 9 C.F.R. §§ 2.100(a) and 2.131(c)(3). I conclude that on August 20, 1999, at the Iowa State Fair, the Respondents' dangerous animals that the Respondents exhibited (photo opportunity tigers) were under the direct control and supervision of a knowledgeable and experienced animal handler, even though that handler had stepped back to be out of the photo, and even though the direct control was achieved through methods and practices, rather than holding onto the tiger.

112. The Respondents' dedication, experience, know-how, practices and methods are essential to my conclusion that, for the most part, there was minimal risk of harm to members of the public who participated in the Great Cats of the World exhibit during the two months of the summer of 1999 in which the Respondents' violations allegedly occurred. Other exhibitors may not be able to put together such a safe and effective presentation, and the Respondents under other circumstances may not. But if exhibitors are to be regulated more tightly, the rules have to be announced in advance.

113. Part of the allure of an exhibit of exotic cats is that, besides being wondrous and gorgeous, they are dangerous. Even so, members of the public no doubt believe that an exhibit in a fair has been cleared by the authorities as safe. The public do not know not to go into a close encounter exhibit - - look at all the young parents who took their elementary school aged children in, and even pre-schoolers. CX 41. Dr. Bellin estimated that the youngest person he saw having a picture taken with a tiger was two years of age. Tr. 385. There were several instances on August 20, 1999, when the Respondents departed from their practices and methods and thereby escalated the risk of harm to more than minimal.

114. During public exhibition in photographic sessions with members of the public at the Iowa State Fair on August 20, 1999, when the Respondents allowed their bottle-feeding young hungry tiger, instead of being on the tiger's feeding platform, to be draped over the laps of people seated in the crowd while waiting their turn for their photo opportunity, the Respondents escalated the risk of harm to more than minimal. When the laps were the laps of children, or close to children, the risk of harm was even worse. Dr. Bellin testified, and CX 41 confirms, that children under the age of 18 had their pictures taken without any adults, and that tigers were on the laps of children, being held only by children. Tr. 386-87, 401-02.

Dutchess County Fair, Rhinebeck, New York - August 28, 1999

115. Eight days after Dr. Bellin's inspection, Respondents' traveling exhibit was again inspected by an APHIS Animal Care Inspector, at Rhinebeck, New York, on August 28, 1999. Again, the APHIS Animal Care Inspector did a complete and thorough inspection. Tr. 39, 53, 57-58, 65.

116. The APHIS Inspector's report, prepared at the Dutchess County Fair in Rhinebeck, New York on August 28, 1999, is CX 22. Tr. 40. The Inspector's name is Ms. Jan Baltrush.

117. The Respondents had leashes on the tigers during photo sessions; there is no allegation related to handling on August 28, 1999, Tr. 49, 54, 56, 64.

118. Ms. Baltrush testified that the Respondents had 18 cats that day (she took a census); the specific documents Ms. Baltrush wanted were readily available for all but four; those four were three tigers and one lion cub. Tr. 40-41, 77. The four were on a health certificate given immediately to Ms. Baltrush; Ms. Baltrush remembered that there was something for the four on the health certificate, but "there was no documentation of when and where they originated, i.e., "when they were born or where they were born, whether they were brought or whether they were born on the premises." Tr. 40, 59, 77.

119. Ms. Baltrush didn't recall whether the health certificate stated how old the animals were. Tr. 78. She testified that APHIS did not need the health certificate; it is required by the state. Tr. 67-68.

120. Ms. Baltrush testified that the information she was looking for did not have to be on a specific form (Tr. 62) (although a "transfer form" is commonly used), but that the record needed to show where the animals originated (Tr. 59), to include the place of birth in addition to the date of birth. Tr. 62-64. Ms. Baltrush testified that that is what she interprets 9 C.F.R. § 2.75(b) to require.

121. In contrast, Mr. Riggs testified that a transfer form does not require the exact age of the animals, but "just says young or old." Tr. 809.

122. Ms. Baltrush testified that Mr. Jay Riggs told her the animals were born on his property, and they were just brought into his traveling group recently. Tr. 42. Ms. Baltrush testified that she wrote up a records violation, but before she left that day, Jay Riggs supplied her with the specific documentation she was looking for. Tr. 43.

123. Ms. Baltrush had gone to her car, typed up the one-page document to show a records violation, and then went back to Mr. Riggs; Mr. Riggs said he found the documentation for those three tigers and one lion cub (Tr. 71), and he gave it to her. Tr. 71, 798. Ms. Baltrush determined that the documentation met APHIS requirements. Tr. 71.

124. Ms. Baltrush explained that there was a violation "because when I first started the inspection and first asked for the information, it was not available to me." Tr. 72.

125. Ms. Baltrush had arrived at about 11:00 in the morning and stayed about 4-1/2 hours. She did not call in advance (Tr. 64), and Mr. Riggs did not know she was coming. The length of time between the completion of her initial inspection and her return after writing up the violation in her car, was "an hour or two," according to Mr. Riggs, during which, Mr. Riggs found the specific documentation that Ms. Baltrush was looking for. Tr. 798.

126. Mr. Riggs testified that the health certificate for Iowa did not have the four new cubs on it; "we had a health certificate generated strictly for Rhinebeck, New York that had all these cats on one page." Tr. 797. Mr. Riggs testified that Ms. Baltrush asked where these animals came from. "And basically she was asking me for the record of acquisition or the transfer form for these cats indicating their origination, where they're from." Tr. 797. "I could not find the papers in the first instance that

accompanied the cats that I had just shown Dr. Bellin in Iowa. I couldn't find the transfer form or that, even that original health certificate. Those two pieces, documents, had not been placed in the permit book at that point and weren't a part of that, and we could not find that upon our initial inspection." Tr. 797-98.

127. Mr. Riggs continued, "Once she (Ms. Baltrush) left, I began to go through the tour bus and everything inside that, and I found both those documents, the original health certificate and the record of transfer that accompanied them from Texas to Iowa. And when she came back, I presented her with those to verify, really just verify the information on the health certificate. But I presented her with those, and she did write that we had found the document she was looking for." Tr. 798.

128. Mr. Riggs testified that Ms. Baltrush also told him that it was a violation for Eric (Drogosch) to be handling the animals, when Heidi and Jay Riggs are the only ones listed that can actually handle the animals. Mr. Riggs testified that "she gave us basically on that inspection report 30 days to send in for pre-approval for all of our employees so that . . . I have never heard of that at all. Tr. 800. So I was shocked. Tr. 801. [No violation is alleged here concerning handling by a person other than Mr. or Ms. Riggs.]

York Fair, York, Pennsylvania - September 10, 1999

129. Two weeks following inspection by Ms. Baltrush, the Respondents' traveling exhibit opened at the York Fair, York, Pennsylvania, on September 10, 1999. Tr. 803. That night, opening night, Fox 43 News at 10:00 featured Respondents' traveling exhibit, Great Cats of the World, in a promotional video of the York Fair. A videotape of the newscast, with news reporter Mr. Kevin Johns, is in evidence. CX 33. Tr. 231.

130. APHIS Animal Care Inspector Robert Markmann inspected the Respondents' traveling exhibit at the York Fair on opening day, September 10, 1999. Mr. Markmann testified that the reporter, Kevin Johns, from Fox 43 News, was inside the cub enclosure, handling some of the cubs, while Mr. Markmann was doing the exit interview with Mr. Riggs. Tr. 230.

131. That night on the news Mr. Markmann saw the Fox 43 News reporter with one of the big, white tigers. Tr. 231. Mr. Markmann's memorandum to Dr. Ellen Magid about the Fox 43 News segment is CX 40. Tr. 231.

132. The reporter Kevin Johns is promoting the York Fair, with opening day video. CX 33. The news clip states that the York Fair is the nation's oldest fair, in 1999 having begun its 234th edition. The news clip states that the unusual new educational exhibit Great Cats of the World is part of the Fair's success. The reporter, Mr. Johns, says that the cute and cuddly cats are stealing the show - - 19 cats altogether, 7 rare species. CX 33.

133. The Kevin Johns segment of CX 33[18] begins with the baby cat Simbala, a four-week old white lion, adorable and very vocal (and rare; the story reports that there were only 20 white lions in existence). The news clip is excellent and makes me, the trier of fact, break out in a big grin every time I watch it. CX 33.

134. The news clip includes lots of spectator reaction and statements of both Mr. Riggs and Mr. Drogosch. Mr. Riggs tells that the cats are endangered and that they are wild, not meant to be pets. Mr. Drogosch tells that one danger is that they'll steal your heart away, that he used to be in law enforcement working with dogs and then fell in love with the exotic cats. CX 33.

135. Near the end of the news clip, the reporter, Mr. Johns, is feeding a bottle to a royal white tiger, Shawnee. The story reports that there were only 200 royal white tigers in the world. Mr. Johns is seated next to Shawnee on Shawnee's feeding platform, much as Ms. Kris Sniedze is seated next to a tiger in CX 8. Mr. Johns is holding Shawnee's bottle with one hand, and with his other hand, he is tousling Shawnee's head. Shawnee clearly is intent on the bottle.

136. I feel no tension watching Mr. Johns with Shawnee, even though Shawnee was bigger than Ms. Sniedze's tiger. CX 33, CX 8. Shawnee weighed 120 to 140 pounds. Tr. 854. Shawnee was at least 8-1/2

[18] CX 33 is the whole newscast, Fox 43 News at 10:00. The tape is cued to the Express Weather segment. The story on the Fair immediately follows Express Weather, which mentions that Floyd is now a hurricane, and immediately precedes coverage of the best spam cook-off competition.

months old, born on or about December 31, 1998. Tr. 148-49. Allowing Mr. Johns to interact directly with Shawnee, to sit next to Shawnee with no barrier and to touch Shawnee and to hold the bottle for her, got Respondents into trouble with both APHIS and the Commonwealth of Pennsylvania.

137. Mr. Riggs paid a $500 fine (plus costs, total of $535) to the Commonwealth of Pennsylvania on September 15, 1999, the day he was given the Pennsylvania citation by Mr. Gregory C. Houghton. CX 42 is a copy of citation. Tr. 333. Mr. Houghton worked for the Pennsylvania Game Commission. At the time of the hearing was Mr. Houghton was Chief of Technical Services, Division for the Bureau of Law Enforcement. He formerly was a District Wildlife Officer in Northern York County, Pennsylvania.

138. Mr. Houghton testified that there were no reports of injuries to any humans or to any animals during the time the Respondents' show was at the York Fair. Tr. 360-61. When Mr. Houghton was at the York Fair on September 13, 1999, he did not observe any violations at Respondents' show. Tr. 328-29, CX 39.

139. But Mr. Houghton issued a Citation to James Lee Riggs for the contact that reporter Kevin Johns had with two different cats. The evidence was the Fox 43 videotape obtained through the Governor's office. Tr. 330, 333, 335. The reporter had contact with Simbala, the four-week old white lion, and with Shawnee, the royal white tiger. CX 33. Tr. 343. The white tiger Shawnee was 8-1/2 months or 9 months old.[19]

[19] Shawnee may have been born on December 31, 1998, as Mr. Riggs testified. Tr. 831, and *see* CX 37, p. 1, the Rabies Certificate. Shawnee would then have been 8-1/2 months old at the York Fair. I find it more likely, based on CX 37, p. 11, that Shawnee was born about two weeks earlier, on or about December 15, 1998. If Shawnee was 8 weeks old on February 9, 1999, as shown by CX 37, p. 11, she would have been nearly 9 months old at the York Fair. The Respondents prepared CX 37, p. 11, with emphasis on Shawnee's birth group: "The 4 little babies need their first round of shots." Those 4 little babies, including Shawnee, are shown to be 8 weeks old on February 9, 1999. If CX 37, p. 10, a form prepared in the Veterinarian's office, were entirely accurate, Shawnee would be a month older; but based on a careful reading of CX 37 p. 11 and p. 10, I find that the date (1-09-99) on that form is wrong and should have been 02/09/99. *See also*, Tr. 119-121.

140. Mr. Riggs regarded news reporter Kevin Johns as being someone he was working with, not as a member of the public, and not as involved in the "photo part" or photo shoot with the accompanying restrictions. Mr. Riggs did not use Shawnee for the photo shoots with members of the public, as he understood the public. Tr. 831, 839-41. I agree with Mr. Riggs, that news reporter Kevin Johns was not a member of the public while he was promoting the York Fair, on location at the Respondents' traveling exhibit.

141. Mr. Riggs had a temporary menagerie permit for the York Fair. Tr. 318. The reporter's contact with the two cats was alleged to be in violation of his menagerie permit. The Pennsylvania Game and Wildlife Code requires the exercise of "due care in safeguarding the public from attack by exotic wildlife." CX 43. Tr. 337-38. The Pennsylvania Game Commission interprets the Code to prohibit members of the public from having any contact.

142. Mr. Riggs did use plexiglas for all his photo shoots at the York Fair, to prevent the public from having any contact, but Mr. Riggs did not regard the reporter as a member of the public.

143. The videotape (CX 33) that includes Mr. Johns' contact with Simbala and Shawnee was played numerous times at the hearing. Tr. 128-29, Tr. 342-43. (APHIS investigator William John Swartz, with Investigative and Enforcement Services, followed up Mr. Markmann's inspection, accompanied by Mr. Houghton. Tr. 93, 96.)

144. Mr. Riggs testified that at the York Fair he did not know in advance that a reporter was coming. Tr. 804. The reporter said he wanted to shoot some film and do an ongoing story, and create a one to three-minute video that actually Mr. Riggs could use as a promo tape.

145. Mr. Riggs testified that the video was being shot all day, that the reporter was there for several, several hours, daylight and nighttime. Mr. Riggs testified the reporter did not pay admission or any kind of fee, and that the reporter was never in any kind of jeopardy. Mr. Riggs testified that he actually assigned Eric (Drogosch) to stay with the reporter. Mr. Riggs testified that he began working with the reporter, until Inspector Markmann made his appearance.

146. Mr. Riggs testified that he told Eric, stay with him, teach him, and help him develop this video. Tr. 805. About the shot in the video with

the bottle, Mr. Riggs testified that Kevin Johns, the reporter, didn't feel he could remember all his lines and pull off his part of this video sitting down with this cat, holding this bottle, and remember everything. Tr. 806. Mr. Riggs continued, "So we have several dry runs to familiarize him with this cat, with this process of holding the bottle, and it was only during the live shot, the final shot, when this thing aired live, is what we see here on the video." Tr. 806.

147. When Mr. Riggs was asked how close he and Eric were to the reporter during the video, Mr. Riggs testified, "We were very close, and he felt much more at ease with that, and I would suggest the camera operator wouldn't have been a very good camera operator if it did show either one of us in that. Tr. 807.

148. When Mr. Riggs was asked if he felt like (he and Eric) were in direct control of that animal (the white tiger in the video) throughout that entire time, Mr. Riggs testified, "If you watch the video, it's obvious that we were in direct control." Tr. 807.

149. When Mr. Riggs was asked if he felt that assisting in that news show put Mr. Johns or the animal at any risk whatsoever, Mr. Riggs testified, "No. Not at all." Tr. 807. Watching the news clip on CX 33, I have to agree. *See also* Tr. 627-29.

150. There is no evidence that Mr. Kevin Johns or Simbala or Shawnee was ever at more risk than is evident from the news clip, which I find to be minimal risk or less. In addition, I find that Mr. Johns was not a member of the public but was instead a volunteer and trainee who had trained all day.

151. Evidence of the methods and practices of Las Vegas, Nevada exhibitors, such as Siegfried and Roy (Tr. 563-566), and the MGM Grand Hotel (Tr. 697-99, 717), did not impact my Decision. Evidence of the much larger number of injuries and fatalities to children caused by dogs (Tr. 704), compared to evidence of human injuries and fatalities caused by great cats (Tr. 705), did not impact my Decision. *See also* Tr. 705-07.

152. APHIS asks me to conclude that each of the Respondents operated as an "exhibitor" as that term is defined in the Animal Welfare

Act, as amended (7 U.S.C. § 2131 *et seq*.), and the Regulations (9 C.F.R. § 1.1 *et seq*.).

Exhibitor

153. The Act defines "exhibitor":

> "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;"

7 U.S.C. § 2132(h).

154. The "Laboratory Animal Welfare Act" of 1966 (P.L. 89-544) was amended in 1970. The pertinent legislative history of the proposed "Animal Welfare Act of 1970" (P.L. 91-579), which added "exhibitors" to those being regulated, shows that:

> "country fairs" may have been meant to say "**county** fairs"[20]; and "exhibitor" **excludes** "organizations sponsoring and **all persons participating in State and county fairs**," as follows,
>
> (8) A new section 2(h) would be added to the Act defining the term 'exhibitor' which would extend the requirements of the Act to persons who acquire animals for purposes of exhibition. The term excludes retail pet stores, and organizations sponsoring and all persons participating in State and county 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.

[20] But *see* Senator Robert Dole's explanation of the exclusions in the proposed 1970 amendments, referring to "country and State fair livestock shows and such exhibitions as are sponsored by the 4-H clubs which are intended to advance the science of agriculture." (*emphasis added*) Complainant's Response to Excerpt . . ., filed September 6, 2006, page 3.

The term specifically includes carnivals, circuses and zoos exhibiting animals, whether operated for profit or not.

Legislative History of P.L. 91-579, referring to the "**Annual** Welfare Act of 1970" but intending the Animal Welfare Act of 1970, House Report No. 91-1651 at 5103, 5106-5109.

155. The Regulations likewise define "exhibitor":

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.

. . . .

9 C.F.R. § 1.1.

156. Ms. Riggs holds a class "C' license as an "exhibitor." CX 2. *Class "C" licensee* (exhibitor) means a person subject to the licensing requirements under part 2 and meeting the definition of an "exhibitor" (§ 1.1), and whose business involves the showing or displaying of animals to the public. A class "C" licensee may buy and sell animals as a minor part of the business in order to maintain or add to his animal collection. 9 C.F.R. § 1.1.

157. In their Answer, the Respondents admitted paragraph I.C. of the Complaint, which reads, "At all times material hereto the Respondents were licensed and operating as an exhibitor as defined in the Act and regulations."

158. By letter filed August 18, 2006, the Respondents confirmed that they were "licensed and operating as exhibitor" ***in general*** during the time frame of the Complaint. The Respondents confirmed that the response "Admitted" to paragraph I.C. of the Complaint, is "literally correct."

159. The Respondents' letter filed August 18, 2006, continued in part, "However, since the statute did not require Heidi (Ms. Riggs) to be operating as a 'licensed exhibitor' at the county fairs for which evidence was adduced at the hearing, the USDA failed to prove a violation."

160. The Respondents' letter filed August 18, 2006, responded to a request I communicated to counsel, regarding whether the Respondents were "participants in State or county fairs" within the meaning of the Act and the Regulations and consequently were not operating as an exhibitor.

161. The Complainant's Response to Excerpt . . . , filed September 6, 2006, persuades me to agree with much of the Complainant's Response; specifically, I agree with the following, found on p. 2:

> . . . . First, a fair's midway (in contrast to its agricultural exhibits and competitions) is a carnival.[21] Second, it is undisputed that respondents were not the "sponsoring organization" of any of the fairs at which they displayed their animals. Third, respondents were not "persons participating" in any of the fairs, as that term

[21] *See* definition of *carnival* as "a traveling enterprise offering amusements; an organized program of entertainment or exhibition." Webster's Seventh New Collegiate Dictionary, 1969.

> is used in the Act, and intended by Congress. They were concessionaires. The respondents did not display their animals "to advance agricultural arts and sciences;" rather, they contracted with the fairs' sponsoring organizations, were required to obtain insurance, and were paid by the fairs to put on their animal display on the fair's midway as an attraction. [footnote omitted, footnote 3] This is not what "persons participating" in the enumerated events do. The word "participate" itself implies a group of persons engaging in the same activity (such as competing in events). [footnote omitted, footnote 4 contains a dictionary definition of participate, including to take or have a part or share, as with others; partake; share (usually fol. by *in*): *to participate in profits; to participate in a play*]
> . . . .
> To hold that an exhibitor can suddenly cease to be an exhibitor subject to regulation if he sets up shop at a fairgrounds would be to eviscerate the Act.

162. Particularly persuasive to me is page 3 of the Complainant's Response to Excerpt . . . , filed September 6, 2006, including the quote from Senator Robert Dole, one of the bill's sponsors:

> It extends humane treatment of animals to wholesale pet dealers, zoos, road shows, circuses, carnivals and auction markets . . . The bill quite properly excludes from its provisions country and State fair livestock shows and such exhibitions as are sponsored by the 4-H clubs which are intended to advance the science of agriculture.

Further, I now agree that the intent of the Animal Welfare Act was "to regulate non-agricultural animal displays; and not to distinguish among animal exhibitors based solely on the venue." Complainant's Response to Excerpt . . . , filed September 6, 2006, p. 3.

163. Considering the evidence as a whole, I now conclude:

(a) that one of the Respondents was licensed, Ms. Riggs; and that Ms. Riggs did business as Bridgeport;

(b) that Bridgeport and Mr. Riggs were operating under Ms. Riggs' license; and

(c) that, because their display of non-agricultural animals (the Great Cats of the World) was more like a carnival, a road show, than like a livestock show or 4-H club exhibition, the

Respondents were operating as an exhibitor, even while appearing at State and county fairs.

164. The Respondents were not "participating in State and county fairs" and therefore were not thereby excluded from being an "exhibitor" under 7 U.S.C. § 2132(h) and 9 C.F.R. § 1.1.

Findings of Fact and Conclusions

165. The Secretary of Agriculture has jurisdiction.

166. Respondent Bridgeport Nature Center, Inc., was a Texas corporation, incorporated on February 29, 1996, with a business address of Route 1, Box 192, Bridgeport, Texas 76426. The registered agent for service of process for Bridgeport Nature Center, Inc., according to the Texas Secretary of State, was Heidi Marie Berry Riggs. Respondent Bridgeport Nature Center, Inc., was at all times material herein an "exhibitor" as that term is defined in the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq*., particularly 7 U.S.C. § 2132(h)), and the Regulations (9 C.F.R. § 1.1 *et seq*., particularly the Definitions in 9 C.F.R. § 1.1). At all times material herein, Respondent Bridgeport Nature Center, Inc., exhibited animals regulated under the Act under the names Bridgeport Nature Center, Bridgeport Nature Center, Inc., and "Great Cats of the World." CX 15.

167. Respondent Heidi M. Berry Riggs, also known as Heidi Marie Berry Riggs, is an individual whose address at the time of the hearing was 245 CR 3422, Bridgeport, Texas 76426. At all times material herein, Respondent Heidi M. Berry Riggs was an owner of, principal in, and an officer (President) of Respondent Bridgeport Nature Center, Inc. At all times material herein, Respondent Heidi M. Berry Riggs was licensed as an "exhibitor" as that term is defined in the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq*., particularly 7 U.S.C. § 2132(h)), and the Regulations (9 C.F.R. § 1.1 *et seq*., particularly the Definitions in 9 C.F.R. § 1.1), and she operated under AWA license number 74-C-0337. At all times material herein, Respondent Heidi M. Berry Riggs exhibited animals regulated under the Act under the names Bridgeport Nature Center, Bridgeport Nature Center, Inc., and "Great Cats of the World." CX 15.

168. Respondent James Lee Riggs, also known as Jay Riggs, is an individual whose address at the time of the hearing was 245 CR 3422,

Bridgeport, Texas 76426. At all times material herein, Respondent James Lee Riggs was an owner of, principal in, and an officer (Vice President) of Respondent Bridgeport Nature Center, Inc. At all times material herein, Respondent James Lee Riggs was employed (though unpaid) by Respondent Bridgeport Nature Center, Inc., and he operated as an "exhibitor" as that term is defined in the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq*., particularly 7 U.S.C. § 2132(h)), and the Regulations (9 C.F.R. § 1.1 *et seq*., particularly the Definitions in 9 C.F.R. § 1.1), and he operated under his wife's AWA license, number 74-C-0337. At all times material herein, Respondent James Lee Riggs exhibited animals regulated under the Act under the names Bridgeport Nature Center, Bridgeport Nature Center, Inc., and "Great Cats of the World." CX 15.

169. The testimony of each witness was credible and impressive. In weighing the differing opinions on safety issues (judgment calls), I found most persuasive the opinions of Mr. and Ms. Riggs, each of whom was a long-term and conscientious participant in the methods and practices the Respondents utilized for their photo opportunity tigers. The testimony of Ms. Sniedze, who likewise was a participant, was persuasive. The testimony of Marcus Cook was persuasive. Tr. 695-66, 699-703. The APHIS inspectors who observed the Respondents' exhibitions were highly qualified and valuable witnesses. The Respondents' noncompliance with the Consent Decision was their initial concern; my Decision focuses on whether the Respondents complied with the Act, Regulations, and Standards. Dr. Bellin interprets the two handler regulations (9 C.F.R. § 2.131(b)(1), and 9 C.F.R. § 2.131(c)(2)) differently from my interpretation, and that causes me to disagree with some of Dr. Bellin's opinions. Dr. Bellin opined that "minimal risk of harm" meant that all potential for harm must be eliminated (Tr. 401), requiring more of the Respondents than is required by the Act, Regulations, and Standards. Dr. Bellin opined that "direct control and supervision" meant direct contact, requiring more of the Respondents than is required by the Act, Regulations, and Standards. Mr. Green opined, based on his observations of the evidence presented at the hearing prior to his testimony, "With the number of the size of the cats that I saw, I don't think that's a minimal risk" (Tr. 473). Whether Mr. Green is including situations that are not alleged in the Complaint is not clear. *See* paragraphs 59. through 66. Mr. Green opined that there would not be sufficient distance or barriers between the animals and the public, because that's the question he was asked (Tr. 473), but the

Regulations and Standards require sufficient distance and/or barriers between the animals and the general viewing public, which is not the same. Mr. Green opined that the animals in direct contact with the subjects having the photographs made were not under the direct control and supervision of experienced animal handlers (Tr. 473-74); Mr. Green opined that when people and animals have direct contact with each other, "it is my opinion that you will always have the opportunity for injury to either the animal or the human. Any time you'd have direct contact between that person and that animal, you're going to have the opportunity for an injury to occur." Tr. 465, *see also* Tr. 466, 469. The Act, Regulations, and Standards do not require elimination of direct contact, even with a dangerous animal such as a tiger.

170. The videotapes, CX 41 and CX 33, weighed heavily in my evaluation: CX 41 persuaded me, together with Dr. Bellin's testimony, to find violations (based on several instances of the risk of harm being escalated to more than minimal); and CX 33 persuaded me, together with the testimony of Mr. Riggs, contrary to the testimony of APHIS officials, to find no violation.

171. APHIS's evidence of other situations where a tiger killed or injured a human proved that even a juvenile tiger can seriously injure a human and even a tiger cub can injure a human, but those situations were different and distinguishable from the situations at issue here, "during (the Respondents') public exhibition in photographic sessions with members of the public." The Respondents' adherence to their own practices and methods of preventing harm in situations involving the Respondents' photo opportunity tigers was essential to maintaining minimal risk of harm to the animals and to the public. I agree with the Respondents that holding the tiger by the leash at all times was not essential to maintaining minimal risk of harm,[22] so long as all their other safeguards were utilized. The Respondents used a bullet-proof glass or Plexiglas board as a barrier[23] between the tiger and the member of the public in the states that required it (including Pennsylvania), but I agree

[22] Holding the tiger by the leash at all times was, of course, essential to maintaining compliance with the Consent Decision. *See* paragraph 107.

[23] "Mr. Riggs had a way of photographing the juvenile cats with the board - - with the bullet-proof, Plexiglas board. And having a professional handler bring the animal to the glass, looking like it's in the photo, but the person is actually on the other side. I think that's a safe way." Mr. Robert Gerard Markmann, Tr. 554. *See also* Tr. 149, 244-46, 495-96.

with the Respondents that such a barrier was not essential to maintaining minimal risk of harm, taking into account all the other circumstances of the Respondents' photo opportunities at issue here.

Northern Wisconsin State Fair, Chippewa Falls - July 10, 1999

172. On July 10, 1999, at the Northern Wisconsin State Fair, the Respondents' tiger depicted with Ms. Sniedze in CX 8 was handled so that there was minimal risk of harm to the tiger and to Ms. Sniedze and to the public. Minimal risk of harm was maintained by the Respondents through their methods and practices, even though the tiger's leash was removed after the tiger was on the feeding platform while the photo was taken; even though the tiger (a juvenile tiger younger than six months old) weighed 75 pounds or more; and even though Ms. Sniedze instead of the Respondents' handler held the bottle for the tiger momentarily (long enough to pose for the photo and to be presented with the photo). Additionally, the Respondents maintained sufficient distance and/or barriers between their animals and the general viewing public. Consequently, the allegation that the Respondents violated sections 2.100(a) and 2.131(b)(1) of the Regulations and Standards (9 C.F.R. §§ 2.100(a), 2.131(b)(1)) during public exhibition in photographic sessions with members of the public at the Northern Wisconsin State Fair at Chippewa Falls on July 10, 1999, was **not proved** by a preponderance of the evidence.

173. On July 10, 1999, at the Northern Wisconsin State Fair, the Respondents' tiger depicted with Ms. Sniedze (CX 8) was under the direct control and supervision of a knowledgeable and experienced animal handler, even though that handler had stepped back to be out of the photo, and even though the direct control was achieved through methods and practices, rather than holding onto the tiger. Consequently, the allegation was **not proved** by a preponderance of the evidence, that the Respondents violated sections 2.100(a) and 2.131(c)(3) of the Regulations and Standards (9 C.F.R. §§ 2.100(a), 2.131(c)(3)) during public exhibition in photographic sessions with members of the public at the Northern Wisconsin State Fair at Chippewa Falls on July 10, 1999.

Iowa State Fair, Des Moines - August 20, 1999

174. On August 20, 1999, at the Iowa State Fair, for the most part, minimal risk of harm was maintained by the Respondents even when a tiger's leash was removed[24] after the tiger was on the feeding platform while the photo was taken, even though the Respondents' handler stepped back momentarily to be out of the photo, and even though the Respondents' handler allowed the customer (so long as the customer was 18 years of age or older) to hold the bottle for the tiger momentarily. Dr. Bellin estimated the weight of the tiger he observed to be "approximately 60 pounds, between 45 and 75." Tr. 390. So long as the Respondents employed their methods and practices and kept the tiger on the feeding platform, so long as the tiger was not draped over the laps of people seated in the crowd while waiting their turn for their photo opportunity, so long as the tiger was not draped over children's laps, so long as the person positioned at the head of the tiger holding the bottle for the tiger was an adult 18 years of age or older, there was minimal risk of harm to the tigers and to the public. In several instances the tiger was not on the feeding platform, the tiger was draped over the laps of people seated in the crowd, the tiger was draped over the laps of children, or there was no adult 18 years of age or older at the head of the tiger holding the bottle for the tiger; in such instances the Respondents permitted greater risk than minimal risk of harm to the tiger and to the public. For these several instances, the Respondents failed to handle tigers during public exhibition so there was minimal risk of harm to the tigers and to the public, in violation of sections 2.100(a) and 2.131(b)(1) of the Regulations and Standards (9 C.F.R. §§ 2.100(a), 2.131(b)(1)). For the remainder of the photographic sessions, the allegation that the Respondents violated sections 2.100(a) and 2.131(b)(1) of the Regulations and Standards (9 C.F.R. §§ 2.100(a), 2.131(b)(1)) during public exhibition in photographic sessions with members of the public was **not proved** by a preponderance of the evidence. Additionally, the Respondents maintained sufficient distance and/or barriers between their animals and the general viewing public so as to assure the safety of animals and the public.

175. On August 20, 1999, at the Iowa State Fair, the Respondents' dangerous animals that the Respondents exhibited (photo opportunity tigers) were under the direct control and supervision of a knowledgeable and experienced animal handler, even though that handler had stepped back to be out of the photo, and even though the direct control was achieved through methods and practices, rather than holding onto the

[24] *See* footnote 22.

tiger. Consequently, the allegation that the Respondents violated sections 2.100(a) and 2.131(c)(3) of the Regulations and Standards (9 C.F.R. §§ 2.100(a), 2.131(c)(3)) during public exhibition in photographic sessions with members of the public at the Iowa State Fair on August 20, 1999, was **not proved** by a preponderance of the evidence.

Dutchess County Fair, Rhinebeck, New York - August 28, 1999

176. The preponderance of the evidence proves that on **August 28, 1999**, the Respondents did maintain the records of animals required of an exhibitor that included any offspring born of any animal while in Respondents' possession or under Respondents' control. The "hour or two" (Tr. 798) required for Mr. Riggs to find the transfer form and the original health certificate was a reasonable amount of time to respond completely to the APHIS Inspector Ms. Baltrush's record request. This is particularly so since (a) the transfer form and the original health certificate were consistent with other records including health certificates that Mr. Riggs immediately supplied to APHIS inspector Ms. Baltrush regarding the three tiger cubs and one lion cub; (b) Dr. Bellin in Iowa (also an APHIS inspector) had been shown the transfer form and the original health certificate by Mr. Riggs eight days earlier; and (c) APHIS inspector Ms. Baltrush had arrived unannounced. Further, even if the health certificates that Mr. Riggs immediately supplied did not specify birth date or birthplace, neither did 9 C.F.R. § 2.75(b) specifically require birth date or birthplace. Tr. 61, 64. Consequently, I conclude that the allegation that Respondents violated section 10 of the Act (7 U.S.C. § 2140), and section 2.75(b) of the Regulations (9 C.F.R. § 2.75(b), was **not proved** by a preponderance of the evidence.

York Fair, York, Pennsylvania - September 10, 1999

177. On September 10, 1999, at the York Fair, York, Pennsylvania, Mr. Kevin Johns, the reporter who had contact with tiger cub Simbala and juvenile tiger Shawnee as shown in the video, was **not a member of the public** but was instead a volunteer who had trained all day (a trainee) with Bridgeport employees Mr. Drogosch and Mr. Riggs, both of whom were knowledgeable and experienced animal handlers. Consequently, the allegation that the Respondents violated sections 2.100(a) and 2.131(b)(1) of the Regulations and Standards (9 C.F.R. §§ 2.100(a), 2.131(b)(1)) during public exhibition in photographic sessions

with **members of the public** at the York Fair on September 10, 1999, was **not proved** by a preponderance of the evidence.

178. On September 10, 1999, at the York Fair, York, Pennsylvania, minimal risk of harm to the tigers and to the public was maintained by the Respondents even though the Respondents' handler did not hold tiger cub Simbala by a leash at all times and even though the Respondents' handler did not hold juvenile tiger Shawnee by a leash at all times when they were exhibited for a videotape, CX 33, which aired that night on television news. Consequently, the allegation that the Respondents violated sections 2.100(a) and 2.131(b)(1) of the Regulations and Standards (9 C.F.R. §§ 2.100(a), 2.131(b)(1)) during public exhibition in photographic sessions with members of the public was **not proved** by a preponderance of the evidence.

179. On September 10, 1999, at the York Fair, York, Pennsylvania, minimal risk of harm to the tigers and to the public was maintained by the Respondents even though juvenile tiger Shawnee was 8-1/2 months or 9 months of age and weighed 120 to 140 pounds when she was exhibited for a videotape, CX 33, which aired that night on television news. Consequently, the allegation that the Respondents violated sections 2.100(a) and 2.131(b)(1) of the Regulations and Standards (9 C.F.R. §§ 2.100(a), 2.131(b)(1)) during public exhibition in photographic sessions with members of the public at the York Fair on September 10, 1999, was **not proved** by a preponderance of the evidence. Additionally, the Respondents maintained sufficient distance and/or barriers between their animals and the general viewing public so as to assure the safety of animals and the public.

180. On September 10, 1999, at the York Fair, the Respondents' dangerous animals tiger cub Simbala and juvenile tiger Shawnee, that the Respondents exhibited for a videotape (CX 33) which aired that night on television news, were under the direct control and supervision of a knowledgeable and experienced animal handler, even though that handler had stepped back to be out of the video, and even though the direct control was achieved through methods and practices, rather than holding onto the tiger. Consequently, the allegation that the Respondents exhibited dangerous animals (tigers) that were not under the direct control and supervision of a knowledgeable and experienced animal handler, in violation of sections 2.100(a) and 2.131(c)(3) of the Regulations and Standards (9 C.F.R. §§ 2.100(a), 2.131(c)(3)) during public exhibition in photographic sessions with members of the public

at the York Fair on September 10, 1999, was **not proved** by a preponderance of the evidence.

Finality

181. This Decision shall be final and effective 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 Appendix B to this Decision). Copies of this Decision shall be served by the Hearing Clerk upon each of the parties.

* * *

APPENDIX A

Complainant's or Government's (APHIS's) exhibits admitted into evidence: CX 1 through CX 45.

CX 1 admitted Tr. 179
CX 2 admitted Tr. 179
CX 3 (Consent Decision) admitted Tr. 536, *see also* Tr. 182
CX 4 admitted Tr. 179
CX 5 admitted Tr. 87
CX 6 admitted Tr. 87
CX 7 admitted Tr. 368
CX 8 admitted Tr. 287
CX 9 admitted Tr. 87
CX 10 admitted Tr. 287
CX 11 admitted Tr. 87
CX 12 admitted Tr. 185
CX 13 admitted Tr. 419
CX 14 admitted Tr. 368
CX 15 admitted Tr. 87
CX 16 admitted Tr. 412
CX 17 admitted Tr. 412
CX 18 admitted Tr. 412
CX 19 admitted Tr. 412
CX 20 admitted Tr. 412
CX 21 admitted Tr. 412
CX 22 admitted at Tr. 43
CX 23 admitted at 241

CX 24-30 admitted (I was interrupted before I said admitted.) Tr. 234; *See* also Tr. 236, 537.
CX 31 admitted Tr. 235
CX 32 admitted. Tr. 123
CX 33 (videotape) admitted Tr. 129
CX 34 admitted Tr. 100-01
CX 35 admitted Tr. 100-01
CX 36 admitted Tr. 100-01
CX 37 - see next page for detail regarding CX 37
CX 38 admitted Tr. 185
CX 39 admitted Tr. 346
CX 40 admitted Tr. 233
CX 41 (videotape) admitted Tr. 415
CX 42 admitted Tr. 345
CX 43 (Pennsylvania Code) admitted Tr. 345
CX 44 (Steele Decision) admitted Tr. 360
[all of your exhibits 1-44 are admitted except Ex 37 p. 15 was not. Tr. 537]
CX 45 admitted Tr. 918

Detail regarding CX 37

CX 37: all of 17 pp. admitted for at least limited purposes except for p. 15, which was rejected.
CX 37 pp. 1-4 admitted Tr. 110;
CX 37 pp. 5-6 admitted but not to show the truth of what is asserted thereon (100 pounds each) Tr. 113-14;
CX 37 pp. 7-9 admitted Tr. 114-15;
CX 37 pp. 10-11 (Vet records kept in Riggs' file) admitted Tr. 118 but the ages (provided by the facility) are not accepted as proof of the correct age of any of the animals;
CX 37 pp. 12-13 (Vet records kept in Riggs' file) admitted Tr. 118 but the ages (provided by the facility) are not accepted as proof of the correct age of any of the animals;
CX 37 p. 14 (Vet record shows when rabies tag issued, Mar 12, 1999 the date of rabies vaccination) admitted Tr. 121, not accepted for truth of the ages of any of the animals;

CX 37 p. 15 ref. to rabies vaccination in March 1999 and four animals in Q listed as five months old in July of 1999; REJECTED Tr. 122; and
CX 37 pp. 16-17 admitted Tr. 122.

* * *

APPENDIX B

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.

* * *

APPENDIX C - Additional Transcript Corrections on Judge's Own Motion

Page/Line	Delete	Add
Tr. 19:18	~~not~~	**now**
Tr. 188:14	~~Christianson~~	**Christensen**
Tr. 188:19	~~Christianson~~	**Christensen**
Tr. 189:5	~~Christianson~~	**Christensen**
Tr. 189:18	~~Christianson~~	**Christensen**
Tr. 190:2	~~Christianson~~	**Christensen**
Tr. 190:11	~~Christianson~~	**Christensen**
Tr. 191:20	~~Christianson~~	**Christensen**
Tr. 193:21	~~Christianson~~	**Christensen**
Tr. 194:8	~~Christianson~~	**Christensen**
Tr. 194:11	~~Christianson~~	**Christensen**
Tr. 194:15	~~Christianson~~	**Christensen**
Tr. 194:17	~~Christianson~~	**Christensen**
Tr. 226:3	~~Rabindeau~~	**Rabideau**
Tr. 265:16	~~Triple Falls~~	**Chippewa Falls**

Tr. 452:3 ~~flush~~ **flesh**
Tr. 518:4 ~~out~~ **put**
Tr. 530:23 ~~tenants~~ **tenets**
Tr. 550:11 ~~kids~~ **kinds**
Tr. 553:21 ~~act~~ **acts**
Tr. 562:18 ~~sued~~ **used**
Tr. 563:11 ~~Sigfreid~~ **Siegfried**
Tr. 563:19 ~~Sigfreid~~ **Siegfried**
Tr. 564:16 ~~Sigfreid~~ **Siegfried**
Tr. 566:18 ~~Fransin~~ **Franzen**
Tr. 566:24 ~~Fransin~~ **Franzen**
Tr. 567:6 ~~Fransin~~ **Franzen**
Tr. 568:7 ~~Fransin~~ **Franzen**
Tr. 571:21 ~~directive~~ **directed**
Tr. 580:4 ~~VFW~~ **DFW**
Tr. 592:10 ~~parole~~ **parol**
Tr. 595:20 ~~they~~ **the**
Tr. 644:2 ~~they go~~ **they don't go**
Tr. 651:17 ~~guestimate [sic]~~ **"guesstimate"**
Tr. 655:13 ~~bed~~ **fed**
Tr. 670:2 ~~believe~~ **belief**
Tr. 688:5 ~~parlets~~ **parlance**
Tr. 688:21 ~~mobilization~~ **immobilization**
Tr. 693:7 ~~Maraciabo~~ **Maracaibo**
Tr. 693:9 ~~Maraciabo~~ **Maracaibo**
Tr. 693:15 ~~Maraciabo~~ **Maracaibo**
Tr. 715:2 ~~effect~~ **affect**
Tr. 718:12 ~~but~~ **bit**
Tr. 725:13 ~~represented~~ **presented**
Tr. 727:2 ~~a few~~ **the**
Tr. 727:2 ~~its~~ **it's**
Tr. 727:3 ~~bottles~~ **bottle's**
Tr. 727:4 ~~represented~~ **presented**
Tr. 751:3 ~~invent~~ **event**
Tr. 752:2 ~~eluded~~ **alluded**
Tr. 752:3 ~~eluded~~ **alluded**
Tr. 762:8 ~~breeches~~ **breaches**
Tr. 763:5 ~~latter~~ **letter**
Tr. 763:9 ~~ion~~ **in**
Tr. 768:12 ~~animals~~ **animal's**
Tr. 779:20 ~~Rinebeck~~ **Rhinebeck**

Tr. 813:5	~~Saballa~~	**Sabala**
Tr. 813:18	~~Saballa~~	**Sabala**
Tr. 816:13	~~Joes~~	**Kjos**
Tr. 816:24	~~Joes~~	**Kjos**
Tr. 853:20	~~Drayosh~~	**Drogosch**
Tr. 854:8	Drayosh	**Drogosch**
Tr. 887:8	~~Joes~~	**Kjos**
Tr. 898:8	~~flush~~	**flesh**
Tr. 901:24	~~their~~	**they're**
Tr. 912:13	Drayosh	**Drogosch**
Tr. 913 [this page is duplicated in transcript]		
Tr. 915:16	~~principle~~	**principal**
Tr.918:21	~~CEX~~	**CX**
Tr. 924:25	~~San~~	**Sand**
Tr. 925:5	~~San~~	**Sand**

[The following corrections are made to eliminate confusion, where the transcript properly reflects what the Judge said, but what the Judge said was wrong.]

Tr. 114:24	~~Exhibits~~	Pages
Tr. 114:24	~~[sic]~~	
Tr. 115:3	~~17~~ ~~[sic]~~	37
Tr. 115:4	~~17~~	37
Tr. 115:9	~~17~~	37
Tr. 116:12	~~17~~	37
Tr. 116:23	~~17~~	37

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FEDERAL CROP INSURANCE ACT

DEPARTMENTAL DECISIONS

In re: SCOTT INSURANCE AGENCY WALDO RUSHY SCOTT.
DNS-FCIC Docket No. 06-0002.
DNS-FCIC Docket No. 06-0003.
Decision and Order.
Filed August 7, 2006.

FCIA – Debarment – Ineligible, geographically – Offering of insurance – Alteration of preapproved form – Acts detrimental to program.

Donald A. Brittenham, Jr and Eldon Gould for Complainant.
Joshua C. Bell for Respondent.
Decision and Order by Administrative Law Judge Peter M. Davenport.

DECISION AND ORDER

This decision involves two appeals of the decisions of Eldon Gould, the Debarring Official, Risk Management Agency, Federal Crop Insurance Corporation, (hereinafter "FCIC"), United States Department of Agriculture to debar both the Scott Insurance Agency and Waldo Rushy Scott for a period of two years. Prior to the decisions, through their attorney, the Respondents submitted written material to the Debarring Official and requested and received an informal hearing before the Debarring Official in Washington, D.C. on January 19, 2006 at which time the Respondents were afforded an opportunity to explain their position. The letters imposing the debarments were both dated April 4, 2006 and the appeals were commenced by a letter from the Respondent's attorney, Joshua C. Bell, Esquire, Kirbo, Kendrick & Bell of Bainbridge, Georgia dated May 11, 2006. A subsequent letter from Mr. Bell dated May 30, 2006 was sent to clarify that both debarment actions were being appealed.

The Respondent, Scott Insurance Agency, (hereinafter "SIA"), maintains its principal place of business at 1705 North Pearl Street, Jakin, Georgia and has a mailing address of Post Office Box 179, Jakin, Georgia 39861. It has sold crop insurance since 1999, and is licensed to do so in both Georgia and Florida. SIA is an independent insurance agency, as it writes policies for a variety of crops for different insurance carriers. The policies have covered a number of crops including apples, corn, cotton, nursery stock, onions, peanuts, pecans, wheat, and clams,

the last of which is pertinent to the issues pending before me. Tab 6, Exhibit 5.

Waldo Rushy Scott (hereinafter "Scott") is a Georgia resident whose business mailing address is the same as that of SIA. He is licensed as an insurance agent in both Georgia and Florida and owns and operates SIA. Tab 4 at 2. He has sold crop insurance policies since 1999 and attended all of the Risk Management Agency ("RMA") sponsored training sessions on the Cultivated Clam Pilot Program. Tab 4 at 10.

The appeals which have been advanced by Scott and SIA contain no hermeneutic specifics and merely assert that the Debarring Official's decisions are not in accordance with the law, are not based upon the applicable standard of evidence, are arbitrary and capricious, and are an abuse of his discretion. Although Judge Clifton's Order of May 23, 2006 setting forth deadlines and procedures would have permitted replies to the Debarring Official's filings, the Respondents failed to avail themselves of those opportunities and have filed no subsequent pleadings other than the Notice of Appearance and the requested clarification.

The grounds for debarment are found in 7 C.F.R. § 3017.800 and include:

(b) Violation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program, such as—

(1) A willful failure to perform in accordance with the terms of one or more public agreements or transactions;

.....

(3) A willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction;

.....

(d) Any other cause of so serious or compelling a nature that it affects your present responsibility.

The debarment actions taken by Federal Crop Insurance Corporation against SIA were prompted by an investigation initiated following receipt of information by the Valdosta Regional Servicing Office from two sources indicating that in September of 2001, SIA had solicited clam insurance policies and premiums from clam growers in Franklin County, Florida, a county not covered by the FCIC's crop insurance program. Tab 6, Executive Summary. SIA's solicitation was made in the form of a letter signed by Scott and an insurance packet which contained a copy of the clam insurance provisions, two pages of quick

quote estimates, a partially completed application, a copy of the county actuarial table, clam policy special provisions and a copy of FCI-35 Coverage and Rates 2002 and Succeeding Years. The quick quote estimates, the copy of the county actuarial table and the FCI-35 each had been altered to reflect that the material was applicable to Franklin County.

Clams were the first aquatic crop insurance product offered by FCIC. The Cultivated Clam Pilot Program announced on August 20, 1999 provided coverage for clam producers who harvested hard-shell clams in Massachusetts, South Carolina, Virginia and Florida. In Florida, federal clam crop insurance coverage for the 2002 crop year was available only in the four counties of Brevard, Dixie, Indian River, and Levy. Tab 4 at 6, 10. Federal crop insurance for clams was not available in Franklin County, Florida during the period in question.

The essentially identical administrative records in the two cases are each nearly three inches thick and consisting of 21 tabs which include the investigative report, extracts of regulatory provisions, FCIC's Standard Reinsurance Agreement (SRA), reports of interviews, the transcripts of both Senior Compliance Investigator R. F. Upton's January 27, 2004 interview of Scott and the informal hearing on January 19, 2006 attended by Scott, Joshua C. Bell, the attorney for both SIA and Scott, the debarring official and other USDA personnel, copies of the solicitation materials, correspondence between the parties, and other material submitted by the Respondent. Administrative Records, Tabs 1-21. The solicitation mailing to clam growers in Franklin County, Florida of approximately 40 insurance and application packets containing unauthorized and altered material by SIA was admitted by Scott who initially indicated that he assumed responsibility for the action, but claimed that SIA's mailing was either unauthorized or done by mistake. Tab 4 at 11-13, 17-18; Tab 16 at 5.

After careful consideration of both of the administrative records and the pleadings in the respective files, the following Findings of Fact and Conclusions of Law are made.

FINDINGS OF FACT

1. SIA is an unincorporated insurance agency having its principal office at 1705 North Pearl Street, Jakin, Georgia with a mailing address of Post Office Box 179, Jakin, Georgia 39861, and is licensed to do business in Georgia and Florida.

2. SIA has participated in the federal crop insurance program since 1999 and written federal crop insurance policies for a variety of crops, including apples, corn, cotton, nursery stock, onions, peanuts, pecans, wheat, and clams.

3. Waldo Rushy Scott is a resident of Georgia and has the business mailing address of Post Office Box 179, Jakin, Georgia 39861. He is licensed as an insurance agent in both Georgia and Florida and is the sole owner of and operates SIA.

4. On or about September 26, 2001, SIA mailed approximately 40 insurance solicitation packets containing altered federal documents to ineligible clam producers located in Franklin County, Florida, a county not eligible for clam federal crop insurance coverage.

5. SIA's solicitation material included a letter signed by Scott and a packet containing a copy of the clam insurance provisions, two pages of quick quote estimates, a partially completed insurance policy application, a copy of the county actuarial table, clam policy special provisions and a copy of FCI-35 Coverage and Rates 2002 and Succeeding Years. The quick quote estimates, a copy of the county actuarial table and the FCI-35 each were altered so as to reflect that the material was applicable to Franklin County.

5a[*]. SIA and Scott had attended the RMA sponsored training sessions on the Cultivated Clam Pilot Program and were aware that Federal clam crop insurance was available in Florida only in the four counties of Brevard, Dixie, Indian River and Levy and not in Franklin County.

6. Neither FCIC nor the insurance provider authorized the alteration of the materials sent to the clam producers. The alteration of the materials was done at the direction of Scott, the sole owner, agent for and operator of SIA and was done willfully, with full knowledge that Clam producers in Franklin County, Florida were not eligible for federal crop insurance coverage.

[*]The original text utilized two paragraphs which were both numbered "5" – Editor.

7. Neither Scott nor SIA notified FCIC, the insurance provider, or any of the 40 recipients of the solicitation materials that the materials were informational only, that the materials had been mailed in error, or that the solicitation was being withdrawn.

8. No federal clam crop insurance policies were written for any of the 40 clam producers receiving SIA's solicitation materials in Franklin County, Florida, the area not covered by the clam federal crop insurance program.

9. The receipt of incorrect and altered insurance solicitation materials sent to clam producers who were not eligible for federal clam crop insurance, while not creating an actual financial loss to FCIC, nonetheless was detrimental to the integrity of the FCIC program and jeopardized public trust in the integrity of the clam insurance program.

10. During the course of the investigation and the informal hearing, Scott and employees of SIA provided inconsistent accounts of how the solicitation was made, recanting in part the nature of their participation and their acceptance of responsibility made during the interviews with the Senior Compliance Investigator R.F. Upton.

CONCLUSIONS OF LAW

1. SIA, as a participant in the FCIC program, agreed to the provisions of the Standard Reinsurance Agreement ("SRA") and violated Sections V. E and V.G.2.g of the SRA by failing to use and follow the crop insurance contract, standards, procedures and instructions as approved by FCIC in the sales of eligible crop insurance contracts by offering a contract to an ineligible clam producer using FCIC approved forms and documents which had been altered without FCIC approval or authorization.

2. The alteration of the FCIC approved preprinted forms by inserting the name of a county not eligible for the federal clam crop insurance program was a willful act.

3. The conduct of the employees of SIA documented in the Administrative Record in making the alterations and the mailing the letter and packet to ineligible clam producers are imputed to Scott as the sole owner and operator of SIA and amply support the debarment

actions of both SIA and Scott as set for in the Debarring Official's letters of April 4, 2006 imposing two year debarment of both Respondents.

4. As I agree with so much of the decision of the Debarring Official that the Respondents violated the terms of a public agreement or transaction so seriously as to affect the integrity of an agency program as set forth in the letter of April 4, 2006, I conclude that his decisions are in accordance with the law and regulations, are based upon the applicable standard of evidence, are not arbitrary or capricious and do not constitute an abuse of the Debarring Official's discretion in either case.

Accordingly, the following Order is entered.

ORDER

It is **ORDERED** that the decisions of Eldon Gould, the Debarring Official, in his debarment letters of April 4, 2006 are **AFFIRMED** as to Scott Insurance Agency and Waldo Rushy Scott.

Copies of this Decision shall be placed in each of the respective files and served upon the parties and the Debarring Official by the Hearing Clerk's Office.

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FOOD STAMP PROGRAM

COURT DECISION

ABDUL KARIM ALHALABI v. USDA.
Case No. 05-2209, 05-2591.
Filed April 11, 2006.

(Cite as: 443 F.3d 605).[1], [2]

FSP – Wire and Food Stamp Fraud – Statute of limitations.

A neighborhood grocery store owned by Appellant was removed from the Food Stamp Program (FSP) based upon exchanging electronic food stamp (LINK card) benefits for cash. The Appellant was convicted of wire fraud (18 U.S.C. §1343) and food stamp fraud (7 U.S.C. §2024(b)). The Appellant alleged the statute of limitation had run out and there were errors in the evidence the government presented. The court determined that the electronic benefit card "swipes" were three days before the 5 year statute of limitations, whereas the receipt of benefits (bank deposits) were after the statute of limitations. The court found no distinction between swiping the food stamp benefit card and depositing cash in the store's bank account and reasoned that the LINK card process was a continuum and the government could substantiate a FSP violation at any point from "swipe" to deposit.

United States Court of Appeals,
Seventh Circuit.

Before MANION, WILLIAMS, and SYKES, Circuit Judges.

MANION, Circuit Judge.

Abdul Alhalabi owned a grocery store in Chicago. Most of the store's income came from transactions with customers using food stamps. The government started investigating Alhalabi after his store reported unusually large food stamp benefit redemptions. Through its efforts, the government determined that Alhalabi was illegally paying his customers

[1]Rehearing and Suggestion for Rehearing En Banc was denied on May 8, 2006.

[2]Certiorari was denied by the U.S. Supreme Court on October 2, 2006. (127 S.Ct. 299) - Editor.

cash for their benefits in an amount well below their face value. The government revoked Alhalabi's participation in the food stamp program but did not bring charges for wire and food stamp fraud until nearly five years later. After a five-day trial, a jury convicted Alhalabi on three counts of wire fraud and three counts of food stamp fraud, and he was sentenced to forty-one months' imprisonment. Alhalabi appeals his conviction. We affirm.

I.

Holyland Foods, Inc. ("Holyland"), a Chicago grocery store owned by Abdul Alhalabi, began participating in the federal food stamp program in 1993. While the United States Department of Agriculture ("USDA") provides food stamp benefits, the Illinois Department of Human Services administers the program in Illinois. The food stamp program allows eligible recipients to use vouchers to buy certain types of staple food, such as grains, meat, dairy, and poultry, from authorized stores. The owners of authorized stores must go through an application process and training, during which they learn that they are forbidden from trading food stamps for cash. After training, the USDA sends an investigator to conduct an inspection of the store and then decides whether to authorize that store.

Holyland's applications to the USDA detailed Holyland's operation. In the initial 1993 application, Alhalabi, identified as the president of Holyland, stated that the store had one cash register and no optical scanners. The application further stated that the store was stocked with household supplies and a range of foods including breads, dairy, fresh produce, poultry, fish, meat, and eggs. He estimated that Holyland would have annual gross sales of $240,000 and that approximately $190,000 of this amount would come from food sales. After a store inspection, Holyland received its authorization in November 1993.

In 1996, Alhalabi applied for reauthorization of Holyland's participation in the program. Alhalabi still listed himself as the president, though the gross sales (for the 1995 tax year) had increased to $367,000, with eligible food sales accounting for $300,000 of the total. Alhalabi indicated that in 1995 Holyland had accepted $280,000 worth of food stamps. Holyland was reauthorized in December 1996.

In 1997, the food stamp program in Illinois underwent a major change, replacing the existing regime in which paper food stamp coupons were used to obtain food. In its place, Illinois adopted an electronic system in which each person eligible for food stamp benefits had an individual account to which benefits were added once a month. The electronic system, which was named the LINK system, made use of a plastic card (the "LINK card"), similar to an ATM card, which was swiped at a point of sale device (the "POS") in an authorized store. The food stamp recipient would then enter a PIN code, and the amount of the sale would be deducted from his account balance. The LINK card also could be used to obtain cash if the card owner participated in the Illinois cash assistance program, which is not related to food stamps. Because this appeal centers on the technicalities of the LINK system and how it relates to the elements of the crime, a detailed description of the operation is helpful.

After a recipient used his LINK card, a retailer received payment through an entirely automated process. For the years 1997 and 1998, Illinois contracted with a company named Transactive, based in Austin, Texas, to administer these payments to retailers. Transactive, in turn, used services provided by National City Bank in this operation. National City offered a type of electronic funds transfer, the automated clearing house ("ACH") program. This computer program compiled the daily LINK card transactions at Transactive, and sent the data to National City, which automatically transmitted payment to the appropriate retailer bank accounts using the Federal Reserve system.

Examining the ACH process in greater detail, the program involved Transactive computers automatically bundling all the information received from Illinois LINK card transactions into an ACH file. The ACH file was created on a daily basis (at 2 p.m.) and included the amounts of all LINK transactions in Illinois for each authorized location's preceding business day. As Transactive received all LINK transactions, the file could contain amounts of both food stamp transactions and Illinois cash assistance. The file also included the bank information for both Transactive and the authorized retailers that were to receive payment. Once the ACH file had been created for a day, Transactive's computers automatically transmitted the information to its concentrator bank, National City, which was located in Kalamazoo, Michigan.

The ACH file received by National City contained information on multiple retailers-whichever stores had LINK transactions during their preceding business day. National City's ACH computer program then sorted the retailers into those which had bank accounts with National City and those that did not. For those with bank accounts outside National City, the ACH program transmitted payments to each retailer according to the dictates of the National Automated Clearinghouse Association. Basically, this meant that the ACH program forwarded each store's account information to the Federal Reserve computer system, which automatically determined the tracking/ routing number of the retailer's bank account and then sent the transaction information to the retailer's bank. The end result was that the retailer's bank posted the amount of the transaction. In other words, the retailer was paid. This process utilized no human interaction after the swipe of the LINK card and the entering of the PIN number, relying instead on computers for the interstate routing and transmission of funds.[1] In other words, once the LINK card was swiped at the site of the retail transaction, it set off a chain reaction of the events described above that ended with a deposit in the retailer's bank account.

Holyland, like other participating Illinois stores, switched from paper food stamps to the LINK system in 1997. Holyland's annual food stamp redemptions in the three years prior to this change were relatively constant: $137,723 in 1994; $201,457 in 1995; and $216,181 in 1996. The food stamp redemptions jumped significantly, however, once Illinois made the switch to the LINK system. In 1997, Holyland redeemed a total of $1,028,015 in food stamp benefits. Beginning in May of that year, the monthly food stamp redemptions shot up from $22,285 to approximately $184,000 in October. The pattern of increased activity continued unabated in 1998, during which time Holyland accepted a total of $1,032,778.26 through the first half of October. The LINK card transaction records from Holyland reflect that, during 1997 and 1998, Holyland repeatedly processed multiple, large food stamp transactions within mere seconds of each other despite its lack of multiple cash registers or optical scanners.

The jump in redemptions at Holyland did not pass unnoticed. The government suspected that Holyland was trading cash for benefits. As

[1] Transactive theoretically could have stopped a retailer payment by calling National City before the file was transmitted to the Federal Reserve.

mentioned previously, trading food stamp benefits for cash is illegal, but the incentive to cheat is high for both a store owner and a food stamp recipient. In a typical trade, the food stamp recipient accepts cash, albeit a discounted amount, in exchange for the ability to spend the proceeds without restriction. For example, a store owner might agree to give a recipient $50 cash for $100 in benefits. This gives the recipient cash to use on anything (instead of staple foods), while the store owner gets reimbursed from the government for significantly more than his actual outlay.

Acting on its suspicions, the government began an investigation, sending in multiple undercover agents to try to exchange food stamp benefits for cash. The first undercover agent posed as a welfare recipient in March 1998, but the cashier at Holyland refused to trade cash for benefits. This reluctance was short-lived, as a Holyland cashier began trading cash for benefits with a second undercover agent, Mireille Swain, in April. Swain received $80 cash for $125 in benefits on April 3 and $100 cash for $150 in benefits on April 8, as well as conducting other trades later that month. The investigation eventually culminated in the government's removal of Holyland's POS device on October 10, 1998. Alhalabi claimed that the increase in food stamp redemptions was the result of high meat sales from Holyland's meat counter and the closing of a nearby supermarket.

After the seizure of Holyland's POS device, the government left the case dormant for nearly five years. On October 8, 2003, the grand jury returned a six-count wire fraud and food stamp fraud indictment relating to payments to Alhalabi from October 8 to October 10, 1998, charging violations of 18 U.S.C. § 1343 and 7 U.S.C. § 2024(b). Before and during trial, Alhalabi argued that the conduct charged in the indictment, which referenced the bank payments he received and not the swipes of the LINK cards, could not constitute food stamp or wire fraud under the language of each of the relevant statutes.[2] The district court at first reserved ruling on this issue.

At trial, the government called a number of witnesses, including Special Agent Swain, as well as a former employee who had traded cash

[2]Alhalabi's argument was rooted in the fact that the government did not charge the actual swipes of the LINK card in the indictment. These swipes, as noted before, occurred on October 7-9, 1998. Had the government charged the swipes, it likely would have violated the five-year statute of limitations, at least regarding the October 7 swipe, as the grand jury did not return the indictment until October 8, 2003.

for benefits, and various food stamp recipients who had traded benefits for cash. The government also introduced testimony from representatives of the USDA, Transactive, and National City, who explained how the ACH computer program worked from card swipe to final payment. After hearing from such representatives, the district court found that the indictment was sufficient. The jury convicted Alhalabi on all six counts, and he was sentenced to forty-one months in prison.

II.

Alhalabi pursues challenges to his conviction in scattershot fashion. First, Alhalabi renews his contention that the indictment fails to charge any offenses. Alhalabi argues that the bank payments referenced in the indictment do not suffice to show food stamp fraud as defined by the food stamp statute. He further contends that the wire fraud counts in the indictment are insufficient. Building off of this theory, Alhalabi asserts that the jury instructions regarding the various counts, as well as the eventual verdict, were fundamentally flawed because of these defects. Next, Alhalabi argues that the district court erred by granting the government's motion to strike surplusage on the wire fraud counts. Alhalabi also suggests that the district court constructively amended the indictment through a number of its actions, including the admission of evidence of some LINK transactions from outside the period of the indictment and the motion to strike surplusage. Finally, he claims that the district court erred in admitting (and denying his motion to strike) certain evidence of fraudulent LINK transactions outside the period charged in the indictment.

A.

1.

As an initial point, Alhalabi opposes the indictment on the grounds that it failed to properly charge either wire or food stamp fraud. We review a district court's denial of a motion to dismiss an indictment de novo. *See United States v. Wilson,* 437 F.3d 616, 619 (7th Cir.2006). While an indictment must allege the elements of an offense to be valid, it is not necessary to spell out each element if each is present in context. *See United States v. Westmoreland,* 240 F.3d 618, 633 (7th Cir.2001). "The test for determining the sufficiency of the indictment is whether the

indictment sets forth the elements of the offense charged and sufficiently apprises the defendant of the charges to enable him to prepare for trial." *Id.* (quoting *United States v. Garcia-Geronimo,* 663 F.2d 738, 743 (7th Cir.1981)).

We first address Alhalabi's belief that the indictment failed to charge wire fraud. Alhalabi did not develop this argument in his initial brief before this court, raising it in a meaningful way only in his reply brief, so it is waived. *See Harper v. Vigilant Ins. Co.,* 433 F.3d 521, 528 (7th Cir.2005) ("The argument is more developed in [the] reply brief, but this is too little, too late, for 'arguments raised for the first time in a reply brief are [also] waived.' "); *see also United States v. Williams,* 436 F.3d 767, 769 (7th Cir.2006); *United States v. Stevens,* 380 F.3d 1021, 1024-25 (7th Cir.2004). Even if this argument were not waived, Alhalabi's theory would still fail. "To secure an indictment for mail or wire fraud, the government was required to show probable cause to believe that the defendant: (i) participated in a scheme to defraud; (ii) acted with intent to defraud; and (iii) used the mail or wires in furtherance of the fraudulent scheme." *United States v. Vincent,* 416 F.3d 593, 600 (7th Cir.2005); 18 U.S.C. § 1343. Here, the allegations in the indictment set forth all three elements, explaining the fraudulent scheme and describing wires that brought Alhalabi his final ill-gotten gains. The district court correctly denied Alhalabi's motion to dismiss the indictment on the mail fraud counts.

Moving to Alhalabi's challenge to the food stamp fraud counts, Alhalabi relies on a narrow reading of the food stamp statute, which provides that "whoever knowingly uses, transfers, acquires, alters, or possesses coupons, authorization cards, or access devices in any manner contrary to this chapter" is guilty of a felony. 7 U.S.C. § 2024(b). Although we have in the past used this section to punish store owners who, like Alhalabi, traded cash for paper coupons, *see United States v. Barnes,* 117 F.3d 328 (7th Cir.1997), Alhalabi claims a distinction between payments into a bank account as a result of food stamp fraud (as included in this indictment) and food stamp coupons (as defined by the statute). Alhalabi contends that the food stamp statute does not punish what was charged in this indictment. As in the trial court, Alhalabi argues that a swipe is all that is needed for food stamp fraud under the LINK system. Under this reading, the statute of limitations would disqualify the charges arising from the October 7 swipe.

Alhalabi's argument, however, lands wide of the mark. The food stamp statute punishes the transfer and acquisition of food stamp benefits, casting a broad net to include as coupons both "electronic benefit transfer card[s]" as well as "cash or check issued in lieu of a coupon." 7 U.S.C. § 2012(d). For each of three dates, the indictment states that Alhalabi "did knowingly acquire, transfer, and possess United States Department of Agriculture Electronic Transfer Card benefits, namely LINK benefits having a value more than $100, ... [and that] he knowingly and unlawfully caused an electronic payment of [the relevant amount for that date]" into his bank account. The payments are simply the end manifestation of the food stamp benefits-the same thing at a later stage. They are part of one seamless transaction, and the indictment charges that transaction. Alhalabi rails against considering these payments as benefits, but he offers no compelling reason to distinguish them. The LINK system simply combines the various elements of the paper system-exchange of the benefits, possession, and redemption-into one. We have no difficulty in concluding that the indictment sufficed under 2024(b).[3]

2.

Piggybacking off of this argument, Alhalabi challenges the district court's jury instructions relating to the food stamp fraud counts.[4] We review jury instructions de novo to determine whether they provide fair and accurate summaries of the law. *See United States v. Stewart,* 411 F.3d 825, 827 (7th Cir.2005); *United States v. Tingle,* 183 F.3d 719, 729 (7th Cir.1999). "Looking at the charge as a whole, we must

[3]While we reject Alhalabi's argument, the government could have avoided any issues had it not flirted dangerously close to the limitations deadline. This led to an awkward indictment that failed to charge the most conceptually accessible part of the transaction-when Holyland employees swiped the LINK cards and traded cash for the benefits. The cardholder got immediate cash, while the store owner had to wait. But the swipe set in motion a process that did not end until the money was in the bank. The government could charge at any point from swipe to deposit under the statute.

[4]Alhalabi mentions that the "wire fraud instructions were similarly erroneous" in his initial brief without any further argument. It is difficult to understand precisely what this cryptic reference means, given the vast difference between the elements of wire and food stamp fraud. Without necessary elaboration, this argument is waived. Even if it were not waived, the district court accurately instructed the members of the jury on what they needed to find for wire and food stamp fraud.

determine whether the instruction misled the jury concerning the issues or its duty in relation to those issues." *See Tingle,* 183 F.3d at 729.

In relevant part, the district court instructed the jury that to convict Alhalabi, it had to find: "First, that the defendant knowingly acquired Link [sic] card benefits in a manner contrary to law and, second, that the amount acquired exceed $100.... Under the law, Link [sic] card benefits may only be exchanged for eligible food and may not be exchanged for cash." As in his argument regarding the indictment, Alhalabi faults the district court for not distinguishing the bank payments from paper food stamp coupons. The district court, however, was correct to treat them as one transaction. The district offered an accurate summary of the law and properly directed the jury in its consideration of the issues.

3.

Alhalabi also contends that the district court erred in its denial of his motion for acquittal after the jury verdict on both the wire and food stamp fraud counts.[5] We review such a denial de novo, asking "whether the evidence presented, when viewed in the light most favorable to the government, could support any rational trier of fact's finding of all the essential elements of the crime beyond a reasonable doubt." *United States v. Brown,* 328 F.3d 352, 355 (7th Cir.2003). We will reverse only if the record is devoid of evidence from which a jury could conclude guilt beyond a reasonable doubt. *See id.*

This challenge comprises the third in Alhalabi's trilogy of objections to the charged conduct. In this recitation, he argues that, as the bank payment wires that were charged did not constitute illegal offenses, the jury could not have properly convicted him. Alhalabi again is mistaken; the government put forward sufficient evidence on both the wire and food stamp fraud counts to secure a conviction. A Holyland employee testified that he traded cash for benefits from the LINK card and food stamp recipients confirmed that Holyland paid them for such benefits. The government introduced testimony from the USDA, Transactive, and National City to explain how the swipe of the LINK card automatically results in the transfer of benefits to a retailer file and eventually payment into a retailer's bank account. Confirming the

[5]Alhalabi also raises a sufficiency of the evidence challenge to the verdicts. As the later challenge proceeds along precisely the same track as his challenge to the denial of the motion for acquittal, we need not address it separately.

testimony of the Transactive employee, the government introduced evidence of both the relevant LINK card swipes and the eventual payment into Alhalabi's account of the amounts of the food stamp benefits. The jury had reasonable evidence from which it could conclude that Alhalabi was guilty beyond a reasonable doubt on each count.

B.

Next, Alhalabi argues that the district court erred in granting the government's motion to strike the various amounts referenced in the food stamp fraud counts. An amendment or change to an indictment will be "allowed to stand if it does not change an 'essential' or 'material' element of the charge so as to cause prejudice to the defendant." *United States v. Cina,* 699 F.2d 853, 857 (7th Cir.1983). A material element of the crime is one whose specification with precise accuracy is necessary to establish the illegality of the behavior and the court's jurisdiction. *See id.; see also United States v. Clark,* 943 F.2d 775, 783 (7th Cir.1991); *United States v. Muhammad,* 928 F.2d 1461, 1470 (7th Cir.1991).

The exact amounts of the payments were not material elements of the charges. The government charged Alhalabi with fraudulently obtaining food stamp benefits, which resulted in the automatic payment into his bank account of certain sums several days later. The exact sums listed in the indictment were not necessary to these charges. What mattered was that he illegally possessed food stamp benefits (for which he received payment), not the inner workings of the payment system. Alhalabi does not contend that these wires reimbursed him for something other than the swipes of the LINK cards several days earlier or were less than one hundred dollars. His challenge on this ground, therefore, fails.

C.

Alhalabi further asserts that several of the district court's actions amounted to a constructive amendment of the indictment. Combining several of his prior arguments, Alhalabi finds fault in: (1) the presentation of evidence about wires not charged in the indictment; (2) testimony about uncharged food stamp fraud; (3) the introduction of the

payments into his bank account, which he contends could not be considered food stamp benefits; and (4) improper jury instructions. We review whether a district court constructively amended the indictment de novo. *United States v. Trennell,* 290 F.3d 881, 886 (7th Cir.2002); *see also United States v. Pigee,* 197 F.3d 879, 885 (7th Cir.1999). "Constructive amendment of the indictment can occur 'when either the government (usually during its presentation of evidence and/or its argument), the court (usually through its instructions to the jury), or both, broadens the possible bases for conviction beyond those presented by the grand jury.' " *United States v. Jones,* 418 F.3d 726, 729 (7th Cir.2005) (quoting *United States v. Cusimano,* 148 F.3d 824, 829 (7th Cir.1998)). Constructive amendments are forbidden as they violate the guarantees of the Fifth Amendment. *See United States v. Murphy,* 406 F.3d 857, 860 (7th Cir.2005).

No constructive amendment occurred in this case. We briefly address each of Alhalabi's contentions, three of which we have already rejected and all of which we reject in this context. First, the government's presentation of wires not expressly mentioned before the grand jury did not affect the scope of the indictment. At trial, the government offered evidence about fraudulent food stamp transactions that directly resulted in payment to Alhalabi's bank account. The government simply supplied more technical details that easily fit with the allegations in the indictment. The introduction of the complete ACH system did not contradict or change in any substantive way what had been presented to the grand jury, and thus, was not a constructive amendment. *See Trennell,* 290 F.3d at 888.

Second, Alhalabi argues that the entry of evidence of conduct occurring prior to the crimes charged amended the indictment by allowing the jury to convict for uncharged acts, in particular the LINK swipes of October 7-9. The admission of evidence intricately related to the charged crimes (the remaining parts of the LINK system) does not constructively amend the indictment. *See, e.g., United States v. Johnson,* 248 F.3d 655, 665 (7th Cir.2001); *Cusimano,* 148 F.3d at 829. Here, the government presented evidence intricately related to the crimes charged to paint for the jury the complete picture of the scheme and Alhalabi's actions. This did not alter the crimes from the ones described in the indictment.

Third, Alhalabi contends that the payments into his bank account that were charged in the indictment did not constitute any crime and,

therefore, the indictment must have been *de facto* amended to support the verdict. As explained before, each count properly charged one transaction, not multiple transactions, in which Alhalabi possessed the electronic coupon benefits and which resulted in the payment of money into the bank account. This fully stated the crimes of food stamp fraud and wire fraud.

Fourth, Alhalabi asserted that, by omitting his narrow reading of food stamp benefits, the district court crafted improper jury instructions. However, the district court properly viewed this as a seamless transaction and delivered instructions that properly summarized the law. No error occurred.

D.

Finally, we examine Alhalabi's claim that the district court erroneously admitted evidence of prior food stamp fraud outside the charged time period. Alhalabi filed both a motion in limine and a motion to strike such evidence, both of which the district court denied. Before this court, Alhalabi suggests that these rulings contravened Federal Rule of Evidence 403, as the unfair prejudicial impact outweighed the evidence's probative value. We review the district court's denials for an abuse of discretion. *See United States v. Griffin,* 194 F.3d 808, 822 (7th Cir.1999) (denial of motion in limine); *United States v. Bucey,* 876 F.2d 1297, 1314-15 (7th Cir.1989) (denial of motion to strike surplusage).

The district court acted properly. In the present case, the government introduced evidence of a long-running scheme by Holyland Foods to abuse the LINK card system by trading cash for benefits. The evidence explained, from the perspective of a store employee, food stamp program recipients, and undercover investigators, the ins and outs of this fraud. This evidence had extremely high probative value. Looking at the other side of the Rule 403 ledger, there is nothing about this evidence that bears the hallmarks of unfair prejudice. *See United States v. Connelly,* K "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=350&FindType=Y&ReferencePositionType=S&SerialNum=1989071815&ReferencePosition=418" 874 F.2d 412, 418 (7th Cir.1989) ("Evidence is considered unfairly prejudicial, not merely because it damages the opposing party's case, but

its admission makes it likely that the jury will be induced to decide the case on an improper basis, commonly an emotional one, rather than on the evidence presented on the crime charged.") (internal citations omitted). Alhalabi failed, in both his briefs and at oral argument, to introduce any compelling reason that would suggest the jury would be confused or "incited" to decide this case on an improper basis. We conclude, therefore, that the district court did not abuse its discretion when denying Alhalabi's various motions opposing the admission of this evidence.

III.

Alhalabi engaged in food stamp and wire fraud on the dates alleged in the indictment, October 8-10, 1998. The indictment crafted by the government, while not ideal, was sufficient. The district court properly ruled on the various challenges to the indictment and evidentiary issues, and we, therefore, Affirm.

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HORSE PROTECTION ACT

COURT DECISIONS

JACKIE MCCONNELL; CYNTHIA MCCONNELL v. USDA.
Case No. 05-3919.
Filed August 22, 2006.

(Cite as:198 Fed. Appx. 417).

HPA – Horse protection – Sore – Entering – Shipping – Custodian – Selective prosecution, when not – Malicious prosecution, when not – Civil penalty – Disqualification.

Petitioner, Cynthia McConnell – a licensed walking horse trainer and a horse business owner, shipped, and entered a "sore" horse into a horse walking show. Her license was suspended by the National Horse Show Commission (NHSC) for 8 months. USDA subsequently charged her with a two year suspension and $4,400 monetary fine. Petitioner beleived that because she accepted the consequences of the NHSC, she was beyond the reach of USDA on this occassion. The court found that there was no agreement between USDA and NHSC about receiving this suspension in lieu of getting civil penalties from USDA. The court also denied Jackie McConnell's (husband of petitioner) claim that he was a victim of selective enforcement. The court found by merely holding the horse for inspection, Jackie McConnell was a custodian who entered a "sore" horse,

United States Court of Appeals,
Sixth Circuit.

On Petition for Review of an Order of the Secretary, United States Department of Agriculture.

Before: BATCHELDER, CLAY, and ROGERS, Circuit Judges.
ROGERS, Circuit Judge.

Petitioners Cynthia and Jackie McConnell seek review of the decision of the United States Department of Agriculture (USDA) that they violated provisions of the Federal Horse Protection Act (Act) by shipping and entering into a horse show a " sore" Tennessee Walking Horse. A " sore" horse is a horse on which chemicals or other

implements have been used on its front feet to make the horse highly sensitive to pain. This pain alters the horse's gait and causes the horse to lift its feet quickly, reproducing the distinctive, high-stepping gait that show judges look for in Tennessee Walking Horses. Cynthia, the trainer, agreed to an eight-month suspension of her training license imposed by an industry organization. The Administrator of the Animal and Plant Health Inspection Service (Administrator) later filed a complaint against her, and the agency found that she shipped and entered a sore horse into a horse show. The Administrator also brought a complaint against Jackie, and the agency found that, as the horse's custodian, he entered, but did not ship, a sore horse.

The McConnells now challenge these findings, arguing that (1) substantial evidence does not support finding that they violated the Act, (2) the Department engaged in selective enforcement by filing a complaint against Jackie, (3) the Department breached an agreement not to file charges against Cynthia, and (4) the Department violated the McConnells' due process rights. We deny the petition.

I.

The McConnells are married. Cynthia was a licensed trainer of Tennessee Walking Horses. She wholly owns and controls Whitter Stables, an unincorporated business in Collierville, Tennessee. Jackie is an employee of Whitter Stables and receives a monthly salary. Jackie's training license had been suspended three times prior to the events concerning his latest disqualification: two six-month disqualifications pursuant to consent orders and one two-year disqualification. *See McConnell v. U.S. Dep't of Agric.,* No. 93-4116, 1994 WL 162761, at 1 (6th Cir. Apr.29, 1994) (order).

On or about August 26, 1998, Cynthia hired an independent contractor to ship a horse named Regal By Generator (Regal) to the Tennessee Walking Horse National Celebration in Shelbyville, Tennessee. It is not disputed that Regal was within her care and control for the purposes of shipping and competing in the horse show.

The Act prohibits the " shipping" of sore horses and the " entering" of sore horses for, among other things, exhibition at horse shows. 15 U.S.C. § 1824(1) and (2). The statute proscribes the following:

(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, or horse sale or auction....
(2) The ... entering for the purpose of showing or exhibiting in any horse show or horse exhibition, any horse which is sore....
15 U.S.C. § 1824.

A " sore" horse is a horse on which chemicals or other implements have been used on its front feet to make the horse highly sensitive to pain. 15 U.S.C. § 1821(3). " A horse shall be presumed to be a horse which is sore if it manifests abnormal sensitivity or inflammation in both of its forelimbs or both of its hindlimbs." 15 U.S.C. § 1821(d)(5). Before competing at a horse show, the horses are examined by Designated Qualified Persons (DQPs) and Veterinarian Medical Officers (VMOs) to determine whether the horses are " sore." DQPs are employed by the management of a horse show to inspect the horses for soreness and to prevent sore horses from competing. The DQPs work under the supervision of VMOs. 9 C.F.R. §§ 11.7, 11.21.

On September 3, 1998, Jackie presented Regal for inspection at the horse show. Two DQPs examined Regal, and both found that the horse was sore. Two VMOs, Drs. Guedron and Kirsten, then examined Regal and agreed with the DQPs that Regal was sore. When the examiners palpated the horse on its anterior pasterns, the horse exhibited mild to strong leg withdrawal. Dr. Guedron testified that the horse reared its head and withdrew its feet in response to the palpation. The two VMOs also found that Regal had " several, thick, firm, abraded" scars on its feet. At least one of the DQPs reexamined the horse, at Dr. Guedron's request, and did not agree with the VMOs that the scarring, by itself, indicated that Regal was sore. Dr. Guedron noted the DQP's disagreement in his report.

Cynthia testified that Regal had been shown three times from the date of shipment, August 26, until the date that Jackie presented Regal, September 3. She also testified that the horse had been inspected five times in the course of those three showings, and none of the inspectors cited her for having a sore horse. The McConnells did not call any of the prior inspectors to testify at the hearing. The McConnells had Regal

inspected by two of their own veterinarians after the September 3 horse show, but they did not call those veterinarians to testify at the hearing.

Cynthia agreed to an eight-month suspension. Cynthia testified that she met with members of the National Horse Show Commission (NHSC) and USDA investigator James Odle in early September 1998 to discuss her options. The suspension-notice form from the NHSC says, " Reported Violation: USDA 8 MONTH SUSPENSION." J.A.2036. She testified that Odle told her that if she took the eight-month industry suspension, the USDA would not file a complaint against her. In her brief, McConnell claims that her testimony was uncontradicted, but Odle did not testify to that fact. Instead, he testified that the eight-month suspension from the NHSC would be appropriate if accepted by the USDA and served by Cynthia.

Dr. Ronald DeHaven was the acting associate administrator of the USDA, Animal and Plant Health Inspection Service in Washington, D.C. Dr. DeHaven testified that the agency attempted to create a Strategic Plan in which the horse organizations would take more responsibility for overseeing their members, but only one of eight or nine organizations accepted the plan. He testified that the agency made it known that it would retain " prosecutorial discretion" as to which cases it would pursue.

In September 1999, the Administrator filed a complaint against, as is relevant to this appeal, the McConnells and Whitter Stables, alleging that they shipped and entered a sore horse into a horse show in violation of the Act. Jackie argues on appeal that he is the first person disciplined for simply leading a horse to the inspection area. He alleges in his brief that he requested under the Freedom of Information Act that the USDA provide him with information concerning whether the USDA had ever before brought a complaint against the custodian, as opposed to the owner or trainer, of an allegedly " sore" horse. He alleges in his brief that the USDA failed to respond to his requests.

At the hearing and through affidavits, both VMOs, Drs. Guedron and Kirsten, testified that Regal was sore when it was presented for inspection on September 3. In response, the McConnells had the witnesses view the videotape of the examinations and comment on how their earlier testimony compared to what they saw on the videotape. The McConnells primarily attempted to elicit testimony from Dr. Guedron

that Regal did not rear its head or withdraw its foot when it was examined.

Dr. DeHaven testified as the USDA's rebuttal witness. On the advice of counsel, he refused to answer some questions concerning what he meant earlier on direct about the USDA's having " prosecutorial discretion." The McConnells saw DeHaven's testimony as necessary to demonstrate how decisions to file a complaint were handled, and the McConnells argue on appeal that the government was giving only the evidence that it wanted to give, not evidence that may have shown that the agency had targeted the McConnells. The McConnells also argue that their questions on cross-examination were related to matters discussed on direct. The government argued that it was afraid that permitting its witness to answer questions that were not relevant to the direct examination would create a dangerous precedent whereby the government's witnesses turn into the respondent's witnesses. The government also voiced concerns that Dr. DeHaven did not have permission from his supervisors to testify as to how the agency decides to file complaints.

Due to the retirement of one of the ALJs, two different ALJs presided over several sets of hearings, and the parties then filed separate proposed findings of fact and conclusions of law. In November 2003, the ALJ decided that Cynthia and Whitter Stables had shipped a sore horse and entered it into a horse show. The ALJ found that Jackie also entered a sore horse into a horse show. The ALJ, however, found that Jackie did not ship a sore horse because he did not have an ownership interest in Whitter Stables. The ALJ assessed Cynthia two " concurrent" $2,200 civil fines, which, according to the ALJ, meant that one $2,200 payment would be satisfactory. The ALJ also disqualified Cynthia for one year for each violation. The ALJ said that these disqualifications were concurrent, and thus one year's suspension would satisfy both suspensions. The ALJ assessed Jackie a civil fine of $2,200 and disqualified him for five years for his one violation.

Both the Administrator and the McConnells appealed to the Judicial Officer, who makes the final adjudicatory decisions for the Secretary of Agriculture. 7 C.F.R. § 2.35. The Judicial Officer, for the issues germane to this appeal, affirmed. However, in response to the Administrator's concerns, he increased the sanctions against Cynthia by

requiring her to pay $4,400 and disqualifying her from participating in a horse show for two years. The McConnells timely appealed to this court. 15 U.S.C. § 1825(b)(2).

II.

We deny the petition because the Secretary applied the correct legal standards and because substantial evidence supports his conclusions. This court reviews an administrative decision of the United States Department of Agriculture under the Act to determine whether the proper legal standards were employed and substantial evidence supports the decision. Substantial evidence, as we have previously explained, is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Substantiality of the evidence must be based upon the record taken as a whole.

Gray v. U.S. Dep't of Agric., 39 F.3d 670, 675 (6th Cir.1994) (quotations and citations omitted); *see also* 15 U.S.C. § 1825(b)(2) (stating that courts of appeals review for substantial evidence when the Secretary imposes fines for " sore" horse violations). First, substantial evidence supports the Secretary's findings that Cynthia shipped and entered into a horse show a sore horse and that Jackie entered into a horse show a sore horse. Second, Jackie's selective prosecution claim is meritless because it is uncontested that the Secretary files complaints against groups other than custodians. Third, Cynthia was not shielded from the Secretary's filing of a federal complaint simply because she accepted an eight-month industry suspension. Finally, the McConnells did not exhaust their several due process arguments because they failed to raise these claims on appeal to the Judicial Officer.

1. Violations of the Act

Substantial evidence supports the Secretary's determination that the McConnells violated the Act. The only issue that Cynthia raises regarding the two violations against her is whether there is substantial evidence to find that Regal was " sore" when she shipped and entered Regal into the show. A horse is presumed sore " if it manifests abnormal sensitivity or inflammation in both forelimbs or both of its hindlimbs." 15 U.S.C. § 1825(d)(5). There is substantial evidence that Regal was sore because Dr. Kirsten declared in his affidavit that two DQPs and two VMOs palpated each of Regal's pasterns and that Regal withdrew his

feet in response to the palpations by each examiner. He also testified that the examiners received a bilateral response, as required by the statute for a violation. Dr. Guedron testified to the same effect, except that he did not see Dr. Kirsten's examination. This evidence is sufficient to support the Secretary's determination that Regal was sore.

The McConnells argue, however, that the record as a whole cannot support the Secretary's findings because other evidence detracts from the government's evidence. The McConnells argue that (1) the video establishes that the VMOs did not tell the truth, (2) Regal had previously been inspected seven other times between the shipping date and the disqualification date without having been disqualified, and (3) the DQPs did not agree that Regal had scar tissue. also argues that he did not " enter" Regal into the horse show by merely presenting her for inspection. None of these arguments is availing.

The McConnells' first argument fails because nothing in the video implies that the witnesses were lying. The McConnells introduced no expert evidence refuting any testimony of the veterinarians regarding the video that required expertise. Moreover, there is nothing in the video that would compel a non-expert to conclude that the veterinarians at the hearing misrepresented the events of the September 3 horse show. We have been able to discern, however, that the McConnells, in their brief, misrepresent various witnesses' statements made in response to the video played at the hearing. For instance, the McConnells state that, contrary to his earlier testimony, Dr. Guedron acknowledged on cross-examination, after viewing the video, that Regal did not rear its head or withdraw its foot during his examination. *See* McConnell Br. at 17. But the page of the record to which they refer does not indicate any such acknowledgment. Indeed, there is no discussion of rearing, and Dr. Guedron merely agrees that in one scene Regal moved his foot when Dr. Guedron moved it. *See* J.A. 290. Moreover, Dr. Guedron testified later that he would not agree that the horse did not rear its head, and he testified that he defines " rearing" as subtle movement of a horse's head held high. *See* J.A. 293-94; *see also* J.A. 295-96 (testifying that a horse holds its head high when it seeks to take weight off of sensitive forelimbs). The witnesses' descriptions of the video, therefore, do not demonstrate that the record as a whole belies the Secretary's conclusions.

As for the McConnells' second argument, the Secretary could have found that Regal was sore on September 3 despite the fact that seven prior inspections revealed no soreness. Although the approval of seven prior inspectors can create an inference that Regal was not sore, the inspectors' approval can also demonstrate that they were not as careful as they should have been or that they were not as expert as the VMOs working on September 3. *See In re Joe Fleming*, 41 Agric. Dec. 38, 44 (1982), *aff'd,* 713 F.2d 179 (6th Cir.1983) (" The fact that the horse in question passed the pre-show examination is not worthy of great weight when measured against the detailed evidence and findings of the post-show examiners."). This court's discussion in *Fleming* of the legitimacy of post-show examinations provides reasons why one horse may not be disqualified in recent, prior examinations and yet be sore:

> Because of the number of horses involved the pre-show exam is necessarily short and cursory.... Moreover, the pre-show exam is not always conducted by a veterinarian and always involves local personnel who must deal with the interested parties on a daily basis. Such personnel may be reluctant to disqualify a horse from being shown-especially since their decision is virtually unreviewable.

713 F.2d at 187 n. 11.

The McConnells never introduced testimony of the inspectors that had earlier examined Regal, and thus the Secretary was merely left to speculate why these experts did not disqualify the horse. The Secretary, however, was presented with testimony and documents describing why the VMOs on September 3 found Regal sore. Therefore, the record as a whole supports the Secretary's findings despite the fact that earlier inspectors did not disqualify Regal.

Substantial evidence also supports the Secretary's finding that Regal was " sore" when shipped because Dr. Kirsten testified that Regal had scarring that had developed over a long period of time. Dr. Guedron also testified in his affidavit that he found scar tissue on Regal. Their findings are somewhat undercut by the fact that seven other inspectors and the two DQPs at the September 3 horse show never reported any other scar-rule violations. But the fact that several inspectors never reported a scar-rule violation does not mean that Regal did not have the scarring that the two veterinarians reported. Moreover, even if these inspections were inconsistent with one another, the McConnells never called to the stand the prior examiners, the DQPs who disagreed with the VMOs, or the two veterinarians that the McConnells had examine Regal immediately after the examination. The McConnells also never

established any motive for the VMOs to exaggerate or lie about the scarring, and it would appear difficult to do so, considering that Dr. Guedron stated clearly in his report that one of the DQPs found to the contrary. It could simply be that these two VMOs were better than other examiners at discovering subtle scarring or that the VMOs considered the scarring more pronounced than others. For these reasons, there is substantial evidence to support the Secretary's findings as to Cynthia.

As for Jackie, Jackie " entered" a sore horse by merely presenting Regal for inspection. The Act does not define " entering," *see* 15 U.S.C. § 1824, but this court has cited approvingly *Elliott v. Administrator, Animal and Plant Health Inspection Service,* 990 F.2d 140, 145 (4th Cir.1993), for the proposition that " entering" a horse includes not only paying the entry fee and registering the horse but also presenting the horse for inspection. *See Gray,* 39 F.3d at 676. As the Fourth Circuit noted, " 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." *Elliott,* 990 F.2d at 145. Jackie presented Regal to inspection, so he " entered" a sore horse. Jackie offers no substantial reason to disturb *Elliott's* and *Gray's* common-sense observation that one enters a horse when one presents it for inspection at a horse show. Therefore, substantial evidence supports the Secretary's conclusion that Jackie " entered" a sore horse in a horse show.

2. Alleged selective enforcement or prosecution of the Act

Jackie's selective enforcement claim also fails because he cannot satisfy the requirements for a selective enforcement claim. Jackie's main argument is that no other custodian that has presented horses for inspection has been targeted by the USDA. For selective prosecution:

> First, [the prosecutor] 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.

United States v. Anderson, 923 F.2d 450, 453 (6th Cir.1991).

Jackie's claim cannot satisfy the first requirement, and thus it is not necessary for us to consider the other two factors. Even if one assumes that custodians are an identifiable group, it is not disputed that the Secretary prosecutes others, such as trainers and owners, outside the class of custodians when inspectors determine a horse is sore. Jackie has failed, therefore, to establish a claim of selective enforcement.

3. Industry suspension in lieu of federal administrative complaint

Substantial evidence also supports the Secretary's finding that Cynthia's acceptance of an industry suspension did not preclude the USDA from filing a complaint against her. Despite Cynthia's testimony that she thought that her acceptance of an industry suspension would preclude federal enforcement, the Secretary found that, because there was no meeting of the minds, there was no agreement between the NHSC and the USDA that the government would not enforce the Act if the industry punished the violating members. Dr. DeHaven testified that only one of several horse industries accepted the proposal. He also testified that he told Cynthia's counsel only that he would notify her before any federal complaint was filed against Cynthia, not that she would not be the subject of a federal complaint. The Secretary's conclusion, therefore, is supported by substantial evidence.

The McConnells argue, however, that Cynthia entered into an agreement with James Odle that she would not be targeted by the agency if she accepted an industry suspension. But James Odle never testified that he told McConnell that the eight-month suspension was sufficient or that, if she accepted the industry suspension, the agency would not file a complaint against her. *See* J.A. 681-82, 687-88, 709, 712. [1]

[1]. The McConnells' brief misrepresents the record in several places. For instance, the McConnells' brief says that Odle thought that an eight-month suspension was an acceptable punishment for Cynthia. *See* McConnell Br. at 38 (referring to J.A. 709, 712). But Odle said, instead, that " [i]t was not his understanding" that " the USDA would forego any other additional penalties" after the industry imposed a suspension. J.A. 709. He also stated that Cynthia's penalty would be appropriate " if it is served and approved and accepted by the U.S. Department of Agriculture." J.A. 712. Even more troubling is the allegation that Odle informed McConnell on September 4, 1998, that the USDA suspension was eight months. McConnell Br. at 38 (referring to J.A. 807). But Joint Appendix page 807 concerns, instead, a conversation on February 17, 1999, with Jackie's counsel about enforcement in Oregon and California. *See* J.A. 807. Although we attempted to discuss these and other inconsistencies with the McConnells' counsel at oral argument, counsel's failure to bring copies of the Joint Appendix with him limited our discussion.

Although the Suspension Notice form from NHSC stated that Cynthia was serving a " USDA 8 MONTH SUSPENSION," Odle testified that there is no such thing as a " USDA suspension" and that the terminology should not be attributed to him because he does not use such terminology and because the agreement was between the industry and Cynthia. Substantial evidence, therefore, supports the Secretary's findings that there was no agreement between Cynthia and the government that would preclude the government from filing a complaint against her.

4. Alleged Department violation of the McConnells' due process rights

Because the McConnells have failed to exhaust their due process arguments by presenting them to the Judicial Officer on administrative appeal, we refuse to consider these arguments now. Agriculture Department regulations require appealing parties to list all of the issues appealed to the Judicial Officer. *See* 7 C.F.R. § 1.145(a). When appealing to the Judicial Officer, the McConnells raised the following issues: (1) whether Cynthia " shipped" a sore horse; (2) whether Cynthia served an appropriate penalty; (3) whether Cynthia was subject to malicious prosecution and selective enforcement; (4) whether Jackie " entered" a sore horse; and (5) whether Jackie was subject to selective enforcement and malicious prosecution. *See* J.A. 24-28. This opinion addresses all of these issues.[2] In their briefs to this court, the McConnells also challenge the ALJ's decisions regarding their FOIA requests,[3] their

[2]Cynthia has not appealed the selective enforcement issue to this court. *See* McConnell Br. at 2, 36.

[3]The Judicial Officer dealt with the McConnells' FOIA requests in the part of his opinion concerning whether Cynthia was selectively prosecuted. *See* J.A. 68. The McConnells now mention their FOIA denials as part of their due process claims. *See* McConnell Br. at 26, 28. Because the these claims differ and require different inquiries, the FOIA/due process claim has not been preserved. Moreover, the McConnells point to no evidence in the record concerning their FOIA requests. The denial of the FOIA requests is not sufficiently developed as a due process claim for appellate review. *Dillery v. City of Sandusky,* 398 F.3d 562, 569 (6th Cir.2005) (" It is well-established that ' issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.' ") (citation omitted).

surprise at the introduction of unannounced exhibits, their subpoenas of government employees, and their inability to confront Dr. DeHaven. The McConnells offer no reason for this court to review issues not exhausted in compliance with agency regulations. *Cf. South Carolina v. U.S. Dep't of Labor,* 795 F.2d 375, 378 (4th Cir.1986); *Sears, Roebuck & Co. v. FTC,* 676 F.2d 385, 398 n. 26 (9th Cir.1982); *cf. also Sims v. Apfel,* 530 U.S. 103, 108, 120 S.Ct. 2080, 147 L.Ed.2d 80 (2000) (noting that courts have declined to review issues that the appealing party, in contravention of agency regulations, has not exhausted). Therefore, we do not review the McConnells' arguments concerning their FOIA requests, limited discovery, and inability to confront Dr. DeHaven.

III.

For the foregoing reasons, we deny the petition for review.

TIM GRAY v. USDA
C.A. 6,2006.
No. 05-4543.
Filed December 20, 2006.

(Cite as 207 Fed.Appx. 638)[*]

HPA – Soring – Severance of parties is implicitly permitted in rules – Discretion, ALJ has broad, to manage dockets.

The Rules of Practice explicitly authorize an ALJ to hold conferences to expedite the proceedings in an orderly and efficient manner. Gray's case administratively proceeded after severance from other parties as a result of ALJ's implicit authority to manage her docket. ALJ did not abuse discretion in requiring Gray's case to proceed especially when case was twice delayed due to Gray's request.

United States Court of Appeals
Sixth Circuit.

[*]This case was not selected for publication in the Federal Reporter.NOT RECOMMENDED FOR FULL--TEXT PUBLICATIONPlease use FIND to look at the applicable circuit court rule before citing this opinion. Sixth Circuit Rule 28(g).

Before BATCHELDER and GRIFFIN, Circuit Judges; PHILLIPS,[**] District Judge.

ALICE M. BATCHELDER, Circuit Judge.

Petitioner Tim Gray ("Gray") appeals the United States Department of Agriculture's ("USDA") decision finding him in violation of the Horse Protection Act ("HPA"), 15 U.S.C. § 1821*et seq*. On appeal Gray argues that the Administrative Law Judge ("ALJ") committed procedural errors rendering the USDA's judgment "null and void." Because Gray's arguments are without merit, we affirm the decision of the USDA.

I. Background

In 2001, the Administrator ("Administrator") of the Animal and Plant Health Inspection Service ("APHIS"), an agency of the USDA, filed a complaint against Gray, Sand Creek Farm, Inc. ("Sand Creek"), William B. Johnson, and Sandra Johnson, alleging that they violated the HPA, 15 U.S.C. § 1824(2), by entering a horse in a show or exhibition while that horse was "sore." The case was assigned to ALJ Jill S. Clifton, and a hearing was set for March 2004. One week before the hearing, the respondents moved for a continuance because Gray had suffered injuries that prevented him from attending the hearing. The Administrator opposed the continuance, or in the alternative, moved to sever Gray from the proceedings. The ALJ decided to sever Gray so that the proceedings could continue against the Johnsons. Moreover, because Sand Creek could not obtain a fair hearing without Gray's participation, the ALJ also severed Sand Creek from the original action, and consolidated Sand Creek and Gray in a separate proceeding.

The hearing against Gray and Sand Creek was set for Monday, March 7, 2005. However on Thursday, March 3, the Administrator filed a motion to summarily resolve the matter against Sand Creek. After a series of teleconferences on Friday, March 4, the ALJ excused Sand Creek from the March 7 hearing in order to provide Sand Creek with additional time to respond to the Administrator's March 3 motion. Nevertheless, in an effort to continue in an "orderly" and "efficient"

[**]The Honorable Thomas W. Phillips, United States District Judge for the Eastern District of Tennessee, sitting by designation.

fashion, the ALJ announced that she would proceed with the March 7 hearing against Gray. The ALJ entered an order severing the parties and assigning separate docket numbers to the recently divided proceedings.

Up to this point, Gray had been proceeding *pro se* and candidly admitted that he was "riding the coattails" of, and utterly depending on, Sand Creek for legal assistance. Because the proceedings were severed on Friday and the hearing was set for Monday, Gray was unable to find counsel on such short notice. At the beginning of the hearing, however, the ALJ noted that she "would hear [Gray] out" if he requested a continuance to obtain counsel. Despite Gray's complaints that he did not know what to do or how to act at the hearing, he did not request a continuance.

At the close of evidence, the ALJ issued an oral decision, concluding that Gray had violated the HPA, 15 U.S.C. § 1824(2)(b), by entering a horse in a show or exhibition while that horse was sore. The ALJ then ordered Gray to pay a civil penalty of $2,200 and disqualified him from participating in any horse shows or exhibitions for a two-year period. Finally, the ALJ scrupulously outlined Gray's rights of appeal to the Judicial Officer ("JO") and provided him with a copy of the relevant appellate rules.

Following the ALJ's decision, Gray obtained numerous continuances of his administrative appeal deadline. Despite these continuances, however, Gray filed his appeal beyond the allotted time period. As a result of this untimely filing, the JO denied his claim. The JO also rejected Gray's argument that his proceeding was not final because the ALJ had no authority to sever it. Gray filed a petition for reconsideration with the JO, which was denied, and he then filed a timely notice of appeal with this Court.

II. Analysis

On appeal Gray argues that the ALJ did not have "power" to issue a decision against him. More specifically, he contends that the ALJ's decision was "null and void" because she lacked authority to sever proceedings under the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary under Various Statutes ("Rules of Practice"). We reject the premise of Gray's argument-that an ALJ lacks authority to sever proceedings-and find his position unpersuasive.

While the Rules of Practice do not explicitly authorize severance of proceedings, we find that the severance orders in Gray's proceedings were supported by other provisions in the Rules of Practice. The Rules of Practice expressly authorize an ALJ to hold conferences to "expedite" the proceedings, *see*7 C.F.R. § 1.140(a)(1), and to consider "matters as may expedite and aid in the disposition of the proceeding,"*see*7 C.F.R. § 1.140(a)(3)(ix). In our case, the ALJ granted the first severance request because Gray was injured and unable to attend the hearing. The ALJ thereafter ordered the second severance to provide Sand Creek with additional time to respond to a motion, and the ALJ, in an effort to proceed in an "orderly" and "efficient" fashion, saw no reason to delay Gray's hearing. In both instances, the ALJ was acting to expedite the timely disposition of the proceedings, as she was authorized to do under the Rules of Practice.[1] We therefore conclude that even though the Rules of Practice do not expressly authorize an AJL to sever proceedings, the severance orders in Gray's case were implicitly permitted under other provisions of the Rules of Practice. Moreover, it is well-settled that "[a]dministrative agencies enjoy 'broad discretion' to manage their own dockets,"*see Florida Mun. Power Agency v. Fed. Energy Regulatory Comm. 'n,* 315 F.3d 362, 366 (D.C.Cir.2003), and as expressed above, the ALJ did not abuse her "broad discretion" in issuing the severance orders in this case.

Gray's arguments imply that the ALJ's second severance prejudiced him by affording inadequate time to obtain counsel. We find that any prejudice Gray experienced was caused by his admitted choice to depend on Sand Creek for legal assistance. Moreover, at the beginning of the hearing, the ALJ indicated that she would seriously entertain a request for a continuance; however, Gray did not request one. In light of these facts, we determine that Gray was not unfairly prejudiced by the ALJ's decision to sever his proceedings.

Finally, Gray contends-without citing any legal authority-that even if the ALJ did not err in severing his proceedings, she lacked authority to issue her decision because she was not formally "appointed as judge" over the newly severed proceedings. It is clear that ALJ Clifton was assigned to the original proceedings involving Gray, and we therefore

[1] Gray does not allege-and indeed the record does not indicate-that he objected to the ALJ's decision to sever the proceedings.

find that she acted within her discretion in continuing to preside over Gray's post-severance proceedings.

III. Conclusion

For the foregoing reasons, we conclude that the ALJ did not err in severing Gray's proceedings, nor did she err in presiding over the post-severance proceedings. Consequently, we deny Gray's appeal and affirm the USDA's decision finding Gray in violation of the HPA.

_____

HORSE PROTECTION ACT

DEPARTMENTAL DECISIONS

In re: DERWOOD STEWART, AN INDIVIDUAL DOING BUSINESS AS STEWART FARMS, A SOLE PROPRIETORSHIP.
HPA Docket No. 06-0001.
Decision and Order.
Filed September 14, 2006.

HPA – Soring – Management – Oral Decision.

Colleen Carroll for Complainant.
L. Thomas Austin for Respondent.
Decision and Order by Administrative Law Judge Jill S. Clifton.

CONFIRMATION OF ORAL DECISION and ORDER

[1] The Complaint, filed on December 5, 2005, alleged that the Respondent Derwood Stewart, an individual doing business as Stewart Farms, a sole proprietorship (frequently herein "Respondent Stewart") on February 26, 2005 violated the Horse Protection Act (frequently herein "the HPA" or "the Act"), specifically 15 U.S.C. § 1825(c).

[2] The Complainant, the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture (frequently herein "APHIS" or "the Complainant"), is represented by Colleen A. Carroll, Esq., with the Office of the General Counsel, Marketing Division, United States Department of Agriculture, 1400 Independence Ave SW, Washington, D.C. 20250-1417.

[3] Respondent Stewart is represented by L. Thomas Austin, Esq., P.O. Box 666, Dunlap, Tennessee 37327-0666. Respondent Stewart timely filed an answer to the Complaint.

[4] On September 7, 2006, I issued my Decision and Order **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.

[5] Three witnesses testified (Ms. Julie Lynn McMillan, Mr. Olin Aldean Valentine, and Mr. Paul Stanley Warren), and the following exhibits were admitted into evidence: CX 1 through CX 8; and RX 1 and RX 2.

Abbreviated Findings of Fact and Conclusions (*See Transcript*)

[6] The Secretary of Agriculture has jurisdiction.

[7] Respondent Stewart is an individual whose business address is 674 Gath Lucky Road, McMinnville, Tennessee 37110.

[8] On February 26, 2005, Respondent Stewart knowingly managed a horse exhibition of Tennessee Walking Horses at his business address, while he was under an order of disqualification.[2] Respondent Stewart thereby violated the Horse Protection Act, specifically 15 U.S.C. § 1825(c).

[9] The following order is authorized by the Act and warranted under the circumstances.

Abbreviated Order (*See Transcript*)

[10] Respondent Stewart is assessed a civil penalty of **$500**, 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**, and sent to the attention of Ms. Carroll via a commercial delivery service such as FedEx or UPS.

[11] My oral Decision and Order becomes final and effective without further proceedings on **Monday, October 16, 2006** (35 days after pronouncement), UNLESS an appeal to the Judicial Officer is filed with the Hearing Clerk by **Tuesday, October 10, 2006** (30 days after pronouncement), in accordance with 7 C.F.R. § 1.145 (see attached Appendix 1 and attached Appendix 2).

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[2] Respondent Stewart was under a one-year period of disqualification from July 25, 2004 through July 24, 2005.

[12] The Hearing Clerk will comply with 7 C.F.R. § 1.142 (c)(2); see attached Appendix 2. Copies of this Confirmation shall be served by the Hearing Clerk upon each of the parties. Respondent Stewart's copy shall be sent by ordinary mail, and also by FAX to Mr. Austin at 423\ 949-4589, in addition to being served by certified mail. The Hearing Clerk shall use the same means to serve Respondent Stewart with the transcript excerpt when it is available.

* * *

APPENDIX 1

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.

* * *

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: ROBERT RAYMOND BLACK, II, AN INDIVIDUAL; CHRISTOPHER B. WARLEY, AN INDIVIDUAL; BLACK GOLD FARM, INC., A TEXAS CORPORATION; ROBBIE WARLEY, AN INDIVIDUAL DOING BUSINESS AS BLACK GOLD FARMS; HERBERT DERICKSON AND JILL DERICKSON, INDIVIDUALS DOING BUSINESS AS HERBERT DERICKSON TRAINING FACILITY, ALSO KNOWN AS HERBERT DERICKSON STABLES AND ALSO KNOWN AS HERBERT DERICKSON BREEDING AND TRAINING FACILITY
HPA Docket No. 04-0003.
Decision and Order.
Filed October 3, 2006.

HPA – Latches – Res judicata – Entering – Collateral estoppel.

Horse industry organization (HIO) proceedings do not bar the Secretary of Agriculture from enforcing the Horse Protection Act. Laches, a defense based upon undue delay in asserting a legal right or privilege, has long been held to be inapplicable to actions of the government. Similarly res judicata, collateral estoppel, and double jeopardy are inapplicable to charges of regulatory offenses brought by governmental agencies where the offenses alleged to be committed are similar, but not equal to those of another non-governmental body. "Entering" a horse is a continuing process of activities which have to be completed before a horse can actually be shown in a contest.

Colleen A. Carroll for Respondent
Jack G. Heffington, L. Thomas Austin, S. Todd Bobo for Respondents
Decision and Order by Administrative Law Judge Peter M. Davenport

DECISION AND ORDER

Preliminary Statement

On August 19, 2004, Kevin Shea, the Administrator of the Animal and Plant Inspection Service, United States Department of Agriculture ("APHIS") initiated this disciplinary proceeding against the Respondents by filing a complaint alleging violations of the Horse Protection Act of 1970, as amended, (15 U.S.C. § 1821, *et seq.)* (the "Act"). The protracted proceedings have included consideration of a procedural issue by the Judicial Officer prior to reaching the case on the

merits.[1] Following motions requesting extensions of time in which to file their answers, all of the Respondents, except for Robert Raymond Black, II[2] (hereinafter "Black") filed answers denying the material allegations of the complaint. Notwithstanding the failure to serve Respondent Black in accordance with the Rules of Practice, the Complainant sought judgment by default by a Motion for Adoption of Proposed Decision and Order filed on October 21, 2004. On November 11, 2004, counsel for Black filed his Notice of Appearance and by a pleading filed on November 12, 2004 indicated that Black had never been served with a copy of the Complaint and sought dismissal of the complaint against Black, or in the alternative, requested an extension of time in which to answer. The Motion for an Extension of Time in Which to Answer was granted by Order dated January 21, 2005, and the Hearing Clerk was directed to serve the Complaint upon counsel. Noting the traditional preference for decisions on the merits over default procedures, the ruling on the Motion for Adoption of the Proposed Decision and Order was deferred. On February 15, 2005, an answer was filed on Black's behalf. The Complainant, however, appealed the deferral of the Motion for Adoption of Proposed Decision and Order to the Judicial Officer, who on May 3, 2005, dismissed the appeal and returned the case to the Administrative Law Judge for further proceedings.[3]

An oral hearing was held on June 26 and 27, 2006 in Shelbyville, Tennessee. The Complainant was represented by Colleen A. Carroll, Esquire, Office of General Counsel, United States Department of Agriculture, Washington, DC. Robert Raymond Black, II was represented by Jack G. Heffington, Esquire, Christiana, Tennessee; Co-Respondents Christopher B. Warley, Black Gold Farm, Inc., and Robbie J. Warley were represented by L. Thomas Austin, Esquire, Austin, Davis & Mitchell, Dunlap, Tennessee; and Co-Respondents Herbert Derickson

[1] *In re Robert Raymond Black, II, et al,* 64 Agric. Dec. 681 (2005).

[2] Black's copy of the Complaint mailed by Certified Mail by the Hearing Clerk was returned by the Postal Service as being "Not deliverable as addressed."

[3] *In re Robert Raymond Black, II, et al,* 64 Agric. Dec. 681 (2005).

and Jill Derickson were represented by S. Todd Bobo, Esquire, Bobo, Hunt & White, Shelbyville, Tennessee.[4]

Upon consideration of the testimony at the hearing,[5] the evidence of record[6] and the proposed findings, conclusions and the briefs filed by the parties, I find that the Respondents Robbie J. Warley, Black Gold Farms, Inc. and Herbert Derickson committed violations of the Act, as indicated, but find that the allegations against the other Respondents should be dismissed.

Discussion

The Complaint alleges that on or about March 21, 2002, Respondents Herbert Derickson, Jill Derickson, and Robert Raymond Black, II, violated § 5(1) of the Act, (15 U.S.C, § 1824(1)), by transporting "Just American Magic" to the Walking Horse Trainers Show in Shelbyville, Tennessee, while the horse was sore, as that term is defined in the Act, with reason to believe that the horse, while sore, may be entered for the purpose of its being shown in that horse show; that on or about the same date, Respondents Christopher B. Warley, Herbert Derickson, Jill Derickson, and Robert Raymond Black, II, violated § 5(2)(B) of the Act, (15 U.S.C. § 1824(2)(B)), by entering "Just American Magic" as entry number 425 in class number 25 in the Walking Horse Trainers Show in Shelbyville, Tennessee, while the horse was sore, as that term is defined in the Act; and that on or about the same date, Respondents Robbie J. Warley and Black Gold Farm, Inc. violated § 5(2)(D) of the Act, (15 U.S.C. § 1824(2)(D)), by allowing Respondents Christopher B. Warley, Herbert Derickson, Jill Derickson, and Robert Raymond Black, II to

[4] Mr. Bobo's representation of the Dericksons commenced on June 6, 2006 with his Entry of Appearance filed on that date. The Dericksons were previously represented by Brenda S. Bramlett, Esquire who upon her request was authorized to withdraw as counsel for the Dericksons by Order dated April 19, 2006.

[5] A total of eleven witnesses testified, of which 9 were called and testified for the Complainant; Robert Raymond Black, II, and his wife were the only two witnesses called by the Respondents.

[6] Complainant's Exhibits CX 1A, 1B, 1C, 2-5, 7-16, 20-22 were identified and admitted into evidence. Exhibits CX 17-19 were not admitted. Respondent's Exhibits RX 1-5 (D) and RX 1, 6 & 7 (W) were admitted.

enter the horse "Just American Magic" owned by Robbie J. Warley and Black Gold Farms, Inc. in the Walking Horse Trainers Show in Shelbyville, Tennessee, for the purpose of showing that horse which was sore, as that term is defined in the Act.

In addition to generally denying the material facts alleged in the Complaint, the Respondents have asserted a number of affirmative defenses, including laches, *res judicata*, collateral estoppel, and double jeopardy. Laches, a defense based upon undue delay in asserting a legal right or privilege, has long been held to be inapplicable to actions of the government. *United States v. Kirkpatrick*, 22 U.S. (9 Wheat) 720 (1824); See also, Gaussen v. United States, 97 U.S. 584, 590 (1878); G*erman Bank v. United States,* 148 U.S. 573, 579 (1893); *United States v. Verdier*, 164 U.S. 213, 219 (1896); *United States v. Mack*, 295 U.S. 480, 489 (1935). Similarly, the United States is not bound by state statutes of limitation. *United States v. Summerlin*, 310 U.S. 414 (1940); *United States v. Merrick Sponsor Corp*., 412 F.2d 1076 (2d Cir. 1970).

The Respondents also assert that the identical violations were the subject of separate proceedings before the National Horse Show Commission against certain of the Respondents and that those proceedings, resulting in the exoneration of Robbie Warley by the National Horse Show Commission Board of Directors[7] and sanctions being imposed against Herbert Derickson,[8] preclude relitigation by the United States Department of Agriculture in the instant proceeding. Supporting this position, they introduced an agreement (APHIS Horse Protection Operating Plan 2001-2003) between the Department and the certified Horse Industry Organization ("HIO") (hereinafter, the "Agreement") under which APHIS ceded "initial enforcement responsibility upon the various certified Designated Qualified Persons (hereinafter, the "DQP") programs for affiliated horse shows, exhibitions, sales and auctions." The Complainant counters this argument by referencing those provisions of the Agreement that

[7] The Hearing Committee had recommended that Robbie Warley be given a suspension for 8 months for the "allowing" violation (RX 6W); however, the Board reversed the Committee decision and exonerated her. RX 7W.

[8] The National Horse Show Commission imposed a fine of $700.00 and a two year suspension upon Herbert Derickson. RX 2D. The Suspension Notice indicates that the suspension would be effective December 16, 2002 and continue in force until December 15, 2004. RX 3D.

expressly contain both a clear reservation of authority on the part of APHIS to enforce the Secretary's authority against any violator when it feels such action is necessary and an express disclaimer that APHIS was in any way relinquishing any of its enforcement authority under the Act or the Regulations.[9] Even were all the requisite threshold elements necessary to trigger the defenses present, which it is argued that they are not, a detailed discussion of the doctrines of *res judicata*, collateral estoppel, and double jeopardy is not necessary as the issue of whether National Horse Show Commission disciplinary proceedings bar a subsequent enforcement action by the Department for the same event has been previously considered and answered adversely to the Respondents by both the Judicial Officer and the Court of Appeals for the Sixth Circuit in *In re Jackie McConnell*, *et al.,* 64 Agric. Dec. 436 (2005), *petition for review denied sub nom. McConnell v. U.S. Department of Agriculture*, WL 2430314 (6th Cir. 2006) (unpublished) (not to be cited except pursuant to Rule 28(g)).

"Just American Magic," then a seven year old registered Tennessee Walking Horse gelding owned by Black Gold Farm, Inc. - - Robbie Warley[10], was entered to show as entry number 425 in Class 25 at the 34th Annual National Walking Horse Trainers Show held in Shelbyville, Tennessee on March 21, 2002. The entry blank to enter the horse in the show bears Herbert Derickson's signature and designates the scheduled rider to be Chris Warley.[11] On the evening of the show, the horse was led to the pre-show inspection area by Herbert Derickson[12] where the

[9] See RX 4 D, Sections II and III.

[10] CX 3. Although the entry form lists the owner of the horse as being Black Gold Farms, Inc. (CX 2), "Just American Magic's" Tennessee Walking Horse registration reflects both names; however, Black Gold Farms, Inc. is wholly owned by Robbie J. Warley according to CX 9.

[11] CX 2

[12] During the course of the inspection process, Derickson, (possibly because he had two horses in the same class; see Tr. 478-479) left the inspection area and was replaced by Black for the balance of the inspection. At the conclusion of the inspections, Black signed the DQP Ticket as the Custodian or Assistant and was listed on the APHIS Form 7077 as being the person (Custodian) presenting the horse for inspection (item 8), trainer (item 11), person responsible for transportation of the horse (item 27). CX 1A, CX 12, (continued...)

horse was first inspected by DQPs Bob Flynn and Charles Thomas and then by Lynn P. Bourgeois, D.V.M. and Clement Dussault, V.M.D., Veterinary Medical Officers (hereinafter VMO(s)) employed by the United States Department of Agriculture. The inspections of both of the DQPs and both VMOs were all consistent in finding that "Just American Magic" was both bilaterally "sore" and in violation of the scar rule. CX 1A, CX 12 and RX 1D.

Transportation Violations.

Although the Complaint alleged that Black and the two Dericksons transported the horse, while sore, for the purpose of being shown at the show, the evidence supporting the allegation was scant, with the entry in item 27 of the APHIS Form 7077 (CX 1A) being the primary evidence introduced in support of the allegations. The entry in question[13] was made by Senior Investigator Steve Fuller, as evidenced by his initials in the upper right hand margin of that entry, ostensibly based upon his interview of Black, a matter disputed by Black during his testimony. (Tr. 460-461). At the hearing, both Black and his wife Amanda testified that Black did not transport the horse to the arena as they had driven together to and from the arena. Tr. 477, 498-499.

Given the equivocal nature of Senior Investigator Fuller's testimony,[14] the believable testimony of both Blacks, and presence of information on the form which is inconsistent with and contradicted by the horse show records, while being well aware that the horse had to have been transported to the arena by someone, I find that the

[12](...continued)
RX 1 (D). Black was under the impression that it had been a clerical worker at the DQP desk that had asked him to sign the DQP Ticket and did not recall speaking to Senior Investigator Fuller. Tr. 472. Black, who is generally known as Robby, rather than his full name also testified that the incident on March 21, 2002 was the first time that he had been asked to sign a DQP ticket. Tr. 461.

[13] Fuller testified that he completed items 8-13, 15-21, 27 and 28 of CX 1A. Tr. 159-160.

[14] Senior Investigator Fuller testified that he "assumed" that he had obtained the information which he placed on the APHIS Form 7077 from Black because he had his Social Security number and date of birth. Tr. 161.

Complainant has failed to meet its burden of proof of establishing that either of the Dericksons or Black transported "Just American Magic" to be shown at the 34th Annual National Walking Horse Trainers Show in Shelbyville, Tennessee on March 21, 2002.

Entering Violations.

"Just American Magic" was entered as Entry number 425 in Class 25 of the 34th Annual National Walking Horse Trainers Show in Shelbyville, Tennessee on March 21, 2002. The Complaint alleges that the horse was entered by the Respondents Christopher B. Warley, Herbert Derickson, Jill Derickson, and Robert Raymond Black, II.

Section 5(2)(B) of the Act prohibits any person from entering a horse in a horse show while the horse is sore. The Complainant argues that under the Act "entering" of a horse is considered to be a continuing process, not merely a single event, and encompasses all of the activities required to be completed before a horse can actually be shown or exhibited, including the "clerical" steps of completing the entry form, paying the entry fee, presenting the horse for inspection and including the time necessary to complete those requirements relying upon language found in the Judicial Officer's and the reviewing Court's decisions in *In re Elliott*, 51 Agric. Dec. 334, 342 (1992), *aff'd. sub nom Elliott v. Administrator*, 990 F.2nd 140 (4th Cir. 1993).[15] The

[15] The language concerning the time necessary to complete the requirements of "entering" a horse addresses the argument raised by Elliott that even though the horse may have been sore when examined, that fact did not prove that the horse was sore when entered in the show. The Judicial Officer discussed the continuing process language and while suggesting that he considered *In re Mary C. Baird, et al.* 48 Agric. Dec. 906 (1989) (the case cited by the Complainant for the proposition) to be dubious precedent, he agreed that the pre-show inspection is part of the entry process. The Circuit Court in affirming the Judicial Officer's decision forcefully rejected Elliott's argument that entering constitutes only registration and payment of the entry fee:...We cannot agree that "entering" means simply paying the fee and registering the horse for showing, which oftentimes is done by mail without the requirement for presenting the horse. Inspection of the horse is a prerequisite to the horse being eligible to show and the horse is not fully qualified to show until the inspection is passed. The plain meaning of "entering" a horse in a show would seem to encompass all the requirements—including inspection—and the time necessary to complete those requirements.

...We think it stretches credulity to argue that Congress intended only to prohibit a horse
(continued...)

Complainant accordingly seeks sanctions against Christopher B. Warley for being designated as the scheduled rider, Herbert Derickson for having signed the entry form, being the horse's trainer and having presented the horse to the DQPs for pre-show inspection, Jill Derickson for having signed the check for the entry fee and Robert Raymond Black, II for being the (successor) custodian of the horse after Herbert Derickson left the inspection area during the course of the inspection.

By way of contrast, the focus of the National Horse Show Commission in their enforcement of violations of their rules, makes a distinction upon whether the violations occurred pre-or post-show. At the hearing, Lonnie Messick, the Executive Vice President for the National Horse Show Commission testified that if a horse was excused from a class for any reason that was a violation, the Commission would seek sanctions against the owner and trainer for pre-show violations and against the owner, trainer and exhibitor for post-show violations. Tr. 340 – 341. In determining the identity of responsible individuals, Mr. Messick testified that the Commission looked to entry documents to determine the parties against whom any action should be taken. Tr. 335. The Commission's enforcement approach does lend itself to common sense predictability, is consistent with the results recorded in the older cases,[16] and avoids potential overreaching with the broad cast of the enforcement net advanced in this case.

The Complainant cites *In re Bowtie Stables, LLC.* , 62 Agric. Dec. 580, 594-95 (2003) for the proposition that merely being the designated rider is sufficient to support a violation of the Act for "entering" if the horse is found to be sore. Such reliance is misplaced, as although such language does appear in both Judge Jill Clifton's initial decision as well

[15](...continued)
being "sore" at registration or when being shown and between that time the horse is permitted to be "sore." 990 F.2d at 145.

[16] See for example *In re A. P. "Sonny" Holt et al.* 49 Agric. Dec. 853 (1990) in which the allegations against Richard Wall, an assistant trainer and employee of Holt who operated solely at Holt's direction were dismissed where his sole participation was to lead the horse to the inspection area. In that case, the owner's daughter was the designated rider, but was not charged with any violation. Similarly, the Department has sought sanctions against a trainer, rather than his employee, even where it was alleged that the employee presented the horse for inspection against the trainer's directions. *In re Paul A. Watlington,* 52 Agric. Dec. 1172, 1199 (1993).

as that of the Judicial Officer, it is dicta in both instances, as the Complaint in that case failed to allege that the scheduled rider, Betty Corlew, "entered" the horse in violation of 15 U.S.C. § 1824 (2)(B). Given that in many cases, there can be last minute rider changes or the rider may see the horse for the first time only after the horse has passed the pre-show inspection as they are focused on keeping riding attire clean prior to mounting, extension of liability to a designated rider whose mount is excused at a pre-show inspection appears unwarranted if the rider is neither an owner of the horse nor presented the horse for inspection.

The evidence introduced at the hearing concerning Jill Derickson's involvement in "entering" the horse is essentially limited to the proof establishing that she signed the check on the Herbert Derickson Training Facility account in payment for entry and other fees incident to the entity's participation in the 34th Annual National Walking Horse Trainer's Show, including the entry fee for "Just American Magic" in class number 25.[17] As the Complainant's interpretation of "entering" would extend liability to any individual who signed a check for entry fees, a bank teller signing a bank or cashier's check for entry fees could become subject to liability under the Act. Accordingly, the Complainant's interpretation in this case will be rejected as over reaching and lacking the requisite nexus to enforcing the objectives of the Act.

In a case of apparent first impression, the Complainant also seeks sanctions against Robert Raymond Black, II as an individual also responsible for "entering" the horse where his involvement was limited to taking over for Mr. [Herbert] Derickson –during the inspection....after it had already started.[18] Tr. 473. At the time, although Black had a

[17] A copy of the check (No. 7368 in the amount of $2295.00) was introduced as CX 10 at page 8. While the Answer filed on behalf of Jill Derickson does admit that she was an individual doing business as Herbert Derickson Training Facility (as did her husband), there was no evidence at the hearing that she had any active involvement with "Just American Magic."

[18] A review of CX 12 indicates that Derickson left after the DQPs had completed their examinations of the horse as Black was first observed holding the reins during the VMO examinations. Neither the testimony nor the video tape indicates whether Derickson knew that the horse would be excused as a result of the DQP examinations (see RX 1 D).

(continued...)

trainer's license,[19] he was a full time employee working for Herbert Derickson from October of 2001 until February of 2003. Tr. 467-8. While it is well established that an individual who presents a horse for inspection may be found to be participating in "entering" a horse, *Elliott v. Administrator*, 990 F.2d 140, 145 (4th Cir. 1993); *Gray v. U.S. Department of Agriculture,* 39 F.3d 670, 676 (6th Cir. 1994), it is not as clear that the objectives of the Act dictate seeking sanctions against a successor rein holder after the horse was initially presented by the trainer.

Allowing Violations. The complaint alleges that Robbie J. Warley and Black Gold Farms, Inc., the co-owners of "Just American Magic," allowed the horse, while sore, to be entered in the 34th Annual National Walking Horse Trainers Show on March 21, 2002. In addition to asserting the defenses of laches, *res judicata,* and collateral estoppel previously discussed, the Respondents rely upon written directives to Herbert Derickson directing him to fully comply with the Horse Protection Act. RX 1 W. The letter further advised Derickson that should he fail to comply with the directions, any horse or horses placed at his facility would be removed, required that he sign the letter as confirmation that he agreed to its direction and requested that he return a signed copy to the owners. The issue of whether the use of similar letters would shield an owner from strict liability under 15 U.S.C. 1824(2)(D) has been considered in two circuits,[20] first in *Burton v. United States Department of Agriculture*, 683 F.2d 231 (4th Cir. 1982) and later in *Baird v. United States Department of Agriculture*, 39 F.3d 131 (6th Cir. 1994). The Court in *Baird* declined to require *Burton*'s three pronged test, but instead required the government to prove that the admonition the owner directed to his trainers concerning the soring of the horses constituted merely a pretext or a self-serving ruse designed to mask what in actuality was conduct violative of § 1824. *Id.* In this case,

[18](...continued)

[19] CX 10 at 1.

[20] The Eleventh and Ninth Circuits have discussed Burton without ruling on the propriety of its holding. *Thornton v. United States Department of Agriculture*, 715 F.2d 1508 (11th Cir. 1983); *Stamper v. Secretary of Agriculture*, 722 F.2d 1483 (11th Cir. 1984).

the Complainant has met that burden. On September 30, 2000, while being trained by Herbert Derickson, "Just American Magic" had been entered in the International Show at Murfreesboro, Tennessee, but was found to be in violation of the Act by virtue of a 7 point score and was excused by the DQPs from showing in the class. Notwithstanding this earlier violation and contrary to the written intent expressed in the letter, Robbie Warley and Black Gold Farms, Inc. allowed "Just American Magic" to remain at the Herbert Derickson Training Facility (where the horse was trained by others during the period of time that Derickson served an 8 month suspension) at least until after the 34th Annual National Walking Horse Trainers Show in March of 2002.

Findings of Fact

1. Respondent Robert Raymond Black, II, is an individual whose mailing address is 140 Parker Road, Shelbyville, Tennessee. At all times relevant to this action, he was an employee of Herbert T. Derickson, IV's (named herein as Herbert Derickson) Herbert Derickson Training Facility.

2. Respondent Christopher B. Warley is an individual whose mailing address is 94 Mountain Road, Glastonbury, Connecticut 06033. According to the entry form, he was to be the scheduled rider of "Just American Magic" in class 25 of the 34th Annual National Walking Horse Trainers Show held in Shelbyville, Tennessee on March 21, 2002. The said Respondent is listed on corporate filings as being a director and vice president of Black Gold Farms, Inc.

3. Respondent Robbie J. Warley is an individual doing business as Black Gold Farms , and whose mailing address is 730 Normandy Road, Normandy, Tennessee 37360. At all times mentioned herein, said Respondent was the registered co-owner and *de facto* owner of the Tennessee Walking Horse named "Just American Magic," and is listed on corporate filings as a director, the president, and sole shareholder of Respondent Black Gold Farm, Inc.

4. Respondent Black Gold Farm, Inc., is a Texas corporation, whose agent for service of process is Robbie J. Warley, 8105 Bells, Frisco, Texas 75034. At all times mentioned herein said Respondent was the

registered co-owner of the Tennessee Walking Horse named "Just American Magic."

5. Respondent Herbert T. Derickson, IV is an individual who has held a AAA license issued by the Walking Horse Trainers Association since the inception of that organization's licensing program in 1988. He does business as Herbert Derickson Training Facility, aka Herbert Derickson Stables, aka Herbert Derickson Breeding and Training Facility, whose mailing address is 131 Mullins Mill Road, Shelbyville, Tennessee 37160. At all times mentioned herein said Respondent was engaged in the business of training the Tennessee Walking Horse named "Just American Magic" for showing at horse shows.

6. Respondent Jill Derickson, whose mailing address is also 131 Mullins Mill Road, Shelbyville, Tennessee 37160, is the wife of Herbert Derickson and assists her husband in the operation of his business.

7. In approximately September 2001, Respondents Black Gold Farm, Inc., and/or Robbie J. Warley[21] retained Respondent Herbert Derickson, to train "Just American Magic" to perform in horse shows and exhibitions, and to show "Just American Magic" in horse shows.

8. On or about March 1, 2002, Respondent Herbert Derickson completed and signed an entry form to enter "Just American Magic" as entry number 425 in class number 25 in the 34th Annual National Walking Horse Trainers Show in Shelbyville, Tennessee. A check written on the Herbert Derickson Training Facility account accompanied the entry form which was delivered to the Walking Horse Trainers Association and on March 21, 2002, the said Respondent presented the horse for pre-show inspection.[22]

10. On or about March 21, 2002, Respondents Robbie J. Warley and Black Gold Farm, Inc., allowed the entry of "Just American Magic" in the Walking Horse Trainers Show in Shelbyville, Tennessee.

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[21] See Finding of Fact No. 3.

[22] No paragraph number 9 in original- Editor

Conclusions of Law

1. On and before March 21, 2002, Herbert Derickson violated Section 5(2)(B) of the Act, (15 U.S.C. § 1824(2)(B)), by entering "Just American Magic" as entry number 425 in class number 25 of the 34th Annual National Walking Horse Trainers Show held in Shelbyville, Tennessee on March 21, 2002, while the horse was sore, as that term is defined in the Act.

2. On and before March 21, 2002, Robbie J. Warley and Black Gold Farms, Inc. violated Section 5(2)(D) of the Act (15 U.S.C. § 1824(2)(D)), by allowing the entry by others of "Just American Magic," a horse owned by them as entry number 425 in class number 25 of the 34th Annual National Walking Horse Trainer's Show held in Shelbyville, Tennessee on March 21, 2002, for the purpose of showing that horse, which was "sore," as that term is defined in the Act.

Order

1. Respondent Herbert Derickson, IV is assessed a civil penalty of $2,200.00, payable to the Treasurer of the United States of America, within 60 days of the effective date of this Order.

2. Respondents Robbie J. Warley and Black Gold Farms, Inc. are jointly and severally assessed a civil penalty of $2,200.00, payable to the Treasurer of the United States of America, within 60 days of the effective date of this Order.

3. The payments of the civil penalties shall be sent to:

Colleen A. Carroll
Office of the General Counsel
U.S. Department of Agriculture
1400 Independence Avenue, S.W.
Mail Stop 1417 South Building
Washington, D.C. 20250-1417

4. Respondent Herbert Derickson, IV and his related entities are disqualified for two years from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, family

member or other device, and from judging, managing or otherwise participating in any horse show, horse exhibition, or horse sale or auction, directly or indirectly through any agent, employee, family member or other device;[22] however, one year of the two year disqualification will be suspended, giving the said Respondent partial credit for the suspension imposed by the National Horse Show Commission.[23] The Respondent will however continue to be disqualified indefinitely as long as any portion of the civil penalty in paragraph 1 above remains unpaid.

5. Respondents Robbie J. Warley, and Black Gold Farm, Inc., are disqualified for one year from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, family member or other device, and from judging, managing or otherwise participating in any horse show, horse exhibition, or horse sale or auction, directly or indirectly through any agent, employee, family member or other device.[24] After the conclusion of the disqualification period, the Respondents will continue to be disqualified indefinitely so long as the civil penalty in paragraph 2 above remains unpaid.

6. The allegations of violations of the Act brought against the other Respondents are **DISMISSED.**

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[22] "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 the warm-up or inspection areas, or in any area where spectators are not allowed, and financing the participation of others in equine events.

[23] Consideration was given to giving additional credit for the suspension imposed by the National Horse Show Commission; however, only partial credit was awarded due to the evidence introduced that the Herbert Derickson Training Facility continued to serve at least as a conduit for entry fees and prize money awarded during the period of Herbert Derickson's National Horse Show Commission suspension. CX 10. Such conduct would appear to be violative of the definition of "participating" adopted as part of this decision.

[24] See preceding note.

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In re: PERCY LACY.
HPA Docket No. 06-0004.
Decision and Order.
Filed October 23, 2006.

HPA – West Nile virus – Statutory presumption – Burden of proof not shifted – Sored – Res judicata, when not – Latches – Collateral estoppel.

Robert A. Ertman for Complainant.
David F. Broderick for Respondent.
Decision and Order by Administrative Law Judge Peter M. Davenport.

Preliminary Statement

On January 18, 2006, Kevin Shea, the Administrator of the Animal and Plant Inspection Service, United States Department of Agriculture, ("APHIS") initiated this disciplinary proceeding against the Respondent by filing a complaint alleging violations of the Horse Protection Act of 1970, as amended, (15 U.S.C. § 1821, *et seq*.) (the "Act"). On February 14, 2006, counsel for Percy Lacy (hereinafter "Lacy") filed an Entry of Appearance and Answer denying generally the material allegations of the complaint, raising certain affirmative defenses, and requesting that an oral hearing be scheduled. A telephonic pre-hearing conference was held on February 17, 2006 at which time dates were established for the exchange of witness and exhibit lists and the matter was initially set to be heard in Bowling Green, Kentucky on July 18, 2006. Due to a scheduling conflict with Respondent's counsel, the initial hearing date was continued and the matter was rescheduled for August 22, 2006.

At the oral hearing held on August 22, 2006 in Bowling Green Kentucky, the complainant was represented by Robert A. Ertman, Esquire, Office of General Counsel, United States Department of Agriculture, Washington, DC[1] and the Respondent was represented by David F. Broderick, Esquire of Bowling Green, Kentucky. Following

[1] The Complainant was initially represented by Brian Hill, Esquire, Office of General Counsel, United States Department of Agriculture, Washington, DC who participated as counsel of record up until the time of the oral hearing.

the hearing, proposed findings of fact, conclusions of law and briefs in support of their respective positions were submitted by both parties.

Discussion

The complaint alleges that on or about April 25, 2002, the Respondent violated §5(2)(B) of the Act (15 U.S.C. § 1824(2)(B)), by entering "Mark of Buck" as entry number 131 in class 77 at the 64th Annual Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, while the horse was sore, for the purpose of showing or exhibiting the horse, and that on or about the same date, also violated §5(2)(D) of the Act (15 U.S.C. § 1824(2)(D)) by allowing "Mark of Buck" to be entered as entry number 131 in class 77 of the 64th Annual Tennessee Walking Horse National Celebration in Shelbyville Tennessee, while the horse was sore, for the purpose of showing or exhibiting the horse.[2]

In addition to denying generally the allegations of the Complaint, the Respondent raised a number of affirmative defenses, including *res judicata*, collateral estoppel, any applicable statutes of limitation, waiver, and laches. Laches, a defense based upon undue delay in asserting a legal right or privilege, has long been held to be inapplicable to actions of the government. *United States v. Kirkpatrick*, 22 U.S. (9 Wheat) 720 (1824); See also, *Gaussen v. United States,* 97 U.S. 584, 590 (1878); G*erman Bank v. United States,* 148 U.S. 573, 579 (1893); *United States v. Verdier*, 164 U.S. 213, 219 (1896); *United States v. Mack*, 295 U.S. 480, 489 (1935). It is also well established that the United States is not bound by state statutes of limitation. *United States v. Summerlin*, 310 U.S. 414 (1940); *United States v. Merrick Sponsor Corp*., 412 F.2d 1076 (2d Cir. 1970). Similarly, counsel's attempt to invoke the federal statute of limitations is without merit as the Complaint in this action was brought within the five years set forth in 28 U.S.C. § 2462, limiting the enforcement of civil fines, penalty, or forfeiture, pecuniary or otherwise.

Although previous adjudicatory proceedings and/or determinations were alluded to in the Respondent's Answer, no evidence of such proceedings was introduced by the Respondent. The general rule is that

[2] Paragraph II, 1 & 2 of the Complaint. The 64th Annual Tennessee Walking Horse National Celebration was actually held from August 21 through August 31, 2002. CX 1.

the federal government may not be equitably estopped from enforcing public laws, even though private parties may suffer hardship as a result in particular cases. *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990); *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51 (1984); *INS v. Miranda*, 459 U.S. 14 (1982); *Schweiker v. Hansen*, 450 U.S. 785 (1981); *Federal Crop Insurance Corporation v. Merrill*, 332 U.S. 380 (1947). Even were all the requisite threshold elements present necessary to trigger the defenses, which they are not, a detailed discussion of the doctrines of *res judicata,* collateral estoppel and waiver is not necessary as the issue of whether disciplinary proceedings instituted by entities other than the Secretary bar a subsequent enforcement action by the Department for the same event has been previously considered and answered adversely to the Respondent by both the Judicial Officer and the Court of Appeals for the Sixth Circuit in *In re Jackie McConnell, et al.,* 64 Agric. Dec. 436 (2005), *petition for review denied sub nom. McConnell v. U.S. Department of Agriculture*, WL 2430314 (6th Cir. 2006) (unpublished) (not to be cited except pursuant to Rule 28(g)).

At the hearing, the Respondent moved for dismissal of the Complaint as the date the violations were alleged to have occurred was April 25, 2002,[3] rather than August 25, 2002 as indicated by the testimony and exhibits introduced at the hearing. Tr. 47-8. As it was clear that the Respondent was not misled as to the actual date of the alleged violations, the Complainant was allowed to amend the Complaint to conform to the proof. Tr. 49.

The term "sore" is defined in both the Act and the regulations as:

> The term "sore" when used to describe a horse means that-
> (A) an irritating or blistering agent has been applied, internally orexternally, 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

[3] In actuality, both dates were contained in the Complaint as Paragraph I did contain the correct date; however, the allegations of violations contained in paragraph II 1 & 2 specified April 25, 2002 as the date of the violations.

> (D) any other substance or device has been used by a person on any limb of a horse or a person has engaged in a practice involving a horse, and, as a result of such application, infliction, injection, use, or practice, such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving, except that such term does not include such an application, infliction, injection, use, or practice in connection with the therapeutic treatment of a horse by or under the supervision of a person licensed to practice veterinary medicine in the State in which such treatment was given.

15 U.S.C. § 1821(3); 9 C.F.R. §11.1

In this case, the Complainant relies heavily upon the statutory presumption found in 15 U.S.C. § 1825(d)(5) which provides:

> In any civil or criminal action to enforce this chapter or any regulation under this chapter a horse shall be presumed to be horse which is sore if it manifests abnormal sensitivity or inflammation in both of its forelimbs or both of its hindlimbs.

In *Landrum v. Block*, No. 81-1035 (M.D. Tenn. June 25, 1981), 40 Agric. Dec. 922 (1981), the Court ruled that in order to be constitutional, the §1825(d)(5) presumption must be interpreted in accordance with Rule 301 of the Federal Rules of Evidence, even though that rule does not directly apply to this type of administrative proceeding. Fed. R. Evid. 301, **Presumptions in General in Civil Actions and Proceedings**, reads:

In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

Because the presumption in most cases does have a direct connection between the presence of bilateral sensitivity and the ultimate fact of soreness, an inference may well be drawn from evidence of bilateral sensitivity, even if the presumption is ignored. *Thornton v. U.S.*

Department of Agriculture, 715 F.2d 1508, 1511 (11th Cir. 1983). While the case law is replete with examples of affidavits and testimony from examining veterinarians concerning a horse's reaction to palpation alone being sufficient to constitute substantial evidence of violations of the Act, **if not meaningfully controverted,** (*See, In re Sparkman*, 50 Agric. Dec. 602, 612-3 (1991), and the cases cited therein), the statutory presumption is not irrebuttable, *Vlandis v. Kline*, 412 U.S. 441 (1972) and cannot be used to shift the ultimate burden of persuasion. *In re Edwards*, 49 Agric. Dec. 188, 198 (1990).

While consideration of the presence of West Nile Virus in a horse may not have been previously considered in Departmental proceedings, evidence of other ailments has been used in the past to successfully rebut the presumption. In the case of *In re Horenbein*, 41 Agric. Dec. 2148 (1982), convincing evidence was introduced that the horse suffered from thrush[4] and contracted heels which overcame the presumption of soreness inferred solely from evidence of bilateral sensitivity. At the oral hearing in this action, the Respondent introduced testimony from John Louis O'Brien, Jr., DVM, a horse practitioner experienced in the treatment of horses with West Nile Virus, that "Mark of Buck" had contracted West Nile Virus and that the sensitivity in the horse's front limbs found by both the Designated Qualified Persons ("DQPs") and the Veterinary Medical Officers ("VMOs") was not the result of being "sored" (he found no indication of that),[5] but rather was consistent with the effects of the virus.[6] Tr. 148-150, RX 1. Dr. O'Brien's diagnosis was

[4] A suppurative disorder of the feet of animals, including horses.

[5] On cross examination, Dr. Bourgeois indicated that he had no information upon which to base his opinion that the bilateral sensitivity was caused by either chemicals or an action device except the reaction he obtained during his examination of the horse. Tr. 65-6, 71. In Complainant's brief (at page 3), Complainant proposed that I adopt a finding that indicates the Dr. Bourgeois testified that there is no naturally occurring condition, no disease condition, and no kind of injury which would cause these reactions [bilateral sensitivity] other than the deliberate application of caustic chemicals or the use of chains. (Tr. 81-82); however, as indicated, such testimony is given no weight in view of his admitted paucity of knowledge about West Nile Virus.

[6] By way of contrast, Dr. Bourgeois candidly testified that his knowledge of West Nile Virus was limited, as West Nile Virus was essentially unknown when he was in Veterinary School, while in private practice he had never treated a case of West Nile
(continued...)

supported by serological testing performed by an independent laboratory. Tr. 138-140, RX 2. No rebuttal testimony as to the effects of West Nile Virus was offered by the Complainant.

Upon consideration of the testimony given at the hearing[7] the evidence of record,[8] and the proposed findings, conclusions and briefs filed by the parties, I find that the allegations of violations contained in the Complaint brought against the Respondent should be dismissed. The following Findings of Fact, Conclusions of Law and Order will entered.

Findings of Fact

1. The Respondent Percy Lacy is an individual whose mailing address is 725 Davis Mill Road, Elkton, Kentucky 42220. At all times material herein, he (and his family) owned "Mark of Buck," a registered Tennessee Walking Horse that was entered by Lacy as entry number 131 in class number 77 of the 64th Annual Tennessee Walking Horse National Celebration held on August 25, 2002 in Shelbyville, Tennessee for the purpose of showing or being exhibited.

2. At the pre-show inspection on August 25, 2002, "Mark of Buck" was found to have bilateral sensitivity by both the two DQPs and the two VMOs that examined the horse, all of who concluded that the horse was "sore" within the meaning of the Act on the basis of their findings of bilateral sensitivity. A DQP ticket and an APHIS Form 7077 were completed reflecting the results of their respective examinations and the horse was excused from showing in the class as being "sore."

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[6](...continued)
Virus, and had not attended any seminars on the subject. Tr. 50-52, 84-5.

[7] Three witnesses were called by the Complainant and two were called by the Respondent. References to the transcript of the proceedings are indicated as Tr."

[8] The Complainant's exhibits CX 1-9 were admitted. CX 15, a video tape of the examinations of the DQPs and the VMOs was objected to by counsel for the Respondent and was not admitted as it was neither included on the Complainant's Exhibit List and nor provided to Respondent's counsel until only shortly before the hearing. The Respondent's exhibits RX 1 and 2 were admitted.

3. Subsequent to being disqualified at the pre-show inspection, "Mark of Buck" was taken to and treated by John Louis O'Brien, Jr., DVM, a practitioner of veterinary medicine for 35 years whose practice is limited to the treatment of horses. Upon examination, Dr. O'Brien found the horse to be somewhat ataxic and hypersensitive to touch. Tr. 134-136. A blood sample was drawn, sent to an independent laboratory, and the results confirmed the presence of West Nile Virus, a viral infection affecting the central nervous system. RX 2.

4. Given Dr. O'Brien's testimony concerning his treatment of the horse and the nature and symptoms of West Nile Virus, the bilateral sensitivity exhibited by "Mark of Buck" at the pre-show inspection on August 25, 2002 was consistent with the symptoms of West Nile Virus and was not the result of the intentional use of chemical or mechanical means and accordingly, was not "sore" as defined in the Act.

Conclusions of Law

1. As "Mark of Buck" was not "sore" within the meaning of the Act on August 25, 2002, the Respondent did not violate the Act as alleged in the Complaint.

2. The evidence of violations of the Act, while sufficient to raise the 15 U.S.C. §1825(d)(5) presumption, was adequately rebutted by the Respondent by testimony that "Mark of Buck" had contracted West Nile Virus, a condition explaining his bilateral sensitivity on the date of the pre-show inspection.

Order

For the foregoing reasons, the Complaint is dismissed on its merits.

This Decision will become final and effective 35 days after service thereof upon the Respondent unless there is an appeal to the Judicial Officer by a party to the proceeding.

Copies of this Decision and Order will be served upon the parties by the Hearing Clerk.

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GENERAL

MISCELLANEOUS ORDERS

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.
Ruling Granting U.S. EPA's Motion For Leave To File An Amicus Brief.
Filed December 5, 2006.

AMAA – PPRCIA – Pork Promotion, Research, and Consumer Information Act – Intervention.

Babak A. Rastgoufard and Frank Martin, Jr., for Respondent.
Jess Anna Speier and Lynn A. Hayes, St. Paul, MN, for Petitioners.
Roger R. Martella, Jr. and Carol S. Holmes, Washington, DC, for Intervenor.
Order issued by William G. Jenson, Judicial Officer.
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On November 30, 2006, the United States Environmental Protection Agency [hereinafter U.S. EPA] filed a Motion For Leave To File An Amicus Brief. Section 900.57 of the rules of practice governing this proceeding provides that any person (other than the petitioner) showing a substantial interest in the outcome of a proceeding shall be permitted to intervene, as follows:

> **§ 900.57 Intervention.**
>
> Intervention in proceedings subject to this subpart shall not be allowed, except that, in the discretion of the Secretary or the judge, any person (other than the petitioner) showing a substantial interest in the outcome of a proceeding shall be permitted to participate in the oral argument and to file a brief.

7 C.F.R. § 900.57.

U.S. EPA asserts it has a substantial interest in the outcome of the instant proceeding.

On November 30, 2006, the Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], filed a response to U.S. EPA's Motion For Leave To File An Amicus Brief stating Respondent supports U.S. EPA's Motion For Leave To File An Amicus Brief and agrees that U.S. EPA has a substantial interest in the outcome of the instant proceeding. On December 1, 2006, Petitioners filed a response to U.S. EPA's Motion For Leave To File An Amicus Brief stating Petitioners do not oppose U.S. EPA's Motion For Leave To File An Amicus Brief.

I find U.S. EPA has shown a substantial interest in the outcome of the instant proceeding. Therefore, I grant U.S. EPA's Motion For Leave To File An Amicus Brief. U.S. EPA may file an amicus brief no later than December 15, 2006.[1]

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.
Order Denying Interim Relief.
Filed December 7, 2006.

AMMA – PPRCIA – Pork Promotion, Research, and Consumer Information Act – Interim relief.

The Judicial Officer denied Petitioners' motion for injunction pending appeal. The Judicial Officer found Petitioners' motion for injunction pending appeal was an

[1]The Hearing Clerk's office receives documents from 8:30 a.m. to 4:30 p.m. To ensure timely filing, U.S. EPA must ensure that its amicus brief is received by the Hearing Clerk no later than 4:30 p.m., December 15, 2006.

application for interim relief. The Judicial Officer held, under the applicable rules of practice (7 C.F.R. §§ 900.52(c)(2)-.71, 1200.50-.52), a person who has filed a petition pursuant to 7 C.F.R. § 900.52 may apply to the Secretary of Agriculture for interim relief, pending final determination of the proceeding (7 C.F.R. § 900.70(a)). The Judicial Officer found Petitioners filed the petition pursuant to 7 C.F.R. § 1200.52, not 7 C.F.R. § 900.52; therefore, interim relief was not available to Petitioners

Babak A. Rastgoufard, for Respondent.
Jess Anna Speier and Lynn A. Hayes, St. Paul, MN, for Petitioners.
Roger R. Martella, Jr., and Carol S. Holmes, Washington, DC, for Intervenor.
Order issued by William G. Jenson, Judicial Officer

On December 1, 2006, Mark McDowell, Jim Joens, Richard Smith, and the Campaign for Family Farms [hereinafter Petitioners] filed Petitioners' Motion for Injunction Pending Appeal and a Memorandum in Support of Petitioners' Motion for Injunction Pending Appeal. On December 5, 2006, the Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], filed Respondent's Opposition to Petitioners' Motion for Injunction Pending Appeal. On December 6, 2006, the Hearing Clerk transmitted the record to the Judicial Officer for consideration of Petitioners' Motion for Injunction Pending Appeal.

Petitioners' Motion for Injunction Pending Appeal is an application for interim relief pending appeal. The rules of practice governing this proceeding (7 C.F.R. §§ 900.52(c)(2)-.71, 1200.50-.52) provide that a person who has filed a petition pursuant to 7 C.F.R. § 900.52 may apply to the Secretary of Agriculture for interim relief, pending final determination of the proceeding.[1] However, Petitioners filed Petitioners'Second Amended Petition[2] pursuant to 7 C.F.R. § 1200.52,

[1]7 C.F.R. § 900.70(a).

[2]Petitioners instituted this proceeding by filing a petition on March 14, 2005; however, Administrative Law Judge Jill S. Clifton dismissed Petitioners' petition (Dismissal Without Prejudice filed April 12, 2005). Petitioners filed an Amended Petition on May 6, 2005, but on June 28, 2005, Petitioners filed a motion for leave to file a second amended petition and a Second Amended Petition. On July 8, 2005, Administrative Law Judge Jill S. Clifton granted Petitioners' motion for leave to file Petitioners' Second Amended Petition (Order filed July 8, 2005). Based on the record before me, I find Petitioners' Second Amended Petition, filed June 28, 2005, is the operative pleading in this proceeding.

not 7 C.F.R. § 900.52; therefore, interim relief is not available to Petitioners.[3]

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

ORDER

Petitioners' Motion for Injunction Pending Appeal is denied.

_____

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.
Ruling Denying NPPC's Motion for Leave to File an Amicus Brief Responding to Petitioners' Motion for Injunction Pending Appeal. Filed December 14, 2006.

AMMA – PPRCIA – Pork Promotion, Research, and Consumer Information Act – Intervention.

Babak A. Rastgoufard, for Respondent.
Jess Anna Speier and Lynn A. Hayes, St. Paul, MN, for Petitioners.
Michael C. Formica and Richard E. Schwartz, Washington, DC, for the National Pork Producers Council.

[3] *In re Gallo Cattle Co.* (Order Denying Interim Relief), 64 Agric. Dec. 689, 690 (2005) (stating the petitioner filed a petition pursuant to 7 C.F.R. § 1200.52; therefore, interim relief is not available to the petitioner); *In re Handlers Against Promoflor* (Order Denying Interim Relief), 55 Agric. Dec. 1042, 1043 (1996) (stating the petitioner filed a petition pursuant to 7 C.F.R. § 1200.52; therefore, interim relief, which is only available to a person who has filed a petition pursuant to 7 C.F.R. § 900.52, is not available to the petitioner); *In re Gallo Cattle Co.* (Order Denying Interim Relief), 55 Agric. Dec. 340, 341 (1996) (stating the petitioner filed a petition pursuant to 7 C.F.R. § 1200.52; therefore, interim relief, which is only available to a person who has filed a petition pursuant to 7 C.F.R. § 900.52, is not available to the petitioner), *appeal dismissed*, No. CIV S-96-1146 EJG/GGH (E.D. Cal. Nov. 13, 1996), *aff'd*, 159 F.3d 1194 (9th Cir. 1998), *reprinted in* 57 Agric. Dec. 895 (1998).

Roger R. Martella, Jr., and Carol S. Holmes, Washington, DC, for Intervenor U.S. EPA.
Order issued by William G. Jenson, Judicial Officer.

Ruling Denying NPPC's Motion for Leave to File an Amicus Brief Responding to Petitioners' Motion for Injunction Pending Appeal

On December 1, 2006, Mark McDowell, Jim Joens, Richard Smith, and the Campaign for Family Farms [hereinafter Petitioners] filed Petitioners' Motion for Injunction Pending Appeal. On December 5, 2006, the Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], filed Respondent's Opposition to Petitioners' Motion for Injunction Pending Appeal. On December 7, 2006, I denied Petitioners' Motion for Injunction Pending Appeal.[1] On December 7, 2006, the National Pork Producers Council filed a Motion for Leave to File Brief of Prospective Amicus Curiae National Pork Producers Council requesting leave to respond to Petitioners' Motion for Injunction Pending Appeal. On December 8, 2006, Petitioners filed Petitioners' Response to National Pork Producers Council's Motion for Leave to File Amicus Brief stating that because I had previously denied Petitioners' Motion for Injunction Pending Appeal, the National Pork Producers Council's December 7, 2006, motion should be denied. On December 13, 2006, the Hearing Clerk transmitted the record to the Judicial Officer for consideration of the National Pork Producers Council's December 7, 2006, Motion for Leave to File Brief of Prospective Amicus Curiae National Pork Producers Council.

On December 7, 2006, I denied Petitioners' Motion for Injunction Pending Appeal.[2] The National Pork Producers Council has not articulated any basis for revisiting the issue raised in Petitioners' Motion for Injunction Pending Appeal.

For the foregoing reason, the following Ruling should be issued.

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[1]*In re Mark McDowell* (Order Denying Interim Relief), __ Agric. Dec. ___ (Dec. 7, 2006).

[2]See note 1.

RULING

The National Pork Producers Council's December 7, 2006, Motion for Leave to File Brief of Prospective Amicus Curiae National Pork Producers Council is denied.

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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.
Ruling Granting NPPC's Motion for Leave to File an Amicus Brief.
Filed December 14, 2006.

AMMA – PPRCIA – Pork Promotion, Research, and Consumer Information Act – Intervention.

Babak A. Rastgoufard, for Respondent.
Jess Anna Speier and Lynn A. Hayes, St. Paul, MN, for Petitioners.
Michael C. Formica and Richard E. Schwartz, Washington, DC, for Intervenor National Pork Producers Council.
Roger R. Martella, Jr., and Carol S. Holmes, Washington, DC, for Intervenor U.S. EPA.
Order issued by William G. Jenson, Judicial Officer.

Ruling Granting NPPC's Motion for Leave to File an Amicus Brief

On December 8, 2006, the National Pork Producers Council filed a Motion for Leave to File Brief of Prospective Amicus Curiae National Pork Producers Council. Section 900.57 of the rules of practice governing this proceeding provides that any person (other than the petitioner) showing a substantial interest in the outcome of a proceeding shall be permitted to intervene, as follows:

§ 900.57 Intervention.

> Intervention in proceedings subject to this subpart shall not be allowed, except that, in the discretion of the Secretary or the judge, any person (other than the petitioner) showing a substantial interest in the outcome of a proceeding shall be permitted to participate in the oral argument and to file a brief.

7 C.F.R. § 900.57.

The National Pork Producers Council asserts it has a substantial interest in the outcome of the instant proceeding.

On December 8, 2006, the Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], filed a response to the National Pork Producers Council's Motion for Leave to File Brief of Prospective Amicus Curiae National Pork Producers Council stating Respondent supports the National Pork Producer Council's December 8, 2006, motion and agrees that the National Pork Producers Council has a substantial interest in the outcome of the instant proceeding. On December 12, 2006, Petitioners filed a response in opposition to the National Pork Producers Council's December 8, 2006, motion arguing the National Pork Producers Council does not have a substantial interest in the outcome of the instant proceeding.

After consideration of Petitioners', Respondent's, and the National Pork Producers Council's filings, I find the National Pork Producers Council has shown a substantial interest in the outcome of the instant proceeding. Therefore, I grant the National Pork Producers Council's December 8, 2006, Motion for Leave to File Brief of Prospective Amicus Curiae National Pork Producers Council. The National Pork Producers Council may file an amicus brief no later than December 15, 2006.[1]

In re: MIGUEL GARZA-LEAL.
A.Q. Docket No. 01-0001.
Order Dismissing Complaint.
Filed August 17, 2006.

[1]The Hearing Clerk's office receives documents from 8:30 a.m. to 4:30 p.m. To ensure timely filing, the National Pork Producers Council must ensure that its amicus brief is received by the Hearing Clerk no later than 4:30 p.m., December 15, 2006.

Rick Herndon for Complainant.
Respondent Pro se.
Order filed by Administrative law Judge Peter M. Davenport.

Complainant's Motion to Dismiss is granted. It is ordered that the complaint be dismissed without prejudice.

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In re: MITCHELL STANLEY, d/b/a STANLEY BROTHERS.
A.Q. Docket No. 06-0007.
Order Denying Petition for Reconsideration.
Filed December 5, 2006.

A.Q. – Animal Health Protection Act – Commercial Transportation of Equine for Slaughter Act – Petition to reconsider – Late-filed petition to reconsider.

The Judicial Officer denied Respondent's Petition for Reconsideration because it was not filed within 10 days after the date the Hearing Clerk served Respondent with the Decision and Order, as required by 7 C.F.R. § 1.146(a)(3).

Thomas N. Bolick for Complainant.
Respondent, Pro se.
Initial Decision issued by Administrative Law Judge Peter M. Davenport.
Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

W. Ron DeHaven, 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 18, 2006. Complainant instituted the proceeding under the Animal Health Protection Act (7 U.S.C. §§ 8301-8321 (Supp. IV 2004)); the Commercial Transportation of Equine for Slaughter Act (7 U.S.C. § 1901 note); regulations issued under the Animal Health Protection Act (9 C.F.R. pt. 75); regulations issued under the Commercial Transportation of Equine for Slaughter Act (9 C.F.R. pt. 88); 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 October 20, 2003, Mitchell Stanley, d/b/a Stanley Brothers [hereinafter Respondent], shipped horses

in commercial transportation from Louisiana to Dallas Crown in Kaufman, Texas, for slaughter without a permit for movement of restricted animals, in violation of 9 C.F.R. § 75.4(b), and without a completed owner-shipper certificate, in violation of 9 C.F.R. § 88.4(a)(3)(iv)-(v), (vii) (Compl. ¶ III). The Hearing Clerk served Respondent with the Complaint, the Rules of Practice, and a service letter on January 23, 2006.[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)). In a letter dated February 23, 2006, the Hearing Clerk informed Respondent that he had failed to file a timely answer and that he would be informed of any future action taken in the proceeding.

On April 4, 2006, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for Adoption of Proposed Default Decision and Order [hereinafter Motion for Default Decision] and a Proposed Default Decision and Order [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 April 19, 2006.[2] Respondent failed to file objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision within 20 days after service, as required by section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). In a letter dated May 16, 2006, the Hearing Clerk informed Respondent that he had failed to file timely objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision and that the file would be referred to an administrative law judge for consideration and decision.

On June 14, 2006, Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] issued a Default Decision and Order [hereinafter Initial Decision]: (1) finding Respondent violated 9 C.F.R. §§ 75.4(b) and 88.4(a)(3)(iv)-(v), (vii), as alleged in the Complaint; and (2) assessing Respondent a $12,800 civil penalty (Initial Decision at 2-4).

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[1]United States Postal Service Domestic Return Receipt for Article Number 7003 1010 0003 0642 2261.

[2]United States Postal Service Domestic Return Receipt for Article Number 7003 3110 0003 7112 2724.

On August 15, 2006, Respondent appealed the ALJ's Initial Decision to the Judicial Officer. On August 30, 2006, Complainant filed a response to Respondent's appeal petition. On October 20, 2006, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision. On October 26, 2006, I issued a Decision and Order in which I affirmed the ALJ's Initial Decision.[3]

On November 1, 2006, the Hearing Clerk served Respondent with the Decision and Order.[4] On November 14, 2006, Respondent filed a "Petition For Reconsideration" of *In re Mitchell Stanley*, 65 Agric. Dec. ___ (Oct. 26, 2006). On November 30, 2006, Complainant filed "Complainant's Response To Respondent's Petition For Reconsideration." On December 1, 2006, the Hearing Clerk transmitted the record to the Judicial Officer for reconsideration of *In re Mitchell Stanley*, 65 Agric. Dec. ___ (Oct. 26, 2006).

CONCLUSION BY THE JUDICIAL OFFICER ON RECONSIDERATION

Section 1.146(a)(3) of the Rules of Practice provides that a petition to reconsider the Judicial Officer's decision must be filed within 10 days after the date of service of the decision, as follows:

> **§ 1.146 Petitions for reopening hearing; for rehearing or reargument of proceeding; or for reconsideration of the decision of the Judicial Officer.**
>
> (a) *Petition requisite*. . . .
>
> . . . .
>
> (3) *Petition to rehear or reargue proceeding, or to reconsider the decision of the Judicial Officer*. A petition to rehear or reargue the proceeding or to reconsider the decision of the Judicial Officer shall be filed within 10 days after the date of service of such decision upon the party filing the petition. Every

[3] *In re Mitchell Stanley*, 65 Agric. Dec. ___ (Oct. 26, 2006).

[4] United States Postal Service Domestic Return Receipt for Article Number 7004 1160 0004 4086 2339.

> petition must state specifically the matters claimed to have been erroneously decided and alleged errors must be briefly stated.

7 C.F.R. § 1.146(a)(3).

Respondent's petition to reconsider, which Respondent filed 13 days after the date the Hearing Clerk served *In re Mitchell Stanley*, __ Agric. Dec. ___ (Oct. 26, 2006), on Respondent, was filed too late, and, accordingly, Respondent's petition to reconsider must be denied.[5]

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[5]*See In re Heartland Kennels, Inc.*, 61 Agric. Dec. 562 (2002) (Order Denying Second Pet. for Recons.) (denying, as late-filed, a petition to reconsider 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 to reconsider 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 to reconsider 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 to reconsider 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 to reconsider 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 to reconsider 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 to reconsider 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 to reconsider 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 to reconsider 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 to reconsider filed 17 days after the date the Hearing Clerk served the respondent with the order denying late appeal as to Kevin Ackerman); *In re Marilyn Shepherd*, 57 Agric. Dec. 1280 (1998) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition to reconsider 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 to reconsider filed 16 days after the date the Hearing Clerk served the (continued...)

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

ORDER

Respondent's Petition for Reconsideration, filed November 14, 2006, is denied.

In re: JEWEL BOND, d/b/a BONDS KENNEL.
AWA Docket No. 04-0024.
Order Denying Petition to Reconsider.
Filed July 6, 2006.

AWA – Animal Welfare Act – Willful – Frequency of inspection – Correction of violations – Credibility determinations.

The Judicial Officer denied Jewel Bond's (Respondent's) petition to reconsider. The Judicial Officer found irrelevant Respondent's contention that the United States Department of Agriculture inspector who inspected her facilities, animals, and records on August 25, 2003, "was a little harsh." The Judicial Officer also rejected

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[5](...continued)
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 to reconsider 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 to reconsider 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 to reconsider 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 to reconsider, 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 to reconsider 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 to reconsider 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 to reconsider filed 17 days after the date the Hearing Clerk served the respondent with the decision and order).

Respondent's contention that the $10,000 civil penalty assessed in *In re Jewel Bond*, 65 *Agric. Dec.* 92 (2006), for her violations of the regulations and standards issued under the Animal Welfare Act (Regulations and Standards) should be reduced because she paid $45,000 to improve her kennel; she corrected the violations of the Regulations and Standards found during a May 13, 2003, United States Department of Agriculture inspection of her kennel; and she was not able to pay the $10,000 civil penalty. The Judicial Officer rejected Respondent's objection to the frequency of the United States Department of Agriculture inspections, stating the Secretary of Agriculture has authority to inspect to determine whether any dealer or exhibitor has violated the Animal Welfare Act or the Regulations and Standards, and the Animal Welfare Act provides, in order to accomplish this purpose, that the Secretary of Agriculture shall, at all reasonable times, have access to the places of business and the facilities, animals, and records of any dealer or exhibitor (7 U.S.C. § 2146(a)). Finally, the Judicial Officer denied Respondent's renewed request for oral argument.

Brian T. Hill, for Complainant.
Respondent Pro se.
Initial decision issued by Victor W. Palmer, 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 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 May 13, 2003, July 16, 2003, and August 25, 2003, Jewel Bond, d/b/a Bonds Kennel [hereinafter Respondent], violated the Regulations and Standards (Compl. ¶¶ II-IV). On September 15, 2004, Respondent filed an answer denying the material allegations of the Complaint.

On May 24 and 25, 2005, Administrative Law Judge Victor W. Palmer [hereinafter the ALJ] conducted a hearing in Springfield, Missouri. Brian T. Hill represented Complainant. Respondent represented herself with the assistance of Larry Bond, Seneca, Missouri. On January 9, 2006, after Complainant and Respondent filed

post-hearing briefs, the ALJ issued a Decision and Order [hereinafter Initial Decision]: (1) concluding Respondent violated the Animal Welfare Act and the Regulations and Standards; (2) ordering Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; (3) assessing Respondent a $10,000 civil penalty; and (4) suspending Respondent's Animal Welfare Act license for 1 year (Initial Decision at 13, 16-17).

On February 16, 2006, Respondent filed an appeal to, and requested oral argument before, the Judicial Officer. On March 16, 2006, Complainant filed a response to Respondent's appeal petition. On April 6, 2006, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision. On May 19, 2006, I issued a Decision and Order affirming the ALJ's Initial Decision, with minor exceptions, and denying Respondent's request for oral argument.[1]

On June 2, 2006, Respondent filed a "Petition For Reconsideration Of The Judicial Officer's Decision" [hereinafter Petition to Reconsider]. On June 29, 2006, after the time for Complainant's response expired, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Respondent's Petition to Reconsider.

Complainant's exhibits are designated by "CX." References to the transcript are designated by "Tr."

CONCLUSIONS BY THE JUDICIAL OFFICER ON RECONSIDERATION

Respondent raises seven issues in her Petition to Reconsider. First, Respondent contends, in light of the extensive repairs she made to her facility between the May 13, 2003, and August 25, 2003, United States Department of Agriculture inspections, David Brigance, a United States Department of Agriculture inspector, "was a little harsh" when he cited Respondent for violating sections 3.4(c) and 3.6(a)(2)(i) of the Regulations and Standards (9 C.F.R. §§ 3.4(c), .6(a)(2)(i)) on August 25, 2003 (CX 67) (Respondent's Pet. to Reconsider at 1-2).

Respondent neither denies she violated sections 3.4(c) and 3.6(a)(2)(i) of the Regulations and Standards (9 C.F.R. §§ 3.4(c), .6(a)(2)(i)) on August 25, 2003, nor contends I erroneously concluded that she violated sections 3.4(c) and 3.6(a)(2)(i) of the Regulations and

[1] *In re Jewel Bond*, 65 Agric. Dec. 92 (2006).

Standards (9 C.F.R. §§ 3.4(c), .6(a)(2)(i)) on August 25, 2003. Therefore, I find the issue of whether Mr. Brigance "was a little harsh," irrelevant.

Second, Respondent asserts that, after she entered into a consent decision with the United States Department of Agriculture in June 2002, she spent over $45,000 to improve her kennel. Respondent contends her expenditure of $45,000 to improve her kennel establishes that she did not have a total disregard for the Regulations and Standards, but, instead, had a strong desire to comply with the Regulations and Standards. (Respondent's Pet. to Reconsider at 2.)

Even if I were to find Respondent expended $45,000 to improve her kennel, I would not reduce the sanction imposed in *In re Jewel Bond*, 65 *Agric. Dec.*92 (2006). Each violation found in the course of the three inspections conducted in 2003 was willful. An act is considered "willful" under the Administrative Procedure Act (5 U.S.C. § 558(c)) if the violator (1) intentionally does an act which is prohibited, irrespective of evil motive or reliance on erroneous advice, or (2) acts with careless disregard of statutory requirements.[2] Respondent's chronic failure to comply with the Animal Welfare Act and the Regulations and Standards throughout the year that followed her signing the consent decision, constitutes obvious and careless disregard of the statutory and regulatory requirements, and Respondent's violations are clearly willful.[3]

Respondent's testimony and actions demonstrate a lack of good faith compliance with the Animal Welfare Act and the Regulations and Standards that apply to her as a licensed dog dealer. Respondent has refused to heed specific Animal and Plant Health Inspection Service instructions. Respondent became so incensed when told by an Animal and Plant Health Inspection Service investigator that a building in her facility still did not meet applicable standards, she removed approximately 10 dogs it housed and put them outside on a cold winter night when the temperature was only 20 degrees Fahrenheit

[2]*In re James E. Stephens*, 58 Agric. Dec. 149, 180 (1999); *In re Arab Stock Yard, Inc*., 37 Agric. Dec. 293, 306 (1978), *aff'd mem*., 582 F.2d 39 (5th Cir. 1978).

[3]*See In re James E. Stephens*, 58 Agric. Dec. 149, 180 (1999) (stating the respondents' chronic failure to comply with the Animal Welfare Act and the Regulations and Standards over a period of almost 4 months presents an obvious and careless disregard of statutory and regulatory requirements; when a Animal Welfare Act licensee disregards statutory and regulatory requirements over such a period of time, the licensee's violations are clearly willful.)

(Tr. 274-78). Respondent's obstinacy, her temper that can blind her to the needs and welfare of her dogs, and the gravity of her violations which ignored basic needs of the dogs and puppies that she sells in interstate commerce, combine to require the imposition of a substantial sanction to achieve compliance with, and deter future violations of, the Animal Welfare Act and the Regulations and Standards.

I have accepted the recommendations of Animal and Plant Health Inspection Service officials which I have concluded fully accord with the Animal Welfare Act's sanction and civil penalty provisions. If each Regulation and Standard that I find to have been violated is treated as a single violation, Respondent committed 11 violations. Arguably, there were multiple violations of several of the Regulations and Standards. Therefore, the $10,000 civil penalty that I assess is far less than may be imposed by applying the $2,750 per violation amount authorized by the Animal Welfare Act and the Federal Civil Penalties Inflation Adjustment Act of 1990 against, at a minimum, 11 violations.[4] A 1-year suspension of Respondent's Animal Welfare Act license is also presently indicated in that the prior, lesser 30-day suspension of Respondent's Animal Welfare Act license was not an effective deterrent. The recommended inclusion of cease and desist provisions is also appropriate.

Third, Respondent contends she corrected the violations found during the May 13, 2003, inspection of her kennel (Respondent's Pet. to Reconsider at 2).

Each Animal Welfare Act licensee must always be in compliance in all respects with the Animal Welfare Act and the Regulations and Standards. While Respondent's corrections of the violations of the Animal Welfare Act found on May 13, 2003, are commendable and can be taken into account when determining the sanction to be imposed, Respondent's corrections of her violations do not eliminate the fact that the violations occurred.[5] Therefore, even if I were to find that,

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[4]See 7 U.S.C. § 2149(b); 28 U.S.C. § 2461 (note); 7 C.F.R. § 3.91(a), (b)(2)(v).

[5]*In re Eric John Drogosch*, 63 Agric. Dec. 623, 643 (2004); *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* (continued...)

subsequent to Respondent's May 13, 2003, violations of the Regulations and Standards, Respondent corrected the violations, I would not grant Respondent's Petition to Reconsider.

Fourth, Respondent contends she is not able to pay a $10,000 civil penalty and a 1-year suspension of her Animal Welfare Act license would make payment of any civil penalty difficult (Respondent's Pet. to Reconsider at 2-3).

Section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) sets forth factors that must be considered when determining the amount of the civil penalty to be assessed against a respondent for violations of the Animal Welfare Act and the Regulations, and a respondent's ability to pay the civil penalty is not one of those factors. Therefore, Respondent's inability to pay the $10,000 civil penalty is not a basis for reducing the $10,000 civil penalty.[6]

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[5](...continued)
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)).

[6]The Judicial Officer did give consideration to ability to pay when determining the amount of the civil penalty to assess under the Animal Welfare Act in *In re Gus White, III*, 49 Agric. Dec. 123, 152 (1990). The Judicial Officer subsequently held that consideration of ability to pay in *In re Gus White, III*, was inadvertent error and that ability to pay would not be considered in determining the amount of civil penalties assessed under the Animal Welfare Act in the future. *See In re Mary Jean Williams* (Decision as to Mary Jean Williams), 64 Agric. Dec. 1347, 1372 (2005) (stating section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) sets forth factors that must be considered when determining the amount of the civil penalty to be assessed against a respondent for violations of the Animal Welfare Act and the Regulations and a respondent's ability to pay the civil penalty is not one of those factors); *In re Mary Jean Williams* (Order Denying Pet. to Reconsider as to Deborah Ann Milette), 64 Agric. Dec.1673, 1679-80 (2005) (stating section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) sets forth factors that must be considered when determining the amount of the civil penalty to be assessed against a respondent for violations of the Animal Welfare (continued...)

Fifth, Respondent states I erroneously found that she averaged about $4,000 per month in sales of dogs and puppies (Respondent's Pet. to Reconsider at 2).

Complainant introduced evidence that, during the period September 4, 2002, through July 23, 2003, Respondent sold 222 puppies in interstate commerce to Okie Pets, PO Box 21, Ketchum, Oklahoma 74349, for $39,690, averaging about $4,000 per month in sales to this

[6](...continued)
Act and the Regulations and a respondent's ability to pay the civil penalty is not one of those factors); *In re J. Wayne Shaffer*, 60 Agric. Dec. 444, 475-76 (2001) (stating section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) sets forth factors that must be considered when determining the amount of the civil penalty to be assessed against a respondent for violations of the Animal Welfare Act and the Regulations and a respondent's ability to pay the civil penalty is not one of those factors); *In re Nancy M. Kutz* (Decision and Order as to Nancy M. Kutz), 58 Agric. Dec. 744, 757 (1999) (stating section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) sets forth factors that must be considered when determining the amount of the civil penalty to be assessed against a respondent for violations of the Animal Welfare Act, the Regulations, and the Standards, and a respondent's ability to pay the civil penalty is not one of those factors); *In re James E. Stephens*, 58 Agric. Dec. 149, 199 (1999) (stating the respondents' financial state is not relevant to the amount of the civil penalty assessed against the respondents for violations of the Animal Welfare Act, the Regulations, and the Standards); *In re Judie Hansen*, 57 Agric. Dec. 1072, 1143 (1998) (stating a respondent's ability to pay a civil penalty is not considered in determining the amount of the civil penalty to be assessed), *appeal dismissed*, 221 F.3d 1342 (Table), 2000 WL 1010575 (8th Cir. 2000) (per curiam); *In re David M. Zimmerman*, 57 Agric. Dec. 1038, 1050 n.1 (1998) (stating the Judicial Officer has pointed out that when determining the amount of a civil penalty to be assessed under the Animal Welfare Act, consideration need not be given to a respondent's ability to pay the civil penalty); *In re James J. Everhart*, 56 Agric. Dec. 1401, 1416 (1997) (stating a respondent's inability to pay the civil penalty is not a consideration in determining civil penalties assessed under the Animal Welfare Act); *In re Mr. & Mrs. Stan Kopunec*, 52 Agric. Dec. 1016, 1023 (1993) (stating the ability to pay a civil penalty is not a relevant consideration in Animal Welfare Act cases); *In re Micheal McCall*, 52 Agric. Dec. 986, 1008 (1993) (stating the ability or inability to pay is not a criterion in Animal Welfare Act cases); *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1071 (1992) (stating the Judicial Officer once gave consideration to the ability of respondents to pay a civil penalty, but that the Judicial Officer has removed the ability to pay as a criterion, since the Animal Welfare Act does not require it), *aff'd*, 61 F.3d 907, 1995 WL 309637 (7th Cir. 1995) (not to be cited per 7th Circuit Rule 53(b)(2)); *In re Jerome A. Johnson*, 51 Agric. Dec. 209, 216 (1992) (stating the holding in *In re Gus White, III*, 49 Agric. Dec. 123 (1990), as to consideration of ability to pay, was an inadvertent error; ability to pay is not a factor specified in the Animal Welfare Act and it will not be considered in determining future civil penalties under the Animal Welfare Act).

one outlet alone (CX 1; CX 4). Respondent fails to cite any evidence introduced to rebut Complainant's evidence concerning Respondent's average monthly sales to Okie Pets. Therefore, I reject Respondent's contention that my finding regarding her average monthly sales to Okie Pets, is error.

Sixth, Respondent asserts her facility was not inspected during the period from October 23, 2001, to May 13, 2003, and then the facility was inspected two times over the next 3½ months (Respondent's Pet. to Reconsider at 3).

Respondent does not explain the relevance of the frequency of the United States Department of Agriculture's inspection of her facilities, animals, and records. I infer Respondent objects to the frequency of the United States Department of Agriculture's inspection of her facilities, animals, and records. The Animal Welfare Act authorizes the Secretary of Agriculture to make inspections in order to determine whether any dealer or exhibitor has violated the Animal Welfare Act or the Regulations and Standards and specifically provides that, in order to accomplish this purpose, the Secretary of Agriculture shall, at all reasonable times, have access to the places of business and the facilities, animals, and records of any dealer or exhibitor.[7] Therefore, I reject Respondent's objection to the frequency of the United States Department of Agriculture's inspection of her facilities, animals, and records.

Seventh, Respondent renews her request for oral argument on the ground that the issues are complex. Respondent asserts the issues are complex because the testimony of the United States Department of Agriculture officials regarding her violations is not credible. (Respondent's Pet. to Reconsider at 3.)

The ALJ found that the United States Department of Agriculture officials who testified regarding Respondent's violations of the Regulations and Standards were credible, as follows:

> Testimony establishing [Respondent's] violations was given by an APHIS Animal Care Inspector and a Veterinarian [sic] Medical Officer. Both were extremely credible witnesses who produced photographic evidence corroborating their observations.

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[7] 7 U.S.C. § 2146(a).

Initial Decision at 14. The Judicial Officer's consistent practice is to give great weight to credibility determinations of administrative law judges, since they have the opportunity to see and hear witnesses testify.[8] I find nothing in the record before me on which to base a reversal of the ALJ's credibility determinations. Therefore, I reject Respondent's basis for her contention that the issues are complex. Moreover, Respondent's renewed request for oral argument comes far too late to be considered. Section 1.145(d) of the Rules of Practice provides that a party bringing an appeal may request, within the time for filing an appeal, an opportunity for oral argument before the Judicial Officer, as follows:

§ 1.145 Appeal to Judicial Officer.

. . . .

(d) *Oral argument.* A party bringing an appeal may request, within the prescribed time for filing such appeal, an opportunity

[8] *In re G & T Terminal Packaging Co.*, 64 Agric. Dec. 1839, 1852 (2005), *appeal docketed*, No. 05-5634 (2d Cir. Oct. 18, 2005); *In re Southern Minnesota Beet Sugar Cooperative*, 64 Agric. Dec. 580, 605-09 (2005); *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*, 543 U.S. 810 (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. 2000), *aff'd*, 12 F. App'x 718 (10th Cir.), *cert. denied*, 534 U.S. 1040 (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).

> 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.

7 C.F.R. § 1.145(d). The Hearing Clerk served Respondent with the Initial Decision on January 17, 2006.[9] Section 1.145(a) of the Rules of Practice (7 C.F.R. § 1.145(a)) provides that a party has 30 days, after receiving service of an administrative law judge's written decision, within which to appeal the decision to the Judicial Officer. Thus, Respondent's time for requesting oral argument before the Judicial Officer expired February 16, 2006. Respondent's renewed request for oral argument, filed June 2, 2006, is late-filed and must be denied.

For the foregoing reasons and the reasons set forth in *In re Jewel Bond*, 65 Agric. Dec. 92 (2006), Respondent'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. Respondent's Petition to Reconsider was timely filed and automatically stayed *In re Jewel Bond*, 65 Agric. Dec. 92 (2006). Therefore, since Respondent's Petition to Reconsider is denied, I hereby lift the automatic stay, and the Order in *In re Jewel Bond*, 65 Agric. Dec. 92 (2006), is reinstated; except that the effective date of the Order is the date indicated in the Order in this Order Denying Petition to Reconsider.

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

ORDER

1. Jewel Bond, her agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease

[9]United States Postal Service Domestic Return Receipt for Article Number 7003 1010 0003 0642 1172.

and desist from violating the Animal Welfare Act and the Regulations and Standards and, in particular, shall cease and desist from:

(a) Failing to keep housing facilities for dogs in good repair;

(b) Failing to maintain surfaces in outdoor housing facilities so that they can be readily cleaned and sanitized;

(c) Failing to provide primary enclosures that have floors that are constructed in a manner that protects the dogs' feet and legs from injury;

(d) Failing to clean primary enclosures;

(e) Failing to maintain an effective program of pest control;

(f) Failing to maintain interior surfaces of housing facilities and surfaces that come in contact with dogs free of excessive rust that prevents cleaning and sanitization;

(g) Failing to have a properly working drainage system in housing facilities; and

(h) Failing to maintain primary enclosures so that they have no sharp points or edges that can injure dogs.

Paragraph 1 of this Order shall become effective on the day after service of this Order on Respondent.

2. Respondent is assessed a $10,000 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:

Brian T. Hill
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, Brian T. Hill within 60 days after service of this Order on Respondent. Respondent shall state on the certified check or money order that payment is in reference to AWA Docket No. 04-0024.

3. Respondent's Animal Welfare Act license is suspended for a period of 1 year and continuing thereafter until Respondent demonstrates to the Animal and Plant Health Inspection Service that she is in full compliance with the Animal Welfare Act, the Regulations and Standards, and this Order, including payment of the civil penalty

imposed in this Order. When Respondent demonstrates to the Animal and Plant Health Inspection Service that she has satisfied this condition, a supplemental order shall be issued in this proceeding upon the motion of the Animal and Plant Inspection Service, terminating the suspension of Respondent's Animal Welfare Act license.

Paragraph 3 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 the Order issued in this Order Denying Petition to Reconsider 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 the Order issued in this Order Denying Petition to Reconsider. Respondent must seek judicial review within 60 days after entry of the Order issued in this Order Denying Petition to Reconsider.[10] The date of entry of the Order issued in this Order Denying Petition to Reconsider is July 6, 2006.

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In re: SUNCOAST PRIMATE SANCTUARY FOUNDATION, INC., A FLORIDA CORPORATION.
AWA Docket No. D-05-0002.
Ruling.
Filed July 28, 2006.

AWA – License, denial of – Stay, automatic, when triggered.

Colleen Carroll for Complainant.
Thomas Dander for Respondent.
Ruling by Chief Administrative Law Judge, Marc R. Hillson.

Ruling denying Motion for Reconsideration

On June 7, 2006, I issued my decision in the above-captioned matter, sustaining APHIS's denial of Suncoast Primate's application for an

[10] 7 U.S.C. § 2149(c).

exhibitor's license, but remanding the case to the Agency to do a more complete investigation. On June 26, Respondent APHIS filed a Motion for Reconsideration, and on July 14, Petitioner filed a Response opposing the Motion.

In short, Respondent's Motion raises no issues that lead me to alter my initial decision. While I concluded that APHIS denial of Petitioner's application was justified on the limited, but inadequate record that was developed, I see no reason to revisit my conclusion that both parties fell short of fulfilling what the statute contemplates in terms of the obligations of an applicant and a reviewer in terms of developing an adequate record, particularly given the complexities of this situation presented by the prior license revocation proceeding and the confusion over who owns the facility and the animals in the facility, as well as the relationships between the current board membership of Petitioner to the entity whose license was revoked. Nothing in the Motion for Reconsideration changes my conclusion that Petitioner fell short of its duty to provide all pertinent information to support its license request, nor that Respondent did not perform a full and complete investigation before denying the application for a license.

APHIS also asks me to reconsider my statement that "it would be improper to permanently deny such a license without the record being more fully developed." Initial Decision at 12. APHIS points out that Petitioner could reapply a year later, unless I ordered otherwise. However, the ban on license issuance to a party whose license has been revoked is indeed a permanent one. Until Petitioner provides all the information that Respondent needs to make a determination, and until Respondent makes a determination based on all the appropriate information, the denial would appear to be permanent. Petitioner is entitled to know what criteria Respondent is utilizing to determine whether current ownership and/or management are the same entity whose license was revoked in the prior proceeding.

Petitioner, both in its Response and in its Notice of Respondent's Non-Compliance With This Court's Order of June 7, 2006, has alleged that Respondent has not complied with my June 7 Order, and that I should either impose sanctions or direct that that Respondent issue a license to Petitioner. While it is true that Respondent did not request that I stay my Order pending my ruling on its Motion, the Rules of Practice do not make it clear whether or not a Motion to Reconsider automatically stays my order. Given the relatively short time period that

has elapsed, and the real possibility that Petitioner may not be entitled to a license, I will deny the request that I direct license issuance. However, since Respondent has had ample time to prepare to comply with my Order, I direct them to comply with the initial step—informing Petitioner exactly what information they require—within 20 days from today, with Petitioner's response due within 50 days from today, and a decision to grant or deny the license application within 80 days from today. Otherwise, my initial decision and order stands as written.

Respondent's Motion for Reconsideration is DENIED.

_____

In re: CHERYL MORGAN, AN INDIVIDUAL, d/b/a EXOTIC PET CO.
AWA Docket No. 05-0032.
Order Denying Petition to Reconsider.
Filed August 15, 2006.

AWA – Animal Welfare Act – Failure to file timely answer.

The Judicial Officer denied Cheryl Morgan's (Respondent) petition to reconsider *In re Cheryl Morgan*, 65 Agric. Dec. ___ (July 6, 2006). The Judicial Officer rejected Respondent's contention that she filed a timely response to the Complaint. The Judicial Officer stated the record established that the Hearing Clerk served Respondent with the Complaint on November 9, 2005, and Respondent's first filing in the proceeding was dated and filed December 28, 2005, 29 days after Respondent's answer was due. Moreover, Respondent's first filing, which responded to the Complaint, was filed on January 31, 2006, 2 months 2 days after Respondent's answer was due. The Judicial Officer concluded that, in accordance with the Rules of Practice, Respondent was deemed, for purposes of the proceeding, to have admitted the allegations in the Complaint, and Respondent had waived opportunity for hearing.

Bernadette R. Juarez, for Complainant.
Phillip Westergren, Corpus Christi, TX, for Respondent.
Initial Decision issued by Administrative Law Judge Peter M. Davenport.
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 9, 2005. 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 Cheryl Morgan [hereinafter Respondent] willfully violated the Regulations and Standards (Compl. ¶¶ 6-11). The Hearing Clerk served Respondent with the Complaint, the Rules of Practice, and a service letter on November 9, 2005.[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 December 6, 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 Proposed Decision and Order [hereinafter Motion for Default Decision] and a proposed Decision and Order as to Cheryl Morgan by Reason of Admission of Facts [hereinafter Proposed Default Decision]. On December 28, 2005, Respondent requested an extension of time within which "to solve this misunderstanding."[2] On December 29, 2005, Acting Chief Administrative Law Judge Jill S. Clifton [hereinafter the Acting Chief ALJ] granted Respondent an extension of time within which to respond to Complainant's Motion for Default Decision. On January 31, 2006, Respondent filed timely objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision. On February 23, 2006, Complainant filed Complainant's Reply to Respondent's Objections to Motion for Adoption of Proposed Decision and Order.

On March 29, 2006, Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] issued a Decision and Order [hereinafter Initial Decision]: (1) concluding Respondent willfully violated the Regulations and Standards as alleged in the Complaint; (2) ordering Respondent to

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[1]Memorandum to the File dated November 9, 2005, and signed by Tonya Fisher, Legal Technician.

[2]Letter from Respondent to the United States Department of Agriculture, Office of Administrative Law Judges, dated and filed December 28, 2005.

cease and desist from violating the Animal Welfare Act and the Regulations and Standards; (3) assessing Respondent a $16,280 civil penalty; and (4) revoking Respondent's Animal Welfare Act licenses (Animal Welfare Act license number 74-C-0406 and Animal Welfare Act license number 74-B-0530) (Initial Decision at 2-3, 22).

On May 1, 2006, Respondent appealed to the Judicial Officer. On May 26, 2006, Complainant filed Complainant's Response to Respondent's Appeal Petition. On June 6, 2006, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision. On July 6, 2006, I issued a Decision and Order: (1) concluding Respondent willfully violated the Regulations and Standards as alleged in the Complaint; (2) ordering Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; (3) assessing Respondent a $16,280 civil penalty; and (4) revoking Respondent's Animal Welfare Act licenses (Animal Welfare Act license number 74-C-0406 and Animal Welfare Act license number 74-B-0530).[3]

On July 21, 2006, Respondent filed a Petition for Reconsideration. On August 10, 2006, Complainant filed a response to Respondent's Petition for Reconsideration. On August 11, 2006, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Respondent's Petition for Reconsideration.

CONCLUSIONS BY THE JUDICIAL OFFICER ON RECONSIDERATION

Respondent raises two issues in Respondent's Petition for Reconsideration. First, Respondent asserts she did not receive the Complaint on November 9, 2005, and contends she filed a timely response to the Complaint (Respondent's Pet. for Recons. at 1).

The record does not support Respondent's contention that she filed a timely response to the Complaint. The Hearing Clerk, by certified mail, sent Respondent the Complaint, the Rules of Practice, and the Hearing Clerk's service letter dated September 9, 2005. The United States Postal Service marked the envelope containing the Complaint, the Rules of Practice, and the Hearing Clerk's September 9, 2005, service letter "unclaimed" and returned it to the Hearing Clerk. On November 9, 2005, the Hearing Clerk, by ordinary mail, sent the

[3]*In re Cheryl Morgan*, 65 Agric. Dec. ___, slip op. at 6-7, 45 (July 6, 2006).

Complaint, the Rules of Practice, and the Hearing Clerk's September 9, 2005, service letter to Respondent at the same address as the Hearing Clerk used for the September 9, 2005, certified mailing.[4] Section 1.147(c)(1) of the Rules of Practice (7 C.F.R. § 1.147(c)(1)) provides, if the Hearing Clerk sends a document by certified mail and it is returned by the United States Postal Service marked "unclaimed," the document shall be deemed to be received by the party on the date of remailing by ordinary mail to the same address. Thus, Respondent is deemed to have received the Complaint, the Rules of Practice, and the Hearing Clerk's September 9, 2005, service letter on November 9, 2005, and Respondent's time for filing a response to the Complaint is calculated from November 9, 2005, not the date Respondent actually received the Complaint.

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).[5] As held in *Stateside Machinery Co., Ltd. v. Alperin*, 591 F.2d 234, 241-42 (3d Cir. 1979):

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[4]See note 1.

[5]*See also Trimble v. United States Dep't of Agric.*, 87 F. App'x 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 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 known 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).

> 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 (Ohio Ct. App. 1982), the court held:

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

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 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 15.

Respondent's answer was due no later than November 29, 2005. Respondent's first filing in this proceeding is dated and was filed December 28, 2005, 29 days after Respondent's answer was due. On January 31, 2006, 2 months 2 days after Respondent's answer was due, Respondent filed a letter generally denying the allegations of the Complaint. Therefore, in accordance with the Rules of Practice, Respondent is deemed, for purposes of this proceeding, to have admitted the allegations in the Complaint and waived opportunity for hearing.

Second, Respondent contends she received an extension of time within which to file a response to the Complaint and she filed an answer within the time limit extended (Respondent's Pet. for Recons. at 1).

The record does not support Respondent's contention that she received an extension of time within which to file a response to the Complaint. On December 6, 2005, Complainant filed Complainant's Motion for Default Decision and Complainant's Proposed Default Decision. On December 28, 2005, in her first filing in this proceeding, Respondent requested an extension of time within which "to solve this misunderstanding." On December 29, 2005, the Acting Chief ALJ issued an order granting Respondent an extension of time within which to file objections to Complainant's Motion for Default Decision. The Acting Chief ALJ clearly states that the time for filing Respondent's response to the Complaint had expired on November 29, 2005:

> By letter dated December 28, 2005, Respondent Cheryl Morgan requested an extension "to solve this misunderstanding." I hereby grant Respondent Cheryl Morgan an extension through **Tuesday, January 31, 2006**, to file her response to Complainant's Motion for Adoption of Proposed Decision and Order. I grant the extension in my capacity as acting chief

> administrative law judge; the case has not yet been assigned to an administrative law judge.
>
> Respondent Cheryl Morgan failed to file a request for additional time by November 29, 2005, the deadline for filing an answer. It is not clear to me whether Respondent Cheryl Morgan recognizes how far this case has progressed. Respondent Cheryl Morgan is in default, having failed to file an answer by November 29, 2005. I wholeheartedly encourage Respondent Cheryl Morgan to contact the Attorney for APHIS, Bernadette R. Juarez, telephone number 202.720.2633 and FAX 202.690.4299, to try to settle the case.

Order Granting Additional Time to Respond to Complainant's Motion for Adoption of Proposed Decision and Order at 1. On January 31, 2006, 2 months 2 days after Respondent's answer was due, Respondent filed a letter generally denying the allegations of the Complaint. The record does not support Respondent's contention that her January 31, 2006, filing is a timely answer filed within a time limit extended by the Acting Chief ALJ.

For the foregoing reasons and the reasons set forth in *In re Cheryl Morgan*, 65 Agric. Dec. ___ (July 6, 2006), Respondent's Petition for Reconsideration is denied.

Section 1.146(b) of the Rules of Practice (7 C.F.R. § 1.146(b)) provides that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely-filed petition to reconsider. Respondent's Petition for Reconsideration was timely filed and automatically stayed *In re Cheryl Morgan*, 65 Agric. Dec. ___ (July 6, 2006). Therefore, since Respondent's Petition for Reconsideration is denied, I hereby lift the automatic stay, and the Order in *In re Cheryl Morgan*, 65 Agric. Dec. ___ (July 6, 2006), is reinstated; except that the effective date of the Order is the date indicated in the Order in this Order Denying Petition to Reconsider.

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

ORDER

1. Respondent, her agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease

and desist from violating the Animal Welfare Act and the Regulations and Standards.

Paragraph 1 of this Order shall become effective on the day after service of this Order on Respondent.

2. Respondent is assessed a $16,280 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

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. Respondent shall state on the certified check or money order that payment is in reference to AWA Docket No. 05-0032.

3. Respondent's Animal Welfare Act licenses (Animal Welfare Act license number 74-C-0406 and Animal Welfare Act license number 74-B-0530) are revoked.

Paragraph 3 of this Order shall become effective on the 60th day after service of this Order on Respondent.

RIGHT TO JUDICIAL REVIEW

Respondent has the right to seek judicial review of the Order in this Order Denying Petition to Reconsider 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 the Order in this Order Denying Petition to Reconsider. Respondent must seek judicial review within 60 days after entry of the Order in this Order Denying

Petition to Reconsider.[6] The date of entry of the Order in this Order Denying Petition to Reconsider is August 15, 2006.

_____

In re: SUNCOAST PRIMATE SANCTUARY FOUNDATION, INC., A FLORIDA CORPORATION.
AWA Docket No. D-05-0002.
Ruling.
Filed October 27, 2006.

AWA – License pre-issue investigation – Final order pending – Duty to develop record.

Colleen Carroll for Complainant.
Thomas Dander for Respondent.
Decision and Order by Chief Administrative Law Judge Marc R. Hillson.

Ruling and Order Granting Motion for Order to Issue Exhibitor's License

In this ruling, I grant the motion of Petitioner Suncoast Primate Sanctuary Foundation, Inc. to order Respondent Animal Plant and Health Inspection Service (APHIS) to issue Petitioner an exhibitor's license under the Animal Welfare Act.

Background and Previous Rulings

The Animal Welfare Act provides that the "Secretary shall issue licenses to dealers and exhibitors upon application therefore." 7 U.S.C. § 2133. Regulations issued under the Act provide that the Secretary may deny initial license applications for a variety of reasons, including that the applicant has "had a license revoked or whose license is suspended." 9 C.F.R. §2.11(a). In 1989, the regulations were amended so that an "applicant whose license application has been denied may request a hearing in accordance with the applicable rules of practice for the purpose of showing why the application for license should not be denied." 9 CFR § 2.11(b). However, not until May 5, 2005 were the

[6] 7 U.S.C. § 2149(c).

Rules of Practice amended to include license denials as among the proceedings to be heard by USDA's Office of Administrative Law Judges.[1]

This case involves the first hearing request challenging a license denial by APHIS since the May 2005 amendments. Following an August 17, 2004 license denial, Suncoast Primate requested a hearing, and I conducted a hearing in Tampa, Florida on November 15, 2005.

On June 7, 2006 I issued a decision where I remanded this matter to APHIS. In this decision I found, among other things, that the denial of the application for a license was proper because there was not enough information in the record to establish that Suncoast Primate was a different entity than the entity whose license had been revoked several years earlier. I further held that APHIS had a duty to properly and fully investigate and document the basis for denying a license, and that they did not do so in this case. Therefore, rather than issuing a final order affirming APHIS's denial of Suncoast's application, I remanded the matter to APHIS to conduct a full investigation, with specific timelines for each party to perform certain actions.[2]

Respondent did not comply with my directions on remand, but instead, without requesting a stay, waited until June 26, 2006 to file a Motion for Reconsideration. Suncoast filed a response opposing the Motion for Reconsideration, along with a separate motion informing me that Respondent had failed to comply with my June 7 order, and requesting that I issue it an exhibitor's license. While I denied the Motion for Reconsideration on July 28, 2006, I also denied Suncoast Primate's request for immediate license issuance. Instead, I slightly

[1] 70 Fed. Reg. 24935 (May 12, 2005).

[2] "This matter is remanded to APHIS. Within 30 days from the issuance of this decision and order, APHIS shall inform Petitioner exactly what information they require in order to make a full determination as to whether Petitioner is a different entity from Anna Mae Noell d/b/a The Chimp Farm. Within 60 days from the date of this decision and order, Petitioner shall supply all requested information, and the parties may agree to any site visits as necessary. Within 90 days from the date of this decision and order, APHIS shall either grant Petitioner an exhibitor's license or affirm its denial with a sufficient explanation of its criteria for determining that Petitioner is the same entity. I will retain jurisdiction over this matter, and if the license is denied on remand, I will grant expedited consideration to Petitioner's request for supplemental briefing, or hearing, as appropriate."

modified the timelines that I had established in my June 7 order, so that APHIS would have to make its final decision to grant or deny the license, after a full investigation, within 80 days from July 28, 2006 (which would have been not later than October 16, 2006).

On September 7, 2006 Petitioner filed a Motion for Order to Issue License. Petitioner contended that since 90 days had passed since my original order, and since I had stated in that order that APHIS must decide whether to grant or deny Petitioner's request for a license within 90 days, that the license should be granted.[3] Petitioner also filed a "Notice of Precedent" citing another matter where APHIS apparently issued an exhibitor's license to the son of an individual, after the father (who had lost his exhibitor's license) transferred the business to his son.

Respondent filed a Response on September 25, 2006. In the Response, Respondent contended that my June 7 decision fully disposed of this case. Respondent further asserted that an administrative law judge has no authority to order APHIS to issue an exhibitor's license, and that if a judge finds that license denial was improper, the judge cannot determine "whether the agency should or should not issue a license."

In a Supplemental Response filed on September 27, 2006, Respondent stated that a judge has no authority to order the agency to conduct an investigation, i.e., if the judge determines that an agency did not conduct a proper investigation to justify its conclusions, however unsupported these conclusions may be, and however inadequate the conduct of the agency investigation, a judge is powerless to impose a remedy. Further, Respondent stated that a judge has no authority to tell the agency how to conduct an investigation, or to direct an agency to tell an applicant what information would be needed to satisfy the agency that a license is merited.

I directed the Hearing Clerk's office to ask Petitioner whether they wanted to file a reply, since several of the issues raised by Respondent had never been mentioned during the prior course of the proceeding. Petitioner filed a reply on October 3, 2006 disputing the contention that a judge has no authority to issue a license. Petitioner said that without a judge having this type of authority, the hearing process would be "meaningless" and that my interim approval of APHIS's denial of the

[3] Even though the date for APHIS resolution on remand was moved back to October 16, 2006, that date has passed as well.

license was, in essence, a tentative remedy to be revisited upon the completion of a proper investigation. Petitioner argued that under the Administrative Procedure Act a judge does have the authority to order the issuance of a license and, since Respondent had not complied with the terms of my order indicating what information they needed, the appropriate remedy at this point was to direct APHIS to issue an exhibitor's license to Suncoast Primate.

I conclude that (1) my initial decision of June 7, remanding the matter to APHIS for further investigation did not constitute a final order; (2) I have the authority, if not the duty, to ensure that reviewable agency decisions are based on a proper record; (3) I have the authority to order APHIS to issue an exhibitor's license; and (4) immediate issuance of an exhibitor's license to Suncoast Primate is the proper remedy in this matter.

1. My initial decision remanding this matter to APHIS for further investigation did not constitute a final order. While I sustained the APHIS decision not to grant a license, I made it abundantly clear that I viewed this ruling as something other than a final decision in this matter. Indeed, I took great pains to point out the inadequacies of the APHIS investigation, along with the likewise inadequate attempts on behalf of Suncoast Primate to provide information necessary for APHIS to make its decision on the basis of a full and complete investigation. The sentence in my opening paragraph that "I remand the case to APHIS to conduct a complete investigation as to whether Petitioner qualifies as a licensee under the Act" is not consistent with Respondent's contention that the decision was final.

Further, I stated that "The best way to assure a proper decision in this matter is to remand the matter to the Agency with instructions to both parties to assure the development of a more complete record, with a final decision based on that complete record." Decision, p. 12. Similarly, I stated that I was unable to make certain factual findings as to ownership of the land and the animals that would be necessary to making a final decision. Decision, p. 15. Finally, rather than stating that I was issuing a decision that would become final in the absence of an appeal, I stated that "This matter is remanded to APHIS." Decision, p. 16. These statements, combined with the repeated, specific language in my decision that APHIS was required to conduct a complete and proper investigation, are not consistent with Respondent's contentions as to finality.

If there was any doubt in Respondent's mind as to the finality of the decision, it could have raised the issue in the Motion for Reconsideration. Instead, Respondent chose to not comply with the specific deadlines I imposed.

2. I have both the authority and the duty to ensure that reviewable agency decisions are based on a proper record. While the rules do not specifically state that a judge can or cannot issue orders directing that an agency's investigation supporting a license denial be conducted properly and completely, such authority is at least implicit in both the Rules of Practice and in the Administrative Procedure Act.

Given that this is the first case litigated since the adoption of rules which provided administrative adjudication availability for an applicant whose license was denied by APHIS, there is no particular precedent within the agency as to what an administrative law judge, or for that matter, the Judicial Officer acting on behalf of the Secretary, must do when he or she is confronted with an utterly inadequate investigation resulting in the denial of an application. The matter is particularly compelling in this case where APHIS sent out investigators who did not demonstrate that they had a clear idea of what they were looking for, and where there is a dearth of guidelines concerning what an investigator needs to be looking for to establish a basis for granting or denying an application. APHIS has issued inspector guidelines for "Compliance Inspections" under the Act[4], so that a party being inspected or investigated at least has some sort of idea of what the Agency is looking for, and there is guidance on what is necessary to comply with regulations. Here, there is not only nothing in terms of guidance, but the deciding official, Dr. Goldentyer, specifically testified under oath that if she was aware that ownership of the animals had been transferred to a different entity, which Petitioner contended at the hearing, then she might have decided otherwise on the license application. In a first impression case such as this, an administrative law judge must do more than stand by and allow agency decision making that is subject to administrative adjudication stand or fall on the basis of an inadequately developed record. Accordingly, I reject Respondent's contention that I did not have the authority to remand the case to APHIS for a further and more thorough investigation, including the authority to require APHIS

[4] http://www.aphis.usda.gov/lpa/pubs/fsheet_faq_notice/fs_awinspect.html.

to indicate to Petitioner what type of information was necessary for APHIS to make its decision[5].

3. I have the authority to order APHIS to issue an exhibitor's license. Respondent's contends that an administrative law judge has no authority to order APHIS to issue an exhibitor's license to a petitioner in a license denial case. Respondent is basically stating that the hearing provisions for license denials create an utterly meaningless process, unless the judge affirms the government's position that the license should be denied. APHIS asserts that the only authority of an administrative law judge in a license denial case is to "determine whether the agency's denial of an application for a license was proper, not whether the agency should or should not issue a license." Thus, if a judge finds that a license was improperly denied, the applicant is left with nothing more than they would have with a decision that was adverse to them. This would make the judge's opinion, and presumably that of the Judicial Officer, merely advisory-- something inconsistent with the administrative adjudication process. A denied applicant would thus have been duped into participating in costly litigation for which there could be no conceivable benefit, even where a license was improperly denied. I refuse to believe that when the Agency amended the rules to allow appeals of license denials to be handled according to the rules of practice, that it was in fact establishing a procedure that was contemplated as disallowing the only relief that the petitioner would be requesting.

This notion is also inconsistent with the fact that a decision of an administrative law judge, if not appealed to the Judicial Officer, becomes the decision of the Secretary. 7 C.F.R. § 1.142(c). The Administrative Procedure Act at 5 U.S.C. § 557(b) provides that the decision of the initial presiding officer—in this case myself—becomes the decision of the agency. Since the agency has the authority to grant or deny Petitioner's appeal of its license denial, and since the decision of the administrative law judge binds the agency unless it is overturned

[5] APHIS does have a publication, "Licensing and Registration Under the Animal Welfare Act," http://www.aphis.usda.gov/ac/awlicreg/awlicreg.html, which provides general guidance as to who must apply for a license and an explanation of the process, but that document provides no guidance for a situation, such as exists here, for determining whether an applicant has a relationship with a previous violator that would bring 9 CFR §2.11(a)(3) into play.

by the Judicial Officer, it follows that I have the authority to issue a decision directing APHIS to issue Petitioner an exhibitor's license.

My interpretation, and that of Petitioner, is further substantiated by the very language used by the agency in adopting the hearing process for license denials. Thus, the agency wrote that "an applicant whose license application has been denied may request a hearing, and that the license denial shall remain in effect until the final legal decision has been rendered." 69 Fed. Reg. 42094, July 14, 2004; 70 Fed. Reg. 24935, May 12, 2005. (emphasis supplied).[6] This provision plainly means that, as a result of the hearing process, the license denial can be reversed by the administrative law judge and/or the Judicial Officer.

I am also concerned with the amount of time that has elapsed between the institution of this proceeding and Respondent's raising the issue of the administrative law judge's authority to order the requested relief. Petitioner made it clear from the filing of its Request for Hearing on September 7, 2004, that it was seeking a reversal of the APHIS's license denial and requested, as one of its alternative remedies, that the "denial of the license should be reversed." Not until nearly two years elapsed, during which I conducted an oral hearing, and received briefs from both parties, was the notion raised that I could not grant the relief Petitioner requested even if Petitioner prevailed at hearing. While the Rules did not require Respondent to file an answer to the Petition, the provisions of Rule 1.136(d), which require a Respondent in an enforcement case to admit or deny all allegations, including jurisdictional ones, are a strong indication that the Rules contemplate that issues of authority and jurisdiction are not to be raised for the first time many months after the conclusion of the hearing.

4. Immediate issuance of an exhibitor's license to Suncoast Primate is the proper remedy in this matter. I have already explained that I believe I have the clear authority to order APHIS to issue an exhibitor's license if I rule in Suncoast Primate's favor. At this point, APHIS has made it abundantly clear that they do not believe an administrative law judge has such authority, in spite of clear regulatory language to the contrary. It has chosen not to comply with my remand

[6] Dr. Goldentyer used the same language in her letter of August 17, 2004. "The license denial will remain in effect until the final decision is rendered."

order, and has left Petitioner, who has invested much time and effort in this proceeding, with no place to turn.

My original order in this case was an attempt to develop a record, with specific deadlines, so that a final ruling could be issued on Petitioner's license application. Respondent has made it clear that they do not intend to comply with any aspect of my order. Under the terms of my order, Respondent was directed, within 90 days of June 7, 2006, to "either grant Petitioner an exhibitor's license or affirm its denial with a sufficient explanation of its criteria for determining that Petitioner is the same entity [as Anna Noell and The Chimp Farm, Inc.]." Subsequently, Respondent was directed to grant the license or affirm its denial with 80 days of July 28, 2006. Both the initial and amended deadlines have passed, and Respondent has neither granted the license nor explained its criteria for denial. Accordingly, I direct that Respondent immediately issue an exhibitor's license to Petitioner Suncoast Primate Sanctuary Foundation, Inc.

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: MICHELLE SCHROCK.
AWA Docket No. D-06-0004.
Cancellation of Hearing and Order Dismissing Case.
Filed November 13, 2006.

Ken Vail for Complainant.
Respondent Pro se.
Order filed by Administrative Law Judge Jill S. Clifton.

The Petitioner Michelle Shrock represents herself. Respondent, the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture ("APHIS"), is represented by Bernadette R. Juarez, Esq.

Respondent's unopposed Motion to Cancel Hearing and Dismiss Case, filed October 3, 2006, is **GRANTED.** The Hearing, scheduled for **December 12-13, 2006,** in **Springfield, Missouri**, is hereby **CANCELLED**. This case is **DISMISSED.**

Copies of this hearing cancellation and order dismissing case shall be served by the Hearing Clerk upon each of the parties and FAXed to Neal R. Gross & Co., Inc., Court Reporters.

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In re: BRUCE LION, AN INDIVIDUAL; ALFRED LION, JR., AN INDIVIDUAL; DANIEL LION, AN INDIVIDUAL; JEFFREY LION, AN INDIVIDUAL; LARRY LION, AN INDIVIDUAL; ISABEL LION, AN INDIVIDUAL; LION RAISINS, INC., A CALIFORNIA CORPORATION; LION RAISIN COMPANY, A PARTNERSHIP OR UNINCORPORATED ASSOCIATION; AND LION PACKING COMPANY, A PARTNERSHIP OR UNINCORPORATED ASSOCIATION.
I & G Docket No. 03-0001.
Ruling on Charles Pashayan, Jr.'s Motion for Settlement Conference and Motion for Reinstatement as Respondents' Attorney of Record.
Filed November 29, 2006.

I&G – Inspection and grading – Settlement conference – Attorney of record.

The Judicial Officer ruled that, as Charles Pashayan, Jr., was neither a party in the proceeding nor an attorney of record for any party in the proceeding, Charles Pashayan Jr.'s motion for settlement conference must be dismissed. The Judicial Officer also dismissed Charles Pashayan, Jr.'s motion for reinstatement as Respondents' attorney of record stating a party who desires assistance of counsel in an administrative adjudicatory proceeding before the Secretary of Agriculture bears the responsibility of obtaining counsel and the Judicial Officer cannot appoint counsel for a party.

Colleen A. Carroll, for Complainant.
Wesley T. Green, Selma, California, for Bruce Lion; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; Larry Lion; Isabel Lion; and Lion Raisins, Inc.
James A. Moody, Washington, DC, for Bruce Lion; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Lion Raisins, Inc.
Charles Pashayan, Jr., Washington, DC.
Ruling issued by William G. Jenson, Judicial Officer.

Motion for Settlement Conference

On May 11, 2006, Charles Pashayan, Jr., filed a request that Chief Administrative Law Judge Marc R. Hillson direct the parties and their counsel to attend a conference to settle the instant proceeding.[1] The record establishes that Charles Pashayan, Jr., is not a party in the instant proceeding. Further, the record establishes that Charles Pashayan, Jr., is not an attorney of record for any party in the instant proceeding. To the contrary, Charles Pashayan, Jr., attached to his May 11, 2006, filing, a copy of a notice which states he withdrew as Respondents' attorney of record effective December 29, 2005.[2] Moreover, Charles Pashayan, Jr., also includes in his May 11, 2006, filing, a request for reinstatement as Respondents' attorney of record. As Charles Pashayan, Jr., is neither a party in the instant proceeding nor an attorney of record for any party in the instant proceeding, he may not appear in this proceeding, and Charles Pashayan, Jr.'s motion for settlement conference must be dismissed.

Motion for Reinstatement as Respondents' Attorney of Record

On May 11, 2006, Charles Pashayan, Jr., filed a request that Chief Administrative Law Judge Marc R. Hillson reinstate him as

[1]Charles Pashayan, Jr.'s motion for settlement conference is erroneously directed to Chief Administrative Law Judge Marc R. Hillson. 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] provide that the Judicial Officer will rule on any motions filed after an appeal is filed (7 C.F.R. § 1.143(a)). The Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], filed an appeal petition on January 27, 2006. Charles Pashayan, Jr., filed the motion for settlement conference on May 11, 2006. Therefore, the Judicial Officer has jurisdiction to rule on Charles Pashayan, Jr.'s motion for settlement conference.

[2]Respondents' Notice of Withdrawal of Mr. Pashayan as Attorney of Record; and Notice of Designation of Mr. Pashayan as Legal Counsel for Settlement Discussions.

Respondents' attorney of record.[3] A party who desires assistance of counsel in an administrative adjudicatory proceeding before the Secretary of Agriculture bears the responsibility of obtaining counsel.[4] The Judicial Officer cannot appoint counsel for a party. Therefore, I must dismiss Charles Pashayan, Jr.'s motion for reinstatement as Respondents' attorney of record.

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

RULING

1. Charles Pashayan, Jr.'s motion for settlement conference is dismissed.

2. Charles Pashayan, Jr.'s motion for reinstatement as Respondents' attorney of record is dismissed.

In re: BRUCE LION, AN INDIVIDUAL; ALFRED LION, JR., AN INDIVIDUAL; DANIEL LION, AN INDIVIDUAL; JEFFREY LION, AN INDIVIDUAL; LARRY LION, AN INDIVIDUAL; ISABEL LION, AN INDIVIDUAL; LION RAISINS, INC., A CALIFORNIA CORPORATION; LION RAISIN COMPANY, A PARTNERSHIP OR UNINCORPORATED ASSOCIATION; AND LION PACKING COMPANY, A PARTNERSHIP OR UNINCORPORATED ASSOCIATION.
I & G Docket No. 03-0001.
Ruling Dismissing Motion To Dismiss and For Summary Judgment.

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[3] Charles Pashayan, Jr.'s motion for reinstatement as Respondents' attorney of record is erroneously directed to Chief Administrative Law Judge Marc R. Hillson. The Rules of Practice provide that the Judicial Officer will rule on any motions filed after an appeal is filed (7 C.F.R. § 1.143(a)). Complainant filed an appeal petition on January 27, 2006. Charles Pashayan, Jr., filed the motion for reinstatement as Respondents' attorney of record on May 11, 2006. Therefore, the Judicial Officer has jurisdiction to rule on Charles Pashayan, Jr.'s motion for reinstatement as Respondents' attorney of record.

[4] *In re Steven Bourk* (Decision as to Steven Bourk and Carmella Bourk), 61 Agric. Dec. 25, 50 (2002); *In re Steven M. Samek* (Ruling Denying Steven M. Samek's Motion for Assistance With Appeal), 57 Agric. Dec. 1276, 1278 (1998); *In re Garland E. Samuel*, 57 Agric. Dec. 905, 911 (1998).

Filed December 5, 2006.

I&G – Inspection and grading – Motion to dismiss on pleading.

The Judicial Officer concluded Respondents' May 11, 2006, motion to dismiss and for summary judgment was a motion to dismiss on the pleading and, under the Rules of Practice (7 C.F.R. § 1.143(b)(1)), could not be entertained.

Colleen A. Carroll, for Complainant.
Wesley T. Green, Selma, California, for Bruce Lion; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; Larry Lion; Isabel Lion; and Lion Raisins, Inc.
James A. Moody, Washington, DC, for Bruce Lion; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Lion Raisins, Inc.
Ruling issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

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]. Complainant alleged that on August 26, 1997, Bruce Lion; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; Lion Raisins, Inc.; Lion Raisin Company; and Lion Packing Company violated the Agricultural Marketing Act and the Regulations. Complainant requested debarment of Bruce Lion; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; Lion Raisins, Inc.; Lion Raisin Company; and Lion Packing Company from inspection and grading services under the

Agricultural Marketing Act in accordance with section 52.54(a) of the Regulations (7 C.F.R. § 52.54(a)).[1]

On December 20, 2002, Bruce Lion; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; Lion Raisins, Inc.; Lion Raisin Company; and Lion Packing Company filed a motion to dismiss the Complaint on the ground that the Complaint alleged violations that occurred beyond the 5-year statute of limitations set forth in 28 U.S.C. § 2462.[2] On February 7, 2003, Complainant filed "Complainant's Response To Respondents' Motion To Dismiss Complaint" arguing that, under section 1.143(b)(1) of the Rules of Practice (7 C.F.R. § 1.143(b)(1)), the December 20, 2002, motion to dismiss the Complaint cannot be entertained.

On October 28, 2003, Bruce Lion; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; Lion Raisins, Inc.; Lion Raisin Company; and Lion Packing Company filed a motion to dismiss the Complaint on the ground that the Agricultural Marketing Act does not authorize the Secretary of Agriculture to demand debarment.[3] On November 13, 2003, Complainant filed "Complainant's Response To 'Respondent's [sic] Motion To Dismiss'" arguing that, under section 1.143(b)(1) of the Rules of Practice (7 C.F.R. § 1.143(b)(1)), the October 28, 2003, motion to dismiss the Complaint cannot be entertained.

On July 12, 2005, Complainant filed an Amended Complaint alleging that on August 26, 1997, Bruce Lion; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; Larry Lion; Isabel Lion; Lion Raisins, Inc.; Lion Raisin Company; and Lion Packing Company [hereinafter Respondents] violated the Agricultural Marketing Act and the Regulations. Complainant requests debarment of Respondents from inspection and grading services under the Agricultural Marketing Act in accordance

[1]Compl. ¶¶ 8-11.

[2]Respondents' Motion To Dismiss at 1.

[3]Respondent's [sic] Motion To Dismiss at 1, 5-14.

with section 52.54(a) of the Regulations (7 C.F.R. § 52.54(a)).[4] On August 10, 2005, Bruce Lion; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; Larry Lion; Isabel Lion; and Lion Raisins, Inc., filed "Respondents' Answer to the USDA's Amended Complaint."[5]

On December 9, 2005, Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] issued a Memorandum Opinion and Order [hereinafter Initial Decision] granting the December 20, 2002, motion to dismiss the Complaint[6] on the ground that the Complaint alleged violations that occurred beyond the 5-year statute of limitations set forth in 28 U.S.C. § 2462.[7] On January 27, 2006, Complainant filed an appeal petition seeking an order vacating the ALJ's Initial Decision. On March 20, 2006, Bruce Lion; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; Larry Lion; Isabel Lion; and Lion Raisins, Inc., filed "Respondents' Reply To Complainant's Appeal Petition." On April 6, 2006, Complainant filed "Complainant's Motion to Strike or Not to Consider 'Respondents' Reply to Complainant's Appeal Petition,'" and on April 26, 2006, Bruce Lion; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; Larry Lion; Isabel Lion; and Lion Raisins, Inc., filed "Respondents' Reply to 'Complainant's Motion to Strike or Not to Consider 'Respondents' Reply to Complainant's Appeal Petition.'"

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[4]Amended Compl. ¶¶ 11-14.

[5]Lion Raisin Company and Lion Packing Company did not file an answer to the Amended Complaint; however, Bruce Lion; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; Larry Lion; Isabel Lion; and Lion Raisins, Inc., assert Lion Raisin Company and Lion Packing Company have no formal existence (Respondents' Answer to the USDA's Amended Complaint ¶¶ 2-3).

[6]The ALJ states the proceeding was before him for resolution of "pending Motions" (Initial Decision at 1). Based on the record before me, I infer the ALJ's reference to "pending Motions" is to the December 20, 2002, and October 28, 2003, motions to dismiss the Complaint. While the ALJ granted the December 20, 2002, motion to dismiss the Complaint, I cannot determine the ALJ's disposition of the October 28, 2003, motion to dismiss the Complaint.

[7]Initial Decision at 4-5.

On May 11, 2006, Bruce Lion; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; Larry Lion; Isabel Lion; and Lion Raisins, Inc., filed "Respondents' Motion To Dismiss for Lack of Subject Matter Jurisdiction and for Summary Judgment Limiting Scope of Relief and for Failure to Afford Pre-litigation Warning and Opportunity to Demonstrate or Achieve Compliance" [hereinafter Motion To Dismiss and For Summary Judgment] and a request for oral argument. On May 31, 2006, Complainant filed "Complainant's Response To Third Motion To Dismiss." On June 5, 2006, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and a ruling on Bruce Lion; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; Larry Lion; Isabel Lion; and Lion Raisins, Inc.'s May 11, 2006, Motion To Dismiss and For Summary Judgment.

CONCLUSIONS BY THE JUDICIAL OFFICER

Respondents Who Filed the Motion To Dismiss and For Summary Judgment

Complainant asserts the Motion To Dismiss and For Summary Judgment suggests that all nine Respondents filed the Motion To Dismiss and For Summary Judgment and contends only seven of the nine Respondents filed the Motion To Dismiss and For Summary Judgment.[8]

I agree with Complainant. Wesley T. Green and James A. Moody signed the Motion To Dismiss and For Summary Judgment.[9] The record reveals that Wesley T. Green is the attorney of record for seven of the nine Respondents, Bruce Lion; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; Larry Lion; Isabel Lion; and Lion Raisins, Inc.,[10] and James A. Moody is the attorney of record for five of the nine Respondents, Bruce Lion; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Lion Raisins,

[8]Complainant's Response To Third Motion To Dismiss at 3-4.

[9]Motion To Dismiss and For Summary Judgment at 39-40.

[10]Respondents' Answer to the USDA's Amended Complaint at 14.

Inc.[11] Lion Raisin Company and Lion Packing Company have been pro se in the instant proceeding since December 29, 2005,[12] and neither Lion Raisin Company nor Lion Packing Company is a signatory to the Motion To Dismiss and For Summary Judgment.

The Request For Oral Argument

Bruce Lion; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; Larry Lion; Isabel Lion; and Lion Raisins, Inc., request oral argument.[13] Section 1.145(d) of the Rules of Practice provides the time within which a party may request opportunity for oral argument before the Judicial Officer, as follows:

> **§ 1.145 Appeal to Judicial Officer.**
>
> . . . .
>
> (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.

7 C.F.R. § 1.145(d).

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[11]Notice of Entry of Appearance filed December 1, 2005.

[12]Respondents' Notice of Withdrawal of Mr. Pashayan as Attorney of Record; and Notice of Designation of Mr. Pashayan as Legal Counsel for Settlement Discussions filed January 24, 2006.

[13]Motion To Dismiss and For Summary Judgment at 39.

On December 9, 2005, the ALJ issued an Initial Decision. On January 27, 2006, Complainant filed an appeal petition seeking an order vacating the ALJ's Initial Decision. On February 9, 2006, the Hearing Clerk served Bruce Lion; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; Larry Lion; Isabel Lion; and Lion Raisins, Inc., with Complainant's appeal petition.[14] Section 1.145(b) of the Rules of Practice (7 C.F.R. § 1.145(b)) provides that any response to an appeal petition must be filed with the Hearing Clerk within 20 days after service of the appeal petition; therefore, Bruce Lion; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; Larry Lion; Isabel Lion; and Lion Raisins, Inc.'s response to Complainant's appeal petition was due no later than March 1, 2006. Bruce Lion; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; Larry Lion; Isabel Lion; and Lion Raisins, Inc., requested that I extend to March 17, 2006, the time for filing a response to Complainant's appeal petition.[15] On March 2, 2006, I granted Bruce Lion; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; Larry Lion; Isabel Lion; and Lion Raisins, Inc.'s request.[16] Thus, Bruce Lion; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; Larry Lion; Isabel Lion; and Lion Raisins, Inc.'s time for filing a response to Complainant's appeal petition and requesting oral argument before the Judicial Officer expired March 17, 2006, and Bruce Lion; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; Larry Lion; Isabel Lion; and Lion Raisins, Inc.'s May 11, 2006, request for oral argument comes far too late to be considered.

The Motion To Dismiss and For Summary Judgment

Bruce Lion; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; Larry Lion; Isabel Lion; and Lion Raisins, Inc.'s May 11, 2006, Motion To Dismiss and For Summary Judgment cannot be entertained. Section 1.143(b)(1)

[14]United States Postal Service Domestic Return Receipt for Article Number 7003 1010 0003 0642 0304.

[15]Respondents' Motion Request for Extension of Time to File Reply to Appeal Petition filed March 1, 2006.

[16]Informal Order Extending Time for Filing Respondents' Response to Complainant's Appeal Petition filed March 2, 2006.

of the Rules of Practice (7 C.F.R. § 1.143(b)(1)) provides that any motion will be entertained other than a motion to dismiss on the pleading. The Rules of Practice do not define the term "motion to dismiss on the pleading." Respondents' Motion To Dismiss and For Summary Judgment clearly seeks dismissal of this proceeding and the basis for Respondents' motion is the purported failure of Complainant to allege facts in its pleading which give the Secretary of Agriculture jurisdiction to withdraw inspection and grading services under the Agricultural Marketing Act.

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

RULING

Bruce Lion; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; Larry Lion; Isabel Lion; and Lion Raisins, Inc.'s May 11, 2006, Motion To Dismiss and For Summary Judgment is dismissed.

In re: BRUCE LION, AN INDIVIDUAL; ALFRED LION, JR., AN INDIVIDUAL; DANIEL LION, AN INDIVIDUAL; JEFFREY LION, AN INDIVIDUAL; LARRY LION, AN INDIVIDUAL; ISABEL LION, AN INDIVIDUAL; LION RAISINS, INC., A CALIFORNIA CORPORATION; LION RAISIN COMPANY, A PARTNERSHIP OR UNINCORPORATED ASSOCIATION; AND LION PACKING COMPANY, A PARTNERSHIP OR UNINCORPORATED ASSOCIATION.
I & G Docket No. 03-0001.
Ruling Granting Complainant's Motion Not To Consider Reply to Complainant's Appeal Petition; and Order Vacating the Administrative Law Judge's Initial Decision and Remanding Proceeding to the Administrative Law Judge.
Filed December 5, 2006.

I&G – Inspection and grading – Motion to dismiss on pleading – Effective date of filing.

The Judicial Officer vacated Administrative Law Judge Peter M. Davenport's (ALJ) Initial Decision and remanded the proceeding to the ALJ for further proceedings in accordance with the Rules of Practice. The Judicial Officer concluded Respondents'

December 20, 2002, and October 28, 2003, motions to dismiss the Complaint were rendered moot by Complainant's filing the Amended Complaint. The Judicial Officer stated, even if the December 20, 2002, and October 28, 2003, motions to dismiss had not been rendered moot, they were motions to dismiss on the pleading and, under the Rules of Practice (7 C.F.R. § 1.143(b)(1)), could not be entertained. The Judicial Officer further found Respondents' reply to Complainant's appeal petition was late-filed and ruled Respondents' reply could not be considered.

Colleen A. Carroll, for Complainant.
Wesley T. Green, Selma, California, for Bruce Lion; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; Larry Lion; Isabel Lion; and Lion Raisins, Inc.
James A. Moody, Washington, DC, for Bruce Lion; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Lion Raisins, Inc.
Ruling and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

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]. Complainant alleged that on August 26, 1997, Bruce Lion; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; Lion Raisins, Inc.; Lion Raisin Company; and Lion Packing Company violated the Agricultural Marketing Act and the Regulations. Complainant requested debarment of Bruce Lion; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; Lion Raisins, Inc.; Lion Raisin Company; and Lion Packing Company from inspection and grading services under the Agricultural Marketing Act in accordance with section 52.54(a) of the Regulations (7 C.F.R. § 52.54(a)).[1]

[1]Compl. ¶¶ 8-11.

On December 20, 2002, Bruce Lion; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; Lion Raisins, Inc.; Lion Raisin Company; and Lion Packing Company filed a motion to dismiss the Complaint on the ground that the Complaint alleged violations that occurred beyond the 5-year statute of limitations set forth in 28 U.S.C. § 2462.[2] On February 7, 2003, Complainant filed "Complainant's Response to Respondents' Motion to Dismiss Complaint" arguing that, under section 1.143(b)(1) of the Rules of Practice (7 C.F.R. § 1.143(b)(1)), the December 20, 2002, motion to dismiss the Complaint cannot be entertained.

On October 28, 2003, Bruce Lion; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; Lion Raisins, Inc.; Lion Raisin Company; and Lion Packing Company filed a motion to dismiss the Complaint on the ground that the Agricultural Marketing Act does not authorize the Secretary of Agriculture to demand debarment.[3] On November 13, 2003, Complainant filed "Complainant's Response to 'Respondent's [sic] Motion to Dismiss'" arguing that, under section 1.143(b)(1) of the Rules of Practice (7 C.F.R. § 1.143(b)(1)), the October 28, 2003, motion to dismiss the Complaint cannot be entertained.

On July 12, 2005, Complainant filed an Amended Complaint alleging that on August 26, 1997, Bruce Lion; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; Larry Lion; Isabel Lion; Lion Raisins, Inc.; Lion Raisin Company; and Lion Packing Company [hereinafter Respondents] violated the Agricultural Marketing Act and the Regulations. Complainant requests debarment of Respondents from inspection and grading services under the Agricultural Marketing Act in accordance with section 52.54(a) of the Regulations (7 C.F.R. § 52.54(a)).[4] On August 10, 2005, Bruce Lion; Alfred Lion, Jr.; Daniel Lion; Jeffrey

[2]Respondents' Motion to Dismiss at 1.

[3]Respondent's [sic] Motion to Dismiss at 1, 5-14.

[4]Amended Compl. ¶¶ 11-14.

Lion; Larry Lion; Isabel Lion; and Lion Raisins, Inc., filed "Respondents' Answer to the USDA's Amended Complaint."[5]

On December 9, 2005, Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] issued a Memorandum Opinion and Order [hereinafter Initial Decision] granting the December 20, 2002, motion to dismiss the Complaint[6] on the ground that the Complaint alleged violations that occurred beyond the 5-year statute of limitations set forth in 28 U.S.C. § 2462.[7] On January 27, 2006, Complainant filed an appeal petition seeking an order vacating the ALJ's Initial Decision. On March 20, 2006, Bruce Lion; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; Larry Lion; Isabel Lion; and Lion Raisins, Inc., filed "Respondents' Reply to Complainant's Appeal Petition." On April 6, 2006, Complainant filed "Complainant's Motion to Strike or Not to Consider 'Respondents' Reply to Complainant's Appeal Petition,'" and on April 26, 2006, Bruce Lion; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; Larry Lion; Isabel Lion; and Lion Raisins, Inc., filed "Respondents' Reply to 'Complainant's Motion to Strike or Not to Consider 'Respondents' Reply to Complainant's Appeal Petition.'" On May 1, 2006, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

THE DECEMBER 20, 2002, AND OCTOBER 28, 2003, MOTIONS TO DISMISS

[5]Lion Raisin Company and Lion Packing Company did not file an answer to the Amended Complaint; however, Bruce Lion; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; Larry Lion; Isabel Lion; and Lion Raisins, Inc., assert Lion Raisin Company and Lion Packing Company have no formal existence (Respondents' Answer to the USDA's Amended Complaint ¶¶ 2-3).

[6]The ALJ states the proceeding was before him for resolution of "pending Motions" (Initial Decision at 1). Based on the record before me, I infer the ALJ's reference to "pending Motions" is to the December 20, 2002, and October 28, 2003, motions to dismiss the Complaint. While the ALJ granted the December 20, 2002, motion to dismiss the Complaint, I cannot determine the ALJ's disposition of the October 28, 2003, motion to dismiss the Complaint.

[7]Initial Decision at 4-5.

The operative pleading in this proceeding is the Amended Complaint filed by Complainant on July 12, 2005. The December 20, 2002, and October 28, 2003, motions to dismiss, which concern the Complaint, were rendered moot by Complainant's filing the Amended Complaint, as the Complaint was no longer at issue.[8]

Moreover, even if I found that the December 20, 2002, and October 28, 2003, motions to dismiss had not been rendered moot by Complainant's filing the Amended Complaint, I would conclude the ALJ erred in entertaining the motions to dismiss. Section 1.143(b)(1) of the Rules of Practice (7 C.F.R. § 1.143(b)(1)) provides that any motion will be entertained other than a motion to dismiss on the pleading. The December 20, 2002, and October 28, 2003, motions to dismiss are motions to dismiss on the pleading; therefore, the ALJ should not have entertained either the December 20, 2002, motion to dismiss or the October 28, 2003, motion to dismiss.

COMPLAINANT'S MOTION TO STRIKE OR NOT TO CONSIDER RESPONDENTS' REPLY TO COMPLAINANT'S APPEAL PETITION

Complainant asserts Bruce Lion; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; Larry Lion; Isabel Lion; and Lion Raisins, Inc., failed to file timely "Respondents' Reply to Complainant's Appeal Petition"; therefore, "Respondents' Reply to Complainant's Appeal Petition" must be struck or not considered.[9]

On February 9, 2006, the Hearing Clerk served Bruce Lion; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; Larry Lion; Isabel Lion; and Lion

[8] *See In re Marjorie Walker*, 65 Agric. Dec. ___, slip op. at 46-48 (Aug. 10, 2006) (stating the operative pleading is the amended complaint, not the complaint, and the respondent's response to the complaint does not operate as a response to the amended complaint); *In re Derwood Stewart* (Decision as to Derwood Stewart), 60 Agric. Dec. 570, 572 n.1 (2001) (stating the operative pleading is the amended complaint and the allegations in the complaint are no longer at issue), *aff'd*, 64 F. App'x 941 (6th Cir. 2003).

[9] Complainant's Motion to Strike or Not to Consider "Respondents' Reply to Complainant's Appeal Petition."

Raisins, Inc., with Complainant's Appeal Petition.[10] Section 1.145(b) of the Rules of Practice (7 C.F.R. § 1.145(b)) provides that any response to an appeal petition must be filed with the Hearing Clerk within 20 days after service of the appeal petition; therefore, Bruce Lion; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; Larry Lion; Isabel Lion; and Lion Raisins, Inc.'s response to Complainant's Appeal Petition was due no later than March 1, 2006.[11]

Bruce Lion; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; Larry Lion; Isabel Lion; and Lion Raisins, Inc., requested that I extend to March 17, 2006, the time for filing a response to Complainant's Appeal Petition.[12] On March 2, 2006, I granted Bruce Lion; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; Larry Lion; Isabel Lion; and Lion Raisins, Inc.'s request.[13] Bruce Lion; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; Larry Lion; Isabel Lion; and Lion Raisins, Inc., assert they timely filed "Respondents' Reply to Complainant's Appeal Petition" on March 17, 2006, and provide as evidence of their assertion a transaction report indicating that they transmitted by facsimile "Respondents' Reply to Complainant's Appeal Petition" beginning on March 17, 2006, at 5:00 p.m., and ending on March 17, 2006, at 5:06 p.m.

Section 1.147(g) of the Rules of Practice provides the effective date of filing a document is the date the document reaches the Hearing Clerk, as follows:

---

[10]United States Postal Service Domestic Return Receipt for Article Number 7003 1010 0003 0642 0304.

[11]The Hearing Clerk served Lion Packing Company on March 14, 2006 (United States Postal Service Domestic Return Receipt for Article Number 7003 1010 0003 0642 1318), and Lion Raisin Company on March 21, 2006 (United States Postal Service Domestic Return Receipt for Article Number 7003 1010 0003 0642 0038). Neither Lion Packing Company nor Lion Raisin Company filed a response to Complainant's Appeal Petition.

[12]Respondents' Motion Request for Extension of Time to File Reply to Appeal Petition filed March 1, 2006.

[13]Informal Order Extending Time For Filing Respondents' Response To Complainant's Appeal Petition filed March 2, 2006.

§ 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).

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.[14]

However, the Rules of Practice do not set forth the hours during which the Office of the Hearing Clerk is open to receive documents. Moreover, I find no indication in the record that the Hearing Clerk provided Bruce Lion; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; Larry Lion; Isabel Lion; and Lion Raisins, Inc., with the Acting Chief Administrative Law Judge's January 28, 1999, memorandum.

[14] *See also In re Derwood Stewart* (Decision as to Derwood Stewart), 60 Agric. Dec. 570, 607 (2001), *aff'd*, 64 F. App'x 941 (6th Cir. 2003).

Nonetheless, the most reliable evidence of the date a document reaches the Hearing Clerk is the date and time stamped by the Office of the Hearing Clerk on that document. The Office of the Hearing Clerk stamped "Respondents' Reply to Complainant's Appeal Petition" as having been received March 20, 2006. Therefore, I conclude "Respondents' Reply to Complainant's Appeal Petition" was late-filed, and I have not considered "Respondents' Reply to Complainant's Appeal Petition."

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

ORDER

1. The ALJ's December 9, 2005, Initial Decision is vacated.
2. This proceeding is remanded to the ALJ for further proceedings in accordance with the Rules of Practice.

In re: MAURICIO A. RAMIREZ.
P.Q. Docket No. 00-0015.
Order Dismissing Complaint.
Filed August 16, 2006.

Rick Herndon for Complainant.
Respondent Pro se.
Order filed by Administrative Law Judge Jill S. Clifton

Complainant's Motion to Dismiss is granted. It is ordered that the complaint be dismissed without prejudice.

In re: ELVIRA ROMEO.
P.Q. Docket No. 01-0009.
Order Dismissing Complaint
Filed August 16, 2006.

Rick D. Herndon for Complainant.
Respondent Pro se
Order filed by Administrative Law Judge Marc H. Hillson

Complainant's Motion to Dismiss is granted. It is ordered that the complaint be dismissed without prejudice.

_____

GENERAL

DEFAULT DECISION

In re: LOUIS JOHN SOUZA AND BETTY SOUZA.
AWA Docket No. 06-0007.
Default Decision.
Filed July 20, 2006.

AWA – Default.

Sharleen Deskins for Complainant
Respondent Pro se.
Default Decision by Administrative Law Judge Jill S. Clifton.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF DEFAULT

Preliminary Statement

This proceeding was instituted under the Animal Welfare Act ("Act"), as amended (7 U.S.C. § 2131 *et seq*.), by a Complaint filed by the Administrator, Animal and Plant Health Inspection Service ("APHIS"), United States Department of Agriculture, alleging that 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 the Respondents by certified mail on January 25, 2006. 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 the Respondents' failure to file an

Answer pursuant to the Rules of Practice, and 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. Louis John Souza and Betty Souza, hereinafter referred to as Respondents, are individuals whose address is 172 Cave Creek Road, Phillipsburg, Missouri 65722.

B. Respondent Louis John Souza is also known as Lew. Louis John Souza and Betty Souza own and operate Sycamore Lane Kennel.

C. The Respondents, at all times material herein, were operating as a dealer as defined in the Act and the regulations without having a license issued pursuant to the Act.

D. In *In re Louis John Souza*, AWA Dkt. No. 99-0037, 59 Agric. Dec. 276, 281 (1999), Respondent Louis John Souza was disqualified from applying for a license until the civil penalty of $21,000 assessed in the decision was paid in full. Respondent Louis John Souza has not paid the civil penalty assessed in *In re Louis John Souza,* AWA Dkt. No. 99-0037 so the period of disqualification has continued.

E. A default judgment was entered against Respondent Louis Souza for failing to pay the $21,000 civil penalty on November 14, 2001 by the United States District Court for the Western District of Missouri. *United States of America v. Louis Souza,* Case No. 01-3360-CV-S-4-ECF (D. Missouri, Nov. 14, 2001). Attachment 1.

II

Since at least March 12, 2000 and continuing to the present, the Respondents operated as dealers as defined in the Act and regulations without being licensed, 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 sold or offered for sale, in commerce, at least 404 dogs for

resale as pets. The sale or offer for sale of each animal constitutes a separate violation of the Act and the regulations issued pursuant to the Act.

Order

1. The provisions of this Order shall be effective on the first day after this Decision and Order becomes final (see page 4).

2. Respondents Louis John Souza and Betty Souza, and their agents, are permanently disqualified from applying for, obtaining, receiving, holding, and using any license under the Animal Welfare Act, personally or through any corporate or other device.

3. Respondents Louis John Souza and Betty Souza, and their 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.

4. Respondents Louis John Souza and Betty Souza are jointly and severally assessed a **civil penalty of $50,000**, which they shall pay within 60 days after this decision becomes final, as follows.

The civil penalty shall be paid by certified check(s), cashier's check(s), or money order(s), made payable to the order of "**Treasurer of the United States**". Respondents shall reference **AWA Docket No. 06-0007** on their certified check(s), cashier's check(s), or money order(s).

Payments of the civil penalty shall be sent by a commercial delivery service, such as FedEx or UPS, to, and received by, Sharlene Deskins, at the following address:

United States Department of Agriculture
Office of the General Counsel, Marketing Division
Attn.: Sharlene Deskins, Esq.
Room 2343 South Building, Stop 1417
1400 Independence Avenue SW
Washington, D.C. 20250-1417.

Finality

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 with the Hearing Clerk 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.

* * *

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

———————

Consent Decisions

ANIMAL QUARANTINE ACT

Hector Eloy Rodriguez, AQ Docket No. 06-0008, 7/5/06.

Jesus A. Lopez, AQ Docket No. 06-0009, 9/06/06.

ANIMAL WELFARE ACT

Karen C. Leichty d/b/a Puppy Luv Kennel, AWA-Docket No. 06-0003, 7/31/06.

Deborah Ann Milette d/b/a Telling Fields Exotic Educational Facility, AWA Docket No 05-0029, 8/02/06.

Joseph M. Estes, Safari Joe's Wildlife Ranch, Inc., Safari Joe's Zoological Park, AWA Docket No. 05-0027, 8/14/06.

Joseph M. Estes, Rock Creek Exotic Drive-Thru, Safari Joe's Wildlife Ranch, Inc., AWA Docket No 04-B032, 8/14/06.

Hans Jakob Lueck, Ginger Gail Luke, Wild Eyes Foundation, AWA Docket No.06-0011, 9/07/06.

Lonnie Faddis, AWA Docket 06-0020, 10/05/06.

David Martin Piccirillo AWA Docket No. 06-0016 10/31/06.

Lost Creek Animal Sanctuary Foundation, Inc., Doug Billingsley, Keith Billingsley, Lost Creek Animal Sanctuary and Animal Entertainment Productions , Docket No. AWA 06-0002, 11/03/06.

Pine Springs Pets, Inc., Thomas Cannon, AWA Docket No 06-0001, 11/08/06.

Voyd Otis Cannon, Sr., Voyd Otis Cannon, Jr., Dae A. Cannon, AWA Docket No 06-0001, 11/08/06.

FEDERAL MEAT INSPECTION ACT

Crescent Slaughterhouse Corporation, Nasser Saad, Nazem Saad,. FMIA Docket No. 06-0006, 7/06/06.

Advanced Frozen Foods, Inc. Roy Tuccillo and Adrienne Pacifico, FMIA Docket No 06-0007 and PPIA Docket 06-0004, 8/01/06.

Crescent Custom Slaughtering, Inc. a/k/a Crescent Customs Meats, FMIA Docket No. 04-0005 & PPIA Docket No. 04-00006, 8/23/06.

Trinh Company, FMIA Docket No 05-0005 & PPIA Docket No 05-0006, 9/05/06.

Coo Coo Rico Off Hook and Javid F. Naghami, FMIA Docket No 07-0027 & PPIA Docket No 07-0027, 11/28/06.

Brandy meats, Inc. and Robert W. Baldhoff, FMIA Docket No 06-0008 and PPIA Docket No 06-0005, 12/29/06.

HORSE PROTECTION ACT

Alice Haun, HPA Docket No 06-0005, 8/09/06

Steve Woody, HPA Docket No. 05-0002, 8/09/06.

Sharon Lessard, HPA Docket No. 05-0002, 8/09/06.

PLANT QUARANTINE ACT

Piggly Wiggly Alabama Distributing Co., Inc PQ Docket No. 07-0010, 11/16/06.

AGRICULTURE DECISIONS

Volume 65

July -December 2006
Part Two (P & S)
Pages 1231 - 1273

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 57 (circa 1998) 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 56 (circa 1997) 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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LIST OF DECISIONS REPORTED

JULY - DECEMBER 2006

PACKERS AND STOCKYARDS ACT

DEFAULT DECISIONS

MISCELLANEOUS ORDER

DEFAULT DECISIONS

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PACKERS AND STOCKYARDS ACT

DEPARTMENTAL DECISIONS

In re: DON LATHAM, AND POPLAR PLAINS LIVESTOCK, INC.
P & S Docket No. D-06-0011.
Decision and Order by Reason of Admissions
Filed August 24, 2006.

PS – Admission – Willful – Insufficient funds – Payment, late.

Ruben Rudolph for Complainant.
Glennis Harris, Jr. for Respondent.
Decision and Order by Administrative Law Judge Jill S. Clifton.

Decision Summary

[1] This case can be decided based on the admissions within the Answer, without a hearing. The Respondents, during 2002, did violate the Packers and Stockyards Act, 1921, 7 U.S.C. § 181 *et seq*. (frequently herein, "the Act"). The Respondents' violations were "willful": violations of the Act require no evil intent, no intentional wrongdoing, but merely the intent to act, such as intentionally writing checks to pay for livestock - - without sufficient funds in the account to pay such checks; or intentionally making livestock purchases - - that were paid late, or never paid at all. *In re Marysville Enterprises, Inc., d/b/a Marysville Hog Buying Co., James L. Breeding, and Byron E. Thoreson,* 59 Agric. Dec. 299 (2000).

Parties and Counsel

[2] The Complainant is the Administrator, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture (frequently herein "GIPSA" or "the Complainant").

[3] Rubén D. Rudolph Jr., Esq., with the Office of the General Counsel, Trade Practices Division, United States Department of Agriculture, Washington, D.C. 20250, represents the Complainant (GIPSA).

[4] The two Respondents are Respondent Don Latham (frequently herein "Respondent Latham" or "the individual Respondent"), and Respondent Poplar Plains Livestock, Inc., a Kentucky corporation (frequently herein "Respondent Poplar" or "the corporate Respondent"). "The Respondents" refers to both Respondents (the individual Respondent and the corporate Respondent), collectively.

[5] Glennis R. Harris, Jr., Esq., 244-A East Water Street, Flemingsburg, Kentucky 41041, represents both Respondents.

Procedural History

[6] The Complaint, filed on February 22, 2006, alleged that the Respondents wilfully violated the Packers and Stockyards Act, 1921, 7 U.S.C. § 181 *et seq*. The Complaint alleged that Respondent Poplar, under the management, direction and control of Respondent Latham, failed to pay, when due, the full purchase prices of livestock, totaling $188,544.76. The Complaint alleged that, of the $188,544.76 Respondents failed to pay when due, $132,293.84 remained unpaid as of the date of the issuance of the Complaint.

[7] The Complaint alleged that Respondent Poplar, under the management, direction and control of Respondent Latham, issued two checks in payment for livestock purchases which were returned unpaid by the bank upon which they were drawn, because Respondent Poplar did not have and maintain sufficient funds on deposit and available in the account upon which the checks were drawn to pay such checks when presented.

[8] The Respondents filed an Answer and requested an oral hearing and the opportunity to review and present evidence as well as provide testimony and cross-examine witnesses.

[9] The Answer, filed on March 20, 2006 (via facsimile initially), asserted that delayed payments and non-payments to Respondent Poplar by subsequent purchasers of livestock from Respondent Poplar were factors in Respondent Poplar's failures to pay as required. The Answer denied the amount of paid or unpaid balance, the Respondents being without sufficient knowledge to express an opinion. The Answer admitted the two returned unpaid checks and asserted that the checks were thereafter paid.

[10] The Answer vigorously opposes the *alter ego* allegations. Based merely on the admissions in the Answer, I cannot determine that issue. Whether Respondent Poplar is the *alter ego* of Respondent Latham (or *vice versa*) need not be determined for purposes of this Decision.

[11] The Respondents did not file a response to GIPSA's Motion for Decision without Hearing by Reason of Admissions, with proposed Decision and Order, filed April 21, 2006.

Findings of Fact

[12] Poplar Plains Livestock, Inc., is a corporation organized and existing under the laws of the Commonwealth of Kentucky, with a mailing address of Rte 1, P.O. Box 66, Flemingsburg, Kentucky 41041.

[13] Respondent Poplar, the corporate Respondent, was, at all times material herein, engaged in the business of buying and selling livestock in commerce for its own account and as a market agency to buy livestock in commerce on a commission basis, and registered with the Secretary of Agriculture as a dealer to buy and sell livestock and as a market agency to buy livestock in commerce on a commission basis.

[14] Mr. Don Latham is an individual whose business mailing address is Rte 1, P.O. Box 66, Flemingsburg, Kentucky 41041. Respondent Latham, the individual Respondent, is and at all times material herein was president, manager, and one-hundred percent shareholder of the

corporate Respondent, and responsible for the day-to-day management, direction, and control of the corporate Respondent.

[15] The corporate Respondent, under the management, direction and control of the individual Respondent, in 2002 issued two checks in payment for livestock purchases which were returned unpaid by the bank upon which they were drawn. These checks were returned because the corporate Respondent did not have and maintain sufficient funds on deposit and available in the account upon which the checks were drawn to pay such checks when presented.

[16] The corporate Respondent, under the management, direction and control of the individual Respondent, in 2002 failed to pay, when due, the full purchase price of livestock, in an amount that clearly was more than *de minimis*.

[17] By virtue of his management, direction and control of the corporate Respondent, the individual Respondent in 2002 acted as a dealer to buy and sell livestock and consequently is subject to the Order entered herein. 7 U.S.C. § 201(d).

Conclusions

[18] The Secretary of Agriculture has jurisdiction.

[19] The Respondents wilfully violated sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a) and 228b(a)) in 2002 by 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, and by failing to pay, when due, the full purchase price of livestock.

Order

[20] The Respondents, their agents and employees, directly or through any corporate or other device, in connection with their activities subject

to the Packers and Stockyards Act, shall cease and desist from:

A. Issuing checks in payment for livestock purchases without maintaining sufficient funds on deposit and available in the account on which the checks are drawn to pay the checks when presented;

B. Failing to pay, when due, the full purchase price of livestock; and

C. Failing to pay the full purchase price of livestock.

[21] The Respondents are 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 Respondents at any time after one (1) year upon demonstration by the Respondents that they are in full compliance with the Act; and provided further, that this Order may be modified upon application to Packers and Stockyards Programs to permit the individual Respondent's salaried employment by another registrant or a packer after the expiration of one (1) year of suspension upon demonstration of circumstances warranting modification of this Order.

[22] The provisions of this Order shall become effective on the sixth (6th) day after this Decision and Order becomes final. (*See* next paragraph.)

Finality

[23] This Decision and Order shall be final without further proceedings 35 days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk 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.

* * *

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: NICHOLAS MEAT PACKING AND EUGENE A. NICHOLAS.
P. & S. Docket No. D-06-0017.
Decision and Order by Reason of Admissions.
Filed December 29, 2006.

PS – Willful – Failure to pay when due – Penalty, inability to pay.

Jonathan Gordy for Complainant.
William Knecht for Respondent.
Decision and Order by Administrative Law Judge Jill S. Clifton.

The Complaint and Notice of Hearing ("Complaint"), filed on April 27, 2006, alleged that the Respondents willfully violated the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §§ 181-229) ("the Act").

Parties and Counsel

The Complainant is the Administrator, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture ("Complainant" or "GIPSA"). Jonathan D. Gordy, Esq., with the Office of the General Counsel, Trade Practices Division, United States Department of Agriculture, South Building Room 2309, 1400 Independence Avenue, SW, Washington, D.C. 20250-1413, represents the Complainant.

The two Respondents are Respondent Nicholas Meat Packing, also known as Nicholas Meat Packing Co. ("Respondent Nicholas Co.") and Respondent Eugene A. Nicholas ("Respondent Nicholas"), referred to collectively as "the Respondents." William L. Knecht, Esq., with the McCormick Law Firm, 835 W. Fourth Street, P.O. Box 577, Williamsport, Pennsylvania 17703, represents the Respondents.

Procedural History

The Complainant filed a "Motion for Decision Without Hearing," which was accompanied by a proposed "Decision Without Hearing Based on Admissions," on November 16, 2006. The Respondents did not respond to the Complainant's Motion. Upon careful consideration of the Complaint and Answer, I conclude that this case can be decided without further proceeding or hearing, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139) (Rules of Practice Governing

Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes, 7 C.F.R. §§ 1.130-1.151).

The Complaint alleged, among other things, that during the period December 9, 2003 through January 8, 2004, Respondents failed to pay the full purchase price, when due, for livestock that Respondents purchased in interstate commerce from twelve sellers in nineteen transactions. (*See* Complaint ¶ II.)

The Respondents' Answer, timely filed June 1, 2006, admitted the Complaint ¶ II. and the jurisdictional allegations of the Complaint. (See Answer ¶¶ I, II.) The Respondents' Answer requested that the Complaint be dismissed, and if not, that the Respondents be provided with a hearing on the merits of the Complaint. The Respondents' Answer denied that Respondent Nicholas was the alter ego of Respondent Nicholas Co. as alleged in the Complaint ¶ III. (Answer ¶ III.)

The Respondents' Answer also denied that the Respondents had committed willful violations of the Act:

> Denied. It is specifically denied that based upon the facts alleged in paragraph II of this Complaint, that the Respondents willfully violated Sections 202(a) and 409 of the Act (7 U.S.C. §§ 192(a), 228b. To the contrary, the dates of payments with respect to the respective transactions were within the ordinary course of business dealings and verbal agreements between the Respondents and the various sellers identified in Paragraph II of Plaintiff's Complaint.
>
> By way of further Answer, and in the alternative, it is averred that any delays in payment, if any, that were not in the ordinary course of business, were not as a result of a willful intention to violate the subject Act recited in Paragraph III of Plaintiff's Complaint, but rather would have been due to circumstances beyond Respondents' reasonable control.
>
> By way of further Answer, it is averred that all of the sellers identified in paragraph II of Plaintiff's Complaint were in fact paid in full and are not now currently owed any money by Respondents.
>
> By way of further Answer, on July 10, 2005, the Respondents' place of business was destroyed by a devastating fire resulting in

the Respondents going out of business.

As a result of the fire, the Respondents were required to and in fact did surrender their license to operate under the Packers and Stockyards Act of 1921 and also at the request of the USDA, the Respondents' bond was surrendered and cancelled.

(Answer ¶ III.)

The foregoing reference to Respondents' license is unclear.[1] The Respondents' Answer asserts further, with supporting detail, that "To assess a fine or penalty under the circumstances set forth above would be inequitable, unfair, inappropriate and not warranted since the Respondent, Nicholas Meat Packing Co ceased operations on July 10, 2005 as a result of the fire and has no financial ability or intention to resume business operations and all sellers were paid in full."

The detail in Respondents' Answer includes the assertion that Respondent Nicholas Co. "has absolutely no resources from which to pay any fines or penalties if any should be assessed . . . " and the assertion that Respondent Nicholas "suffered a severe financial loss as a result of the aforesaid fire of July 10, 2005 because of the inadequacy of insurance proceeds and the personal guarantees of business debt which he has had to honor. The assessment of any further fine or penalty arising out of the facts alleged in this Complaint would cause the Respondent, Eugene A. Nicholas, additional significant financial hardship."

Findings of Fact

1. Respondent Nicholas Meat Packing, also known as Nicholas Meat Packing Co., was a corporation incorporated and doing business in the Commonwealth of Pennsylvania, with a mailing address of P.O. Box 95, Loganton, Pennsylvania, and was, at all times material to this Decision:

a. engaged in the business of purchasing livestock in commerce for the purpose of slaughter and of manufacturing or preparing

[1] The "license" to which Respondents refer to is unclear, because there is no requirement in the Act that packers be licensed or registered.

meats or meat food products for sale or shipment in commerce; and

b. a packer within the meaning of and subject to the provisions of the Act.

2. Respondent Eugene A. Nicholas is an individual whose business address is P.O. Box 95, Loganton, Pennsylvania, and who was, at all times material to this Decision:

a. President and owner of 100% of the issued stock of Respondent Nicholas Co., and responsible for the management, direction, and control of Respondent Nicholas; and

b. A packer within the meaning of and subject to the provisions of the Act.

3. During the period December 9, 2003 through January 8, 2004, the Respondents failed to pay the full purchase price, when due, for livestock that Respondents purchased in interstate commerce from twelve sellers in nineteen transactions. *See* Complaint ¶ II.

Conclusions

1. The Secretary of Agriculture has jurisdiction.

2. The Respondents' violations of the Act were "willful" merely in the sense that the Respondents intended to do their actions (such as making livestock purchases) or their inactions (such as failing to pay when due); no evil intent, no intentional wrongdoing is required to violate the Act. *In re Marysville Enterprises, Inc., d/b/a Marysville Hog Buying Co., James L. Breeding, and Byron E. Thoreson*, 59 Agric. Dec. 299 (2000).

3. By reason of Finding of Fact 3, the Respondents willfully violated sections 202(a) and 409 of the Act (7 U.S.C. §§ 192(a), 228b).

4. The Complainant asks for a $5,000.00 civil penalty, which would arise from the Respondents' violations 1-1/2 years prior to the Respondents' losses from the devastating fire. A $5,000.00 civil penalty is a small amount, compared with what could have been imposed,

particularly in light of the Secretary's prior cease and desist order.

Order

1. Respondent Nicholas Co. and Respondent Nicholas, their officers, directors, agents, employees, successors and assigns, directly or through any corporate or other device, in connection with all their activities subject to the Act, shall cease and desist from failing to pay the full amount of the purchase price for livestock within the time period required by the Act and the regulations promulgated under it.

2. Pursuant to section 203(b) of the Act (7 U.S.C. § 193(b)), the Respondents are jointly and severally assessed a **civil penalty** in the amount of Five Thousand dollars, (**$5,000.00**). The civil penalty payment instrument shall be made payable to the order of USDA-GIPSA and sent to:

USDA-GIPSA
P.O. Box 790335
St. Louis, Missouri 63179-0335.

Payment shall be made within 30 days from the date this Order is final and effective (see next paragraph).

Finality

This Decision and Order shall be final and effective without further proceedings 35 days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within 30 days after service, pursuant to 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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PACKERS AND STOCKYARDS ACT

MISCELLANEOUS ORDERS

In re: GFI AMERICA, INC., d/b/a NICOLLET CATTLE TRADING, GARY GOLDBERGER, AND NICOLLET CATTLE COMPANY, INC.
P. & S. Docket No. D-06-0016.
Order of Dismissal as to Nicollet Cattle Company, Inc.
Filed July 12, 2006.

Eric Paul for Complainant.
Phillip Kunkel, Charles N. Nauen, Reed Rasmussen for Respondents.
Order of Dismissal by Administrative Law Judge Peter M. Davenport.

Order of Dismissal of Notice to Show Cause as to Respondent Nicollet Cattle Company, Inc.

The Complaint and Notice to Show Cause filed in the above-captioned proceeding alleged, *inter alia,* that Nicollet Cattle Company, Inc., was unfit for registration under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.).* Respondent Nicollet Cattle Company, Inc., filed an answer denying that it was unfit for registration, but withdrawing its application for registration as a dealer. Accordingly, the Notice to Show Cause part of this proceeding is hereby dismissed. This dismissal is without prejudice, and Complainant may bring another Notice to Show Cause based on the same facts alleged herein in the event that Respondent Nicollet Cattle Company, Inc., files a new application for registration.

Copies of this Order of Dismissal shall be served upon the parties.

DEFAULT DECISIONS

In re: GFI AMERICA, INC., d/b/a NICOLLET CATTLE TRADING, GARY GOLDBERGER, AND NICOLLET CATTLE COMPANY, INC.
P. & S. Docket No. D-06-0016.
Default Decision.
Filed July 12, 2006.

P&S – Default.

Eric Paul for Complainant.
Phillip Kunkel, Charles N. Nauen, Reed Rasmussen for Respondents.
Decision and Order by Administrative Law Judge Peter M. Davenport.

DECISION AND ORDER AS TO RESPONDENT GFI AMERICA, INC., D/B/A NICOLLET CATTLE TRADING, UPON ADMISSION OF FACTS BY REASON OF DEFAULT

Preliminary Statement

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (U.S.C. § 181 *et seq*.), herein referred to as the Act, instituted by a complaint and notice to show cause filed by the Administrator, Grain Inspection, Packers and Stockyards Administration (GIPSA), United States Department of Agriculture, charging that the Respondents GFI America, Inc., d/b/a Nicollet Cattle Trading, and Gary Goldberger wilfully violated the Act; and giving Respondent Nicollet Cattle Company, Inc., an opportunity to show cause why its application for registration should not be denied.

Copies of the Complaint and Notice to Show Cause, and the Rules of Practice (7 C.F.R. § 1.130 *et seq*.) governing proceedings under the Act, were served upon Respondents. Respondents Gary Goldberger and Nicollet Cattle Company, Inc. filed an answer, and Respondent Nicollet Cattle Company, Inc., withdrew its application for registration as a dealer under the Act. Service was made on Respondent GFI America,

Inc., d/b/a Nicollet Cattle Trading, by certified mail delivered to its Chapter 11 Trustee, Mr. Phillip Kunkel, on April 24, 2006. During a subsequent telephone call, Complainant's attorney reviewed the terms of the order Complainant seeks against Respondent GFI America, Inc., d/b/a Nicollet Cattle Trading with Mr. Kunkel; and Mr. Kunkel advised Mr. Paul that as the Chapter 11 proceeding was going to be converted into a Chapter 7 proceeding, he did not intend to file an answer on behalf of Respondent GFI America, Inc., d/b/a Nicollet Cattle Trading. By letter dated May 5, 2006, Respondent GFI America, Inc., d/b/a Nicollet Cattle Trading, was notified that it had failed to file an answer with the Hearing Clerk within the allotted time.

Respondent GFI America, Inc., d/b/a Nicollet Cattle Trading, has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by Respondent GFI America, Inc., d/b/a Nicollet Cattle Trading's failure to file an answer, are adopted and set forth herein as findings of fact.

Findings of Fact

1. Respondent GFI America, Inc., d/b/a Nicollet Cattle Trading, is a Minnesota corporation whose official address and registered office is 2815 Blaisdell Avenue South, Minneapolis, MN 55408, and whose business operations are now being conducted during a Chapter 11 bankruptcy proceeding by a Trustee, Phillip L. Kunkel, whose mailing address is Phillip L. Kunkel, Esq., Gray, Plant, Mooty & Bennett, P.A., 1010 West St. Germain, Suite, Suite 600, St. Cloud, MN 56301.

2. Respondent GFI America, Inc., d/b/a Nicollet Cattle Trading, at all times material herein was:

(a) Engaged in the business of a dealer, buying and selling livestock in commerce for its own account.

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce, and as a market agency buying on commission.

3. Respondent GFI America, Inc., d/b/a Nicollet Cattle Trading, on

or about the dates and in the transactions set forth below, purchased livestock and failed to pay the full purchase price of such livestock.

Livestock Seller	**Purchase Date**	**No. of Head**	**Livestock Amount**	**Invoice Amount after deductions and additions***	**Date Payment Due per § 409(a)**	**Pro Rata Dealer Bond Distribution in 2006**	**Amount Remaining Unpaid**
Gregory A. Jensen Hamlin, IA	4/18/05	34	$37,146.15	$37,112.15	4/19/05	$2,479.11	$34,633.04 (note 1)
Whempner Bros. Wilmont, SD	4/19/05	84	$92,278.72	$92,194.72	4/20/05	$6,158.65	$86,036.07 (note 1)
Sisseton Livestock Auction, Inc. Sisseton, SD	4/21/05 4/21/05	116 320	$148,301.52 $373,474.06	$148,676.46 $390,340.26 $539,016.72	4/22/05 4/22/05	$36,007.25	(note 2) (note 1) $503,009.47
Francis Pravacek Scotland, SD	4/26/05	76	$100,206.82	$100,130.82	4/27/05	$6,688.79	$93,442.03 (note 1)
Marion Blom Corsica, SD	4/20/05	40	$46,811.00	$46,811.00	4/21/05	$3,127.00	$43,684.00 (note 1)

Wayne Raymond Zych d/b/a W-Zych Cattle Co. Beardsley, MN	4/25/05	216	$237,904.82	$237,688.82	4/26/05	$15,877.73	$221,811.09 (note 1)
Dam's Farm, Inc. Hooper, NE	4/25/05	40	$46,185.02	$46,145.02	4/26/05	$3,082.51	$43,062.51 (note 2)
Roger V. Stotts Appleton, MN	4/28/05	213	$232,233.68	$232,020.68	4/29/05	$15,497.72	$216,522.96
Michael Currence Sisseton, SD	4/24/05	59	$72,524.76	$72,465.76	4/25/05	$4,840.75	$67,625.01 (note 1)
Robert Nienow Farm, Inc. Mapleton, MN	4/17/05	115	$140,871.75	$140,756.75	4/18/05	$9,410.30	$131,346.45
Brandon O. Schweigert Edgely, ND	4/13/05	2	$2,451.60	$2,449.60	4/14/05	$163.63	$2,285.97

South Dakota Livestock Sales Watertown, SD	4/27/05	79	$96,559.10	$100,349.10	4/28/05	$6,704.04	$93,645.06
Livestock Seller	**Purchase Date**	**No. of Head**	**Livestock Amount**	**Invoice Amount after deductions and additions***	**Date Payment Due per § 409(a)**	**Pro Rata Dealer Bond Distribution in 2006**	**Amount Remaining Unpaid**
Central Livestock Association, Inc. St. Paul, MN (Central Order Buyers)	4/20/05 4/26/05 4/26/05 4/27/05	14 79 30 30	$16,307.71 $88,850.15 $34,838.36 $35,116.37	$16,307.71 $88,850.15 $34,838.36 $35,164.07 $175,160.29	4/21/05 4/27/05 4/27/05 4/28/05	$11,700.79	$163,459.50
Holtzen Farms LTD	4/23/05	30	$29,287.44	$29,287.44	4/25/05	no bond claim filed	$29,287.44
Jim & Abe Mach Sturgeon Lake, MN	4/24/05	35	$36,654.36	$36,619.36	4/25/05	$2,446.19	$34,173.17
Fredin Brothers, Inc. Springfield, MN	4/25/05 4/26/05	80 525	$ 96,268.22 $638,606.86	$ 96,178.22 $638,071.86 $734,250.08	4/26/05 4/27/05	$49,048.29	(note 1) (note 1) $685,201.79

Keith J. Kvistero Milan, MN	4/28/05	252	$267,878.05	$267,626.05	4/29/05	$17,877.55	$249,748.50
Equity Cooperative Livestock Sales Association Baraboo, WI	4/27/05	39	$43,596.33	$43,586.33	4/28/05	$2,912.26	$40,674.07 (note 1)
O&S Cattle Company, Inc. South St. Paul, MN	4/27/05	77	$89,481.97	$93,645.55	4/28/05	$5,977.44	$87,668.11 (note 1)
TOTALS:			$3,003,834.82	$3,027,316.24		$200,000.00	$2,827,316.24

* Deductions were made for beef promotion check off, and for the sending of payment checks by Federal Express. Additions were made for buying commission and trucking obligations paid by seller on behalf of buyer and added to invoices.

Note 1 This livestock seller has also filed statutory trust and bond claims against National Beef Packing Co., claiming that Nicollet Cattle Trading was buying livestock in this transaction as an agent for National Beef Packing Co., a disclosed principal.

Note 2 This livestock seller has also filed statutory trust and bond claims against Creekstone Farms Premium Beef, LLC, claiming that Nicollet Cattle Trading was buying livestock in this transaction as an agent for Creekstone Farms Premium Beef, LLC., a disclosed principal.

4. Respondent GFI America, Inc., d/b/a Nicollet Cattle Trading, had agreed with the livestock sellers that payment for the above livestock purchases was to come from Respondent GFI America, Inc., d/b/a Nicollet Cattle Trading, although the livestock was almost always shipped directly to packers whose identity had been fully disclosed to the livestock sellers. In two thirds of these transactions, the packers were billed by Nicollet Cattle invoice for the same livestock purchase amounts plus an itemized buying commission (generally twenty-five cents per hundredweight), and in some instances an additional itemized "clearing expense."

5. Respondent GFI America, Inc., d/b/a Nicollet Cattle Trading, in purported payment for the livestock purchases set forth in paragraph II above, issued checks which were returned unpaid because there were insufficient funds on deposit and available in the account upon which they were drawn when the checks were presented for payment. The information regarding the checks appears below:

Livestock Seller Payee	Check Date	Check No.	Check Amount	Date Returned	Reason Shown for Return
Greg Jensen	4/19/05	402485	$37,112.15	5/04/05	Insufficient funds
Whempner Bros	4/20/05	402504	$92,194.72	5/03/05	Insufficient funds
Sisseton Livestock Auction, Inc.	4/22/05	402531	$148,676.46	5/03/05	Insufficient funds
Sisseton Livestock Auction, Inc.	4/22/05	402532	$390,340.26	5/03/05	Insufficient funds
Marion Blom	4/22/05	402535	$46,811.00	5/03/05	Insufficient funds
Brandon Schweigert	4/22/05	402539	$2,449.60	5/11/05	Refer to maker
Mike Currence	4/25/05	402544	$72,465.76	5/03/05	Insufficient funds
Jim & Abe Mach	4/25/05	402547	$36,619.36	5/03/05	Insufficient funds
W-Zych Cattle Co.	4/25/05	402548	$237,688.82	5/03/05	Insufficient funds & refer to maker

Fredin Bros	4/25/05	402549	$96,178.22	5/03/05	Insufficient funds
Fredin Bros	4/27/05	402572	$638,071.86	5/03/05	Insufficient funds
Robert Nienow Farm, Inc.	4/27/05	402574	$140,756.75	5/05/05	Insufficient funds & refer to maker
Central Livestock Association, Inc.*	4/27/05	402575	$88,850.15	5/05/05	Insufficient funds & refer to maker
Central Livestock Association, Inc.*	4/27/05	402576	$34,838.36	5/05/05	Insufficient funds & refer to maker
Central Livestock Association, Inc.*	4/27/05	402586	$35,164.07	5/05/05	Insufficient funds & refer to maker
Central Livestock Association, Inc.*	4/29/05	402596	$16,307.71	5/05/05	Insufficient funds & refer to maker
Holtzen Farms LTD	4/27/05	402578	$29,287.44	5/06/05	Insufficient funds
Dams Farms, Inc.	4/27/05	402580	$46,145.02	5/04/05	Insufficient funds
Francis Pravacek	4/27/05	402581	$100,130.82	5/02/05	Insufficient funds
Equity Cooperative Livestock Sales	4/28/05	402587	$43,586.33	5/03/05	Insufficient funds

O&S Cattle Co.	4/28/05	402588	$93,645.55	5/03/05	Insufficient funds & refer to maker
South Dakota Livestock Sales	4/28/05	402589	$100,349.10	5/03/05	Insufficient funds
Roger Stotts	4/28/05	402591	$232,020.68	5/05/05	Insufficient funds & refer to maker
Keith Kvistero	4/28/05	402592	$267,626.05	5/05/05	Insufficient funds & refer to maker
TOTAL:			$3,027,316.24		

* named Central Order Buyers on check

6. Respondent GFI America, Inc., d/b/a Nicollet Cattle Trading, knew, at the time the livestock was purchased and the above payment checks were issued, that Respondent had consistently been in default with respect to its secured loan agreement with Wachovia Capital Finance Corporation (Wachovia). Wachovia had given Respondent written notice on April 20, 2005, that Wachovia's forbearance with Respondent's defaults was at an end. Wachovia gave Respondent this notice due to Respondent's admission to Wachovia that approximately $1,390,151.33 of the Accounts Respondent had reported to secure new advances on the Wachovia loan agreement were in fact the same Accounts previously reported to secure prior loan agreement advances.

7. Respondent GFI America, Inc., d/b/a Nicollet Cattle Trading, knew, or should have known, that Respondent's defaults provided Wachovia with good reason to apply all livestock payments received by Respondent from packers, and deposited to the lockbox account required by Wachovia, to reduce Respondent's secured debt, instead of transferring such funds to the checking account on which Respondent drew checks to pay livestock sellers from whom Respondent had obtained the livestock.

Conclusions

By reason of the facts found in Findings of Fact 3 through 7 above, Respondent GFI America, Inc., d/b/a Nicollet Cattle Trading, has wilfully violated section 312 (a) of the Act (7 U.S.C. §§ 213(a)).

Order

Respondent GFI America, Inc., d/b/a Nicollet Cattle Trading, directly or through any corporate or other device, in connection with its operations subject to the Packers and Stockyards Act, shall cease and desist from:

1 Failing to pay the full purchase price of livestock; and

2. 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.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), Respondent GFI America, Inc., d/b/a Nicollet Cattle Trading, is suspended as a registrant for the period of five years.

This decision shall become final and effective without further proceedings 35 days after the date of service upon the Respondent, unless it is appealed to the Judicial Officer by a party to the proceeding within 30 days pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Copies of this decision shall be served upon the parties.

IN RE: KENNETH E. BARROWS d/b/a SCHALLER'S MEATS, OR NORTH AMERICAN MEAT PACKERS.
P. & S. Docket No. D-06-0018.
Default Decision.
Filed September 22, 2006.

PS – Default.

Jonathan Gordy for Complainant.
Respondent Pro se.
Decision and Order by Administrative Law Judge Peter M. Davenport

DECISION WITHOUT HEARING BY REASON OF DEFAULT

Preliminary Statement

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq*.) ("Act"), by a Complaint filed on May 1, 2006, by the Administrator, Grain Inspection, Packers and Stockyards Administration (GIPSA), United States Department of Agriculture, alleging that the Respondent willfully violated the Act. The Complaint and a copy of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R.

§ 1.130 *et seq*.) ("Rules of Practice") were served on Respondent by certified mail. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the Complaint.

Respondent 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 in this decision and order 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. Kenneth E. Barrows, ("Respondent") d.b.a. Schaller's Meats, or North American Meat Packers, is an individual whose business address is State Route 8, Bridgewater, NY 13331.

2. Respondent was at all times material to this Decision:

(a) engaged in the business of buying livestock in commerce for purposes of slaughter; and

(b) a packer within the meaning of and subject to the provisions of the Act

3. Respondent, on or about the dates and in the transactions set forth below, purchased livestock and failed to pay, when due, the full purchase price of the livestock:

Purchase Date	Payee	Number of Head	Purchase Amount
03/07/2005	Millers Livestock Auction, 4008 State Route 40 Argyle, NY 12809	10	$502.93
03/10/2005	Millers Livestock Auction	11	$620.55
03/14/2005	Millers Livestock Auction	6	$200.44
06/09/2005	N.N.Y. Farmers Marketing Co-op., Inc. P.O. Box. 169 Lowville, NY 13367	19	$1,262.32
06/13/2005	N.N.Y. Farmers Marketing Co-op., Inc.	24	$1,370.68
06/16/2005	N.N.Y. Farmers Marketing Co-op., Inc.	11	$628.48
06/20/2005	N.N.Y. Farmers Marketing Co-op., Inc.	16	$902.22
06/23/2005	N.N.Y. Farmers Marketing Co-op., Inc.	10	$531.18
03/10/2005	Empire Livestock Marketing, Lewis Co. P.O. Box 4844 Syracuse, NY 13221-4844	5	$1,010.80
03/23/2005	Tom Przysiecki, d.b.a. Fox Valley Vail Farms 247 Zimmer Rd. Schoharie, NY 12157	2	$1,827.04
Total:		114	$8,856.64

4. As of the May 1, 2006, there remained unpaid a total of $6,422.18 for those livestock purchases.

5. Respondent failed to keep records, as required by section 401 of the Act (7 U.S.C. § 221), that fully and correctly disclosed all transactions involved in his business, in that Respondent failed to keep kill sheets, bank statements, invoices and shipping records.

Conclusions

By reason of the facts found in Findings of Fact 3 and 4, Respondent wilfully violated sections 202(a) and 409 of the Act (7 U.S.C. §§ 192(a), 228b) by failing to pay, when due, for livestock.

By reason of the facts found in Finding of Fact 5, Respondent has failed to keep records as required by section 401 of the Act (7 U.S.C. § 221) and, therefore, has willfully engaged in an "unfair practice" under section 202(a) of the Act (7 U.S.C. § 192(a)).

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 the material allegations in the Complaint. Complainant has moved for the issuance of a Decision Without Hearing by Reason of Default, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). Accordingly, this decision and order is entered without hearing or further procedure.

Order

Respondent, 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 failing to pay the full amount of the purchase price for livestock within the time period required by the Act and the regulations promulgated under it.

Respondent and his agents and employees shall keep such accounts, records and memoranda which fully and correctly disclose all transactions conducted subject to the Act, including, but not limited to, kill sheets, bank statements, invoices and shipping records.

Pursuant to section 203(b) of the Act (7 U.S.C. § 193(b)), Respondent is assessed a civil penalty in the amount of Two Thousand dollars ($2,000.00).

This decision shall become final and effective without further proceedings thirty-five days (35) 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 of this order shall be served on the parties.

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In re: PHILLIP O. MATTES, JR., d/b/a R OR M CATTLE COMPANY.
P&S Docket No. 06-0021.
Default Decision.
Filed October 6, 2006.

PS – Default.

Ruben Rudolph for Complainant.
Respondent Pro se.
Decision and Order by Administrative Law Judge Peter M. Davenport.

Preliminary Statement

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Deputy Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondents wilfully violated the Act.

Copies of the complaint and the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.130 *et seq.*) governing proceedings under the Act were served on Respondents by regular mail on July 7, 2006, after

service by certified mail, return receipt requested, was returned marked "unclaimed." Respondent Philip O. Mattes was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by Respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Philip O. Mattes Jr. (hereinafter "Respondent Mattes") is an individual doing business as R or M Cattle Company (hereinafter "R or M Cattle"), whose business mailing address is N13640 Gorman Avenue, Thorp, Wisconsin 54771.

2. Respondent Mattes is and at all times material herein was:

(A) Manager of R or M Cattle;

(B) One hundred percent owner of R or M Cattle;

(C) Responsible for the day-to-day management, direction, and control of R or M Cattle.

3. Respondent Mattes, doing business as R or M Cattle at all times material herein, was:

(A) Engaged in the business of buying and selling livestock in commerce for his own account as a dealer; and

(B) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account, and as a market agency buying on commission.

4. On or about the dates and in transactions set forth in paragraph II (a) of the complaint, Respondent Mattes, doing business as R or M Cattle,

issued checks in payment for livestock purchases which were returned unpaid by the bank upon which they were drawn. These checks were returned because Respondent Mattes did not have and maintain sufficient funds on deposit and available in the account upon which the checks were drawn to pay such checks when presented.

5. On or about the dates and in the transactions listed paragraph II (b) of the complaint, Respondent Mattes, doing business as R or M Cattle, failed to pay the full purchase price of livestock in the amount of $186,505.61. Of the $186,505.61 Respondent failed to pay, $176,505.61 remained unpaid as of the date of the issuance of the complaint in this matter.

Conclusions

By reason of the facts alleged in paragraph 4 and 5, Respondent Mattes, doing business as R or M Cattle, wilfully violated sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a) and 228b).

Order

Respondent Mattes, doing business as R or M Cattle, his company's officers, directors, agents and employees, successors and assigns, directly or indirectly, in connection with hsi activities subject to the Packers and Stockyards Act, shall cease and desist from:

1. Failing to pay the full purchase price of livestock; and

2. Issuing checks in payment for livestock purchases without maintaining sufficient funds on deposit and available in the account upon which the checks were drawn to pay the checks when presented.

Respondent Mattes, doing business as R or M Cattle, is suspended as a registrant under the Act for a period of five (5) years.

This decision shall become final and effective without further proceedings 35 days after the date of service upon Respondents, unless it

is appealed to the Judicial Officer by a party to the proceeding within 30 days pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

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In re: AMERICAN FAMILY FARMS, INC., AND TIM DIETZLER.
P. & S. Docket No. D-06-0015.
Default Decision only American Family Farms, Inc.
Filed October 31, 2006.

PS – Default.

Andrew Stanton for Complainant.
Respondent Pro se.
Decision and Order by Administrative Law Judge Jill S. Clifton.

Decision

The Complaint and Notice of Hearing ("Complaint") filed on March 8, 2006, alleged that the Respondents willfully violated the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq*.) ("Act").

Parties and Counsel

The Complainant is the Administrator, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture ("Complainant").

Andrew Y. Stanton, Esq., with the Office of the General Counsel, Trade Practices Division, United States Department of Agriculture, 1400 Independence Avenue SW, Washington, D.C. 20250, represents the Complainant.

The two Respondents are Respondent American Family Farms, Inc. (hereinafter sometimes referred to as the "Corporate Respondent"), and Respondent Tim Dietzler. This Decision and Order concerns only the Corporate Respondent; only the Corporate Respondent is in default.

Procedural History

The Complaint that was initially sent to the Corporate Respondent by certified mail was returned to the Hearing Clerk, with the Post Office label indicating "RETURN TO SENDER" "MOVED, LEFT NO ADDRESS." On March 28, 2006, the Hearing Clerk sent the Complaint to the Corporate Respondent by certified mail to the address of the Corporate Respondent's registered agent, Tibeck, Inc., addressed to: American Family Farms, Inc., c/o Tibeck, Inc., 102 S. Main Street, Elkader, Iowa 52043, but the Complaint was again returned to the Hearing Clerk, with the Post Office label indicating "RETURN TO SENDER" "MOVED, LEFT NO ADDRESS."

On March 30, 2006, a copy of Hearing Clerk's letter acknowledging receipt of the answer of Respondent Tim Dietzler was mailed to American Family Farms, Inc., c/o Tibeck, Inc., 102 S. Main Street, Elkader, Iowa 52043, but the envelope was returned to the Hearing Clerk with a Post Office label indicating that Tibeck was located at P.O. Box 331, Elkader, Iowa 52043-0331, and that the time for forwarding had expired. After receiving this information about Tibeck's location, the Hearing Clerk, on April 11, 2006, sent the Complaint to the Corporate Respondent by certified mail to the address of the Corporate Respondent's registered agent, Tibeck, Inc., addressed to: American Family Farms, Inc., P.O. Box 331, Elkader, Iowa 52043-0331 (the Hearing Clerk did not include "c/o Tibeck, Inc."). The Complaint was returned to the Hearing Clerk, with the Post Office label indicating "RETURN TO SENDER" "REFUSED." On April 28, 2006, the Hearing Clerk sent the Complaint to the Corporate Respondent by ordinary mail to the address of the Corporate Respondent's registered agent, Tibeck, Inc., as follows: American Family Farms, Inc., P.O. Box 331, Elkader, Iowa 52043-0331 (the Hearing Clerk did not include "c/o Tibeck, Inc.").

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"), states as follows, with regard to the service of complaints:

> 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)

Since the Hearing Clerk's attempt to serve the Complaint on the Corporate Respondent by certified mail on April 11, 2006, at the address of its registered agent, was returned marked "RETURN TO SENDER" "REFUSED," the April 28, 2006, remailing of the Complaint by ordinary mail to the same address satisfied the requirements for service set forth in section 1.147(c)(1) of the Rules of Practice. The Corporate Respondent's answer was due within 20 days after service, according to section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). The Corporate Respondent has failed to file an answer, so the Corporate Respondent is in default, pursuant to section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)).

Further, the Hearing Clerk sent the Complainant's Motion for Decision together with the Complainant's proposed Decision ("Motion for Decision"), to the Corporate Respondent by certified mail on August 7, 2006, to the address of the Corporate Respondent's registered agent, Tibeck, Inc., addressed to: American Family Farms, Inc., P.O. Box 331, Elkader, Iowa 52043-0331 (the Hearing Clerk did not include "c/o Tibeck, Inc."). The Motion for Decision was returned to the Hearing Clerk, with the Post Office label indicating "RETURN TO SENDER" "REFUSED." On August 22, 2006, the Hearing Clerk sent the Motion for Decision to the

Corporate Respondent by ordinary mail to the address of the Corporate Respondent's registered agent, Tibeck, Inc., addressed to: American Family Farms, Inc., P.O. Box 331, Elkader, Iowa 52043-0331 (the Hearing Clerk did not include "c/o Tibeck, Inc.").

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)). Failure to file an answer constitutes a waiver of hearing (7 C.F.R. § 1.139). Accordingly, the material facts alleged in the Complaint, which are admitted by the Corporate Respondent's default, are adopted and set forth herein as Findings of Fact. This Decision and Order as to American Family Farms, Inc., 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*.

Findings of Fact

1. Respondent American Family Farms, Inc., is a corporation whose business mailing address is that of its registered agent, Tibeck, Inc., P.O. Box 331, Elkader, Iowa 52043-0331.

2. Respondent American Family Farms, Inc., was, at all times material herein:

(a) Engaged in the business of buying livestock in commerce for purposes of slaughter;

(b) Manufacturing or preparing meat and meat food products for sale and shipment in commerce; and

(c) A packer within the meaning of and subject to the Act.

3. Respondent American Family Farms, Inc., in connection with its operations subject to the Act, purchased livestock for slaughter and failed to pay the full amount of the purchase price for livestock within the time period required by the Act, with $765,445.72 remaining unpaid.

4. Respondent American Family Farms, Inc. was insolvent as of August 15, 2003, as its current liabilities then exceeded its current assets in the

amount of $1,141,203.36.

Conclusions

1. The Secretary of Agriculture has jurisdiction.

2. By reason of Finding of Fact 3 herein, Respondent American Family Farms, Inc. has willfully violated sections 202(a) and 409 of the Act (7 U.S.C. §§ 192(a), 228b).

3. By reason of Finding of Fact 4 herein, Respondent American Family Farms, Inc.'s financial condition does not meet the requirements of the Act (7 U.S.C. § 204).

Order

1. Respondent American Family Farms, Inc., its officers, directors, agents, employees, successors and assigns, individually or through any corporate or other device, in connection with its operations subject to the Act, shall cease and desist from:

a. Failing to pay the full amount of the purchase price for livestock within the time period required by the Act; and

b. Purchasing livestock in commerce while insolvent, i.e., while current liabilities exceed current assets, unless Respondent American Family Farms, Inc. pays the full purchase price of the livestock at the time of purchase in U.S. currency, by cashier's check or wire transfer.

2. Pursuant to section 203(b) of the Act (7 U.S.C. § 193(b)), Respondent American Family Farms, Inc., is assessed a **civil penalty** in the amount of Fifty Thousand Dollars (**$50,000.00**). The civil penalty payment instrument shall be made payable to the order of **USDA-GIPSA** and sent to: USDA-GIPSA

P.O. Box 790335
St. Louis, Missouri 63179-0335.

Payment shall be made within 30 days from the date this Order is final and

effective (*see* next paragraph).

Finality

This Decision and Order shall be final and effective without further proceedings 35 days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk 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. The address for the Corporate Respondent is **American Family Farms, Inc., c/o Tibeck, Inc., P.O. Box 331, Elkader, Iowa 52043-0331**. The remaining Respondent shall also be served, even though this Decision and Order does not decide the case as to him: **Mr. Tim Dietzler, National Fish Hatchery, HC37 Box 8, Willow Beach, AZ 86445**.

* * *

APPENDIX A:

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

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Consent Decisions

PACKERS AND STOCKYARDS ACT

Larry K. Smeal d/b/a Fatted Calf Cattle Farms P&S Docket No. D-06-0002 7/25/06
Beeville Livestock Commission, Inc. and W. E. Butler P & S Docket No D-05-0004 8/02/06
T-Byrd Cattle Company and Jerry T. Byrd P&S Docket No D-06-0012 8/31/06
Steve.M. Hand P&S Docket No D-06-0013 10/12/06
James T. Harmon d/b/a J.H. Cattle Company Docket No. P & S D-06-0009 11/7/06
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AGRICULTURE DECISIONS

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Pages 1274 -1489

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AGRICULTURE DECISIONS

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The published decisions and orders may be cited by giving the volume number, page number and year, e.g., 1 Agric. Dec. 472 (1942). It is unnecessary to cite a decision's docket number, e.g., AWA Docket No. 99-0022, and the use of such references generally indicates that the decision has not been published in *Agriculture Decisions*.

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JAMES E. THAMES, JR. v. USDA.
Case No. 06-11609.
Filed August 15, 2006.

(Cite as:195 Fed. Appx. 850). *

PACA – Non-nominal board director – Responsibly connected-- Arbitrary and capricious, when not – Failure to exercise prudent Director duties.

PACA Licensee, a tomato repacking plant, failed to make full and prompt payment to its producers. Its license was revoked when it failed to pay a licensing fee to USDA. The petitioner was a vice president, a director, and a 16.2% shareholder of the company and could not overcome the presumption that he was more than a nominal director. Additionally, as an industry expert and a director, he could have but did not exert his authority to prevent the PACA violations and therefore was "responsibly connected" to the revoked license.

United States Court of Appeals,
Eleventh Circuit.

Petition for Review of a Decision of the Department of Agriculture. Agency No. 04-0003-PACA-APP.

Before BIRCH, BLACK and BARKETT, Circuit Judges.
PER CURIAM:

James E. Thames, Jr., petitions for review of the final decision of the Secretary of Agriculture, acting through a Department of Agriculture Judicial Officer ("JO"), determining that Thames was "responsibly connected" with John Manning Company, Inc., ("John Manning") at a time during which that company violated section 2(4) of the Perishable Agricultural Commodities Act ("PACA"), 7 U.S.C. § 499b(4), thereby subjecting him to licensing and employment restrictions under the PACA. *See* 7 U.S.C. § 499h. Because we find that there is substantial evidence in the record to support the JO's determination, the petition is DENIED.

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* Rehearing was denied on November 09, 2006 by Eleventh Circuit Appeals Court. - Editor.

I. BACKGROUND

Thames began working in the produce packing industry in 1963. He joined John Manning, a tomato re-packing plant, in 1991, at which point he, George Fuller, Jr., and Jon Fuller each owned 31 percent of the stock and George Fuller, Sr., one of the founders, owned 7 percent. ROA-Tab 11, ¶ 1. Thames and the Fullers also constituted the board of directors of John Manning at that time. Thames held the position of vice president, ran the tomato-repacking line, purchased produce, and was responsible for hiring and firing those working on the line.

In 1999, the board decided to bring Steve McCue into the company. George Fuller, Sr., sold his 7 percent to McCue, and Thames and the other Fullers sold enough of their stock to make McCue, Thames and the younger Fullers equal one-fourth owners. *Id.* Tab 11, ¶ 2. McCue was also made president of John Manning.

After a year, with the business going well, McCue told the other board members that he would stay with John Manning only if he were made a majority stockholder in the business. On 27 August 2001, Thames and the younger Fullers sold McCue sufficient stock, at one dollar per share, to make him an owner of 51 percent while they shared ownership of the remaining 49 percent. *Id.* Tab A at 17-18. Thames continued to serve as vice president and owned 16.2 percent of the corporate shares of John Manning. *Id.* Tab 7.

John Manning's by-laws provide that "[t]he holders of a majority of the stock issued and outstanding ... shall constitute a quorum at all meetings of the shareholders for the transaction of business" and that "the affirmative vote of the majority of the shares represented at the meeting and entitled to vote on the subject matter shall be the act of the shareholders." *Id.* Tab 4, § § 2.5, 2.7. The by-laws also provide that "the property and business of the corporation shall be managed by its Board of Directors," which, as elected by the shareholders, is to "consist of not less than three nor more than five members." *Id.* Tab 4, § § 3.1, 3.2; *see id.* Tab 4, § 2.2. Finally, "[a] majority of the members of the Board shall be necessary to constitute a quorum and a matter may be carried by a majority within the quorum. The act of a majority of the directors at any meeting at which there is a quorum shall be the act of the Board of Directors." *Id.* Tab 4, § 4.5.

As for corporate officers, the by-laws provide that the president "shall have general and active management of the corporation, and shall see that all orders and resolutions of the Board are carried into effect." *Id.* Tab 4, § 5.4(a). If the President fails to act in accordance with this duty, the Vice President "shall have all the powers of the President, and shall perform such duties as shall from time to time be imposed upon him by the Board of Directors." *Id.* § 5.5. Finally, "[a]ll checks and drafts shall be signed in such a manner as the Board of Directors may from time to time determine." *Id.* Tab 4, § 12.1.

Thames testified that, after McCue became majority shareholder, Thames continued to run the tomato processing line and to manage his employees, as he had previously done, but that he was no longer involved in purchasing produce. He explained that he was not included in any meetings with the accountant McCue hired nor did he have any check-signing authority. *Id.* Tab A at 20-22. Thames was paid $1000 a week for his work. *Id.* Tab A at 27. He was also entitled to receive a portion of any retained earnings in proportion to the stock he held. Thames worked in this capacity until John Manning closed its doors. Throughout this period, he also continued to sit on the board of directors along with McCue and the younger Fullers. In that capacity, Thames signed two guarantees for loans on behalf of John Manning, one for $100,000 in September 1999 and one for $250,000 in December 2000. *Id.* Tab A at 59. He also signed a lease for new expanded headquarters. Throughout this period, Thames attended board meetings at which John Manning's financial concerns were discussed.

At the meeting on 24 April 2002, the board discussed the corporation's precarious financial situation, which had been made evident by its failure to pay monthly group health insurance premiums, the discontinuation of corporate cell phone service, its failure to pay the Blue Book bill, and trouble paying produce suppliers. At that meeting, McCue sought and was granted permission by the younger Fullers to ask their father for a loan to stave off the bankruptcy of John Manning.

At a follow-up meeting held five days later, the board discussed obtaining a loan for $200,000 to be secured by a guarantee signed by the directors. *Id.* Tab 15, ¶ 6. The younger Fullers refused to sign the guarantee without first being provided certain financial information. On 3 May 2002, the board met for a third time and McCue distributed a 2001 year-end report showing a loss of $140,805 for 2001 and a $32,598 loss for the first quarter of 2002. *Id.* Tab 16, ¶ 3. The board

members refused to assist with an infusion of personal cash and John Manning closed its doors that August. Its PACA license was terminated on 5 June 2003, for failure to pay the annual renewal fee.

In November 2003, the Chief of the PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture, determined that Thames was responsibly connected with John Manning at the time it violated the PACA by failing to make full and prompt payment for certain lots of perishable agricultural commodities. Thames filed a petition seeking reversal of this determination. In April 2004, an Administrative Law Judge ("ALJ") consolidated his case with those of the two younger Fullers and conducted a hearing in Atlanta in March 2005. In October, the ALJ issued a decision and order finding that all three were responsibly connected to John Manning at the time of the violations. Thames then sought review of that decision. The JO, acting for the Secretary of Agriculture, adopted the ALJ's conclusions and found that Thames had failed to prove by a preponderance of the evidence that he was only nominally an officer, director, or shareholder of John Manning. Thus, the final decision of the Secretary was that Thames was responsibly connected to John Manning for purposes of the PACA licensing and employment restrictions. Thames has filed a timely petition for our review, virtually repeating the arguments he made before the JO.

II. DISCUSSION

With an aim to prevent unfair business practices and promote financial responsibility in the interstate commerce of the shipping and handling of perishable agricultural commodities, the PACA requires that brokers and dealers be licensed by the Secretary of Agriculture and that licensees refrain from unfair business conduct. 7 U.S.C. § § 499b(4), 499c-499d; *see Bama Tomato Co. v. USDA,* 112 F.3d 1542, 1545 (11th Cir.1997). To promote compliance, the PACA authorizes the Secretary to revoke or suspend the license of a licensee who fails to "make full payment promptly" for perishable shipments and to restrict employment within the industry of "any person who is or has been responsibly connected with" such a violator. 7 U.S.C. § § 499b(4), 499h(b).

"We uphold a USDA decision under the PACA unless we find the decision to be unconstitutional, arbitrary, capricious, an abuse of discretion, or in excess of statutory authority." *Bama Tomato Co.,* 112 F.3d at 1546 (citing 5 U.S.C. § 706(2)). We review factual findings,

such as the determination that a person is "responsibly connected" with a violating licensee, under the substantial evidence test. *Id.* Under this test, an agency determination must be supported by the record in the form of "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229, 59 S.Ct. 206, 217, 83 L.Ed. 126 (1938). Under "this deferential standard of review[,] ... as long as the conclusion is reasonable, we defer to the agency's findings of fact even if we could have justifiably found differently." *Kelliher v. Veneman,* 313 F.3d 1270, 1277 (11th Cir.2002).

Under the PACA, a person is "responsibly connected" if he or she is "affiliated or connected with a commission merchant, dealer, or broker as ... [an] 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). The presumption that a person so situated is responsibly connected may be rebutted, however, 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 [the PACA] *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.
Id. (emphasis added).[1]

With regard to the second part of this test, Thames argues that, because the by-laws of John Manning gave McCue, as president, director, and majority shareholder, the unqualified authority to elect and remove directors or corporate officers, he occupied his positions as vice-president and director only at McCue's whim, and was thus only a nominal officer and director. Courts interpreting this statute, however, have held that to be considered a nominal officer or director, a person must show that he lacks any "actual, significant nexus with the violating company," and "therefore, neither knew nor should have known of the company's misdeeds." *Hart v. Department of Agriculture,* 112 F.3d 1228, 1231 (D.C.Cir.1997)quotations and punctuation omitted).

Here, in light of his lengthy experience working in the produce repacking industry in general, and his more than decade-long experience

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[1]In this case, because he owned 16.2 percent of the outstanding John Manning stock at the time of the violations, the latter option, regarding ownership of a violating licensee, is not available to Thames.

as an officer and director at John Manning, Thames had sufficient background to understand the import of the corporation's financial predicament. As a continuing director, under sections 3.1 and 4.5 of the by-laws, Thames had a vote equal to McCue's as to any matter involving the management of John Manning's property and business. Thames attended board meetings during the period of the violations at which he could have voted as part of a majority, along with the Fullers, to address John Manning's financial problems.

Although Thames asserts that courts have found that attendance at board meetings, the ability to vote at a meeting, and knowledge of the fact that producers were going unpaid do not necessarily preclude nominal director or officer status, each of the cases he cites is easily distinguishable from the facts of his case. First, in *Minotto,* the director at issue was a clerical employee, with no prior experience in the produce industry and no knowledge of the activities that led to the violating transactions, who had been put in the position to ensure a quorum at board meetings. *Minotto v. USDA,* 711 F.2d 406, 407-09 (D.C.Cir.1983). In *Bell,* the person in question was made president of the corporation to mediate disputes between the two owners, but "never participated in the formal decision making structures of the corporation." *Bell v. Dep't of Agric.,* 39 F.3d 1199, 1204 (D.C.Cir.1994). Yet another corporation appointed a production line supervisor as vice-president to satisfy a statutory minimum number of officers, but gave him no decisionmaking authority in that role. *Quinn v. Butz,* 510 F.2d 743, 747 (D.C.Cir.1975). Finally, a further wholesale produce business made the manager of its vegetable department titular president, apparently without his understanding that it had done so, upon his investing $40,000 in the company, but he never attended any corporate meetings. *Maldonado v. Dep't of Agric.,* 154 F.3d 1086, 1087 (9th Cir.1998).

Thames, on the other hand, had plenty of background in the produce industry and had long sat on the board of John Manning out of his own entrepreneurial interests rather than for the administrative convenience of the corporation. Further, in addition to attending board meetings, Thames continued to run the processing line, to be paid his salary of $1000 per week, and to have the right to receive a portion of retained earnings. Finally, although McCue could have removed Thames from the board of directors, he never did so. Accordingly, we conclude that there is sufficient evidence in the record to support the conclusion of the JO, on behalf of the Secretary of Agriculture, that, at the time of the PACA violations, Thames "had an actual, significant nexus with" John

Manning and possessed oversight and governance powers that "he failed to use in an effort to prevent [John Manning's] violations of the prompt payment provision of the PACA," and thereby failed to establish that he was only nominally an officer or director of John Manning for purposes of the PACA's licensing and employment restrictions.[2] Administrative Papers, Decision and Order of the Judicial Officer for the Secretary of Agriculture at 20-21, 26 (Jan. 24, 2006.).

III. CONCLUSION

Thames petitions for review of the final determination of the Secretary of Agriculture that he was responsibly connected with John Manning when it violated the PACA. We find that there is substantial evidence in the record to support the JO's determination that Thames failed to demonstrate he was only a nominal director and officer of John Manning at the time of the violations and was thus responsibly connected to the company for purposes of licensing and employment restrictions. Accordingly, the petition is **DENIED**.

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G & T TERMINAL PACKAGING CO., INC. v. USDA.
Case No. 05-5634-ag.
Filed November 3, 2006.

(Cite as: 468 F. 3d 86).

PACA – Perishable agricultural commodities - Bribery - Extortion - Illegal payments - Credibility determinations - Acts of employees and agents - Willful, flagrant, and repeated violations - License revocation – Implied duty not to pay bribe.

Citing deference under *Chevron* (104 S.Ct. 2778), the court found that petitioners, PACA licensees, had willfully paid bribes to USDA inspectors to obtain inaccurate reports for years and violated licensee's implied duty to refrain from making illegal payments to inspectors. The Secretary's decisions were affirmed and the appeal petition was denied.

United States Court of Appeals,

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[2]Because the record supports the conclusion that Thames was not a nominal officer or director, we do not reach the issue of whether he was "actively involved" in the activities resulting in violations of the PACA.

Second Circuit.

Before: MESKILL, SOTOMAYOR, and KATZMANN, Circuit Judges.

KATZMANN, Circuit Judge:

The matter at hand calls upon us to interpret the Perishable Agricultural Commodities Act ("PACA"), 7 U.S.C. § 499b, *et seq.,* specifically, to determine whether a PACA licensee bears an implied duty to refrain from paying illegal gratuities to a United States Department of Agriculture ("USDA") inspector, and the scope of the circumstances that constitute "reasonable cause" for the breach of such a duty.

This case arises out of the rampant corruption that existed for years, if not decades, in the Hunts Point Terminal Produce Market in the Bronx, NY. It is undisputed that many of the produce inspectors hired by the Department of Agriculture to provide impartial assessments of the condition of agricultural commodities arriving at Hunts Point for distribution throughout the metropolitan New York City area, far from acting as honest brokers, regularly accepted, and often demanded, cash payments from the merchants they were supposed to serve. When they did not receive payments from a merchant, the unscrupulous inspectors often would delay the performance of their duties or intentionally skew the results of their inspections in a manner calculated to harm the bottom line of the non-compliant merchant. In contrast, these inspectors gave preferential treatment to the merchants who crossed their palms with silver, quickly responding to their requests for inspections and, at least in some cases, shading the outcomes of their inspections in favor of merchants who agreed to pay. This situation left merchants operating in the Hunts Point Market to decide whether to acquiesce in the corruption and pay the illicit gratuities, knowing that if they did not, they risked operating at a competitive disadvantage vis-à-vis the complicit merchants. Petitioners G & T Terminal Packaging Co, Inc. and Tray-Wrap, Inc., by their agent, Anthony Spinale, chose to pay. The question now before us is whether we may affirm the Secretary of Agriculture's conclusions (1) that the petitioners breached a duty impliedly imposed by the Perishable Agricultural Commodities Act in making these illegal payments, and (2) that the situational coercion created by the inspectors' corruption did not constitute "reasonable cause" for this breach. We grant *Chevron* deference to the Secretary's

construction of the scope of the implied duties created by the PACA and affirm that construction as reasonable. We do not decide whether the Secretary's unelaborated determination that the "extortion evidenced in this proceeding is not a 'reasonable cause' " for Spinale's payments" is similarly entitled to deference under *Chevron* because we would reach the same conclusion upon a *de novo* review. We therefore deny the petition for review and affirm the Secretary's decision.

I.

A.

The Perishable Agricultural Commodities Act establishes a wide-ranging regulatory regime governing the wholesale trade in perishable goods such as fresh fruits and vegetables.[1] As Congress explained in enacting an amendment to PACA in 1956:

> The Perishable Agricultural Commodities Act is admittedly and intentionally a 'tough' law. It was enacted in 1930 for the purpose of providing a measure of control and regulation over a branch of industry which is engaged almost exclusively in interstate commerce, which is highly competitive, and in which the opportunities for sharp practices, irresponsible business conduct, and unfair methods are numerous. The law was designed primarily for the protection of the producers of perishable agricultural products-most of whom must entrust their products to a buyer or commission merchant who may be thousands of miles away, and depend for their payment upon his business acumen and fair dealing-and for the protection of consumers who frequently have no more than the oral representation of the dealer that the product they buy is of the grade and quality they are paying for.
>
> The law has fostered an admirable degree of dependability and fairness in this industry chiefly through the method of requiring the registration of all those who carry on an interstate business in perishable agricultural commodities and denying this registration to those whose business tactics disqualify them. S.Rep. No. 84-2507, at 3 (1956), *as reprinted in* 1956 U.S.C.C.A.N. 3699, 3701.

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[1] 7 U.S.C. § 499a(b)(4) provides that the term "perishable agricultural commodity ... [m]eans any of the following, whether or not frozen or packed in ice: Fresh fruits and fresh vegetables of every kind and character; and ... [i]ncludes cherries in brine as defined by the Secretary in accordance with trade usages."

The Secretary of Agriculture is charged with implementing and enforcing this regulatory regime, which permits only persons and entities that hold a valid license from the Secretary to participate in this trade. 7 U.S.C. § 499c(a).[2] By statute, the Secretary is empowered to award damages to persons injured by PACA violations. *See* § 499e.[3] In addition, the Secretary possesses authority to revoke a previously granted license if, after the filing of a complaint and subsequent administrative proceedings, *see generally* § 499f, the license holder is found to have committed "flagrant or repeated" violations of § 499b. *See* § 499h(a). This sanction is strong medicine, as it has the effect of exiling the violator from the portions of the produce trade governed by the PACA. However, it is also integral to Congress' goal of restricting participation in this critical interstate trade to honest businesspersons.

B.

Petitioners G & T Terminal Packaging Co., Inc. ("G & T") and Tray-Wrap, Inc. ("Tray-Wrap") are New York corporations that have held PACA licenses since 1964 and 1970, respectively. G & T deals in wholesale potatoes, while Tray-Wrap operates in the wholesale tomato

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[2]This subsection provides that "no person shall at any time carry on the business of a commission merchant, dealer, or broker without a license valid and effective at such time." 7 U.S.C. § 499c; *see also*7 U.S.C. § 499d(a) (providing that the issuance of a license "entitle[s] the licensee to do business as a commission merchant and/or dealer and/or broker unless and until it is suspended or revoked by the Secretary."). 7 U.S.C. § 499a(b)(5) defines the term "commission merchant" to mean "any person engaged in the business of receiving in interstate or foreign commerce any perishable agricultural commodity for sale, on commission, or for or on behalf of another." The term "dealer" is defined to mean, with certain exceptions, "any person engaged in the business of buying or selling in wholesale or jobbing quantities, as defined by the Secretary, any perishable agricultural commodity in interstate or foreign commerce." 7 U.S.C. § 499a(b)(6). "Broker" is similarly defined under the PACA, again with limited exceptions, as "any person engaged in the business of negotiating sales and purchases of any perishable agricultural commodity in interstate or foreign commerce for or on behalf of the vendor or the purchaser, respectively." 7 U.S.C. § 499a(b)(7).

[3]Under the terms of this section, "[i]f any commission merchant, dealer, or broker violates any provision of section 499b of this title he shall be liable to the person or persons injured thereby for the full amount of damages ... sustained in consequence of such violation." 7 U.S.C. § 499e(a). The section further provides that "[s]uch liability may be enforced either (1) by complaint to the Secretary as hereinafter provided, or (2) by suit in any court of competent jurisdiction; but this section shall not in any way abridge or alter the remedies now existing at common law or by statute, and the provisions of this chapter are in addition to such remedies." 7 U.S.C. § 499e(b).

trade. The two companies share a common mailing address, a common pool of employees, and operated out of the same office at the Hunts Point Terminal Market in the Bronx, NY.[4] In addition, they share close ties to Anthony Spinale, who was the director, president and 100 percent owner of G & T, and Tray-Wrap's founder and principal manager.

In late 1996, the USDA Office of the Inspector General and the FBI launched an investigation into allegations of corruption in the USDA office in Hunts Point, tipped off by "complaints from a variety of growers that wholesalers seemed to be taking advantage of the inspection system at Hunts Point, forcing growers to make constant price concessions." The investigators discovered that "corrupt inspectors ... were taking cash payments (usually $50 per container of produce) from produce wholesalers in exchange for agreeing to 'downgrade' produce on inspection certificates, to the substantial financial detriment of growers." The investigation also "revealed the existence of an ongoing, coordinated criminal organization operating within the Hunts Point USDA office. Supervisory inspectors used their positions to assign corrupt inspectors under them to conduct inspections that were likely to produce payoffs. These inspectors in turn often kicked back a percentage of the cash payments to the supervisors in exchange for the favorable assignments."

William Cashin was one of the unscrupulous USDA inspectors. After his arrest, Cashin cooperated with the ongoing investigation into the Hunts Point corruption by surreptitiously making audio and video recordings of his interactions with various Hunts Point inspectors and merchants. Cashin's cooperation led to the arrest and indictment of seven other USDA inspectors. The dragnet also ensnared several merchants who were making payments to the inspectors, including Spinale, who was indicted in the Southern District of New York on October 21, 1999, and charged with nine counts of bribing a public official in violation of 18 U.S.C. §§ 201(b)(1)(A) and (2).[5] On January

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[4]The Hunts Point Terminal Market is the largest wholesale produce terminal in the United States, with annual revenues in excess of $1.5 billion annually. *See* http:// www. term inalmarkets.com/ huntspoint.htm (last visited Sept. 26, 2006).

[5]The Hunts Point investigation and its conclusions are described in further detail in *Illegal Activities at the Hunts Point Market: Hearing Before the Subcomm. on Livestock and Horticulture of the H. Comm. on Agric.,* 106th Cong. 1-122 (2000), http:// commdocs. house.gov/commi ttees/ag/hag106 58.000/hag10658 _0.htm (last visited Oct. 9, 2006).

26, 2001, Spinale pleaded guilty to Count Nine of that indictment before Magistrate Judge Ronald Ellis. In the course of his allocution, Spinale admitted that "[o]n 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. On the other dates in the Indictment, I paid Mr. Cashin $100 per inspection to influence the outcome of the report." Spinale immediately followed that statement by saying, "Your Honor, I would like to state I never intended to defraud the shippers who had sent me the produce." Spinale then reiterated that he was "paying [Cashin] to dictate what he was putting into the report." He also gave an affirmative response when the court asked, "[s]o it was [Cashin's] job to make reports about the produce that he was inspecting, and you were trying to influence him to write things in the report?" On August 21, 2001, District Judge Richard C. Casey accepted Spinale's plea and sentenced him, upon a downward departure, to a five-year term of probation, including twelve months of home confinement, and a $30,000 fine.

On June 3, 2003, the government filed an administrative complaint charging G & T and Tray-Wrap with having "willfully, fragrantly, and repeatedly violated Section 2(4) of the PACA 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" by making payments, through Spinale, to Cashin. *See*7 U.S.C. § 499p (providing that a regulated merchant is liable for the acts, omissions and failures of any of its agents and officers). Specifically, the complaint charged G & T with having "made illegal payments to a USDA inspector in connection with four federal inspections of perishable agricultural commodities" between July 1999 and August 1999. It similarly charged Tray-Wrap with having made six illegal payments to a USDA inspector between March 1999 and June 1999. The petitioners responded by filing a joint answer which, in sum and substance, denied the charges against them but admitted that Spinale had been indicted on federal bribery charges and subsequently pleaded guilty to a single count of that indictment.

ALJ William Moran presided over a six-day disciplinary hearing beginning on October 25, 2004, during which he heard extensive testimony from Cashin and Spinale, as well as other witnesses. Spinale testified that he began to make what became customary gratuity

payments in 1991, shortly after the petitioners moved to the Hunts Point Terminal market. According to Spinale, he and Lou Guerra, another produce merchant, "were talking and I had just-I don't know if somebody had handed me an inspection or had an inspection, and I turned around and told them that these people up here, they're just impossible to work with. They don't know what they're looking at, you can't get a fair inspection, you can't get a timely inspection, and Mr. Guerra made some kind of signal to me and basically he was going like this here [rubbing two fingers together], and I said, well, you know, look. If I have to do that, I have to do it. So he turned around and said he's going to send somebody to see me and the guy will mention my name and you'll know what you have to do." Spinale testified that he understood Mr. Guerra to mean that he had to give somebody money "[t]o get a fair inspection or a fast inspection." Spinale further described that "the next time I ordered an inspection, Mr. Cashin popped up, and he turned around and said Lou ... said that I should [say] hello to you, or something similar to that.... [A]fter he finished the inspection, I just turned around and slipped a hundred dollars, just gave him the hundred dollars.... I just gave him a hundred dollars, didn't ask him anything, he didn't say anything to me and I didn't say anything to him." Spinale stated that he continued to make cash payments to several inspectors thereafter, including Cashin. However, Spinale repeatedly denied that he had made the payments to induce the inspectors to make inaccurate inspections of the arriving produce.[6] On the contrary, Spinale testified that, as a general matter, he gave the inspectors cash for the sole purpose of obtaining "fair, fast [and] accurate" inspections. Spinale described the inspectors' practice of withholding timely and accurate produce inspections unless they were paid as "soft extortion," and contended that giving in to that "soft extortion" "was something you had to do if you wanted to run a successful business. It was just a necessity."

Spinale's account was corroborated in several respects by the testimony of Paul Cutler and Edmund Esposito, two former Hunts Point USDA inspectors who, like Cashin, were active participants in the

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[6]Spinale did admit that, on at least one occasion-which was caught on tape as part of the sting operation-he "dictated" the contents of an inspection report to Cashin. Spinale explained that "the reason I was dictating these reports was because, in my mind, the man was [in]capable of writing a fair inspection.... And I turned around and dictated these reports so that we could get a fair appraisal of what was actually in the car...." At another point in his testimony, Spinale asserted that he gave "in my opinion, what I thought was a correct and accurate report because Cashin wasn't able to do it. He was a nervous wreck."

bribery scheme and pled guilty to bribery charges. Cutler explained that there was a chronic shortage of USDA inspectors in the Hunts Point office, and that because of this shortage it sometimes took "a day or two" to perform a requested inspection. As Cutler testified, this situation created a profit opportunity for inspectors willing to "put pressure" on merchants to extend gratuities in their direction: "a lot of times I would come down to do an inspection, like I had applicants would have to sell things, you know-you know, the produce is perishable and they would have to get an inspection in a timely manner.... And when we came down there, like I said, they would be yelling a lot and saying where were you, you know. And I would be so ticked off at them, because we have a big load, and here you have an applicant yelling at you, and I would try in some of these stores to say hey, if you want a right inspection, I would tell them to pay me." Cutler was then asked what he would do if a merchant refused to pay him. "If he refused to pay me, it depends on the inspection on-you know, on what defects I found. If it was on the border ... I would pass it. If he paid me ... I would add maybe-say it was on the border, I add like two or three percentage points ... to fail it."Cutler explained that he felt that he had significant power over the merchants in the market because "we could kind of force them to pay to get an inspection, or else they knew they wouldn't get the-a right inspection."

Esposito similarly testified that when Hunts Point merchants refused to pay him, "I usually screwed them." Asked to elaborate, Esposito stated: "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." Esposito also explained that although as many as "30, 35" merchants were paying the inspectors, not all of paying merchants received the same return on their investments. Instead, according to Esposito, "there were people that paid and you didn't do nothing for them, but they still paid. And then there was people that you did things for that paid, also." Esposito clarified that for the first group "[y]ou just did the normal fair inspection. You gave them a fair inspection and they paid you," but that he would write false inspection reports on behalf of the second group of merchants. Esposito did not explain why the inspectors treated some paying merchants differently than others. Esposito testified, however, that Spinale never asked him to alter, falsify or downgrade an inspection, though he also testified to having given Spinale "a benefit of

doubt on inspections" without having been asked to do so because he "got paid and [Spinale is] a nice guy."

Cashin also testified at the hearing. Unlike Esposito, Cashin asserted that Spinale had paid the inspectors for more than just "fast, fair and accurate" inspections. Cashin testified that he and Spinale had an "understanding" that Spinale's payments were intended to influence, and in fact did influence, the outcome of Cashin's inspections. According to Cashin, this "understanding" originally arose from an agreement between Spinale and another USDA inspector, Bob Snolec, and that when Snolec left the USDA, Cashin took over at G & T and Tray-Wrap, telling Spinale, "I'll be coming here a lot, I think, and, you know, I'll help you like Bob helped you." Cashin did not describe Spinale's response to that statement. Cashin explained that he provided "help" for Spinale and other merchants that paid him illegal gratuities "in any one of three ways, and it's a combination of any one of the three factors. The first factor is increasing the number of containers reported on a certificate.... The second way was to increase on the certificate, under the defects, the percentages of condition.... And the third way of help was the temperatures recorded on the certificate." By inaccurately recording the quantity and quality of the produce received by the wholesaler, Cashin testified that an inspector could reduce the price that a wholesaler would have to pay a supplier for the produce he had received. Cashin further testified that he would "usually" help Spinale by adjusting the percentage of defects found in Spinale's favor, explaining that Spinale "would be very specific and tell me what he wanted written down," "oftentimes" telling Cashin what to put in his inspection reports, and that when Cashin "helped" Spinale, his inspections did not accurately reflect the conditions of the produce received.

On March 28, 2005, Judge Moran issued a lengthy opinion dismissing the government's complaint against the petitioners. Judge Moran rejected Cashin's claim that Spinale had made the gratuity payments for the purpose of inducing him to make inaccurate inspections, and instead credited Esposito's testimony that Spinale "was paying only for a fair and accurate inspection," also finding broadly that "in all aspects where [Cashin's] testimony conflicted with Mr. Spinale's testimony, Mr. Spinale's testimony was credible and Cashin's was not." Judge Moran also took note of the substantial economic power that the inspectors wielded over the Hunts Point merchants. As Judge Moran colorfully put it, "Cashin and his cabal of corrupt cronies knew they had merchants like Mr. Spinale over a barrel. 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 light of these findings, Judge Moran determined that the payments made by Spinale to Cashin were a "personal fee" extracted by Cashin "for every *visit* to Mr. Spinale's place of business and that in no instance was Mr. Spinale benefitting from those visits [by obtaining] ... an inspection report which downgraded a load of produce from its actual condition." Having found that Spinale did not benefit in this way, Judge Moran declined to extend preclusive effect to the fact or substance of Spinale's admission of guilt to a federal bribery charge, and found that Spinale "was not *bribing* Cashin but that unlawful gratuities were made." To Judge Moran, this distinction was determinative, as he found that a licensee has an implied duty to refrain from paying bribes, but does not bear such a duty to refrain from paying illegal gratuities that do not benefit the licensee. He further found that even if the payment of illegal gratuities constitutes a breach of a PACA duty, the illicit payments that Spinale had made to Cashin did not "constitute sufficient cause to warrant revocation of the licenses of G & T and Tray-Wrap when the central contention of the [Petitioners] 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."

The government appealed Judge Moran's decision to Judicial Officer William G. Jenson who, pursuant to 7 C.F.R. § 2.35(a), is authorized to make final determinations on behalf of the Secretary of Agriculture in adjudicatory proceedings. The Judicial Officer adopted Judge Moran's credibility determinations with respect to the witnesses who had testified at the hearing, and did not explicitly overturn any of Judge Moran's other factual findings. He nonetheless reversed Judge Moran's ultimate decision and revoked the petitioners' PACA licenses, taking a very different view of both the scope of the petitioners' implied duties under the PACA and the circumstances under which extortionate pressure may constitute reasonable cause for the breach of an implied duty.[7]

With respect to the first, the Judicial Officer concluded that PACA licensees "have a duty to refrain from making payments to [USDA] inspectors in connection with the inspection of perishable agricultural commodities which will or could undermine the trust produce sellers

[7]The Judicial Officer's order was stayed pending the outcome of this appeal.

place in the accuracy of the [USDA] inspection certificates and the integrity of [USDA] inspectors," and that "[a] PACA licensee's payment to a [USDA] inspector, whether caused by bribery or extortion and whether to obtain an accurate [USDA] inspection certificate or an inaccurate [USDA] inspection certificate, undermines the trust a produce seller places in the accuracy of the [USDA] inspection certificate and the integrity of the [USDA] inspector." As such, he concluded that "the purpose and reasons for Anthony Spinale's payments to William Cashin are not relevant to this proceeding. A payment to a [USDA] inspector in connection with the inspection of perishable agricultural commodities, whether the result of extortion evidenced in this proceeding or bribery and whether to obtain accurate or inaccurate [USDA] inspection certificates, is a violation of section 2(4) of the PACA."

The Judicial Officer also rejected the petitioners' claim that the inspectors' practice of "soft extortion" constituted reasonable cause for the payments made by Spinale, concluding that "[t]he extortion evidenced in this proceeding is not a 'reasonable cause' ... for a commission merchant, dealer, or broker to fail to perform the implied duty to refrain from paying [USDA] inspectors in connection with the inspection of perishable agricultural commodities. Moreover, avoidance of inspection delays and avoidance of the issuance of inaccurate [USDA] inspection certificates are not 'reasonable causes' " for the commission of such an breach. The Judicial Officer offered no further explanation of what circumstances might be encompassed by the term "reasonable cause," however.[8]

Relying on Spinale's repeated admissions that he had made numerous payments[9] to Cashin in connection with Cashin's inspections of

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[8]We also note that the respondent was not able to point us to any guiding principle articulated by the Secretary with respect to the meaning of "reasonable cause" in its main brief, upon our call for supplemental briefing, or at oral argument. The respondent instead principally defended the Secretary's conclusion by analogizing to the manner in which this Court and others have treated the relationship between bribery and extortion in construing various federal criminal statutes. *See, e.g.,* Respondent's Supp. Br. at 6-7 (citing, *inter alia, United States v. Barash,* 365 F.2d 395 (2d Cir.1966)). We need not and do not address the persuasiveness of these analogies here.

[9] Spinale insisted during his testimony before the ALJ that he did not "pay" Cashin or make "payments" to him, and that he instead "gave" him money, explaining, "I told you, I gave them money which I considered to be soft extortion. I didn't pay anybody to do anything.... I didn't pay him, I keep on telling you that it wasn't a payment. It was, (continued...)

agricultural commodities for the petitioners, the Judicial Officer concluded that Spinale, and therefore the petitioners, had "engaged in willful, flagrant, and repeated violations of section 2(4) of the PACA ... by failing, without reasonable cause, to perform an implied duty arising out of an undertaking in connection with transactions involving perishable agricultural commodities purchased, received, and accepted in interstate or foreign commerce." He therefore ordered the petitioners' PACA licenses revoked.

This timely petition for review of the Secretary's decision followed.

II.

A.

The petitioners challenge two conclusions adopted by the Secretary in the course of a formal adjudication conducted pursuant to the agency's express statutory authority to administer and implement the PACA regulatory regime. *See*7 U.S.C. § 499a(b)(2) (defining the term "Secretary" as used in the PACA to mean the Secretary of Agriculture); §§ 499d-f (empowering the Secretary of Agriculture to enact a PACA licensing scheme, enforce that scheme, and award damages to persons injured by PACA violations). First, the petitioners challenge the Secretary's generally applicable view that § 499b(4) encompasses a duty to refrain from making a payment to an inspector that only is intended to cause, and does in fact only cause, the inspector to create an accurate and timely inspection report. They argue that because a USDA inspector's duty is to provide timely and accurate inspections, the Secretary's construction is unreasonable. Second, they challenge the Secretary's case-specific determination, unaccompanied by a comprehensive discussion of the meaning of "reasonable cause," that the inspectors' actions did not constitute "reasonable cause" for Spinale's payments. The petitioners claim that Spinale reasonably feared that the petitioners would suffer significant economic loss if he did not pay regular gratuities to the inspectors, and that such a fear must be

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[9](...continued)
as far as I'm concerned, soft extortion." The petitioners pick up on this theme in their opening brief, claiming that the Judicial Officer erred in describing Spinale as having "paid" or made "cash payments" to inspectors when he in fact "gave" them money. Given the Judicial Officer's conclusion that the giving of any money in connection with a perishable commodities inspection violates PACA Section 2(4), we find it unnecessary to address this dispute.

encompassed by the term "reasonable cause."

We consider both of the petitioners' arguments against the backdrop of the familiar two-step framework set forth by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Under *Chevron,*"[f]irst, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron,* 467 U.S. at 842-43, 104 S.Ct. 2778 (footnotes omitted). As a result, unless we find the Secretary's construction of the statute to be "arbitrary, capricious, or manifestly contrary to the statute,"*id.* at 844, 104 S.Ct. 2778, we must yield to that construction of the statute even if we would reach a different conclusion of our own accord. *See Regions Hosp. v. Shalala,* 522 U.S. 448, 457, 118 S.Ct. 909, 139 L.Ed.2d 895 (1998).

It is firmly established that we review under the *Chevron* standard an agency's binding and generally applicable interpretation of a statute that it is charged with administering when that interpretation is adopted in the course of a formal adjudicatory proceeding. *See United States v. Mead Corp.,* 533 U.S. 218, 230 n. 12, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001) (citing prior Supreme Court cases applying *Chevron* to agency adjudicatory decisions); *Freeman v. Burlington Broadcasters, Inc.,* 204 F.3d 311, 322 (2d Cir.2000) ("An agency's interpretation of an ambiguous statute it is charged with administering is entitled to *Chevron* deference not only when the agency interprets through rule-making, but also when it interprets through adjudication."). The Supreme Court has indicated that because some "ambiguous statutory terms" can be given concrete meaning only "through a process of case-by-case adjudication," the individual determinations reached by an agency engaged in that process also "should be accorded *Chevron* deference." *INS v. Aguirre-Aguirre,* 526 U.S. 415, 425, 119 S.Ct. 1439, 143 L.Ed.2d 590 (1999); *see also INS v. Cardoza-Fonseca,* 480 U.S. 421, 449, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1987) (citing *Chevron*) ("There is obviously some ambiguity in a term like well-founded fear which can only be

given concrete meaning through a process of case-by-case adjudication. In that process of filling any gap left, implicitly or explicitly, by Congress, the courts must respect the interpretation of the agency to which Congress has delegated the responsibility for administering the statutory program.") (quotation marks omitted); *In re Sealed Case,* 223 F.3d 775, 779-80 (D.C.Cir.2000) (extending *Chevron* deference to the Federal Election Commission's case-specific probable cause determination).

B.

Our task at the first step of the *Chevron* analysis is a simple one, as it is pellucidly clear that Congress has not spoken to the precise issues before us in this appeal: whether a PACA licensee bears an implied duty to refrain from paying illegal gratuities to a USDA inspector, and the scope of the circumstances that constitute "reasonable cause" for the breach of such a duty. 7 U.S.C. § 499b provides that "[i]t shall be unlawful in or in connection with any transaction in interstate or foreign commerce ... (4) For any commission merchant, dealer, or broker ... to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any [transaction involving any perishable agricultural commodity]." This statutory language plainly leaves undelineated what implied duties and specifications a PACA licensee might be required to bear, and under what circumstances a breach owes its occurrence to a "reasonable cause," and therefore must be excused. It is the province of the Secretary of Agriculture, who as we have noted above, has been charged with implementing and administering the PACA, to fill in these gaps. *Accord JSG Trading Corp. v. Dep't of Agric.,* 235 F.3d 608, 614 n. 8 (D.C.Cir.2001) ("Given the substantial ambiguity in § 499b(4), it is the Department's function, not ours, to define offenses under that provision."). Therefore, in light of Congress' silence, we turn to step two of the *Chevron* analysis, asking whether the Secretary has filled these statutory gaps in a manner reasonably consonant with the language, structure and purposes of the Act.

C.

1.

We affirm as reasonable the Secretary's conclusion that the PACA imposes an implied duty upon licensees to refrain from making

payments to USDA inspectors in connection with produce inspections, irrespective of whether those payments induce, or are intended to induce, the inspectors to issue inaccurate inspection certificates. Indeed, given a statutory scheme which assigns government inspectors to protect the financial interests of distant shippers by providing impartial assessments of the condition of the produce upon arrival, *see* § 499n(a); *cf. R Best Produce, Inc. v. Shulman-Rabin Mktg., Corp.,* 467 F.3d 238, 241, 2006 WL 3040061, at *2 (2d Cir.2006) (noting that Congress amended PACA in 1984 to provide sellers with "additional protection"), we can hardly conceive of a duty more clearly implicated than the obligation of recipients not to make side-payments to these inspectors. As the Judicial Officer noted, such payments give rise to a strong inference that the inspector's loyalty has been purchased by the payor, and therefore "undermine[ ] the trust a produce seller places in the accuracy of the [USDA] inspection certificate and the integrity of the [USDA] inspector." The facts of this case do not belie that presumption. Even accepting Judge Moran's conclusion that Spinale made his payments intending only to procure "fast, fair and accurate inspections," the record suggests that Spinale received additional benefits from the inspectors he paid. Esposito testified, for example, that he sometimes gave Spinale "a benefit of doubt on inspections," in part because he "got paid." Cutler similarly testified that he would shade his inspection results to benefit the merchants that paid him. This undisputed testimony tends to confirm what common sense and common experience suggest: that strict impartiality and secret cash payments do not easily co-exist.

Given that a principal purpose of the PACA is to "protect[ ] ... the producers of perishable agricultural products-most of whom must entrust their products to a buyer or commission merchant who may be thousands of miles away, and depend for their payment upon his business acumen and fair dealing,"*see*S.Rep. No. 84-2507, at 3, *as reprinted in* 1956 U.S.C.C.A.N. at 3701, we think it is appropriate for the Secretary to construe the implied duties owed by PACA licensees in a manner designed to secure shippers' confidence in the USDA agents hired, in effect, to stand in their shoes when the produce arrives at its destination. We therefore conclude that the Secretary has permissibly construed § 499b(4) as encompassing an implied duty to refrain from paying illicit gratuities to USDA inspectors in conjunction with inspections of perishable agricultural products, even where those payments are not intended to result, and do not result, in the filing of an inaccurate inspection certificate.

2.

We also affirm the Secretary's conclusion that the inspectors' practice of withholding "fast, fair and accurate" inspections from merchants who refused to pay illegal gratuities does not excuse the petitioners' decision to breach the implied duties owed under the PACA by making such payments. Once again we begin with the statute, which provides that "[i]t shall be unlawful in or in connection with any transaction in interstate or foreign commerce ... (4) For any commission merchant, dealer, or broker ... to fail, *without reasonable cause,* to perform any specification or duty, express or implied, arising out of any undertaking in connection with any [transaction involving any perishable agricultural commodity]." 7 U.S.C. § 499b (emphasis added). In construing this clause-the expansiveness of which suggests that Congress intended to grant the Secretary broad leeway to address the infinite variety of facts and circumstances that might surround a PACA violation-the Secretary rejected the petitioners' claim that "any violation of the statute was unavoidable due to extortion," instead finding that the "avoidance of inspection delays and avoidance of the issuance of inaccurate [USDA] inspection certifications are not 'reasonable causes' " for the payment of unwarranted gratuities to a USDA inspector.

We think the Secretary's case-specific determination that "reasonable cause" had not been demonstrated typically would be entitled to *Chevron* deference because agencies are generally accorded *Chevron* deference when they give "ambiguous statutory terms concrete meaning through a process of case-by-case adjudication." *See, e.g., INS v. Aguirre-Aguirre,* 526 U.S. 415, 425, 119 S.Ct. 1439, 143 L.Ed.2d 590 (1999) (internal quotation marks omitted); *In re Sealed Case,* 223 F.3d 775, 779-780 (D.C.Cir.2000) (extending *Chevron* deference to the Federal Election Commission's case-specific probable cause determination). Although such case-by-case adjudication may ultimately be necessary to give concrete meaning to the term "reasonable cause" as used in 7 U.S.C. § 499b, our task in reviewing the Secretary's determination in this case would have been considerably aided had the Secretary provided some guiding principle for identifying what constitutes "reasonable cause," or at least a rationale for rejecting petitioners' alternative construction. However, we need not reach the question whether the Secretary's cursory treatment of the term "reasonable cause" is still entitled to *Chevron* deference, as we would reach the same conclusion as the Secretary under either a *de novo* or deferential standard.

Coercion, as the various hypotheticals drawn up by the parties in their written submissions and at oral argument reaffirm, exists in many degrees and can take many forms. We may presume that there are species of coercion so extreme that they rob an individual of any meaningful opportunity to resist, as well as varieties too moderate to ever excuse the performance of an illegal act. We need not engage these or other hypotheticals, however, because we have before us a well-developed factual record of the circumstances faced by Spinale. The facts in the record reveal that the "extortion" practiced by Cashin and his cohorts, while real, was indeed "soft" enough to support the view that no reasonable cause existed for the petitioners' breach of duty.

Spinale has never suggested that he was physically threatened, and Esposito specifically denied that the inspectors employed such threats to obtain their gratuities. Nor did the inspectors threaten Spinale with the loss or destruction of his business, harm to his family or employees, blackmail, or the outright denial of produce inspections. Indeed, Spinale's payment relationship with Cashin was not even initiated by an inspector's suggestion; rather, according to Spinale's own testimony, he decided of his own accord, at the suggestion of a fellow produce merchant, that it would be worthwhile to start making cash payments to the inspectors, and began to do so at the next available opportunity. We also note Cashin's testimony that while many of the Hunts Point merchants gave in to the inspectors demands, some twenty-five to forty percent of the merchants managed to resist. In the same vein, we note petitioners' concession at oral argument that Spinale never attempted to report the illegal activities at Hunts Point to the Bronx District Attorney's Office, the United States Attorney's Office for the Southern District of New York, the USDA Inspector General, the NYPD, or any other official body. While we need not and do not address whether he bore an affirmative obligation to do so, we simply point out that there were clearly available-and potentially anonymous-means of resisting the inspectors' illegal scheme that Spinale never explored. We think this fact serves to bolster the Secretary's decision to reject the petitioners' assertion that Spinale had no choice but to make cash payments to the inspectors for over a decade.

In short, we view the record as demonstrating that the inspectors' corrupt practices left Spinale with choices about how to respond to their demands for illegal payments-hard choices, perhaps, but meaningful ones all the same. Given that backdrop, we concur in the Secretary's view that "[t]he extortion evidenced *in this proceeding* is not a 'reasonable cause' ... for a commission merchant, dealer, or broker to fail to perform the implied duty to refrain from paying [USDA]

inspectors in connection with the inspection of perishable agricultural commodities."(emphasis added). We therefore affirm the Secretary's decision to strip the petitioners of their PACA licenses.

III.

We have considered all of petitioners' other arguments and find them to be without merit. Therefore, for the reasons set forth above, the petition for review is **DENIED** and the decision of the Secretary of Agriculture is hereby **AFFIRMED.**

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HUNTS POINT TOMATO CO., INC. v. USDA.
Case No. 06-1072-ag.
Filed November 13, 2006.

(Cite as: 204 Fed. Appx. 981).

PACA – License terminated – Prompt payment, failure to make - License lapse – Slow pay.

Appellant, lapsed licensee, repeatedly and flagrantly violated PACA when it failed to make full payment to its suppliers promptly. The court found that the "slow pay" provisions would not change the statutory sanction and PACA does not require "uniformity of sanctions" (cite: *Harry Klein Produce Corp.* 831 F.2d 407). The Judicial Officer's decision was affirmed.

United States Court of Appeals,
Second Circuit.

Appeal from the Secretary of Agriculture (William J. Jenson, Judicial Officer).

This cause came on to be heard on the transcript of record and was argued.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the Secretary of Agriculture be and it hereby is **AFFIRMED.**

Present: ROGER J. MINER, ROSEMARY S. POOLER, and ROBERT

A. KATZMANN, Circuit Judges.

SUMMARY ORDER

Petitioner Hunts Point Tomato Co., Inc. ("Hunts") petitions for review of an order of the Secretary of the United States Department of Agriculture ("USDA"), which ordered publication of the facts and circumstances of its findings: that Hunts had repeatedly and flagrantly violated the Perishable Agricultural Commodities Act ("PACA"), 7 U.S.C. §§ 499a-499s. Petitioner contends, *inter alia,* that the decision not to postpone its hearing after it promised to make full payment to its suppliers was an abuse of discretion, as was the USDA's failure to take into account the possibility of repayment and other relevant mitigating circumstances before going forward with the hearing and imposing sanctions.

On March 31, 2003, the USDA filed a complaint alleging that during the period between September 2001 and June 2002, Hunts failed to make prompt and full payment to sellers of agricultural commodities, as mandated by PACA, which requires all covered entities such as petitioner to make "full payment promptly" for all purchases of perishable agricultural commodities received in interstate commence. 7 U.S.C. § 499b(4). "Full payment promptly" has been defined as, *inter alia,* payment "for produce purchased by a buyer, within 10 days after the day on which the produce is accepted." 7 C.F.R. § 46.2(aa)(5).

On August 5, 2004, five days before the hearing, Hunts requested a postponement, allegedly so that it might pay its creditors in full. The USDA declined. Hunts reiterated this request in its preliminary statement at the hearing, but offered no evidence that it had any funds available to make full payment.[1] The administrative law judge ("ALJ") found that Hunts had failed to make timely payments of over $795,000 to agricultural suppliers. The ALJ also found that Hunts' violations were repeated and willful, and since the appropriate punishment would have been license revocation, but for the fact that Hunts had allowed its license to lapse in June 2002, the appropriate sanction was to publish the facts and circumstances of Hunts' violations. *SeeFiner Foods Sales Co. v. Block,* 708 F.2d 774, 777 (D.C.Cir.1983).

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[1]Two of Hunts' suppliers had filed an action in the United States District Court for the Southern district of New York under 7 U.S.C.§ 499e(b)(2). Pursuant to a preliminary injunction entered in that case, all of Hunts' assets are held in trust for those creditors.

Hunts now argues that the USDA's actions deprived it of an opportunity to avail itself of the agency's "slow pay" policy, as set forth in *In re Scamcorp Inc.,* 57 Agric. Dec. 527, 548-49 (1998), in a manner that was arbitrary and capricious. Hunts argues that since PACA is designed to promote prompt payment to the suppliers of perishable agricultural commodities, that by refusing Hunts' settlement offer (and thereby delaying payment to Hunts' creditors until after the hearing) the USDA acted in a manner contrary to PACA's purpose.

This argument is without merit. While Hunts offered evidence that it had made partial repayment, it had failed to make full payment to those suppliers to which it was admittedly seriously in arrears within 120 days of being served with the complaint. Had the ALJ postponed the hearing (and had Hunts indeed been able to make full repayment to its suppliers, a fact which is not established by the record we have before us), the same sanctions as those actually imposed would still have been applicable, since Hunts would not have been able to retroactively avail itself of *Scamcorp's* "slow pay" provisions, as Hunts would have been making payment 17 months after having been served with the complaint. Hunts' argument that the decision not to postpone the hearing resulted in more serious sanctions is incorrect.

Furthermore, the USDA's purported decision to delay the repayment of creditors in order to impose sanctions was not contrary to PACA's purpose. PACA is a remedial statute designed to ensure that commerce in agricultural commodities is conducted in an atmosphere of financial responsibility. *See Harry Klein Produce Corp. v. United States Dep't of Agric.,* 831 F.2d 403, 405 (2d Cir.1987). "It is an intentionally rigorous law whose primary purpose is to exercise control over an industry 'which is highly competitive, and in which the opportunities for sharp practices, irresponsible business conduct, and unfair methods are numerous.' "*Id.* (quoting S.Rep. No. 84-2507 at 3 (1956), reprinted in 1956 U.S.C.C.A.N. 3699, 3701). Contrary to the petitioner's arguments, PACA's primary purpose is not compensatory.[2]

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[2]If, as petitioner seemingly alleges, PACA's requirements are inconsistent with industry custom or are counter-productive, "Congress is the body that must make that judgment." *Havana Potatoes,* 136 F.3d at 94. We do not find, given PACA's "prompt payment" requirement, that the application of the Secretary's regulations enforcing prompt payment are "arbitrary, capricious, or manifestly contrary to [PACA]." *See Chevron U.S.A. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 844, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

(continued...)

While petitioner also contends that the ALJ's decision was not based on substantial evidence, this argument is without merit, given Hunts' own admission that they were at one point over $1,000,000 in arrears to multiple agricultural suppliers. Accordingly, we find that the ALJ's factual findings are supported by substantial evidence, and that his conclusion that petitioner's violations were flagrant and repeated did not constitute an abuse of discretion. *See Havana Potatoes of New York Corp. v. United States,* 136 F.3d 89, 91-92 (2d Cir.1997).

Finally, petitioner's argument that the sanction here was arbitrary because lesser sanctions have been imposed in similar cases is not convincing. *See Harry Klein Produce Corp.,* 831 F.2d at 407 (holding that "PACA does not require uniformity of sanctions for similar violations."). We have carefully considered petitioner's remaining arguments and find them to be without merit. Accordingly, the petition is DENIED and we direct enforcement of the USDA's order.

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[2](...continued)

PERISHABLE AGRICULTURAL COMMODITIES ACT

DEPARTMENTAL DECISIONS

In re: EDWARD S. MARTINDALE.
PACA-APP Docket No. 04-0010.
Decision and Order.
Filed July 26, 2006.

PACA-APP – Perishable agricultural commodities – Responsibly connected – Actively involved in activities resulting in violation – Nominal officer, director, and shareholder – Alter ego.

The Judicial Officer affirmed Chief Administrative Law Judge Marc R. Hillson's (Chief ALJ) decision concluding Edward S. Martindale (Petitioner) was responsibly connected with Garden Fresh Produce, Inc., when Garden Fresh Produce, Inc., violated the PACA. The Judicial Officer found Garden Fresh Produce, Inc., violated the PACA during the period January 14, 2002, through February 26, 2003. During the violation period, Petitioner was the secretary, a director, and a holder of 20 percent of the outstanding stock of Garden Fresh Produce, Inc. The Judicial Officer stated the burden was on Petitioner to demonstrate by a preponderance of the evidence that he was not responsibly connected with Garden Fresh Produce, Inc., despite his being the secretary, a director, and a major shareholder of Garden Fresh Produce, Inc. The PACA provides a two-prong test which a petitioner must meet in order to demonstrate that he or she was not responsibly connected. First, a petitioner must demonstrate by a preponderance of the evidence that he or she was not actively involved in the activities resulting in a violation of the PACA. If a petitioner satisfies the first prong, then for the second prong, the petitioner must demonstrate by a preponderance of the evidence one of two alternatives: (1) the petitioner was only nominally a partner, an officer, a director, or a shareholder of the violating PACA licensee or entity subject to a PACA license; or (2) the petitioner was not an owner of the violating PACA licensee or entity subject to a PACA license, which was the alter ego of its owners. The Judicial Officer concluded Petitioner failed to prove by a preponderance of the evidence that he met the first prong and second prong of the responsibly-connected test. The Judicial Officer also rejected Petitioner's contention that the Chief ALJ held Petitioner to a standard of proof higher than preponderance of the evidence to demonstrate that Petitioner was only a nominal 20 percent shareholder of Garden Fresh Produce, Inc.

Charles L. Kendall for Respondent.
P. Sterling Kerr, Las Vegas, NV, for Petitioner.
Initial decision issued by Marc R. Hillson, Chief Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

On May 10, 2004, James R. Frazier, Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], issued a

determination that Edward S. Martindale [hereinafter Petitioner] was responsibly connected with Garden Fresh Produce, Inc., during the period January 2002 through February 2003, when Garden Fresh Produce, Inc., violated the PACA.[1] On June 14, 2004, Petitioner filed a Petition for Review pursuant to the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice] seeking reversal of Respondent's May 10, 2004, determination that Petitioner was responsibly connected with Garden Fresh Produce, Inc.

On March 2, 2005, Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] presided over a hearing in San Jose, California. P. Sterling Kerr, Kerr & Associates, Las Vegas, Nevada, represented Petitioner. Charles L. Kendall, Office of the General Counsel, United States Department of Agriculture, represented Respondent.

On January 27, 2006, after the parties filed post-hearing briefs, the Chief ALJ issued a Decision [hereinafter Initial Decision] in which the Chief ALJ concluded Petitioner was responsibly connected with Garden Fresh Produce, Inc., when Garden Fresh Produce, Inc., violated the PACA (Initial Decision at 1, 14).

On March 8, 2006, Petitioner appealed to the Judicial Officer. On March 28, 2006, Respondent filed a response to Petitioner's appeal petition. On April 28, 2006, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I agree with the Chief ALJ's conclusion that Petitioner was responsibly connected with Garden Fresh Produce, Inc., when Garden Fresh Produce, Inc., violated the PACA. Respondent's exhibits are designated by "RX." Transcript references are designated by "Tr."

APPLICABLE STATUTORY PROVISIONS

7 U.S.C.:

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[1]During the period January 14, 2002, through February 26, 2003, Garden Fresh Produce, Inc., purchased, received, and accepted in interstate commerce, from five produce sellers, 109 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $379,923.25, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). *In re Garden Fresh Produce, Inc.*, 63 Agric. Dec. 1032 (2004).

TITLE 7—AGRICULTURE

. . . .

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

. . . .

§ 499a. Short title and definitions

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(b) Definitions

For purposes of this chapter:

. . . .

(9) The term "responsibly connected" means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association. A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of this chapter and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.

. . . .

§ 499b. Unfair conduct

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

. . . .

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

such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter.

. . . .

§ 499d. Issuance of license

(a) Authority to do business; termination; renewal

Whenever an applicant has paid the prescribed fee the Secretary, except as provided elsewhere in this chapter, shall issue to such applicant a license, which shall entitle the licensee to do business as a commission merchant and/or dealer and/or broker unless and until it is suspended or revoked by the Secretary in accordance with the provisions of this chapter, or is automatically suspended under section 499g(d) of this title, but said license shall automatically terminate on the anniversary date of the license at the end of the annual or multiyear period covered by the license fee unless the licensee submits the required renewal application and pays the applicable renewal fee (if such fee is required)[.]

(b) Refusal of license; grounds

The Secretary shall refuse to issue a license to an applicant if he finds that the applicant, or any person responsibly connected with the applicant, is prohibited from employment with a licensee under section 499h(b) of this title or is a person who, or is or was responsibly connected with a person who–

(A) has had his license revoked under the provisions of section 499h of this title within two years prior to the date of the application or whose license is currently under suspension; [or]

(B) within two years prior to the date of application has

been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect[.]

. . . .

(c) Issuance of license upon furnishing bond; issuance after three years without bond; effect of termination of bond; increase or decrease in amount; payment of increase

An applicant ineligible for a license by reason of the provisions of subsection (b) of this section may, upon the expiration of the two-year period applicable to him, be issued a license by the Secretary if such applicant furnishes a surety bond in the form and amount satisfactory to the Secretary as assurance that his business will be conducted in accordance with this chapter and that he will pay all reparation orders which may be issued against him in connection with transactions occurring within four years following the issuance of the license, subject to his right of appeal under section 499g(c) of this title. In the event such applicant does not furnish such a surety bond, the Secretary shall not issue a license to him until three years have elapsed after the date of the applicable order of the Secretary or decision of the court on appeal. If the surety bond so furnished is terminated for any reason without the approval of the Secretary the license shall be automatically canceled as of the date of such termination and no new license shall be issued to such person during the four-year period without a new surety bond covering the remainder of such period. The Secretary, based on changes in the nature and volume of business conducted by a bonded licensee, may require an increase or authorize a reduction in the amount of the bond. A bonded licensee who is notified by the Secretary to provide a bond in an increased amount shall do so within a reasonable time to be specified by the Secretary, and upon failure of the licensee to provide such bond his license shall be automatically suspended until such bond is provided. The Secretary may not issue a license to an applicant under this subsection if the applicant or any person responsibly connected with the applicant is prohibited from employment with a licensee under section 499h(b) of this title.

§ 499h. Grounds for suspension or revocation of license

(a) Authority of Secretary

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

(b) Unlawful employment of certain persons; restrictions; bond assuring compliance; approval of employment without bond; change in amount of bond; payment of increased amount; penalties

Except with the approval of the Secretary, no licensee shall employ any person, or any person who is or has been responsibly connected with any person–

(1) whose license has been revoked or is currently suspended by order of the Secretary;

(2) who has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect; or

(3) against whom there is an unpaid reparation award issued within two years, subject to his right of appeal under section 499g(c) of this title.

The Secretary may approve such employment at any time following nonpayment of a reparation award, or after one year following the revocation or finding of flagrant or repeated violation of section 499b of this title, if the licensee furnishes and maintains a surety bond in form and amount satisfactory to the Secretary as assurance that such licensee's business will be

> conducted in accordance with this chapter and that the licensee will pay all reparation awards, subject to its right of appeal under section 499g(c) of this title, which may be issued against it in connection with transactions occurring within four years following the approval. The Secretary may approve employment without a surety bond after the expiration of two years from the effective date of the applicable disciplinary order. The Secretary, based on changes in the nature and volume of business conducted by the licensee, may require an increase or authorize a reduction in the amount of the bond. A licensee who is notified by the Secretary to provide a bond in an increased amount shall do so within a reasonable time to be specified by the Secretary, and if the licensee fails to do so the approval of employment shall automatically terminate. The Secretary may, after thirty days[']notice and an opportunity for a hearing, suspend or revoke the license of any licensee who, after the date given in such notice, continues to employ any person in violation of this section. The Secretary may extend the period of employment sanction as to a responsibly connected person for an additional one-year period upon the determination that the person has been unlawfully employed as provided in this subsection.

7 U.S.C. §§ 499a(b)(9), 499b(4), 499d(a), (b)(A)-(B), (c), 499h(a)-(b).

DECISION

Preliminary Statement

The term *responsibly connected* means affiliated or connected with a commission merchant, dealer, or broker as a partner in a partnership or an officer, a director, or a holder of more than 10 percent of the outstanding stock of a corporation or association.[2] The record establishes Petitioner was an officer, a director, and a holder of more than 10 percent of the outstanding stock of Garden Fresh Produce, Inc., during the period January 14, 2002, through February 26, 2003, when Garden Fresh Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). The burden is on Petitioner to demonstrate by a preponderance of the evidence that he was not responsibly connected with Garden Fresh Produce, Inc., despite being an officer, a director, and

[2] 7 U.S.C. § 499a(b)(9).

a holder of more than 10 percent of the outstanding stock of Garden Fresh Produce, Inc.

Section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) provides a two-prong test which a petitioner must meet in order to demonstrate that he or she was not responsibly connected. First, a petitioner must demonstrate by a preponderance of the evidence that he or she was not actively involved in the activities resulting in a violation of the PACA. If a petitioner satisfies the first prong, then for the second prong, the petitioner must demonstrate by a preponderance of the evidence one of two alternatives: (1) the petitioner was only nominally a partner, an officer, a director, or a shareholder of the violating PACA licensee or entity subject to a PACA license; or (2) the petitioner was not an owner of the violating PACA licensee or entity subject to a PACA license, which was the alter ego of its owners.

Petitioner failed to carry his burden of proof that he was not actively involved in the activities resulting in Garden Fresh Produce, Inc.'s violations of the PACA. Petitioner also failed to carry his burden of proof that he was only nominally an officer, a director, and a holder of more than 10 percent of the outstanding stock of Garden Fresh Produce, Inc. Moreover, as Petitioner was an owner of Garden Fresh Produce, Inc., the defense that he was not an owner of Garden Fresh Produce, Inc., which was the alter ego of its owners, is not available to Petitioner.[3] As Petitioner has failed to carry his burden of proof regarding the first prong and second prong of the two-prong test, I conclude Petitioner was responsibly connected with Garden Fresh Produce, Inc., when Garden

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[3]*In re James E. Thames, Jr.* (Decision as to James E. Thames, Jr.), 65 Agric. Dec. 429, 439 (2006) (holding the petitioner, who was an owner of the violating PACA licensee could not raise the defense that he was not an owner of the licensee, which was the alter ego of its owners), *appeal docketed*, No. 06-11609-CC (11th Cir. Mar. 13, 2006); *In re Benjamin Sudano*, 63 Agric. Dec. 388, 411 (2004) (holding the petitioners, who were owners of the violating PACA licensee could not raise the defense that they were not owners of the licensee, which was the alter ego of its owners), *aff'd per curiam*, 131 F. App'x 404 (4th Cir. 2005); *In re Anthony L. Thomas*, 59 Agric. Dec. 367, 390 (2000) (stating a petitioner must prove not only that the violating PACA licensee was the alter ego of an owner, but also, the petitioner was not an owner of the violating licensee; therefore, the petitioner, who held 49 percent of the outstanding stock of the violating PACA licensee, cannot avail himself of the defense that the violating PACA licensee was the alter ego of an owner), *aff'd*, No. 00-1157 (D.C. Cir. Jan. 30, 2001); *In re Steven J. Rodgers*, 56 Agric. Dec. 1919, 1956 (1997) (stating a petitioner must prove not only that the violating PACA licensee was the alter ego of an owner, but also, the petitioner was not an owner of the violating licensee; therefore, the petitioner, who held 33.3 percent of the outstanding stock of the violating PACA licensee, cannot avail himself of the defense that the violating PACA licensee was the alter ego of an owner), *aff'd per curiam*, 172 F.3d 920, 1998 WL 794851 (D.C. Cir. 1998) (Table), printed in 57 Agric. Dec. 1464 (1998).

Fresh Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, Petitioner is subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)).

Facts

Petitioner Edward Shane Martindale[4] has worked in the produce business for approximately 15 years. Petitioner began working at Martindale Distributing, a business run by his father in Salinas, California. When Petitioner began working at Martindale Distributing, his stepbrother, Donald R. Beucke, and his older brother, Wayne Martindale, were already involved in the business. Petitioner started in Martindale Distributing as a produce inspector and "on grounds" buyer. When Petitioner's father retired from Martindale Distributing in 1999, Petitioner, along with his stepbrother and brother, purchased the company, with each of them owning one-third of the company. Since approximately May 2003, when his brother and stepbrother resigned from Martindale Distributing, Petitioner has been the 100 percent owner of Martindale Distributing. (Tr. 36-39, 41-42.)

In late 1999 or early 2000, Wayne Martindale, who, with his stepbrother Donald Beucke, had already started Bayside Produce, a produce company with a warehouse in San Diego, "started talking about wanting to open another company in Las Vegas." (Tr. 42.) Petitioner joined his brother and stepbrother, along with several others, and formed Garden Fresh Produce, Inc. Petitioner was a 20 percent shareholder of the new company and was listed as a director and the secretary. Petitioner was issued a stock certificate indicating that he owned 1,000 shares of stock in Garden Fresh Produce, Inc. (RX 10 at 4), although Petitioner stated he had never seen the stock certificate before the institution of the instant proceeding. Petitioner signed the original PACA license application and the check in payment of the PACA licensing fee. Petitioner submitted his resignation and reassigned his stock on April 4, 2003. By letter dated April 28, 2003, Petitioner notified the United States Department of Agriculture, Agricultural Marketing Service, Fruit and Vegetable Programs, PACA Branch, that he was no longer connected with Garden Fresh Produce, Inc., and asked that his name be removed from Garden Fresh Produce, Inc.'s PACA

[4]Petitioner's legal name is Edward Shane Martindale but he is generally known as Shane Martindale (Tr. 34).

license (RX 1 at 16).

Petitioner stated he originally decided to join Garden Fresh Produce, Inc., because he was good with bills and money management (Tr. 85). During the early days of Garden Fresh Produce, Inc.'s operations, Petitioner, working from Martindale Distributing's Salinas, California, office, handled much of Garden Fresh Produce, Inc.'s paperwork, even receiving a salary for handling Garden Fresh Produce, Inc.'s payables. Petitioner classified his principal duties with Garden Fresh Produce, Inc., as that of an accounts payable manager, but after Wayne Martindale moved Garden Fresh Produce, Inc.'s accounts payable operations to Las Vegas, Nevada, at the end of 2001, Petitioner issued only a small number of checks for Garden Fresh Produce, Inc. Petitioner stated he relinquished his role because of differences of opinion with his brothers, problems arising from the use of non-matching computer systems, and problems with coordination of purchase orders and bills. Petitioner told the other shareholders that he would no longer handle the payables for Garden Fresh Produce, Inc. All the Garden Fresh Produce, Inc., invoices that he had in his possession and had not been paid were taken by Wayne Martindale to Las Vegas, Nevada, in December 2001. (Tr. 48-50.)

Petitioner purchased produce on behalf of Garden Fresh Produce, Inc., in the first year it did business, but did not recall purchasing produce after his brother took Garden Fresh Produce, Inc.'s payables to Las Vegas at the end of 2001 (Tr. 51). However, Joe Quijada, a produce seller, testified that, while he was not 100 percent certain of the year of the transactions, he dealt with Petitioner when selling produce to Garden Fresh Produce, Inc., in 2002 (Tr. 17-18). Petitioner issued checks after 2001 when he was directed by his brother and stepbrother "to make payment to certain vendors that were in Salinas." (Tr. 52, 95.) The record does not contain evidence that Petitioner was directly involved in any of the transactions that were the subject of *In re Garden Fresh Produce, Inc.*, 63 Agric. Dec. 1032 (2004).

Petitioner testified that, after December 2001, he did not actively monitor Garden Fresh Produce, Inc., on a regular basis, even though he was still a shareholder, an officer, and a director (Tr. 52). Petitioner took calls for Garden Fresh Produce, Inc., at his Salinas, California, office and became aware in 2002 that there were complaints about the way Garden Fresh Produce, Inc., handled accounts payable. Petitioner referred callers to Wayne Martindale to attempt to resolve Garden Fresh Produce, Inc.'s failures to pay (Tr. 52-53). Other than referring callers to his brother, Petitioner only could recall warning one company, Sun America Produce, that he had concerns about Garden Fresh Produce, Inc.'s failures to pay its bills promptly (Tr. 81). Even though Petitioner

knew Garden Fresh Produce, Inc., had financial problems, he did not ask to see a financial statement or bank statements, relying on statements from Wayne Martindale and Donald Beucke "that things were getting better." (Tr. 99.)

Before Petitioner resigned from Garden Fresh Produce, Inc., by letter dated April 4, 2003, Petitioner signed documents accepting the resignation of two of Garden Fresh Produce, Inc.'s directors, David N. Wiles and Bruce Martindale (RX 1 at 13, RX 9, RX 11). Joe Quijada and Steven Wood (the latter called by Respondent) each testified that Wayne Martindale was the primary contact when dealing with Garden Fresh Produce, Inc. (Tr. 25, 28). Mr. Quijada testified that he never had any slow-pay problems with Martindale Distributing and characterized Petitioner as "an upstanding individual." (Tr. 22.)

Evert Gonzalez, a senior marketing specialist for the PACA Branch, testified that his investigation was initiated after the PACA Branch received reparation complaints instituted by produce sellers against Garden Fresh Produce, Inc. (Tr. 108-09). Mr. Gonzalez described his investigation, which primarily involved visiting Garden Fresh Produce, Inc.'s Las Vegas, Nevada, office. No one was at the premises when he first arrived, but he eventually received access and requested a variety of records (Tr. 110-11). Wayne Martindale indicated to Mr. Gonzalez that all the principals in Garden Fresh Produce, Inc., including the Petitioner, had equal authority and could sign checks and pay payables (Tr. 112).

Phyllis Hall, a senior marketing specialist for the PACA Branch, reviewed the file and identified the documents (RX 1-RX 10) contained in the responsibly connected file maintained by the PACA Branch (Tr. 117-40).

Findings of Fact

1. Petitioner was part of a group of individuals who organized Garden Fresh Produce, Inc., in April 2000. On April 28, 2000, Petitioner signed the minutes of the organizational meeting of Garden Fresh Produce, Inc.'s board of directors. Petitioner was a 20 percent shareholder, a director, and the secretary of Garden Fresh Produce, Inc. (Tr. 42; RX 8.)

2. Petitioner signed Garden Fresh Produce, Inc.'s application for a PACA license and was authorized to sign checks on behalf of Garden Fresh Produce, Inc. As the money manager of Garden Fresh Produce, Inc., Petitioner handled a significant portion of the payables in 2001. Even after the payables were transferred to Las Vegas, Nevada, in late

2001, Petitioner handled occasional payments as directed by Wayne Martindale. In 2002, Petitioner purchased some produce for Garden Fresh Produce, Inc. (Tr. 17-18, 48-50, 91-96.)

3. On October 8, 2002, Petitioner signed the board of directors resolution accepting the resignation of director David N. Wiles. On October 8, 2002, Petitioner signed the waiver of notice and action by written consent of the shareholders of Garden Fresh Produce, Inc., accepting the resignation of director David N. Wiles. (RX 9, RX 11.)

4. On March 3, 2003, Petitioner signed the board of directors resolution accepting the resignation of director Bruce Martindale (RX 1 at 13).

5. Petitioner resigned as a director of Garden Fresh Produce, Inc., on April 4, 2003. Petitioner also assigned his stock in the company back to Garden Fresh Produce, Inc., on April 4, 2003. (RX 1 at 18, 20.)

6. During the period January 14, 2002, through February 26, 2003, Garden Fresh Produce, Inc., failed to make full payment promptly of the agreed purchase prices to five produce sellers for 109 lots of perishable agricultural commodities, in the total amount of $379,923.25 (RX 12).

7. During the period January 14, 2002, through February 26, 2003, Petitioner was a director, the secretary, and 20 percent stockholder of Garden Fresh Produce, Inc. (RX 1, RX 7, RX 8, RX 10 at 4; Tr. 134-36). The record does not contain evidence that Petitioner was directly involved in any of the transactions described in Finding of Fact number 6.

8. At all times material to this proceeding, Petitioner had the same authority as all other principals in Garden Fresh Produce, Inc. (Tr. 112).

9. At all times material to this proceeding, Petitioner was authorized to negotiate contracts, leases, and other arrangements for and on behalf of Garden Fresh Produce, Inc., and, with the other officers of Garden Fresh Produce, Inc., had responsibility for the activities of the corporation (RX 8 at 4, 5).

10. Petitioner notified the United States Department of Agriculture, Agricultural Marketing Service, Fruit and Vegetable Programs, PACA Branch, by letter dated April 28, 2003, that he was no longer connected with Garden Fresh Produce, Inc. In that letter, Petitioner requested that the United States Department of Agriculture remove his name from Garden Fresh Produce, Inc.'s PACA license. (RX 1 at 16.)

11. Petitioner has extensive experience in the produce industry. At the time of the hearing, Petitioner had worked in the produce industry for over 15 years; Petitioner had held a number of positions, including sole ownership of Martindale Distributing; Petitioner was particularly knowledgeable in the areas of money management and bill paying in the produce industry; and Petitioner was thoroughly knowledgeable in

produce industry operations. (Tr. 35-36, 83-85.)

12. With respect to his employment at Martindale Distributing, Petitioner enjoys a good reputation in the produce business, including timely payment in produce transactions (Tr. 22).

13. Petitioner received compensation for his services in the first year of Garden Fresh Produce, Inc.'s operations (Tr. 45).

14. At all times material to this proceeding, Petitioner knew that Garden Fresh Produce, Inc., was not making full payment promptly for produce. In 2002, a number of Garden Fresh Produce, Inc.'s produce sellers, who were not being paid promptly by Garden Fresh Produce, Inc., contacted Petitioner in order to obtain payment for produce. Petitioner only warned one of these produce sellers, Sun Valley Produce, that Petitioner had concerns about the manner in which Garden Fresh Produce, Inc., was paying its bills. (Tr. 52-53, 81.)

Discussion

I. Introduction

Responsibly connected liability is triggered when a company has its PACA license revoked or suspended or when the company has been found to have committed flagrant and repeated violations of section 2 of the PACA (7 U.S.C. § 499b). During the period January 14, 2002, through February 26, 2003, Garden Fresh Produce, Inc., committed willful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly of the agreed purchase prices to five produce sellers for 109 lots of perishable agricultural commodities, in the total amount of $379,923.25.[5] Thus, an individual who was responsibly connected with Garden Fresh Produce, Inc., when Garden Fresh Produce, Inc., violated the PACA 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)).

Petitioner was an officer, a director, and a holder of more than 10 percent of the outstanding stock of Garden Fresh Produce, Inc., during the period January 14, 2002, through February 26, 2003, when Garden Fresh Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). The burden is on Petitioner to demonstrate by a preponderance of the evidence that he was not responsibly connected

[5] *In re Garden Fresh Produce, Inc.*, 63 *Agric. Dec.* 1032 (2004).

with Garden Fresh Produce, Inc., despite being an officer, a director, and a holder of more than 10 percent of the outstanding stock of Garden Fresh Produce, Inc.

Petitioner failed to carry his burden of proof that he was not actively involved in the activities resulting in Garden Fresh Produce, Inc.'s violations of the PACA. Petitioner also failed to carry his burden of proof that he was only nominally an officer, a director, and a holder of more than 10 percent of the outstanding stock of Garden Fresh Produce, Inc. Moreover, as Petitioner was an owner of Garden Fresh Produce, Inc., the defense that he was not an owner of Garden Fresh Produce, Inc., which was the alter ego of its owners, is not available to Petitioner.[6] As Petitioner has failed to carry his burden of proof regarding the first prong and second prong of the two-prong responsibly connected test, I conclude Petitioner was responsibly connected with Garden Fresh Produce, Inc., at the time Garden Fresh Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

II. Petitioner Was Actively Involved In Activities Resulting In PACA Violations

The United States Department of Agriculture's standard for determining whether a petitioner is actively involved in the activities resulting in a violation of the PACA was first set forth in *In re Michael Norinsberg* (Decision and Order on Remand), 58 *Agric. Dec.* 604, 610-11 (1999), as follows:

> The standard is 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.

Petitioner was actively involved in the activities resulting in the PACA violations committed by Garden Fresh Produce, Inc. Although

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[6]See note 3.

Petitioner did not directly participate in the specific transactions resulting in Garden Fresh Produce, Inc.'s PACA violations, Petitioner issued checks in 2002, usually at the direction of Wayne Martindale, at a time when Petitioner knew Garden Fresh Produce, Inc., was not paying produce sellers promptly (Tr. 52, 55). Also, Petitioner made some purchases for Garden Fresh Produce, Inc., in 2002 (Tr. 17-18). By making payments at a time when he knew Garden Fresh Produce, Inc., was not paying some of its produce sellers, Petitioner was in effect choosing which debts to pay, even though it was ostensibly under the "direction" of Wayne Martindale or Donald Beucke. As a co-owner, an officer, and a director, Petitioner cannot avoid his responsibilities under the PACA by characterizing himself as an individual powerless to disobey these directives. Petitioner's executing these checks at a time when he knew Garden Fresh Produce, Inc., was having financial problems is just the kind of conduct referred to in *In re Lawrence D. Salins*, 57 *Agric. Dec.* 1474 (1998), when I held that check writing and choosing which debts to pay "can cause an individual to be actively involved in failure to pay promptly for produce." *Id.* at 1488-89. Moreover, continuing to make purchases during the period when a PACA licensee is violating the prompt payment provision of the PACA can cause an individual to be actively involved in the failure of a PACA licensee to make full payment promptly in accordance with the PACA.

III. Petitioner Was Not Merely A Nominal Officer, Director, Or Shareholder

Petitioner did not meet his burden of showing, by a preponderance of the evidence, that he was only a nominal 20 percent shareholder, director, and secretary. In order for a petitioner to show that he or she was only nominally an officer, a director, and a stockholder, the petitioner must show by a preponderance of the evidence that he or she did not have an actual, significant nexus with the violating company during the violation period. Under the actual, significant nexus standard, responsibilities are placed upon corporate officers, directors, and stockholders, even though they may not actually have been actively involved in the activities resulting in violations of the PACA, because their status with the company requires that they knew, or should have known, about the violations being committed and they failed to

counteract or obviate the fault of others.[7] The record establishes Petitioner had an actual, significant nexus with Garden Fresh Produce, Inc., during the violation period.

Petitioner was a co-founder of Garden Fresh Produce, Inc., and was actively involved in managing the money and paying the bills of the company at its outset. Petitioner's relationship to Garden Fresh Produce, Inc., is much different than an individual who is listed as an owner because his or her spouse or parent put him or her on corporate records and had no involvement in the corporation or experience in the produce business. Rather, Petitioner is an experienced, savvy individual who has worked in the produce business for at least 15 years, who has worked for years with some or all of the principals in Garden Fresh Produce, Inc., and who is fully aware of the significance of having a valid PACA license and the importance of complying with the prompt payment provision of the PACA. Congress' utilization of ownership of more than 10 percent of the outstanding stock of a corporation as sufficient to trigger the presumption that the owner was responsibly connected is a strong indication that a 20 percent owner does not serve in a nominal capacity.[8]

There is no evidence that Petitioner was other than a voluntary investor, who undertook the responsibilities associated with being a director, the secretary, and a co-owner in an attempt to establish a profitable business. Petitioner presumably would have shared in the company's profits when there were some. Petitioner participated in a

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[7] *Bell v. Department of Agric.*, 39 F.3d 1199, 1201 (D.C. Cir. 1994); *Minotto v. United States Dep't of Agric.*, 711 F.2d 406, 408-09 (D.C. Cir. 1983); *Quinn v. Butz*, 510 F.2d 743, 756 n.84 (D.C. Cir. 1975).

[8] *Siegel v. Lyng*, 851 F.2d 412, 417 (D.C. Cir. 1988) (stating this court has held, most clearly in *Martino*, that approximately 20 percent stock ownership would suffice to make a person accountable for not controlling delinquent management); *Veg-Mix, Inc. v. United States Dep't of Agric.*, 832 F.2d 601, 611 (D.C. Cir. 1987) (stating with approval, in *Martino*, we found ownership of 22.2 percent of the violating company's stock was enough support for a finding of responsible connection); *Martino v. United States Dep't of Agric.*, 801 F.2d 1410, 1414 (D.C. Cir. 1986) (holding ownership of 22.2 percent of the stock of a company formed a sufficient nexus to establish the petitioner's responsible connection to the company); *In re Joseph T. Kocot*, 57 *Agric. Dec.* 1517, 1544-45 (1998) (stating the petitioner's ownership of a substantial percentage of the outstanding stock of the violating company alone is very strong evidence that the petitioner was not a nominal shareholder); *In re Steven J. Rodgers*, 56 *Agric. Dec.* 1919, 1956 (1997) (stating the petitioner's ownership of 33.3 percent of the outstanding stock of the violating entity alone is very strong evidence that the petitioner was responsibly connected with the violating entity), *aff'd per curiam*, 172 F.3d 920, 1998 WL 794851 (D.C. Cir. 1998) (Table), printed in 57 *Agric. Dec.* 1464 (1998).

number of corporate matters, including signing the PACA license application, signing documents accepting the resignations of at least two other directors, and allowing himself to be an authorized signatory on company checks. While for practical purposes it is evident that Wayne Martindale ran Garden Fresh Produce, Inc., the record indicates only one occasion when Petitioner exercised authority consistent with his positions as 20 percent owner, a director, and the secretary to counteract or obviate the fault of others. Despite being contacted by numerous unpaid produce sellers, Petitioner, on only one occasion, warned a produce seller, Sun America Produce, that he had concerns about the way Garden Fresh Produce, Inc., was paying its bills (Tr. 81). That Petitioner chose not to act does not establish that his role was nominal.

Petitioner's Appeal Petition

Petitioner raises three issues in "Petitioner Martindale's Appeal Petition to Department Judicial Officer and Supporting Brief" [hereinafter Petitioner's Appeal Petition]. First, Petitioner contends the facts established in the record do not support the Chief ALJ's conclusion that Petitioner was actively involved in activities resulting in Garden Fresh Produce, Inc.'s PACA violations (Petitioner's Appeal Pet. at 3-9).

Petitioner states "Judge Hillson, specifically found in his statement of facts in the opinion that '. . . He (Shane Martindale) was *not directly involved* in any of the transactions that were the subject of the Default Decision I entered against Garden Fresh.' Opinion p. 4, p. 8. In his legal conclusions, Judge Hillson then states that during the period Garden Fresh was in violation of PACA that '. . . Petitioner was actively involved in the activities resulting in a violation of the PACA.' Opinion p. 14 (Conclusion 4)." (Petitioner's Appeal Pet. at 4-5.) I infer Petitioner contends the Chief ALJ could not properly conclude Petitioner was actively involved in activities resulting in Garden Fresh Produce, Inc.'s violations of the PACA and also find Petitioner was not was not directly involved in any of the transactions that were the subject of *In re Garden Fresh Produce, Inc.*, 63 *Agric. Dec.* 1032 (2004).

I disagree with Petitioner's contention. The United States Department of Agriculture's standard for determining whether a petitioner is actively involved in the activities resulting in a violation of the PACA does not require that the petitioner must have been directly

involved in the violative transactions.[9] Thus, I do not find that, in order to conclude Petitioner was actively involved in the activities resulting in Garden Fresh Produce, Inc.'s violations of the PACA, I must first find Petitioner actually purchased the produce for which Garden Fresh Produce, Inc., failed to make full payment promptly. In *In re Lawrence D. Salins*, 57 *Agric. Dec.* 1474, 1488-89 (1998), I found erroneous an administrative law judge's conclusion that the activities directly involving the actual purchase of produce are the only activities which can result in a violation of the PACA, as follows:

> The ALJ is correct that purchasing produce when there are insufficient funds leads directly to PACA payment violations, but I agree with Respondent that the ALJ's conclusion erroneously assumes that the activities directly involving the actual purchase of produce are the only activities which can result in a violation of PACA. The ALJ gives no authority for this assumption and I do not believe such a conclusion can be supported.
>
> On the contrary, I agree with Respondent that there are many functions within the company, *e.g.*, corporate finance, corporate decision making, check writing, and choosing which debt-in-arrears to pay, which can cause an individual to be actively involved in failure to pay promptly for produce, even though the individual does not ever actually purchase produce.

I concluded the petitioner, Lawrence D. Salins, was actively involved in the activities resulting in Sol Salins, Inc.'s violations of the PACA even though the petitioner did not purchase any produce. *In re Lawrence D. Salins*, 57 *Agric. Dec.* 1454 (1998).

Petitioner also asserts that "[i]t is quite apparent from Judge Hillson's decision that Petitioner Martindale is being punished not for acts of commission, but rather, for acts of omission." (Petitioner's Appeal Pet. at 5.)

I disagree with Petitioner's contention that the Chief ALJ based his conclusion that Petitioner was actively involved in activities resulting in a violation of the PACA solely on Petitioner's acts of omission. The Chief ALJ based his conclusion that Petitioner was actively involved in activities resulting in Garden Fresh Produce, Inc.'s violations of the PACA both on Petitioner's acts of commission, as well as, Petitioner's

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[9] *See In re Michael Norinsberg* (Decision and Order on Remand), 58 *Agric. Dec.* 604, 610-11 (1999).

acts of omission. The Chief ALJ found Petitioner issued checks and may have made some purchases for Garden Fresh Produce, Inc., during the period when Garden Fresh Produce, Inc., violated the PACA (Initial Decision at 11). The record supports the Chief ALJ's finding that Petitioner issued checks, and I find Petitioner made some purchases on behalf of Garden Fresh Produce, Inc., during the period when Garden Fresh Produce, Inc., violated the PACA (Tr. 17-18, 29-30, 33, 52, 55). Check writing and choosing which debts to pay can cause an individual to be actively involved in the failure of a PACA licensee to make full payment promptly in accordance with the PACA.[10] Moreover, continuing to make purchases during the period when a PACA licensee is violating the prompt payment provision of the PACA can cause an individual to be actively involved in the failure of a PACA licensee to make full payment promptly in accordance with the PACA.

As for Petitioner's acts of omission, I disagree with the Chief ALJ's assertion that Petitioner's acts of omission support the conclusion that Petitioner was actively involved in activities resulting in Garden Fresh Produce, Inc.'s violations of the PACA. The Chief ALJ, citing *In re Anthony L. Thomas*, 59 *Agric. Dec.* 367, 388 (2000), states "[t]he failure to exercise powers inherent in [Petitioner's] various positions with Garden Fresh, 'because he chose not to use the powers he had' has previously been found a basis for finding active participation." (Initial Decision at 12.) However, the passage from *Thomas* quoted by the Chief ALJ relates to issue of whether an individual was a nominal officer, director, and shareholder of a violating company, not to the issue of whether the individual was actively involved in the activities resulting in a violation of the PACA, as follows:

> Even if I accept Petitioner's claim that he acted at the direction of Mr. Giuffrida, that does not negate Petitioner's actual, significant nexus to Sanford Produce Exchange, Inc. As the Court stated in *Veg-Mix, Inc. v. United States Dep't of Agric.*, 832 F.2d 601, 611 (D.C. Cir. 1987), in determining whether or not an individual is nominal, "the crucial inquiry is whether an individual has an 'actual significant nexus with the violating company,' rather than whether the individual has exercised real authority." Petitioner cannot avoid responsibility for the violations Sanford Produce Exchange, Inc., committed while he was president, simply because he chose not to use the powers he

[10] *In re Lawrence D. Salins*, 57 *Agric. Dec.* 1474, 1489 (1998).

had.

In re Anthony L. Thomas, 59 *Agric. Dec.* 367, 387-88 (2000).

Similarly, the Chief ALJ quotes *Bell v. Department of Agriculture*, 39 F.3d 1199, 1201 (D.C. Dir. 1994), to support his conclusion that Petitioner's inaction constitutes active involvement in activities resulting in a violation of the PACA (Initial Decision at 12). *Bell* makes clear that the passage quoted by the Chief ALJ relates to the issue of whether an individual was a nominal officer, director, and shareholder of a violating company, not to the issue of whether the individual was actively involved in the activities resulting in a violation of the PACA, as follows:

> The second way of rebutting the presumption is for the petitioner to prove that at the time of the violations he was only a *nominal* officer, director, or shareholder. This he could only establish by proving that he lacked "an actual, significant nexus with the violating company." *Minotto*, 711 F.2d at 409. Where responsibility was not based on the individual's "personal fault", *id*. at 408, it would have to be based at least on his "failure to 'counteract or obviate the fault of others'", *id*.

Bell v. Department of Agriculture, 39 F.3d 1199, 1201 (D.C. Cir. 1994) (footnote omitted).

While I disagree with the Chief ALJ's assertion that Petitioner's acts of omission support the conclusion that Petitioner was actively involved in activities resulting in Garden Fresh Produce, Inc.'s violations of the PACA, I do not hold that an act of omission can never constitute active involvement in the activities resulting in a violation of the PACA. I only conclude, based on the record before me, that Petitioner's acts of omission do not constitute active involvement in the activities resulting in Garden Fresh Produce, Inc.'s violations of the PACA.

Second, Petitioner contends the Chief ALJ erroneously concluded Petitioner was not a nominal officer, director, and shareholder of Garden Fresh Produce, Inc., during the period January 14, 2002, through February 26, 2003, when Garden Fresh Produce, Inc., violated the PACA (Petitioner's Appeal Pet. at 3-4, 9-12).

I agree with the Chief ALJ's conclusion that Petitioner failed to establish by a preponderance of the evidence that he was only nominally an officer, a director, and a stockholder of Garden Fresh Produce, Inc. In order for a petitioner to show that he or she was only nominally an

officer, a director, and a stockholder, the petitioner must show by a preponderance of the evidence that he or she did not have an actual, significant nexus with the violating company during the violation period. Under the actual, significant nexus standard, responsibilities are placed upon corporate officers, directors, and stockholders, even though they may not actually have been actively involved in the activities resulting in violations of the PACA, because their status with the company requires that they knew, or should have known, about the violations being committed and they failed to counteract or obviate the fault of others.[11] The record establishes Petitioner had an actual, significant nexus with Garden Fresh Produce, Inc., during the violation period.

During the period when Garden Fresh Produce, Inc., violated the PACA, Petitioner owned a substantial percentage of the outstanding stock of Garden Fresh Produce, Inc. Petitioner's ownership of a substantial percentage of stock alone is very strong evidence that he was not a nominal shareholder.[12] Petitioner has not demonstrated by a preponderance of the evidence that he was only a nominal shareholder of Garden Fresh Produce, Inc.

Moreover, Petitioner had the appropriate business experience to be a corporate officer and director. At the time of the March 2, 2005, hearing, Petitioner had 15 years of experience in the produce business. Petitioner began working at Martindale Distributing, a business run by Petitioner's father in Salinas, California. Petitioner started in Martindale Distributing as a produce inspector and "on grounds" buyer. When Petitioner's father retired from the Martindale Distributing in 1999, Petitioner, along with his stepbrother and brother, purchased the company, with each of them owning one-third of the company. Since approximately May 2003, when his brother and stepbrother resigned from Martindale Distributing, Petitioner has been the 100 percent owner of Martindale Distributing. (Tr. 36-39, 41-42.)

A person's active participation in corporate decision-making is an important factor in the determination that the person was not merely a nominal corporate officer and director.[13] In late 1999 or early 2000, Petitioner, along with several others, formed Garden Fresh Produce, Inc.

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[11]See note 7.

[12]See note 8.

[13]*In re Lawrence D. Salins*, 57 *Agric. Dec.* 1474, 1494 (1998).

(Tr. 42). Petitioner was a 20 percent shareholder of the new company, a director, and the secretary. Petitioner signed the original PACA license application and the check in payment of the PACA licensing fee. Petitioner remained a stockholder, a director, and the secretary until he submitted his resignation and reassigned his stock in April 2003 (RX 1 at 16, 18, 20).

Petitioner joined Garden Fresh Produce, Inc., because he was good with bills and money management (Tr. 85). During the early days of Garden Fresh Produce, Inc.'s operations, Petitioner, working from Martindale Distributing's Salinas, California, office, handled much of Garden Fresh Produce, Inc.'s paperwork, even receiving a salary for handling the payables. Petitioner classified his principal duties with Garden Fresh Produce, Inc., as that of an accounts payable manager. (Tr. 48-50.)

Petitioner purchased produce on behalf of Garden Fresh Produce, Inc., in the first year it did business, and continued making a small number of purchases in 2002 (Tr. 17-18). Petitioner issued checks after 2001 when he was directed by his brother and stepbrother "to make payment to certain vendors that were in Salinas." (Tr. 52, 95.) Petitioner took calls for Garden Fresh Produce, Inc., at his Salinas, California, office and became aware in 2002 that there were complaints about the way Garden Fresh Produce, Inc., handled accounts payable. Petitioner referred callers to Wayne Martindale to attempt to resolve Garden Fresh Produce, Inc.'s failures to pay (Tr. 52-53). Even though Petitioner knew Garden Fresh Produce, Inc., had financial problems, he did not ask to see a financial statement or bank statements, relying on statements from Wayne Martindale and Donald Beucke "that things were getting better." (Tr. 99.)

Before Petitioner resigned from Garden Fresh Produce, Inc., Petitioner signed documents accepting the resignation of two directors, David N. Wiles and Bruce Martindale (RX 1 at 13, RX 9, RX 11). At all times material to this proceeding, all the principals in Garden Fresh Produce, Inc., including Petitioner, had equal authority and could sign checks and pay payables (Tr. 112). At all times material to this proceeding, Petitioner was authorized to negotiate contracts, leases, and other arrangements for and on behalf of Garden Fresh Produce, Inc., and, with the other officers of Garden Fresh Produce, Inc., had responsibility for the activities of the corporation (RX 8 at 4, 5).

In short, I find Petitioner had an actual, significant nexus with Garden Fresh Produce, Inc. Petitioner was a major stockholder of Garden Fresh Produce, Inc.; Petitioner had the appropriate business experience to be a corporate officer and director; and Petitioner participated in corporate decision-making.

Third, Petitioner contends the Chief ALJ erroneously concluded, because Petitioner owned 20 percent of the stock in Garden Fresh Produce, Inc., Petitioner had to make a particularly compelling case in order to establish that he was not responsibly connected (Petitioner's Appeal Pet. at 4, 12-13).

Section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) provides that for the first alternative of the second prong of the responsibly connected test, a petitioner, who is a holder of more than 10 percent of the outstanding stock of a company, must demonstrate by a preponderance of the evidence that he or she was only nominally a shareholder of the company. Petitioner bases his contention that the Chief ALJ held Petitioner to a higher standard of proof than preponderance of the evidence on the following statement: "[t]he fact that Congress utilized 10% ownership as sufficient in and of itself to trigger the presumption regarding responsibly connected is a strong indication that a 20% owner must make a particularly compelling case to meet the burden of proof." (Initial Decision at 13.) I do not find that the Chief ALJ's reference to "a particular compelling case" indicates the Chief ALJ applied the incorrect standard of proof in this proceeding.

The Chief ALJ correctly cites section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) as the statutory provision applicable in this proceeding (Initial Decision at 7). Moreover, the Chief ALJ explicitly applies the standard of proof in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), stating: "Even if [Petitioner] was not actively involved in the violation, Petitioner likewise did not meet his burden of showing, by a preponderance of the evidence, that he was only a nominal 20% shareholder, director, and secretary." (Initial Decision at 12.) The Chief ALJ does not apply an alternative standard of proof in this proceeding. Therefore, I reject Petitioner's contention that the Chief ALJ held Petitioner to a standard of proof higher than preponderance of the evidence to demonstrate that he was only a nominal 20 percent shareholder of Garden Fresh Produce, Inc.

Conclusions of Law

1. Petitioner was a 20 percent shareholder, a director, and the secretary of Garden Fresh Produce, Inc., from its inception in April 2000 until he resigned from Garden Fresh Produce, Inc., in April 2003.

2. During the period January 14, 2002, through February 26, 2003, Garden Fresh Produce, Inc., committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly of the agreed purchase prices to five

produce sellers for 109 lots of perishable agricultural commodities, in the total amount of $379,923.25.

3. Petitioner failed to prove by a preponderance of the evidence that he was not actively involved in the activities resulting in Garden Fresh Produce, Inc.'s violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), during the period January 14, 2002, through February 26, 2003.

4. Petitioner failed to prove by a preponderance of the evidence that he was only nominally an officer, a director, and a shareholder of Garden Fresh Produce, Inc., during the period January 14, 2002, through February 26, 2003, when Garden Fresh Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

5. Petitioner failed to prove by a preponderance of the evidence that he was not an owner of Garden Fresh Produce, Inc., during the period January 14, 2002, through February 26, 2003, when Garden Fresh Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

6. Petitioner was *responsibly connected*, as that term is defined in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with Garden Fresh Produce, Inc., during the period January 14, 2002, through February 26, 2003, when Garden Fresh Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

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

ORDER

I affirm Respondent's May 10, 2004, determination that Petitioner was responsibly connected with Garden Fresh Produce, Inc., when Garden Fresh Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, Petitioner is subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)), effective 60 days after service of this Order on Petitioner.

RIGHT TO JUDICIAL REVIEW

Petitioner has the right to seek judicial review of the Order in this Decision and Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341-2350. Petitioner must seek judicial review within 60 days after entry of the Order in this Decision and

Order.[14] The date of entry of the Order in this Decision and Order is July 26, 2006.

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In re: RAY JUSTICE.
PACA-APP Docket No. 05-0004.
Decision and Order.
Filed August 11, 2006.

PACA – Actively involved – Nominal director, when not.

Mary Hobbie for Complainant.
Andrew Hellenger and Meland Russin for Respondent.
Decision and Order by Chief Administrative Law Judge Marc R. Hillson.

DECISION

In this decision, I find that Ray E. Justice, Sr. was responsibly connected with Do Ripe Farms, Inc., when Do Ripe committed disciplinary violations of the Perishable Agricultural Commodities Act (PACA). I find that Mr. Justice was both actively involved in the activities that lead to the violations committed by Do Ripe, and that he was not only a nominal shareholder of Do Ripe.

Procedural History

On July 20, 2004, Ray Justice was notified by a letter from Karla Whalen, Head of the Trade Practice Section, PACA Branch, Fruit and Vegetable Programs, that an initial determination had been made that as a 50 percent stockholder and director of Do Ripe, he was "responsibly connected" to Do Ripe during the period of time when it committed violations of the PACA. RX 2. Mr. Justice was informed that if he did not contest the initial determination letter within thirty days by requesting that the Chief of the PACA Branch review the initial determination, he would be subject to licensing and employment restrictions under the PACA.

By letter of August 19, 2004, Mr. Justice, through his counsel, denied that he was responsibly connected to Do Ripe. RX 3. After review of documentation supplied by counsel for Mr. Justice, a final determination

[14] 28 U.S.C. § 2344.

was made on January 4, 2005 by Bruce W. Summers, Acting Chief, PACA Branch, Fruit and Vegetable Programs, that Mr. Justice was responsibly connected with Do Ripe during the period Do Ripe violated the PACA. The letter informed Mr. Justice of his right to seek review of the final decision by filing a petition for review within thirty days from receipt of the letter.

Meanwhile, the PACA Branch had filed a disciplinary complaint against Do Ripe Farms, Inc. on July 9, 2004, alleging that Do Ripe, during the period from September 2002 through April 2003, failed to make full payment promptly to sixteen sellers in the amount of over one million dollars for one hundred lots of perishable agricultural commodities that Do Ripe had purchased, received, and accepted in interstate commerce. Upon failure of Do Ripe to file an answer to the complaint, the Complainant moved on February 10, 2005 for a default decision, which I issued on August 10, 2005, finding that the violations alleged were established as willful, flagrant and repeated violations of section 2(4) of the PACA.

On February 4, 2005, Mr. Justice filed a timely Petition for Review with the USDA's Office of the Hearing Clerk seeking to reverse the determination that he was responsibly connected to Do Ripe. I conducted a hearing in this matter in Atlanta, Georgia on December 13, 2005. Andrew B. Hellinger, Esq. and Coralee G. Penabad, Esq. represented Petitioner, and Christopher Young-Morales, Esq., represented Respondent.

Petitioner testified on his own behalf and also called Robert Hoch to testify. Respondent called Josephine E. Jenkins to testify as its sole witness. Petitioner introduced exhibits PX 1 through PX 12, and Respondent introduced exhibits RX 1 through RX 8. Both parties submitted Proposed Findings of Fact and Conclusions of Law and accompanying briefs.

Facts

Ray Justice is an astute and experienced businessman who has owned and invested in a number of businesses over the past 35 years. Tr. 14-15, 31. At the time of the hearing, he had been acquainted with Robert Hoch, president of Do Ripe Farms, for over 30 years. Tr. 31. He had loaned Hoch money many times over the years and had always been paid back. Tr. 32. However, in early 2002, Hoch owed him $600,000 and indicated he needed more funds. Tr. 22-23. A series of transactions occurred which resulted in Justice owning 50% of Do Ripe. The significance of this 50% ownership, and some of the transactions which Justice participated in during the period during which Do Ripe

committed violations, are the key to my determination as to whether Justice was responsibly connected to Do Ripe at the time Do Ripe committed violations of the PACA.

At the time that Do Ripe Farms, Inc. originally received its PACA license on March 24, 2000, Robert Hoch was the sole shareholder and president of the company. RX 1, pp. 3-5. License number 2000-0951 was issued to Do Ripe on that date and was terminated on March 24, 2002 for failure to pay the required annual license fee. RX 1, p. 1. Thus, Do Ripe was operating without a PACA license during the entire time period when the violations occurred. Do Ripe was in the produce business and 95% of its business was in tomatoes. Tr. 64. Hoch handled the company's day-to-day business. Hoch's family had been in the produce business and Hoch had been involved in the business for approximately 30 years. Tr. 31-32.

Hoch described Justice as a "fatherly type" who frequently gave him advice on business during the course of their thirty-year acquaintance. Tr. 73-74. Their relationship began as a result of Hoch having gone to school with Justice's children. Tr. 35. When Hoch founded Do Ripe he would occasionally have conversations with Justice as to how his business was doing. Hoch borrowed money from a number of financial institutions, and also began borrowing money from Justice, and paying it back with interest to help him pursue his business. Tr. 49, 88. There came a point in early 2002 when the debt of Do Ripe to Justice was approximately $600,000, and the company was unable to pay back the loans. Tr. 16-17. Hoch represented to Justice that he needed up to another $500,000 to "get to the next stage" and make his tomato business a success. Tr. 32. Rather than simply loaning Hoch and Do Ripe the additional funds, Justice insisted that some sort of measures be taken to safeguard his investment. Tr. 17, 22. On January 14, 2002, he set up a line of credit with Hoch (and Hoch's wife) for $1.1 million, representing the $600,000 he was already owed and the additional $500,000 Hoch wanted to borrow on behalf of Do Ripe. PX 6. As part of the collateral for this line of credit, the Hochs secured the loan with their personal residence. Tr. 39. In addition, he conditioned the series of transactions on his being made a 50 per cent shareholder in the company.[1] Justice considered the stock as part of the collateral he was

[1] As a result of these transactions, Justice became a 50% shareholder in both Do Ripe Farms, Inc and DRF, which was a related company set up to handle some of the aspects of financing. When DRF was set up in early 2002, Justice was made a 50% shareholder in both Do Ripe and DRF. Tr. 17. When Hoch wanted to borrow money on behalf of Do Ripe, he would request it of DRF who would request it from Justice, who would "draw it down" and send it to DRF who would then send it to Do Ripe. *Id.*
(continued...)

receiving for his $1.1 million loan. Tr. 50. There is no dispute that Justice was a 50 per cent shareholder of Do Ripe throughout the period Do Ripe was found to have violated the PACA.

Justice throughout this proceeding has characterized his role as that of a "passive investor." Tr. 30. He stated that other than providing the funds to Do Ripe so that Hoch could improve the company's ability to do business, he had no role in the day to day operations of the company. Tr. 25, 27. While he stopped by the office on occasion to have lunch, it was generally a fairly casual event, based on his proximity to Do Ripe, and most of his conversations with Hoch about business were fairly general in nature, according to both Hoch and Justice. Tr. 35-36, 74-75. Justice testified that he did not review Do Ripe's bills; that he did not decide which bills to pay; that he did not review Do Ripe's invoices; that he did not sign any contracts on behalf of Do Ripe; and that he did not receive compensation from Do Ripe or sign any loan documents for Do Ripe. Tr. 28-29. On the other hand, Justice was generally aware of the financial condition of the company; knew generally why Hoch needed to borrow the additional funds; and was receiving statements regarding the financial condition of Do Ripe--although not always on a timely basis. Tr. 51.

Further, for a period of time during the violation period, Justice loaned Do Ripe additional funds--$70,000--above and beyond the $1.1 million to tide the company over during the holiday season to cover expenses at a time when the company was being slow paid by some of its customers. Tr. 41-45, 50-51. Not only were these loans repaid by Do Ripe during the very period the company was committing violations of the PACA, but in February 2003, when Justice was made aware that he was on the company's bank signature card, he signed the company's checks to himself paying off the $70,000 loan, including interest. Tr. 42-43, 49.[2]

With respect to the produce business, Justice generally claimed ignorance as to how the produce business functioned. As he put it, when he first began loaning Hoch money, "I never really got into his business." Tr. 16. At the time of making his initial loans and the loans through DRF, Justice had no familiarity with the PACA. Tr. 20. However, he did not loan the additional funds to Hoch blindly. He was

[1](...continued)
It is only Justice's relationship with Do Ripe Farms, Inc. that is material to the responsibly connected determination.

[2] The "Payment to insiders" attachment to Do Ripe's bankruptcy filing, RX 6, p. 64, indicated that Petitioner received four checks from the company, totaling over $84,000, in February and March, 2003. Apparently the first three checks, totaling over $77,000, were for the repayment of the loans to tide Do Ripe over the holiday season, with the additional $7,000 check for a loan covering some telephone equipment. Tr. 46.

given to understand that Do Ripe needed to expand geographically; that they needed to retool and rent more space; that Hoch told him that he had additional commitments from companies who wished to purchase produce from Do Ripe; and that additional equipment, including a machine that cost $125,000 to sort tomatoes, needed to be purchased in order to successfully compete. Tr. 21-23. Hearing this information from Hoch convinced him to make the additional funds available to Do Ripe in exchange for the ownership share in the company. Justice testified that he never actually received any stock certificate with his name on it indicating that he was a 50% shareholder, Tr. 23, but there is no dispute that he was such a shareholder throughout the relevant time period. Tr. 31. He also indicated that he never considered himself to be an officer or director of Do Ripe. Tr. 24.

His failure to look into the details of the produce business before investing so heavily in Do Ripe appears to be inconsistent with his prior practice as an astute businessman. As he stated during cross-examination, "To make that large of an investment in any business you should know the ins and outs of the business, I agree, but I had a lot of faith in that individual." Tr. 34. Because of his then apparent faith in Hoch, Justice did not follow his normal precautions before investing, choosing to rely instead on Hoch's representations and periodic updates as to the state of the business.

Matters came to a head for Do Ripe when their assets were frozen as a result of a PACA Trust action initiated by Six L's Packaging Co. in March 2003. Tr. 75-79. Shortly thereafter, Do Ripe ceased doing business and filed a voluntary petition for Chapter 11 bankruptcy protection. PX 3F, RX 6. Both Hoch and Justice signed the relevant documents as the holders of 100% of the outstanding shares of Do Ripe. The bankruptcy filings also listed Justice as a director of the company, PX 3F, p. 53, although Justice testified that he never was informed that he was a director and that he was basically presented the forms to sign by the bankruptcy attorney. Tr. 41.

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.

In addition to penalizing the violating merchant, which in this case would be Do Ripe, the Act also imposes severe sanctions against any person "responsibly connected" to an establishment that has had its license revoked or suspended.[3] 7 U.S.C. §499h(b). The Act prohibits any licensee from employing any person who was responsibly connected with any other licensee 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,

[3] Since Do Ripe's license had already been terminated for failure to pay the required fee, my default ruling did not include an order revoking or suspending its license. Instead, I ordered that "the facts and circumstances of the violation shall be published." The Judicial Officer has ruled that "Publication of the facts and circumstances of Respondent's violations has the same effect on Respondent and persons responsibly connected with Respondent as revocation of Respondent's PACA license." *In re M. Trombetta & Sons, Inc.*, 64 Agric. Dec. 1869, 1903 (2005).

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.

Discussion

I conclude that Petitioner has failed to meet 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 50% shareholder of a violating licensee or entity subject to license.

Petitioner Justice was actively involved in the activities resulting in a violation of this chapter. Even though Justice and Hoch both considered Justice to be a "passive investor;" (a) the degree of his knowledge of Do Ripe's condition at the time he assumed half-ownership; (b) his general knowledge of the business's problems; (c) his knowledge of how his investment was going to be used; (c) his failure to investigate the regulations and laws pertinent to the produce business; and (d) his decision, at a time when he knew the company was unable to pay its creditors, to pay the company's debt to him for the short term loan—in effect a decision by a co-owner to grant his claim a higher priority than other claims, all constituted active involvement under the statute.

The burden of proof is on the Petitioner to demonstrate that he was not actively involved in the activities resulting in Do Ripe's violations. Although Hoch was clearly in charge of running the business, and made the day-to-day decisions, Petitioner's decision to invest in the business in exchange for half ownership of the business, when he had very good knowledge as to how his investment was going to be used, and when he knew the business was not doing well, convinces me, and I so find, that his role within the company was active under the statute. An individual does not have to be the major corporate decision maker to be actively involved. As the Judicial Officer held in *In re Lawrence D. Salins*, 57 *Agric. Dec.* 1474, 1489 (1998), ". . . there are many functions within the company, e.g., corporate finance, corporate decision making, check writing, and choosing which debt-in-arrears to pay, which can cause an individual to be actively involved in failure to promptly pay for produce, even though the individual does not ever actually purchase produce." Indeed, Justice had a far lesser role in the activities of Do Ripe than did Salins who, as Petitioner points out in his reply brief, was extensively

and regularly involved in his company's business. There is no evidence that Justice was involved in Do Ripe's day-to-day activities; or that he did buying or selling of produce; or did sign or write checks (with the exception of paying back his short term holiday loan to the company); or was generally aware of who Do Ripe's creditors were prior to the time the accounts were frozen; or was a part of many of the decisions that are traditionally linked with high-level management.

However, that he was less involved than the petitioner in the *Salins* case does not necessarily warrant a finding that Justice was not actively involved. While he apparently made the unusual decision to forego the type of investigation that he normally would conduct into the affairs of a business in which he was about to invest a substantial amount of money, due to his long-term acquaintance with Hoch, he did know enough to realize that the business was in trouble and that it was continually borrowing money even before he became half-owner. He knew generally what his investment was going to be used for. He had to personally authorize each increment of the loan that was financed through DNF, and his multiple exercise of that authority, particularly in light of his awareness of Do Ripe's financial conditions, is not consistent with being a "passive investor," but rather indicates active participation in the company's decisions. And the decision to pay back his own short term loan at a time when Do Ripe was in trouble with a number of creditors is utterly inconsistent with "passive" investment, while being an extremely strong indicator of active involvement.

Petitioner was not merely a nominal shareholder in Do Ripe. Petitioner did not meet his burden of showing, by a preponderance of the evidence, that he was only a nominal 50 percent shareholder of Do Ripe. In order to show that his 50% ownership was only nominal, Justice would have to demonstrate, by a preponderance of the evidence, that he did not have an "actual, significant nexus" with Do Ripe during the period Do Ripe was violating the PACA. *In re Anthony Thomas*, 59 *Agric. Dec.* 367, 386 (2000), *In re Edward S. Martindale*, *Agric. Dec.* (slip op. p. 28)(July 26, 2006).

I am basing my finding that Justice was responsibly connected to Do Ripe on his role as 50% shareholder, and not on his being an officer or director of the company. While Justice did sign a bankruptcy document indicating that he was a director, neither he nor Hoch had any recollection of him being made a director or an officer. The bankruptcy filing papers, signed by Justice at the request of the bankruptcy attorney, appear to be the only mention of Justice being a director. The evidence does not support a finding that Justice was a director or officer of Do Ripe. However, Justice's stock ownership is more than sufficient to

establish his responsibly connected status, particularly in view of his overall business background, his knowledge of Do Ripe's financial condition, and his involvement in financial transactions during the violation period.

Respondent contends, correctly, that the basic fact that Petitioner owned 50% of the corporate stock of Do Ripe at the time the violations were committed is strong evidence that Petitioner was not a nominal shareholder. Resp. brief at 16. With Congress setting 10% ownership as the threshold for an individual to be found responsibly connected based on percentage ownership of a violating entity, 50% ownership is a rather powerful indication that an individual is responsibly connected to a company. As the Judicial Officer stated in *In re Edward S. Martindale*, supra, at slip op. p. 29, "Petitioner's ownership of a substantial percentage of stock alone is very strong evidence that he was not a nominal shareholder." The "substantial percentage" referred to in Martindale was 20 per cent, far less than the 50% ownership of Petitioner in this case.[4] Simply by virtue of his ownership interest in Do Ripe, Justice could have taken measures to investigate further the problems the company was having in paying its debts, monitored the company more closely, and simply paid more attention to the business. Instead, he decided to trust Hoch and Do Ripe's employees, and to make no attempts to fix the conduct that was leading the company to PACA violations and bankruptcy.

In making a determination as to whether a shareholder is nominal, it is appropriate to look at his overall business background and knowledge. It has been recognized that a person may be in a nominal position, even if they are a more than 10% shareholder, if they have little or no training and experience. Thus, in *Minotto v. USDA*, 711 F. 2d 406, 409, the court found that Minotto, who was only a bookkeeper and had very little training or experience, was only a nominal director. Although Petitioner here had little knowledge of the produce business, he had a long history of owning successful businesses and in investing. He testified that he had been a businessman for 35 years prior to investing in Do Ripe, and that he had owned approximately twenty businesses during that time. While he remained relatively unaware of the details of Do Ripe's business, he was well aware that the company was having severe financial difficulties at the time he became a shareholder. Indeed, the failure of Do Ripe to repay $600,000 in loans was both a crystal clear indicator that the company was in trouble, as well as the inducement for

[4] See, also, the cases cited in footnote 8 of *Martindale*, where the Judicial Officer and the courts have held that ownership of 20 to 33.3 percent of the stock of a violating entity was "strong evidence" that a person was responsibly connected to that entity.

Justice to seek further protection, in the form of a 50% share of Do Ripe, before he would set up the mechanism to loan additional funds. He knew the purpose of the additional funding, and approved each incremental advance of funds until the additional $500,000 was distributed. As an experienced businessman, he certainly had the capability of inquiring further into the details of a business he knew was losing money, and as a 50% stockholder he had the obligation, even if he was not actively involved in the activities resulting in the violations of the PACA, to take action to counteract or obviate the fault of Hoch. Instead, Justice was content to stay away from learning about the details of the business, and to not take any measures to correct the situation. His situation is a far cry from that in *Minotto*, where a bookkeeper with no real business knowledge or ownership role in the company was put on the board to essentially cast a figurehead vote in favor of every resolution supported by the company's ownership. Rather, as a successful businessman who actively sought ownership as a condition of advancing further loans to Do Ripe, and who hoped to make a profit with his investment in the company, Tr. 50, 52-53, Justice's position with Do Ripe contrasts sharply with the facts of the *Minotto* case.

Two other factors deemed significant by the Judicial Officer in determining whether an individual's stock ownership was "merely nominal" are active participation in corporate decision making and knowledge of the company's financial condition. Once again, Petitioner's actions are inconsistent with those of a nominal shareholder. In *Salins*, the Judicial Officer stated that active participation in corporate decision making was another indicia whether an individual was serving in a nominal capacity. While Justice clearly was not participating in day-to-day decision-making at Do Ripe, he played a significant role in corporate finance decision making. Thus, if he did not advance the funds to purchase the tomato sorter and to otherwise finance Do Ripe's anticipated expansion of business, it is likely that those events would not have occurred. His approval of the additional funding on an incremental basis confirms that he gave his individual approval to numerous steps in the company's financing decisions. He also participated in the company's decision to file for bankruptcy, a rather pivotal decision. In addition, he made the decision to repay loans that he made to the corporation, that were above the $1.1 million, Tr. 50, even when he knew the company was suffering financially. The fact that he issued four separate checks to repay himself contradicts his claim that his involvement in the company was only passive.

In *Salins*, the Judicial Officer also stated that knowledge of the company's financial condition was an additional factor to be looked at in determining whether a shareholder was only serving in a nominal

capacity. Justice's knowledge of Do Ripe's financial condition was clearly established—he discussed the company's condition numerous times with Koch even before he became a shareholder; was well-aware there were significant problems as his loans were not being repaid; and saw numerous financial statements reflecting the company's troubles before and during the violation period. Rather than attempt to take action to learn more about the produce business or otherwise apply his considerable business savvy towards taking measures to improve the company's practices, Petitioner appeared to be content to let Hoch and his employees run the business without interference. As a major shareholder in the company, Petitioner cannot avoid his responsibilities under the PACA. As a major shareholder he knew, or should have known, that the company was delinquent in paying for its purchases, and should have taken prompt measures to correct this situation. While he became a shareholder in part in order to secure his loaning Do Ripe additional funds, he at the same time became a person who was responsible for assuring that Do Ripe was compliant with the PACA, a responsibility he did not fulfill.

Petitioner invested in Do Ripe to make money. While he originally loaned the company money with the goal of getting repaid with interest, the series of transactions that lead him to become a 50% shareholder was entered into as a means of assuring he could get all his money back with interest and to make a profit as well. He was a voluntary investor who received money from Do Ripe during the time Do Ripe was committing violations of the PACA. The receipt of compensation from the violating company is another factor cited by the Judicial Officer in *Salins*, and the voluntary investment of substantial funds with the expectation of eventually receiving compensation in the way of profits and increased value of his investment interest is consistent with my finding that he is responsibly connected to Do Ripe.

Findings of Fact

1. Petitioner Ray Justice is an experienced businessman, who has owned over 20 companies.

2. Do Ripe Farms, Inc. held PACA license 2000-0951 from March 24, 2000 through March 24, 2002, when the license terminated for non-payment of the annual fee. During this period Robert Hoch was the sole owner and president of Do Ripe.

3. Even though it was unlicensed, Do Ripe continued its produce

operations until it filed for voluntary bankruptcy on April 18, 2003. Between September 2002 and April 2003, Do Ripe failed to make full payment promptly for 100 lots of perishable agricultural commodities to 16 sellers in the amount of over $1 million.

4. Petitioner has been acquainted with Robert Hoch for over 30 years, since his children went to school with Hoch. Hoch had discussed Do Ripe's tomato business with Petitioner on numerous occasions, and had borrowed, and subsequently repaid with interest, funds from Petitioner on a number of occasions.

5. In early 2002, at a time when Do Ripe owed Petitioner approximately $600,000, he requested that Petitioner loan him an additional $500,000. Petitioner indicated that he needed some sort of collateral to safeguard his investment, and agreed to set up a $500,000 line of credit through a newly created entity called DRF in exchange for being made a 50% shareholder in Do Ripe.

6. From February 2002 until the company filed for bankruptcy protection, Petitioner was a 50% shareholder in Do Ripe.

7. Before investing in Do Ripe, Petitioner did not investigate or learn about the workings of the produce business. He was unaware of the PACA and the requirement of a PACA license. He was aware that Do Ripe was having financial difficulties, and was further aware of some or most of the purposes for which Hoch desired to borrow the additional funds.

8. While a shareholder in Do Ripe, Petitioner incrementally advanced funds to the company from DRF.

9. While a shareholder in Do Ripe, Petitioner made additional loans, above and beyond the $1.1 million, to tide the company over during the holiday season. On four different occasions during the period Do Ripe was violating the PACA, Petitioner, having found out that he was authorized to sign checks, wrote checks to himself to pay off loans he had made to Do Ripe.

Conclusions of Law

Petitioner was a 50% shareholder in Do Ripe Farms, Inc. from February 2002 through the time the company filed for bankruptcy in April 2003.

Between September 2002 and April 2003 Do Ripe Farms, Inc. committed willful, flagrant and repeated violations of section 2(4) of the PACA by failing to make full payment promptly to sixteen sellers in the amount of over one million dollars for one hundred lots of perishable agricultural commodities Do Ripe had purchased, received, and accepted in interstate commerce.

Petitioner was actively involved in the violations committed by Do Ripe.

Petitioner was not a nominal 50% shareholder in Do Ripe.

Petitioner was responsibly connected to Do Ripe during the time Do Ripe committed violations of the PACA.

Conclusion and Order

Petitioner has failed to show, by a preponderance of the evidence, that he was not responsibly connected to Do Ripe Farms, Inc. at a time when Do Ripe committed willful, flagrant and repeated violations of section 2 (4) of PACA for failing to make full payment promptly for produce purchases. Petitioner was actively involved in the activities resulting in the violations, and was more than a nominal 50% shareholder. Wherefore, I affirm the finding of the Chief of the PACA Branch that Ray Justice was responsibly connected with Do Ripe at the time the violations were committed.

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: WILLIAM DUBINSKY & SON, INC.
PACA Docket No. D-02-0002.
Decision without Hearing.
Filed August 21, 2006.

PACA – General denial – Show cause order – Prompt payment, failure to make.

David Richardson for Complainant.
Respondent Pro se.
Decision and Order by Chief Administrative Law Judge Marc R. Hillson

Decision Without Hearing

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 23, 2001, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The Complaint alleges that during the period October 1999 through December 2000 Respondent purchased, received, and accepted, in interstate and foreign commerce, from 138 sellers, 967 lots of perishable agricultural commodities in the course of interstate and foreign commerce, but failed to make full payment promptly of the agreed purchase prices in the total amount of $1,795,045.82.

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. During the period of March through June 2005, a follow up investigation was conducted by the PACA Branch of the Agricultural Marketing Service which revealed that as of June 2005, at least 20 of the sellers listed in the Complaint were still owed $90,024.65.[1] 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, in January 2006, the Chief 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. Service of that Order to the addresses listed in the file in the Hearing Clerk's Office was unsuccessful. On May 16, 2006 Complainant made a motion for Decision Without Hearing. Complainant argued in its motion that as Respondent was properly served with the disciplinary complaint in this case, was on notice of the

[1] Mr. Nefferdorf attempted to contact 32 out of the 138 sellers listed in the complaint. 12 out of 32 sellers never responded to Mr. Nefferdorf's inquiries. As indicated in his affidavit, Mr. Nefferdorf tried numerous times to contact the remaining 12 sellers to no avail.

proceedings against it, and filed an answer to the complaint, Respondent was obligated to keep the Hearing Clerk's Office apprised of its current mailing addresses and relevant contact information. Respondent failed to do so. Accordingly, and as Respondent's failure to fulfill its obligation resulted in unsuccessful service of the January 2006 Order to Respondent to Show Cause, I am persuaded by Complainant's arguments and grant its motion for the issuance of a Decision Without Hearing finding that Respondent committed willful, flagrant and repeated violations of section 2(4) of the PACA and publishing Respondent's violations.

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 on or about March 15, 2002, 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 Connecticut. Its mailing address is 101 Reserve Road, Hartford, Connecticut 06114.

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 770517 was issued to Respondent on January 14, 1977. This license terminated on January 14, 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 October 1999 through December 2000, Respondent purchased, received, and accepted, in interstate and foreign commerce, from 138 sellers, 967 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 $1,795,045.82.

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 967 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.

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In re: DONALD R. BEUCKE.
PACA-APP Docket No. 04-0009.
Decision and Order.
Filed September 28, 2006.

PACA-APP – Perishable agricultural commodities – Responsibly connected – Actively involved in activities resulting in violation – Nominal officer, director, and shareholder – Alter ego – Standard of proof – Timing of employment bar – Multiple petitions for review consolidated for hearing.

The Judicial Officer affirmed Chief Administrative Law Judge Marc R. Hillson's (Chief ALJ) decision concluding Donald R. Beucke (Petitioner) was responsibly connected with Garden Fresh Produce, Inc., when Garden Fresh Produce, Inc., violated the PACA. The Judicial Officer found Garden Fresh Produce, Inc., violated the PACA during the period January 14, 2002, through February 26, 2003. During the violation period, Petitioner was a vice president, a director, and a holder of 20 percent of the outstanding stock of Garden Fresh Produce, Inc. The Judicial Officer stated the burden was on Petitioner to demonstrate by a preponderance of the evidence that he was not responsibly connected with Garden Fresh Produce, Inc., despite his being a vice president, a director, and a major shareholder of Garden Fresh Produce, Inc. The PACA provides a two-prong test which a petitioner must meet in order to demonstrate that he or she was not responsibly connected. First, a petitioner must demonstrate by a preponderance of the evidence that he or she was not actively involved in the activities resulting in a violation of the PACA. If a petitioner satisfies the first prong, then for the second prong, the petitioner must demonstrate by a preponderance of the evidence one of two alternatives: (1) the petitioner was only nominally a partner, an officer, a director, or a shareholder of the violating PACA licensee or entity subject to a PACA license; or (2) the petitioner was not an owner of the violating PACA licensee or entity subject to a PACA license, which was the alter ego of its owners. The Judicial Officer concluded Petitioner failed to prove by a preponderance of the evidence that he met the first prong and second prong of the responsibly-connected test. The Judicial Officer also rejected Petitioner's contention that the Chief ALJ held Petitioner to a standard of proof higher than preponderance of the evidence to demonstrate that Petitioner was only a nominal 20 percent shareholder of Garden Fresh Produce, Inc. Finally, the Judicial Officer rejected Petitioner's contention that the bar on his employment by PACA licensees should have commenced on the day that Garden Fresh Produce, Inc., was found to have violated the PACA.

Charles L. Kendall, for Respondent.
Effie F. Anastassiou and Paul Hart, Salinas, CA, for Petitioner.
Initial decision issued by Marc R. Hillson, Chief Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

On April 28, 2004, James R. Frazier, Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], issued a

determination that Donald R. Beucke [hereinafter Petitioner] was responsibly connected with Garden Fresh Produce, Inc., during the period January 2002 through February 2003, when Garden Fresh Produce, Inc., violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA].[1] On June 2, 2004, Petitioner filed "Petition of Donald R. Beucke for Review of Determination Re Responsibly Connected Status" pursuant to the PACA and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice] seeking reversal of Respondent's April 28, 2004, determination that Petitioner was responsibly connected with Garden Fresh Produce, Inc.

On March 1 and 2, 2005, Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] presided over a hearing in San Jose, California. Effie F. Anastassiou and Paul Hart, Anastassiou & Associates, Salinas, California, represented Petitioner. Charles L. Kendall, Office of the General Counsel, United States Department of Agriculture, represented Respondent.

On January 19, 2006, after the parties filed post-hearing briefs, the Chief ALJ issued a Decision [hereinafter Initial Decision] in which the Chief ALJ concluded Petitioner was responsibly connected with Garden Fresh Produce, Inc., when Garden Fresh Produce, Inc., violated the PACA (Initial Decision at 1, 14).

On February 8, 2006, Petitioner appealed to the Judicial Officer. On March 6, 2006, Respondent filed a response to Petitioner's appeal petition and a cross-appeal. On April 6, 2006, Petitioner filed a response to Respondent's cross-appeal. On April 27, 2006, Respondent filed a reply to Petitioner's response to Respondent's cross-appeal, and on May 15, 2006, Petitioner filed a declaration in response to Respondent's April 27, 2006, filing. On May 15, 2006, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I agree with the Chief ALJ's conclusion that Petitioner was responsibly connected with Garden Fresh Produce, Inc., when Garden Fresh Produce, Inc., violated the PACA. Respondent's exhibits are designated by "RX." The transcript is divided into two volumes, one volume for each day of the 2-day hearing. References to "Tr. I" are to the volume of the transcript

[1]During the period January 14, 2002, through February 26, 2003, Garden Fresh Produce, Inc., purchased, received, and accepted in interstate commerce, from five produce sellers, 109 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $379,923.25, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). *In re Garden Fresh Produce, Inc.*, 63 *Agric. Dec.* 1032 (2004).

that relates to the March 1, 2005, segment of the hearing, and references to "Tr. II" are to the volume of the transcript that relates to the March 2, 2005, segment of the hearing.

APPLICABLE STATUTORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

. . . .

§ 499a. Short title and definitions

. . . .

(b) Definitions

For purposes of this chapter:

. . . .

(9) The term "responsibly connected" means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association. A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of this chapter and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.

. . . .

§ 499b. Unfair conduct

It shall be unlawful in or in connection with any transaction in

interstate or foreign commerce:

. . . .

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter.

. . . .

§ 499d. Issuance of license

(a) Authority to do business; termination; renewal

Whenever an applicant has paid the prescribed fee the Secretary, except as provided elsewhere in this chapter, shall issue to such applicant a license, which shall entitle the licensee to do business as a commission merchant and/or dealer and/or broker unless and until it is suspended or revoked by the Secretary in accordance with the provisions of this chapter, or is automatically suspended under section 499g(d) of this title, but said license shall automatically terminate on the anniversary date of the license at the end of the annual or multiyear period covered by the license fee unless the licensee submits the required renewal application and pays the applicable renewal fee (if such fee is required)[.] . . .

(b) Refusal of license; grounds

The Secretary shall refuse to issue a license to an applicant if he finds that the applicant, or any person responsibly connected

with the applicant, is prohibited from employment with a licensee under section 499h(b) of this title or is a person who, or is or was responsibly connected with a person who–

(A) has had his license revoked under the provisions of section 499h of this title within two years prior to the date of the application or whose license is currently under suspension; [or]

(B) within two years prior to the date of application has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect[.]

. . . .

(c) Issuance of license upon furnishing bond; issuance after three years without bond; effect of termination of bond; increase or decrease in amount; payment of increase

An applicant ineligible for a license by reason of the provisions of subsection (b) of this section may, upon the expiration of the two-year period applicable to him, be issued a license by the Secretary if such applicant furnishes a surety bond in the form and amount satisfactory to the Secretary as assurance that his business will be conducted in accordance with this chapter and that he will pay all reparation orders which may be issued against him in connection with transactions occurring within four years following the issuance of the license, subject to his right of appeal under section 499g(c) of this title. In the event such applicant does not furnish such a surety bond, the Secretary shall not issue a license to him until three years have elapsed after the date of the applicable order of the Secretary or decision of the court on appeal. If the surety bond so furnished is terminated for any reason without the approval of the Secretary the license shall be automatically canceled as of the date of such termination and no new license shall be issued to such person during the four-year period without a new surety bond covering the remainder of such period. The Secretary, based on changes in the nature and volume of business conducted by a bonded licensee, may require an increase or authorize a reduction in the amount of the bond. A bonded licensee who is notified by the Secretary to provide a

bond in an increased amount shall do so within a reasonable time to be specified by the Secretary, and upon failure of the licensee to provide such bond his license shall be automatically suspended until such bond is provided. The Secretary may not issue a license to an applicant under this subsection if the applicant or any person responsibly connected with the applicant is prohibited from employment with a licensee under section 499h(b) of this title.

. . . .

§ 499h. Grounds for suspension or revocation of license

(a) Authority of Secretary

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

(b) Unlawful employment of certain persons; restrictions; bond assuring compliance; approval of employment without bond; change in amount of bond; payment of increased amount; penalties

Except with the approval of the Secretary, no licensee shall employ any person, or any person who is or has been responsibly connected with any person–

(1) whose license has been revoked or is currently suspended by order of the Secretary;

(2) who has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect; or

> (3) against whom there is an unpaid reparation award issued within two years, subject to his right of appeal under section 499g(c) of this title.
>
> The Secretary may approve such employment at any time following nonpayment of a reparation award, or after one year following the revocation or finding of flagrant or repeated violation of section 499b of this title, if the licensee furnishes and maintains a surety bond in form and amount satisfactory to the Secretary as assurance that such licensee's business will be conducted in accordance with this chapter and that the licensee will pay all reparation awards, subject to its right of appeal under section 499g(c) of this title, which may be issued against it in connection with transactions occurring within four years following the approval. The Secretary may approve employment without a surety bond after the expiration of two years from the effective date of the applicable disciplinary order. The Secretary, based on changes in the nature and volume of business conducted by the licensee, may require an increase or authorize a reduction in the amount of the bond. A licensee who is notified by the Secretary to provide a bond in an increased amount shall do so within a reasonable time to be specified by the Secretary, and if the licensee fails to do so the approval of employment shall automatically terminate. The Secretary may, after thirty days['] notice and an opportunity for a hearing, suspend or revoke the license of any licensee who, after the date given in such notice, continues to employ any person in violation of this section. The Secretary may extend the period of employment sanction as to a responsibly connected person for an additional one-year period upon the determination that the person has been unlawfully employed as provided in this subsection.

7 U.S.C. §§ 499a(b)(9), 499b(4), 499d(a), (b)(A)-(B), (c), 499h(a)-(b).

DECISION

Facts

Petitioner has worked in the produce business for over 25 years. Petitioner began working for his stepfather at Martindale Distributing Company, first as an inspector and later as a buyer. At one point, Petitioner was president of Martindale Distributing Company. During

this period, Petitioner worked with other family members, including his stepbrothers Wayne Martindale and Edward Shane Martindale. (Tr. I at 59-60, 82-84.)

At the beginning of the year 2000, Wayne Martindale asked Petitioner to invest in Garden Fresh Produce, Inc., a produce company Wayne Martindale intended to operate in Las Vegas, Nevada. Petitioner invested $20,000 in Garden Fresh Produce, Inc., and was listed as a 20 percent stockholder of the company. (Tr. I at 61.) Wayne Martindale and Edward Shane Martindale were also listed on the PACA license certificate as 20 percent stockholders (RX 1 at 1-2, 5-6, 9). Nevada corporate records list Petitioner as a director and vice president of marketing (RX 3 at 9, 11, 13). Petitioner was authorized to sign checks on behalf of Garden Fresh Produce, Inc., but there is no evidence that he did so after the first few months the company was operating (RX 13; Tr. I at 63). Petitioner was one of the signatories on Garden Fresh Produce, Inc.'s application for a PACA license and was listed on the application as a director, a vice president, and a 20 percent shareholder (RX 12; Tr. I at 87-89). Petitioner was issued a stock certificate in Garden Fresh Produce, Inc., indicating that he owned 1000 shares in the company (RX 8 at 3).

Petitioner maintained his positions with Garden Fresh Produce, Inc., when Garden Fresh Produce, Inc., committed willful, flagrant, and repeated violations of the PACA. Petitioner testified that Wayne Martindale ran Garden Fresh Produce, Inc., and that he (Petitioner) had virtually no role in Garden Fresh Produce, Inc.'s operations other than making his initial $20,000 investment. (Tr. I at 60-67.) Petitioner testified that, while Garden Fresh Produce, Inc., was operating out of Las Vegas, Nevada, he maintained his position working full-time at Martindale Distributing Company in Salinas, California. He remembered attending a single meeting of the board of directors in Las Vegas, but had no recollection of receiving a stock certificate or signing the PACA license application (until his recollection was refreshed on viewing a copy of the application at the hearing) (Tr. I at 62-64, 85-88). He stated he wrote a single check on the company's behalf but otherwise wrote no checks for Garden Fresh Produce, Inc., never saw any tax or financial books or records, and had virtually no duties (Tr. I at 62-64). Petitioner stated he was never involved in any business decisions for Garden Fresh Produce, Inc. (Tr. I at 64-66). However, Petitioner ordered produce for Garden Fresh Produce, Inc. (Tr. I at 20, 65; Tr. II at 16-18, 29-30), and was involved in decision-making with respect to which of Garden Fresh Produce, Inc.'s debts to pay (Tr. II at 52, 55). Petitioner also received approximately $1,500 in compensation for his duties as an officer of Garden Fresh Produce, Inc., during the first year

of operation of Garden Fresh Produce, Inc. (Tr. I at 65).

Beginning in December 2002, Petitioner began receiving calls from Garden Fresh Produce, Inc.'s produce sellers, who stated Garden Fresh Produce, Inc., was not paying for produce timely. Petitioner referred the callers to Wayne Martindale and also told some of the callers they should stop doing business with Garden Fresh Produce, Inc., if payment was not timely. Petitioner placed calls to Garden Fresh Produce, Inc.'s office in Las Vegas, Nevada, to determine the status of payments, but had difficulty reaching Wayne Martindale, and, when he did talk to him, Petitioner was told that checks were in the mail, that business would be improving, or that new accounts had been obtained—information which was not true. (Tr. I at 69-73.)

There is no evidence that Petitioner had any direct involvement in the transactions that were the subject of *In re Garden Fresh Produce, Inc.*, 63 *Agric. Dec.* 1032 (2004). Several witnesses testified that they viewed Wayne Martindale as the person running Garden Fresh Produce, Inc., and they only called Petitioner to obtain advice about contacting Wayne Martindale and to inform Petitioner of Garden Fresh Produce, Inc.'s failures to pay for produce (Tr. I at 17, 29-30, 41-42). During the violation period, Petitioner never saw Garden Fresh Produce, Inc.'s books. Before he resigned from Garden Fresh Produce, Inc., by letter dated April 4, 2003, Petitioner signed documents accepting the resignation of two of Garden Fresh Produce, Inc.'s directors, David N. Wiles and Bruce Martindale (RX 1 at 11-13, RX 7).

Petitioner's witnesses generally corroborated Petitioner's testimony that Wayne Martindale ran Garden Fresh Produce, Inc., as far as they were concerned. Petitioner's witnesses also testified that Petitioner enjoyed a good reputation in the produce industry and had a reputation for paying the bills of Martindale Distributing Company on a timely basis.

Evert Gonzalez, a senior marketing specialist for the PACA Branch, testified that his investigation was initiated after the PACA Branch received reparation complaints initiated by produce sellers against Garden Fresh Produce, Inc. Mr. Gonzalez described his investigation, which primarily involved visiting Garden Fresh Produce, Inc.'s Las Vegas, Nevada, office. No one was at the premises when he first arrived, but he eventually gained access to the premises and requested a variety of records. (Tr. I at 136-39.) Wayne Martindale informed Mr. Gonzalez that all the principals in Garden Fresh Produce, Inc., including Petitioner, had equal authority and could sign checks and pay payables (Tr. I at 139-41).

Phyllis Hall, a senior marketing specialist for the PACA Branch,

reviewed the file and identified the documents contained in the responsibly connected file maintained by the PACA Branch (RX 1-RX 9) (Tr. I at 145-64).

Discussion

I. Introduction

Responsibly connected liability is triggered when a company has its PACA license revoked or suspended or when the company has been found to have committed flagrant or repeated violations of section 2 of the PACA (7 U.S.C. § 499b). During the period January 14, 2002, through February 26, 2003, Garden Fresh Produce, Inc., committed willful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly of the agreed purchase prices to five produce sellers for 109 lots of perishable agricultural commodities, in the total amount of $379,923.25.[2] Thus, an individual who was responsibly connected with Garden Fresh Produce, Inc., when Garden Fresh Produce, Inc., violated the PACA 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)).

The term *responsibly connected* means affiliated or connected with a commission merchant, dealer, or broker as a partner in a partnership or an officer, a director, or a holder of more than 10 percent of the outstanding stock of a corporation or association.[3] Petitioner was an officer, a director, and a holder of more than 10 percent of the outstanding stock of Garden Fresh Produce, Inc., during the period January 14, 2002, through February 26, 2003, when Garden Fresh Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). The burden is on Petitioner to demonstrate by a preponderance of the evidence that he was not responsibly connected with Garden Fresh Produce, Inc., despite being an officer, a director, and a holder of more than 10 percent of the outstanding stock of Garden Fresh Produce, Inc.

Section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) provides a two-prong test which a petitioner must meet in order to demonstrate that he or she was not responsibly connected. First, a petitioner must demonstrate by a preponderance of the evidence that he or she was not actively involved in the activities resulting in a violation of the PACA.

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[2] *In re Garden Fresh Produce, Inc.*, 63 Agric. Dec. 1032 (2004).

[3] 7 U.S.C. § 499a(b)(9).

If a petitioner satisfies the first prong, then for the second prong, the petitioner must demonstrate by a preponderance of the evidence one of two alternatives: (1) the petitioner was only nominally a partner, an officer, a director, or a shareholder of the violating PACA licensee or entity subject to a PACA license; or (2) the petitioner was not an owner of the violating PACA licensee or entity subject to a PACA license, which was the alter ego of its owners.

Petitioner failed to carry his burden of proof that he was not actively involved in the activities resulting in Garden Fresh Produce, Inc.'s violations of the PACA. Petitioner also failed to carry his burden of proof that he was only nominally an officer, a director, and a holder of more than 10 percent of the outstanding stock of Garden Fresh Produce, Inc. Moreover, as Petitioner was an owner of Garden Fresh Produce, Inc., the defense that he was not an owner of Garden Fresh Produce, Inc., which was the alter ego of its owners, is not available to Petitioner.[4] As Petitioner has failed to carry his burden of proof regarding the first prong and second prong of the two-prong test, I conclude Petitioner was responsibly connected with Garden Fresh Produce, Inc., when Garden Fresh Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, Petitioner is subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)).

II. Petitioner Was Actively Involved in Activities Resulting in PACA Violations

The United States Department of Agriculture's standard for determining whether a petitioner is actively involved in the activities resulting in a violation of the PACA was first set forth in *In re Michael Norinsberg* (Decision and Order on Remand), 58 Agric. Dec. 604, 610-11 (1999), as follows:

> The standard is as follows: A petitioner who participates in activities resulting in a violation of the PACA is actively involved

[4] *In re Edward S. Martindale*, 65 Agric. Dec. ___, slip op. at 9 (July 26, 2006); *In re James E. Thames, Jr.* (Decision as to James E. Thames, Jr.), 65 Agric. Dec. 429, 439 (2006), *aff'd per curiam*, No. 06-11609-CC (11th Cir. Aug. 15, 2006); *In re Benjamin Sudano*, 63 Agric. Dec. 388, 411 (2004), *aff'd per curiam*, 131 F. App'x 404 (4th Cir. 2005); *In re Anthony L. Thomas*, 59 Agric. Dec. 367, 390 (2000), *aff'd*, No. 00-1157 (D.C. Cir. Jan. 30, 2001); *In re Steven J. Rodgers*, 56 Agric. Dec. 1919, 1956 (1997), *aff'd per curiam*, 172 F.3d 920, 1998 WL 794851 (D.C. Cir. 1998) (Table), printed in 57 Agric. Dec. 1464 (1998).

> 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.

Petitioner did not meet his burden of showing, by a preponderance of the evidence, that he was not actively involved in the activities resulting in Garden Fresh Produce, Inc.'s PACA violations. Although Petitioner did not directly participate in the specific transactions resulting in Garden Fresh Produce, Inc.'s PACA violations, Petitioner directed payment of certain creditors in 2002, at a time when Petitioner knew Garden Fresh Produce, Inc., was not paying produce sellers promptly (Tr. II at 52, 55). Also, Petitioner purchased produce for Garden Fresh Produce, Inc., in 2002 (Tr. I at 20, 65; Tr. II at 16-18, 29-30). By directing the payment of certain creditors at a time when he knew Garden Fresh Produce, Inc., was not paying some of its produce sellers, Petitioner was in effect choosing which debts to pay. In *In re Lawrence D. Salins*, 57 Agric. Dec. 1474 (1998), I held that choosing which debts to pay "can cause an individual to be actively involved in failure to pay promptly for produce." *Id*. at 1488. Moreover, continuing to make purchases during the period when a PACA licensee is violating the prompt payment provision of the PACA can cause an individual to be actively involved in the failure of a PACA licensee to make full payment promptly in accordance with the PACA.

III. Petitioner Was Not Merely a Nominal Officer, Director, or Shareholder

Petitioner did not meet his burden of showing, by a preponderance of the evidence, that he was only a nominal 20 percent shareholder, director, and vice president. In order for a petitioner to show that he or she was only nominally an officer, a director, and a stockholder, the petitioner must show by a preponderance of the evidence that he or she did not have an actual, significant nexus with the violating company during the violation period. Under the actual, significant nexus standard, responsibilities are placed upon corporate officers, directors, and stockholders, even though they may not actually have been actively involved in the activities resulting in violations of the PACA, because

their status with the company requires that they knew, or should have known, about the violations being committed and they failed to counteract or obviate the fault of others.[5] The record establishes Petitioner had an actual, significant nexus with Garden Fresh Produce, Inc., during the violation period.

Petitioner was a co-founder of Garden Fresh Produce, Inc., who invested $20,000 as part of the initial capitalization of Garden Fresh Produce, Inc. Petitioner's relationship to Garden Fresh Produce, Inc., is much different than an individual who is listed as an owner, an officer, or a director because his or her spouse or parent put him or her on corporate records and who has no involvement in the corporation or experience in the produce business. Rather, Petitioner is an experienced, savvy individual who has worked in the produce business for over 25 years, who has worked for years with some or all of the principals in Garden Fresh Produce, Inc., and who is fully aware of the significance of having a valid PACA license and the importance of complying with the prompt payment provision of the PACA. Congress' utilization of ownership of more than 10 percent of the outstanding stock of a corporation as sufficient to trigger the presumption that the owner was responsibly connected is a strong indication that a 20 percent owner does not serve in a nominal capacity.[6]

There is no evidence that Petitioner was other than a voluntary investor, who undertook the responsibilities associated with being a director, a vice president, and a co-owner in an attempt to establish a

[5] *Bell v. Department of Agric.*, 39 F.3d 1199, 1201 (D.C. Cir. 1994); *Minotto v. United States Dep't of Agric.*, 711 F.2d 406, 408-09 (D.C. Cir. 1983); *Quinn v. Butz*, 510 F.2d 743, 756 n.84 (D.C. Cir. 1975).

[6] *Siegel v. Lyng*, 851 F.2d 412, 417 (D.C. Cir. 1988) (stating this court has held, most clearly in *Martino*, that approximately 20 percent stock ownership would suffice to make a person accountable for not controlling delinquent management); *Veg-Mix, Inc. v. United States Dep't of Agric.*, 832 F.2d 601, 611 (D.C. Cir. 1987) (stating with approval, in *Martino*, we found ownership of 22.2 percent of the violating company's stock was enough support for a finding of responsible connection); *Martino v. United States Dep't of Agric.*, 801 F.2d 1410, 1414 (D.C. Cir. 1986) (holding ownership of 22.2 percent of the stock of a company formed a sufficient nexus to establish the petitioner's responsible connection to the company); *In re Joseph T. Kocot*, 57 Agric. Dec. 1517, 1544-45 (1998) (stating the petitioner's ownership of a substantial percentage of the outstanding stock of the violating company alone is very strong evidence that the petitioner was not a nominal shareholder); *In re Steven J. Rodgers*, 56 Agric. Dec. 1919, 1956 (1997) (stating the petitioner's ownership of 33.3 percent of the outstanding stock of the violating entity alone is very strong evidence that the petitioner was responsibly connected with the violating entity), *aff'd per curiam*, 172 F.3d 920, 1998 WL 794851 (D.C. Cir. 1998) (Table), printed in 57 Agric. Dec. 1464 (1998).

profitable business. Petitioner presumably would have shared in the company's profits when there were some. Petitioner participated in a number of corporate matters, including signing the PACA license application, signing documents accepting the resignations of two other directors, and allowing himself to be an authorized signatory on company checks. While for practical purposes it is evident that Wayne Martindale ran Garden Fresh Produce, Inc., the record indicates Petitioner exercised authority consistent with his positions as 20 percent owner, a director, and a vice president to counteract or obviate the fault of others only by responding to telephone calls made by unpaid produce sellers. That Petitioner chose not to take further action to counteract or obviate the fault of others does not establish that his role was nominal.

Petitioner's Appeal Petition

Petitioner raises six issues in "Petitioner Beucke's Appeal Petition to Department Judicial Officer and Supporting Brief" [hereinafter Petitioner's Appeal Petition]. First, Petitioner contends the facts established in the record do not support the Chief ALJ's conclusion that Petitioner was actively involved in the activities resulting in Garden Fresh Produce, Inc.'s PACA violations (Petitioner's Appeal Pet. at 3, 10-15).

Petitioner states the Chief ALJ found there is no evidence that Petitioner was directly involved in any of the transactions resulting in Garden Fresh Produce, Inc.'s PACA violations (Petitioner's Appeal Pet. at 11). I infer Petitioner contends the Chief ALJ could not properly conclude Petitioner was actively involved in the activities resulting in Garden Fresh Produce, Inc.'s violations of the PACA and also find Petitioner was not directly involved in any of the transactions that were the subject of *In re Garden Fresh Produce, Inc.*, 63 Agric. Dec. 1032 (2004).

I disagree with Petitioner's contention. The United States Department of Agriculture's standard for determining whether a petitioner is actively involved in the activities resulting in a violation of the PACA does not require that the petitioner must have been directly involved in the violative transactions.[7] Thus, I do not find that, in order to conclude Petitioner was actively involved in the activities resulting in Garden Fresh Produce, Inc.'s violations of the PACA, I must first find Petitioner actually purchased the produce for which Garden Fresh

[7]*See In re Edward S. Martindale*, 65 Agric. Dec. ___, slip op. at 24 (July 26, 2006); *In re Michael Norinsberg* (Decision and Order on Remand), 58 Agric. Dec. 604, 610-11 (1999).

Produce, Inc., failed to make full payment promptly. In *In re Lawrence D. Salins*, 57 Agric. Dec. 1474, 1488-89 (1998), I found erroneous an administrative law judge's conclusion that the activities directly involving the actual purchase of produce are the only activities which can result in a violation of the PACA, as follows:

> The ALJ is correct that purchasing produce when there are insufficient funds leads directly to PACA payment violations, but I agree with Respondent that the ALJ's conclusion erroneously assumes that the activities directly involving the actual purchase of produce are the only activities which can result in a violation of PACA. The ALJ gives no authority for this assumption and I do not believe such a conclusion can be supported.
>
> On the contrary, I agree with Respondent that there are many functions within the company, *e.g.*, corporate finance, corporate decision making, check writing, and choosing which debt-in-arrears to pay, which can cause an individual to be actively involved in failure to pay promptly for produce, even though the individual does not ever actually purchase produce.

I concluded the petitioner, Lawrence D. Salins, was actively involved in the activities resulting in Sol Salins, Inc.'s violations of the PACA even though the petitioner did not purchase any produce. *In re Lawrence D. Salins*, 57 Agric. Dec. 1454 (1998).

Petitioner also contends he was not actively involved in the activities resulting in Garden Fresh Produce, Inc.'s violations of the PACA because: (1) he did not handle any of Garden Fresh Produce, Inc.'s finances; (2) Garden Fresh Produce, Inc., was located in Las Vegas, Nevada, and Petitioner did not have an office at the Las Vegas, Nevada, facility; (3) Petitioner did not make decisions regarding Garden Fresh Produce, Inc., debt payments; and (4) Petitioner did not participate in corporate decisions (Petitioner's Appeal Pet. at 11-13).

The evidence establishes that Petitioner was involved in Garden Fresh Produce, Inc.'s finances, payment decisions, and corporate decision-making. Petitioner was part of a group of individuals who organized Garden Fresh Produce, Inc., in April 2000 (Tr. I at 60-61); Petitioner signed Garden Fresh Produce, Inc.'s application for a PACA license (RX 12; Tr. I at 87-88); Petitioner signed the board of directors' resolutions accepting the resignation letters of directors David N. Wiles and Bruce W. Martindale (RX 1 at 11-13, RX 7); Petitioner ordered produce for Garden Fresh Produce, Inc. (Tr. I at 20, 65; Tr. II at 16-18,

29-30); and Petitioner was involved in decisions regarding which of Garden Fresh Produce, Inc.'s debts to pay (Tr. II at 52, 55). Petitioner had equal authority with all the other principals of Garden Fresh Produce, Inc.; Petitioner was authorized to sign checks, pay payables, negotiate contracts, leases, and other arrangements for and on behalf of Garden Fresh Produce, Inc.; and Petitioner, along with the other officers of Garden Fresh Produce, Inc., had responsibility for the activities of the corporation (RX 6 at 4-5; Tr. I at 139-41). Moreover, while I agree with Petitioner's assertions that Garden Fresh Produce, Inc., was located in Las Vegas, Nevada, and that Petitioner did not have an office in Las Vegas, Nevada, I do not find that Petitioner's proof of these facts is sufficient to conclude that Petitioner proved by a preponderance of the evidence that Petitioner was not actively involved in the activities resulting in Garden Fresh Produce, Inc.'s violations of the PACA.

Petitioner also argues that his circumstance is similar to that of the petitioner in *Maldonado v. Department of Agriculture*, 154 F.3d 1086 (9th Cir. 1998), who the Court held was not responsibly connected with W. Fay, a company which had violated the PACA. However, the question in *Maldonado* was whether the petitioner, a putative officer of W. Fay, was only a nominal officer. Therefore, I find *Maldonado* inapposite to the question of Petitioner's active involvement in the activities resulting in Garden Fresh Produce, Inc.'s violations of the PACA.

Second, Petitioner contends the Chief ALJ erroneously concluded Petitioner was actively involved in the activities resulting in Garden Fresh Produce, Inc.'s violations of the PACA based upon Petitioner's failure to prevent Wayne Martindale's misconduct (Petitioner's Appeal Pet. at 3, 15-20).

I agree with Petitioner's contention that the Chief ALJ erroneously based his conclusion that Petitioner was actively involved in the activities resulting in Garden Fresh Produce, Inc.'s violations of the PACA on Petitioner's failure to counteract or obviate the fault of Wayne Martindale. The Chief ALJ, citing *In re Anthony L. Thomas*, 59 Agric. Dec. 367, 388 (2000), states "[t]he failure to exercise powers inherent in [Petitioner's] various positions with Garden Fresh, 'because he chose not to use the powers he had' has previously been found a basis for finding active participation." (Initial Decision at 12.) However, the passage from *Thomas* quoted by the Chief ALJ relates to issue of whether an individual was a nominal officer, director, and shareholder of a violating company, not to the issue of whether the individual was actively involved in the activities resulting in a violation of the PACA, as follows:

> Even if I accept Petitioner's claim that he acted at the direction of Mr. Giuffrida, that does not negate Petitioner's actual, significant nexus to Sanford Produce Exchange, Inc. As the Court stated in *Veg-Mix, Inc. v. United States Dep't of Agric.*, 832 F.2d 601, 611 (D.C. Cir. 1987), in determining whether or not an individual is nominal, "the crucial inquiry is whether an individual has an 'actual significant nexus with the violating company,' rather than whether the individual has exercised real authority." Petitioner cannot avoid responsibility for the violations Sanford Produce Exchange, Inc., committed while he was president, simply because he chose not to use the powers he had.

In re Anthony L. Thomas, 59 Agric. Dec. 367, 387-88 (2000).

Similarly, the Chief ALJ quotes *Bell v. Department of Agriculture*, 39 F.3d 1199, 1201 (D.C. Dir. 1994), to support his conclusion that Petitioner's inaction constitutes active involvement in the activities resulting in a violation of the PACA (Initial Decision at 12). *Bell* makes clear that the passage quoted by the Chief ALJ relates to the issue of whether an individual was a nominal officer, director, and shareholder of a violating company, not to the issue of whether the individual was actively involved in the activities resulting in a violation of the PACA, as follows:

> The second way of rebutting the presumption is for the petitioner to prove that at the time of the violations he was only a *nominal* officer, director, or shareholder. This he could only establish by proving that he lacked "an actual, significant nexus with the violating company." *Minotto*, 711 F.2d at 409. Where responsibility was not based on the individual's "personal fault", *id*. at 408, it would have to be based at least on his "failure to 'counteract or obviate the fault of others'", *id*.

Bell v. Department of Agriculture, 39 F.3d 1199, 1201 (D.C. Cir. 1994) (footnote omitted).

While I disagree with the Chief ALJ's assertion that Petitioner's acts of omission support the conclusion that Petitioner was actively involved in the activities resulting in Garden Fresh Produce, Inc.'s violations of the PACA, I do not hold that an act of omission can never constitute active involvement in the activities resulting in a violation of the PACA.

I only conclude, based on the record before me, that Petitioner's acts of omission do not constitute active involvement in the activities resulting in Garden Fresh Produce, Inc.'s violations of the PACA.

Third, Petitioner contends the Chief ALJ erroneously concluded Petitioner was not a nominal officer, director, and shareholder of Garden Fresh Produce, Inc., during the period January 14, 2002, through February 26, 2003, when Garden Fresh Produce, Inc., violated the PACA (Petitioner's Appeal Pet. at 3, 20-24).

I agree with the Chief ALJ's conclusion that Petitioner failed to establish by a preponderance of the evidence that he was only nominally an officer, a director, and a stockholder of Garden Fresh Produce, Inc. In order for a petitioner to show that he or she was only nominally an officer, a director, and a stockholder, the petitioner must show by a preponderance of the evidence that he or she did not have an actual, significant nexus with the violating company during the violation period. Under the actual, significant nexus standard, responsibilities are placed upon corporate officers, directors, and stockholders, even though they may not actually have been actively involved in the activities resulting in violations of the PACA, because their status with the company requires that they knew, or should have known, about the violations being committed and they failed to counteract or obviate the fault of others.[8] The record establishes Petitioner had an actual, significant nexus with Garden Fresh Produce, Inc., during the violation period.

During the period when Garden Fresh Produce, Inc., violated the PACA, Petitioner owned a substantial percentage of the outstanding stock of Garden Fresh Produce, Inc. Petitioner's ownership of a substantial percentage of stock alone is very strong evidence that he was not a nominal shareholder.[9] Petitioner has not demonstrated by a preponderance of the evidence that he was only a nominal shareholder of Garden Fresh Produce, Inc.

Moreover, Petitioner had the appropriate business experience to be a corporate officer and director. At the time of the March 2005 hearing, Petitioner had over 25 years of experience in the produce business. Petitioner began working at Martindale Distributing Company, a business run by Petitioner's stepfather in Salinas, California. Petitioner started in Martindale Distributing Company as a produce inspector and later became a buyer. At one point, Petitioner was the president of Martindale Distributing Company. (Tr. I at 59-60, 82-84.) Petitioner

[8]See note 5.

[9]See note 6.

was also an officer, a director, and a stockholder of Bayside Produce, Inc. (Tr. I at 95, 102-03).

A person's active participation in corporate decision-making is an important factor in the determination that the person was not merely a nominal corporate officer and director.[10] At the beginning of the year 2000, Petitioner, along with several others, founded Garden Fresh Produce, Inc. Petitioner invested $20,000 in Garden Fresh Produce, Inc., and became a 20 percent shareholder, a director, and a vice president of the new company. Petitioner signed the original PACA license application and was given authority to sign checks. Petitioner remained a stockholder, a director, and a vice president until he submitted his resignation and reassigned his stock in April 2003. (RX 1 at 1-2, 5-6, 9, RX 3 at 9, 11, 13, RX 8 at 3, RX 12, RX 13; Tr. I at 61, 87-89.)

Petitioner purchased produce on behalf of Garden Fresh Produce, Inc. Petitioner made decisions about which Garden Fresh Produce, Inc., debts to pay. Petitioner took calls for Garden Fresh Produce, Inc., and became aware in 2002 that produce sellers were complaining about Garden Fresh Produce, Inc.'s failures to pay for produce timely. Petitioner referred callers to Wayne Martindale to attempt to resolve Garden Fresh Produce, Inc.'s failures to pay. Even though Petitioner knew Garden Fresh Produce, Inc., had financial problems, he did not ask to see financial statements or bank statements, relying on statements from Wayne Martindale that Garden Fresh Produce, Inc.'s finances were improving.

Before Petitioner resigned from Garden Fresh Produce, Inc., Petitioner signed documents accepting the resignation of two directors, David N. Wiles and Bruce Martindale (RX 1 at 11-13, RX 7). At all times material to this proceeding, all the principals in Garden Fresh Produce, Inc., including Petitioner, had equal authority and could sign checks and pay payables (Tr. I at 139-41). At all times material to this proceeding, Petitioner was authorized to negotiate contracts, leases, and other arrangements for and on behalf of Garden Fresh Produce, Inc., and Petitioner, along with the other officers of Garden Fresh Produce, Inc., had responsibility for the activities of the corporation (RX 6 at 4-5).

In short, I find Petitioner had an actual, significant nexus with Garden Fresh Produce, Inc. Petitioner was a major stockholder of Garden Fresh Produce, Inc.; Petitioner had the appropriate business experience to be a corporate officer and director; and Petitioner

[10] *In re Edward S. Martindale*, 65 Agric. Dec. ___, slip op. at 30 (July 26, 2006); *In re Lawrence D. Salins*, 57 Agric. Dec. 1474, 1494 (1998).

participated in corporate decision-making.

Fourth, Petitioner contends the Chief ALJ erroneously concluded, because Petitioner owned 20 percent of the stock in Garden Fresh Produce, Inc., Petitioner had to make a particularly compelling case in order to establish that he was not responsibly connected (Petitioner's Appeal Pet. at 3, 24-27).

Section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) provides that for the first alternative of the second prong of the responsibly-connected test, a petitioner, who is a holder of more than 10 percent of the outstanding stock of a company, must demonstrate by a preponderance of the evidence that he or she was only nominally a shareholder of the company. Petitioner bases his contention that the Chief ALJ held Petitioner to a higher standard of proof than preponderance of the evidence on the following statement: "[t]he fact that Congress utilized 10% ownership as sufficient in and of itself to trigger the presumption regarding responsibly connected is a strong indication that a 20% owner must make a particularly compelling case to meet the burden of proof." (Initial Decision at 12-13.) I do not find that the Chief ALJ's reference to "a particular compelling case" indicates the Chief ALJ applied the incorrect standard of proof in this proceeding.

The Chief ALJ correctly cites section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) as the statutory provision applicable in this proceeding (Initial Decision at 7). Moreover, the Chief ALJ explicitly applies the standard of proof in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), stating: "[e]ven if [Petitioner] was not actively involved in the violations, Petitioner likewise did not meet his burden of showing, by a preponderance of the evidence, that he was only a nominal 20% shareholder, director, and vice president." (Initial Decision at 12.) The Chief ALJ does not apply an alternative standard of proof in this proceeding. Therefore, I reject Petitioner's contention that the Chief ALJ held Petitioner to a standard of proof higher than preponderance of the evidence to demonstrate that he was only a nominal 20 percent shareholder of Garden Fresh Produce, Inc.

Fifth, Petitioner contends the Chief ALJ erroneously failed to address Petitioner's argument that any employment prohibition resulting from the instant proceeding began August 25, 2004, the date the Chief ALJ filed *In re Garden Fresh Produce, Inc.*, 63 Agric. Dec. 1032 (2004) (Petitioner's Appeal Pet. at 3, 27-30).

I agree with Petitioner's contention that the Chief ALJ did not address Petitioner's argument that the bar on Petitioner's employment by PACA licensees began August 25, 2004. However, in accordance with the terms of the Initial Decision, the bar on Petitioner's employment by PACA licensees would have become effective 35 days

after service of the Initial Decision on Petitioner had Petitioner not appealed the Chief ALJ's decision to the Judicial Officer (Initial Decision at 14). I find this effective date clearly establishes that the Chief ALJ rejected Petitioner's contention regarding the timing of the employment bar, and I find no purpose would be served by remanding this proceeding to the Chief ALJ to address Petitioner's timing issue.

Sixth, Petitioner contends the Chief ALJ erroneously failed to conclude that any employment prohibition imposed on Petitioner began August 25, 2004, the date the Chief ALJ filed *In re Garden Fresh Produce, Inc.*, 63 Agric. Dec. 1032 (2004). Petitioner argues the plain language of section 8(b) of the PACA (7 U.S.C. § 499h(b)) requires that the Secretary of Agriculture impose the employment prohibition on responsibly connected individuals beginning on the date the person with whom the individuals are responsibly connected is found to have violated the PACA. Thus, under Petitioner's reading of the PACA, the bar on Petitioner's employment by PACA licensees began August 25, 2004, even though a final determination that Petitioner was responsibly connected with Garden Fresh Produce, Inc., had not been issued. (Petitioner's Appeal Pet. at 3, 27-30.)

Petitioner's reading of section 8(b) of the PACA (7 U.S.C. § 499h(b)) would thwart the remedial purposes of the PACA. Using Petitioner's interpretation of the PACA, principals of a violating PACA licensee would, in many cases, avoid the employment bar because the period of employment bar would conclude before a determination is made that the principals were responsibly connected. The United States Court of Appeals for the Second Circuit stated that section 8(b) of the PACA (7 U.S.C. § 499h(b)) is designed to prevent circumvention of the PACA by forbidding responsibly connected persons from employment by PACA licensees, as follows:

> Legislative history indicates that Section 499h(b) was enacted in order to prevent circumvention of the purposes behind the Act by persons currently under suspension or by persons whose licenses had been revoked and who, by the subterfuge of acting as an "employee" of a nominal licensee nevertheless continued in business. It was felt that the only way to prevent this flouting of the purposes of the Act was to forbid persons under suspension, persons whose licenses were revoked, and persons who had been or were currently responsibly connected with them from all employment in the industry.

Zwick v. Freeman, 373 F.2d 110, 118 (2d Cir.) (footnote omitted), *cert.*

denied, 389 U.S. 835 (1967). Petitioner's reading of section 8(b) of the PACA (7 U.S.C. § 499h(b)) would result in the very circumvention of the PACA that section 8(b) of the PACA (7 U.S.C. § 499h(b)) was designed to prevent.

Petitioner cites two cases, *Frank Tambone, Inc. v. United States Dep't of Agric.*, 50 F.3d 52 (D.C. Cir. 1995), and *Farley and Calfee, Inc. v. U.S. Dep't of Agric.*, 941 F.2d 964 (9th Cir. 1991), in support of his argument that an employment bar must commence as soon as a PACA licensee is found to have violated the PACA. In *Tambone*, the Court addressed the timing of a license bar where a company had been without a license prior to the final determination that the company had violated the PACA, as follows:

> The Judicial Officer rendered his decision on February 2, 1994. By that time Tambone, Inc. already had been without a license for more than a year. The order has not yet become effective; publication will result in a prospective bar under § 499d(b)(B), preventing the company from obtaining a license for two years. The bar will run from the effective date of this publication order, which will occur after we render our decision here. Why the bar necessarily should be entirely prospective—why, in other words, the effective date cannot be made retroactive—is a matter the Judicial Officer did not address, doubtless because no one raised the point. Even before *S.S. Farms*, at least one ALJ made the effective date of a publication order retroactive. *See Farley & Calfee*, 941 F.2d at 966. But, as we have said, the point was not raised in the administrative proceedings and it has not been argued here.

Frank Tambone, Inc. v. United States Dep't of Agric., 50 F.3d 52, 56 n.† (D.C. Cir. 1995).

Tambone does not address the timing of an employment bar imposed on responsibly connected individuals. *Tambone* merely stands for the proposition that the bar on an applicant obtaining a PACA license runs from the effective date of a court order finding that the applicant has flagrantly or repeatedly violated the PACA. The Court declined to address the issue of retroactive application of the license bar. I find *Tambone* inapposite.

Farley and Calfee, Inc. v. U.S. Dep't of Agric., 941 F.2d 964 (9th Cir. 1991), involved the application of the employment bar to an individual who had been determined to be responsibly connected with a company prior to the final determination that the company had

violated the PACA. The instant proceeding involves the application of the employment bar to an individual who is determined to be responsibly connected with a company after the final determination that the company had violated the PACA. I find *Farley and Calfee* inapposite.

Respondent's Cross Appeal

Respondent asserts the instant proceeding and *In re Edward S. Martindale*, __ Agric. Dec. ___ (July 26, 2006), were consolidated for hearing. Respondent contends the Chief ALJ erroneously held the March 1, 2005, hearing in the instant proceeding and the March 2, 2005, hearing in *Martindale* were severed and erroneously refused to consider evidence introduced during the March 2, 2005, segment of the consolidated hearing. (Respondent's Reply to Petitioner Buecke's Appeal to the Judicial Officer at 25-27.)

Section 1.137(b) of the Rules of Practice explicitly provides, where there is no pending proceeding alleging a licensee's violation of the PACA, but multiple petitions for review of determinations of responsible connection with that licensee have been filed, the petitions for review must be consolidated for hearing, as follows:

> **§ 1.137 Amendment of complaint, petition for review, or answer; joinder of related matters.**
>
> . . . .
>
> (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 by the Chief, PACA Branch, that individuals are responsibly connected, within the meaning of 7 U.S.C. 499a(b)(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).

The proceeding alleging Garden Fresh Produce, Inc., violated the

PACA, had been decided on August 25, 2004, and was not pending on March 1 and 2, 2005, when the Chief ALJ conducted the hearing in the instant proceeding and in *Martindale*. Two petitions for review of Respondent's determinations of responsible connection with Garden Fresh Produce, Inc., had been filed, one by Petitioner, on June 2, 2004, the other by Edward S. Martindale on June 14, 2004. The Rules of Practice are binding on administrative law judges;[11] therefore, the Chief ALJ was required by section 1.137(b) of the Rules of Practice (7 C.F.R. § 1.137(b)) to consolidate for hearing Petitioner's and Edward S. Martindale's petitions for review of Respondent's determinations that they were responsibly connected with Garden Fresh Produce, Inc., when Garden Fresh Produce, Inc., violated the PACA.

Moreover, the Chief ALJ appears to have consolidated the instant proceeding and *Martindale*, as required by section 1.137(b) of the Rules of Practice (7 C.F.R. § 1.137(b)). In a Notice of Hearing filed February 11, 2005, the Chief ALJ explicitly notifies the parties of single 3-day hearing to be conducted in the instant proceeding and in *Martindale* and a single transcript of that hearing, as follows:

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	PACA-APP Docket No. 04-0009
Donald R. Beucke,	)	
	)	
Petitioner	)	
		and
	)	PACA-APP Docket No. 04-0010
Edward S. Martindale,	)	
	)	
Petitioner	)	

NOTICE OF HEARING

The hearing will be held as follows:

Date: March 1-3, 2005

Time: 9 a.m., local time

Location: U.S. District Court
280 S 1st Street

[11] *In re William J. Reinhart*, 59 Agric. Dec. 721, 740-41 (2000), *aff'd per curiam*, 39 F. App'x 954, 2002 WL 1492097 (6th Cir. July 10, 2002), *cert. denied*, 538 U.S. 979 (2003); *In re Far West Meats*, 55 Agric. Dec. 1033, 1036 n.4 (1996) (Ruling on Certified Question); *In re Hermiston Livestock Co.*, 48 Agric. Dec. 434 (1989).

Clerk's Office, Room 2112
San Jose, CA

Anticipated Duration : Three Days

Exhibits are to be pre-marked, on the lower right corner, as CX-1, CX-2, *et seq*. (for Complainant's exhibits) and RX-1, RX-2, *et seq*. (for Respondent's exhibits). Multi-page exhibits are to be paginated. Please place numbers on the bottom of the pages. At least two copies of a party's proposed exhibits should be brought to the hearing.

An independent reporting company will transcribe hearing testimony. A copy of the transcript may be purchased by making arrangements with the reporter at the hearing.

/s/
MARC R. HILLSON
Administrative Law Judge

February 11, 2005

Similarly, the Chief ALJ filed an Amended Notice of hearing on February 16, 2005, in which the Chief ALJ again refers to a single 3-day hearing and a single transcript in connection with both the instant proceeding and *Martindale*.

Nevertheless, the Chief ALJ states he severed the March 1, 2005, hearing in the instant proceeding from the March 2, 2005, hearing in *Martindale*, and Petitioner's attorney was not entitled to appear or examine witnesses in the March 2, 2005, *Martindale* hearing (Initial Decision at 3 n.2, 10 n.3). Moreover, based on an examination of the transcript, it appears the Chief ALJ conducted the proceedings as if they had not been consolidated for hearing (Tr. I at 5, 12-14, 193; Tr. II at 5-6). However, I find no order issued by the Chief ALJ severing the March 1, 2005, segment of the hearing from the March 2, 2005, segment of the hearing or instructing Petitioner that he may not appear and examine witnesses during the March 2, 2005, segment of the hearing.

I find the state of the record perplexing. Nonetheless, in light of the Chief ALJ's Notice of Hearing, the Chief ALJ's Amended Notice, the requirement in the Rules of Practice that the instant proceeding and *Martindale* be consolidated for hearing,[12] and no record of the Chief ALJ's order severing the proceedings for hearing, I must conclude that the instant proceeding and *Martindale* were consolidated for hearing.

My conclusion that the instant proceeding and *Martindale* were consolidated for hearing does not affect the disposition of this

[12] 7 C.F.R. § 1.137(b).

proceeding. In order to prevail, Petitioner must prove by a preponderance of the evidence that he was not actively involved in the activities resulting in Garden Fresh Produce, Inc.'s violations of the PACA and that he was only a nominal vice president, director, and 20 percent shareholder of Garden Fresh Produce, Inc. While I base my conclusion that Petitioner failed to prove that he was not actively involved in the activities resulting in Garden Fresh Produce, Inc.'s violations of the PACA on evidence introduced during the March 2, 2005, segment of the hearing, I do not base my conclusion that Petitioner failed to prove that he was only a nominal vice president, director, and 20 percent shareholder of Garden Fresh Produce, Inc., on evidence introduced during the March 2, 2005, segment of the hearing.

Findings of Fact

1. Petitioner was part of a group of individuals who organized Garden Fresh Produce, Inc., in April 2000. Petitioner invested $20,000 in Garden Fresh Produce, Inc., and was the vice president of marketing, a director, and a 20 percent shareholder of Garden Fresh Produce, Inc. (RX 1 at 1-2, 5, 9, RX 3 at 9, 11, 13, RX 12 at 2; Tr. I at 60-61, 87-89.)

2. Petitioner signed Garden Fresh Produce, Inc.'s application for a PACA license and was authorized to sign checks on behalf of Garden Fresh Produce, Inc., although there is no evidence that he signed any checks other than in the period shortly after Garden Fresh Produce, Inc., was formed (RX 12, RX 13; Tr. I at 63, 87-89).

3. On October 8, 2002, Petitioner signed the board of directors' resolution accepting the resignation letter of director David N. Wiles (RX 7).

4. On March 18, 2003, Petitioner signed the board of directors' resolution accepting the resignation letter of director Bruce W. Martindale (RX 1 at 11-13).

5. Petitioner resigned from his positions as a director and vice president of Garden Fresh Produce, Inc., on April 4, 2003. Petitioner also assigned his stock in the company back to Garden Fresh Produce, Inc., on April 4, 2003. (RX 1 at 17-19, 21.)

6. During the period January 14, 2002, through February 26, 2003, Garden Fresh Produce, Inc., failed to make full payment promptly of the agreed purchase prices to five produce sellers for 109 lots of perishable agricultural commodities, in the total amount of $379,923.25. *In re Garden Fresh Produce, Inc.*, 63 Agric. Dec. 1032 (2004).

7. During the period January 14, 2002, through February 26, 2003, Petitioner was a director, a vice president, and 20 percent stockholder of Garden Fresh Produce, Inc. (RX 1 at 1-2, 5-6, 9, 17-20).

8. The record does not contain evidence that Petitioner was directly involved in any of the transactions described in Finding of Fact number 6.

9. At all times material to this proceeding, Petitioner had the same authority as all other principals in Garden Fresh Produce, Inc., including the authority to sign checks and pay payables (Tr. I at 139-41).

10. At all times material to this proceeding, Petitioner was authorized to negotiate contracts, leases, and other arrangements for and on behalf of Garden Fresh Produce, Inc., and, with the other officers of Garden Fresh Produce, Inc., had responsibility for the activities of the corporation (RX 6 at 4-5).

11. Petitioner purchased produce for Garden Fresh Produce, Inc., and some of Petitioner's produce purchases occurred in 2002, when Garden Fresh Produce, Inc., was in violation of the prompt payment provision of the PACA (Tr. I at 20, 65; Tr. II at 16-18, 29-30).

12. Petitioner was involved in decision-making with respect to which of Garden Fresh Produce, Inc.'s debts to pay, and some of Petitioner's decision-making occurred in 2002, when Garden Fresh Produce, Inc., was in violation of the prompt payment provision of the PACA (Tr. II at 52, 55).

13. Petitioner notified the PACA Branch by letter dated April 28, 2003, that he was no longer connected with Garden Fresh Produce, Inc. In that letter, Petitioner requested that the United States Department of Agriculture remove his name from Garden Fresh Produce, Inc.'s PACA license. (RX 1 at 17.)

14. Petitioner has extensive experience in the produce industry. At the time of the March 2005 hearing, Petitioner had worked in the produce industry for over 25 years; Petitioner had held a number of positions, including president at Martindale Distributing Company; Petitioner had co-founded Garden Fresh Produce, Inc.; Petitioner was a stockholder, an officer, and a director of Bayside Produce, Inc.; and Petitioner was thoroughly knowledgeable in produce industry operations. (Tr. I at 59-60, 82-84, 95, 102-03.)

15. With respect to his employment at Martindale Distributing Company, Petitioner enjoys a good reputation in the produce business, including timely payment for produce.

16. Petitioner received approximately $1,500 from Garden Fresh Produce, Inc., for his services in the first year of Garden Fresh Produce, Inc.'s operations (Tr. I at 65).

17. At all times material to this proceeding, Petitioner should have known that Garden Fresh Produce, Inc., was not making full payment promptly for produce. Beginning no later than December 2002,

Petitioner knew that Garden Fresh Produce, Inc., was not making full payment promptly for produce. A number of Garden Fresh Produce, Inc.'s produce sellers, who were not being paid promptly by Garden Fresh Produce, Inc., contacted Petitioner in order to obtain payment for produce. (Tr. I at 69-73.) Petitioner did not sufficiently exercise his authority as 20 percent shareholder, a vice president, and a director to prevent or correct the violations committed by Garden Fresh Produce, Inc.

Conclusions of Law

1. Petitioner was a 20 percent shareholder, a director, and a vice president of Garden Fresh Produce, Inc., from its inception in April 2000, until he resigned from Garden Fresh Produce, Inc., in April 2003.

2. During the period January 14, 2002, through February 26, 2003, Garden Fresh Produce, Inc., committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly of the agreed purchase prices to five produce sellers for 109 lots of perishable agricultural commodities, in the total amount of $379,923.25. *In re Garden Fresh Produce, Inc.*, 63 Agric. Dec. 1032 (2004).

3. Petitioner failed to prove by a preponderance of the evidence that he was not actively involved in the activities resulting in Garden Fresh Produce, Inc.'s violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), during the period January 14, 2002, through February 26, 2003.

4. Petitioner failed to prove by a preponderance of the evidence that he was only nominally an officer, a director, and a shareholder of Garden Fresh Produce, Inc., during the period January 14, 2002, through February 26, 2003, when Garden Fresh Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

5. Petitioner failed to prove by a preponderance of the evidence that he was not an owner of Garden Fresh Produce, Inc., during the period January 14, 2002, through February 26, 2003, when Garden Fresh Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

6. Petitioner was *responsibly connected*, as that term is defined in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with Garden Fresh Produce, Inc., during the period January 14, 2002, through February 26, 2003, when Garden Fresh Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

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

ORDER

I affirm Respondent's April 28, 2004, determination that Petitioner was responsibly connected with Garden Fresh Produce, Inc., when Garden Fresh Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, Petitioner is subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)), effective 60 days after service of this Order on Petitioner.

RIGHT TO JUDICIAL REVIEW

Petitioner has the right to seek judicial review of the Order in this Decision and Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341-2350. Petitioner must seek judicial review within 60 days after entry of the Order in this Decision and Order.[13] The date of entry of the Order in this Decision and Order is September 28, 2006.

In re: JUDITH'S FINE FOODS INTERNATIONAL, INC.
PACA DOCKET NO. D-06-0012.
Decision and Order.
Filed October 25, 2006.

PACA – Admissions, failure to deny – Prompt payment, failure to make – No pay.

Jonathan Gordy for Complainant.
John Lohner for Respondent.
Decision and Order by Administrative Law Judge Peter M. Davenport

DECISION WITHOUT HEARING BY REASON OF ADMISSIONS

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a-§ 499f)("PACA"), instituted by a complaint filed on May 2, 2006, by the Associate Deputy Administrator, Fruit and Vegetable Programs,

[13] 28 U.S.C. § 2344.

Agricultural Marketing Service, United States Department of Agriculture ("Complainant") alleging that Respondent Judith's Fine Foods International, Inc. ("Respondent") has willfully violated the PACA.

The Complaint alleged that Respondent willfully, flagrantly and repeatedly violated Section 2(4) of the PACA (7 U.S.C. § 499b(4)) during the period of January 2005 through August 2005, by failing to make full payment promptly to eight sellers of the agreed purchase prices in the total amount of $395,687.09 for 115 lots of perishable agricultural commodities, which it purchased, received, and accepted in the course of interstate and foreign commerce. Complainant has now filed a motion for a decision based on admissions pursuant to section 1.139 of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes ("Rules of Practice"). *See* 7 C.F.R. § 1.139.

A copy of the Complaint was sent to Respondent's business mailing address by certified mail on May 2, 2006, and Respondent received it on June 3, 2006. On July 10, 2006, Respondent filed, through its Vice President John M. Lohner, a "Response to Complaint" ("Answer"). The Answer generally denied the allegations of the Complaint pertaining to its failure to make full payment promptly.[1] (Answer at 1.) On October 10, 2005, Respondent had filed a Voluntary Petition under Chapter 7, in the U.S. Bankruptcy Court of Puerto Rico 05-10629-SEK7. Complainant has now filed a "Motion for a Decision without Hearing Based on Admissions." Complainant's motion will be granted and the following decision is issued in the disciplinary case against Respondent without further proceeding or hearing pursuant to section 1.139 of the Rules of Practice.

Respondent has failed to deny or otherwise respond to the jurisdictional allegations in the complaint, including an allegation that it was operating subject to a PACA license at the time of the alleged violations. Complainant is not required to summon witnesses to a hearing for the purpose of proving that Respondent was licensed under the Act during the relevant period simply because Respondent has declined to answer these allegations. Pursuant to the Rules of Practice, if an answer fails to deny or otherwise respond to specific complaint allegations, they are deemed admitted. *See* 7 C.F.R. § 1.136(c).

In Respondent's bankruptcy proceeding in the District of Puerto Rico Bankruptcy Court, case no. 05-10629-SEK7, Respondent admitted that

[1]As the Respondent's *pro se* Answer failed to allege that it would make full payment within 120 days of June 3, 2006, it must be considered a "no pay" case. Moreover, there is no indication that any payment has been made which might have converted the case to a "slow pay" as opposed to a "no pay" case.

it owed $338,942.07 to the eight sellers of produce listed in the Complaint. Amended schedules: E and F, *In re: Judith's Fine Food International, Inc.*, Case No. 05-10629-SEK7 (January 16, 2006) (ECF Docket No. 16). Bankruptcy documents are judicially noticed in proceedings before the Secretary. *See, e.g., In re: Five Star Food Distributors*, 56 Agric. Dec. 880, 893 (1997).

The Department's policy with respect to admissions in PACA disciplinary cases in which a respondent is alleged to have failed to make full payment promptly for produce purchases is as follows:

> *In re Furr's Supermarkets Inc.*, 62 Agric. Dec. 385, 386 (2003) (citing *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 549 (1998)). In this instance, Respondent has made an admission in a Bankruptcy proceeding that it has failed to pay $338,942.07 to the same produce creditors named in the Complaint. Respondent has failed to pay more than a *de minimis* amount for produce in violation of section 2(4) of the PACA, and it has not asserted that it will achieve full compliance with the PACA by making full payment within 120 days of the service of the complaint. This is a "no-pay" case.

The only appropriate sanction in a "no-pay" case is license revocation, or where there is no longer any license to revoke, as is the case here, where Respondent's license has terminated, the appropriate sanction in lieu of revocation is a finding of repeated and flagrant violation of the PACA and publication of the facts and circumstances of the violations. *See In re Furr's Supermarkets Inc.*, 62 Agric. Dec. at 386-87. A civil penalty is not appropriate in this case because "limiting participation in the perishable agricultural commodities industry to financially responsible persons is one of the primary goals of the PACA," and it would not be consistent with the Congressional intent to require a PACA violator to pay the government while produce sellers remain unpaid. *See In re Scamcorp, Inc.*, 57 Agric. Dec. at 570-71. Because there can be no debate over the appropriate sanction, a decision can be entered in this case without hearing or further procedure based on the admitted facts. *See* 7 C.F.R. § 1.139.[2]

Findings of Fact

[2] A hearing is only required where an issue of material fact is joined by the pleadings. *See* 7 C.F.R. § 1.141(b); *Veg. Mix, Inc. v. U. S. Dep't of Agriculture*, 832 F.2d 601, 607 (D.C. Cir. 1987).

1. Judith's Fine Foods International, Inc. ("Respondent") is a corporation organized and existing under the laws of the Commonwealth of Puerto Rico. Its physical business address was Urb Ind El Commandante, San Marcos Avenue, Carolina, Puerto Rico 00087. Its mailing address was P.O. Box 13301, Santurce, Puerto Rico 00908.

2. At all times material herein, Respondent was licensed under the provisions of the PACA. License number 19961052 was issued to the Respondent on March 5, 1996. On September 5, 2006, the license was terminated for failure to pay the annual renewal fee.

3. During the period of January 2005 through August 2005, Respondent failed to make full payment promptly to eight sellers of the agreed purchase prices in the total amount of $338,942.07 for 115 lots of perishable agricultural commodities, which it purchased, received and accepted in the course of interstate and foreign commence.

Conclusions of Law

Respondent's failure to make full payment promptly with respect to the 115 transactions set forth in Finding of Fact 3 above, constitutes 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 it is served unless a party to the proceeding appeals the Decision to the Secretary within 30 days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies of this Decision shall be served upon the parties.

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In re: DONALD R. BEUCKE.
PACA-APP Docket No. 04-0014.
In re: KEITH K. KEYESKI.
PACA-APP Docket No. 04-0020.
Decision and Order.
Filed November 8, 2006.

PACA-APP – Perishable agricultural commodities – Responsibly connected – Actively involved in activities resulting in violation – Nominal officer, director, and shareholder – Alter ego – Opportunity to achieve compliance – Joinder of responsibly connected and disciplinary proceedings – Service of default decision –

Due process clause of 14th Amendment inapplicable – Timing of employment bar – Statement of witness called by respondent not covered by rules of practice.

The Judicial Officer affirmed Administrative Law Judge Peter M. Davenport's (ALJ) decision concluding Donald R. Beucke and Keith K. Keyeski (Petitioners) were responsibly connected with Bayside Produce, Inc., when Bayside Produce, Inc., violated the PACA. The Judicial Officer found Bayside Produce, Inc., violated the PACA during the period November 23, 2002, through February 7, 2003. During the violation period, Petitioner Beucke was the vice president, the secretary, a director, and a holder of 33-1/3 percent of the outstanding stock of Bayside Produce, Inc., and Petitioner Keyeski was a holder of 33-1/3 percent of the outstanding stock of Bayside Produce, Inc. The Judicial Officer stated the burden was on Petitioner Beucke to demonstrate by a preponderance of the evidence that he was not responsibly connected with Bayside Produce, Inc., despite his being the vice president, the secretary, a director, and a major shareholder of Bayside Produce, Inc., and on Petitioner Keyeski to demonstrate by a preponderance of the evidence that he was not responsibly connected with Bayside Produce, Inc., despite his being a major shareholder of Bayside Produce, Inc. The PACA provides a two-prong test which a petitioner must meet in order to demonstrate that he or she was not responsibly connected. First, a petitioner must demonstrate by a preponderance of the evidence that he or she was not actively involved in the activities resulting in a violation of the PACA. If a petitioner satisfies the first prong, then for the second prong, the petitioner must demonstrate by a preponderance of the evidence one of two alternatives: (1) the petitioner was only nominally a partner, an officer, a director, or a shareholder of the violating PACA licensee or entity subject to a PACA license; or (2) the petitioner was not an owner of the violating PACA licensee or entity subject to a PACA license, which was the alter ego of its owners. The Judicial Officer concluded Petitioners failed to prove by a preponderance of the evidence that they met the first prong and second prong of the responsibly-connected test. The Judicial Officer also rejected Petitioners' contentions that the Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service (Respondent), violated the Rules of Practice and the due process clause of the Fourteenth Amendment of the Constitution of the United States. Further, the Judicial Officer rejected Petitioners' contention that the bar on their employment by PACA licensees should have commenced on the day that Bayside Produce, Inc., was found to have violated the PACA. Finally, the Judicial Officer rejected Petitioner Beucke's contention that the ALJ erroneously failed to order Respondent to produce prior written and recorded statements of Respondent's witness.

Charles L. Kendall for Respondent.
Effie F. Anastassiou and Paul Hart, Pismo Beach and Salinas, CA, for Petitioner Donald R. Beucke.
Paul W. Moncrief, Salinas, CA, for Petitioner Keith K. Keyeski.
Initial decision issued by Peter M. Davenport, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

On August 13, 2004, James R. Frazier, Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], issued a

determination that Keith K. Keyeski [hereinafter Petitioner Keyeski] was responsibly connected with Bayside Produce, Inc., during the period December 2002 through February 2003, when Bayside Produce, Inc., violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA].[1] On August 17, 2004, Respondent issued a determination that Donald R. Beucke [hereinafter Petitioner Beucke] was responsibly connected with Bayside Produce, Inc., during the period December 2002 through February 2003, when Bayside Produce, Inc., violated the PACA[2] and when Bayside Produce, Inc., failed to pay three reparation awards issued against it.[3]

On August 25, 2004, Petitioner Beucke instituted PACA-APP Docket No. 04-0014 by filing "Petition of Donald R. Beucke for Review of Determination Re Responsibly Connected Status" pursuant to the PACA and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice] seeking reversal of Respondent's August 17, 2004, determination that Petitioner Beucke was responsibly connected with Bayside Produce, Inc. On September 13, 2004, Petitioner Keyeski instituted PACA-APP Docket No. 04-0020 by filing "Petition for Review" pursuant to the PACA and the Rules of Practice seeking reversal of Respondent's August 13, 2004, determination that Petitioner Keyeski was responsibly connected with Bayside Produce, Inc.

On October 12 and 13, 2005, Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] presided over a hearing in San Jose, California. Effie F. Anastassiou and Paul Hart, Anastassiou & Associates, Pismo Beach and Salinas, California, represented Petitioner Beucke. Paul W. Moncrief, Lombardo & Gilles, P.C., Salinas, California, represented Petitioner Keyeski. Charles L. Kendall, Office of the General Counsel, United States Department of Agriculture, represented Respondent.

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[1]During the period November 23, 2002, through February 7, 2003, Bayside Produce, Inc., purchased, received, and accepted in interstate commerce, from 22 produce sellers, 74 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $163,102.70, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). *In re Bayside Produce, Inc.*, 63 Agric. Dec. 1029 (2004).

[2]See note 1.

[3]One reparation order issued against Bayside Produce, Inc., became effective August 26, 2003, the other two reparation orders issued against Bayside Produce, Inc., became final September 2, 2003.

On December 20, 2005, after the parties filed post-hearing briefs, the ALJ issued a Decision and Order [hereinafter Initial Decision] in which the ALJ concluded Petitioner Beucke and Petitioner Keyeski were responsibly connected with Bayside Produce, Inc., when Bayside Produce, Inc., violated the PACA (Initial Decision at 2, 12).

On January 23, 2006, Petitioner Beucke and Petitioner Keyeski appealed to the Judicial Officer. On February 15, 2006, Respondent filed a response to Petitioner Beucke's appeal petition and Petitioner Keyeski's appeal petition. On April 7, 2006, 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 conclusion that Petitioner Beucke and Petitioner Keyeski were responsibly connected with Bayside Produce, Inc., when Bayside Produce, Inc., violated the PACA. References to the transcript are designated "Tr." References to Petitioner Beucke's exhibits are designated "CX." References to Petitioner Keyeski's exhibits are designated "KK." References to Respondent's exhibits are designated "RX" and "EX."

APPLICABLE STATUTORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

. . . .

§ 499a. Short title and definitions

. . . .

(b) Definitions

For purposes of this chapter:

. . . .

(9) The term "responsibly connected" means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association. A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of this chapter and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.

. . . .

§ 499b. Unfair conduct

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

. . . .

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter.

. . . .

§ 499d. Issuance of license

(a) Authority to do business; termination; renewal

Whenever an applicant has paid the prescribed fee the Secretary, except as provided elsewhere in this chapter, shall issue to such applicant a license, which shall entitle the licensee to do business as a commission merchant and/or dealer and/or broker unless and until it is suspended or revoked by the Secretary in accordance with the provisions of this chapter, or is automatically suspended under section 499g(d) of this title, but said license shall automatically terminate on the anniversary date of the license at the end of the annual or multiyear period covered by the license fee unless the licensee submits the required renewal application and pays the applicable renewal fee (if such fee is required)[.] . . .

(b) Refusal of license; grounds

The Secretary shall refuse to issue a license to an applicant if he finds that the applicant, or any person responsibly connected with the applicant, is prohibited from employment with a licensee under section 499h(b) of this title or is a person who, or is or was responsibly connected with a person who–

(A) has had his license revoked under the provisions of section 499h of this title within two years prior to the date of the application or whose license is currently under suspension; [or]

(B) within two years prior to the date of application has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect[.]

. . . .

(c) Issuance of license upon furnishing bond; issuance after three years without bond; effect of termination of bond; increase or decrease in amount; payment of increase

An applicant ineligible for a license by reason of the provisions of subsection (b) of this section may, upon the expiration of the two-year period applicable to him, be issued a license by the Secretary if such applicant furnishes a surety bond

in the form and amount satisfactory to the Secretary as assurance that his business will be conducted in accordance with this chapter and that he will pay all reparation orders which may be issued against him in connection with transactions occurring within four years following the issuance of the license, subject to his right of appeal under section 499g(c) of this title. In the event such applicant does not furnish such a surety bond, the Secretary shall not issue a license to him until three years have elapsed after the date of the applicable order of the Secretary or decision of the court on appeal. If the surety bond so furnished is terminated for any reason without the approval of the Secretary the license shall be automatically canceled as of the date of such termination and no new license shall be issued to such person during the four-year period without a new surety bond covering the remainder of such period. The Secretary, based on changes in the nature and volume of business conducted by a bonded licensee, may require an increase or authorize a reduction in the amount of the bond. A bonded licensee who is notified by the Secretary to provide a bond in an increased amount shall do so within a reasonable time to be specified by the Secretary, and upon failure of the licensee to provide such bond his license shall be automatically suspended until such bond is provided. The Secretary may not issue a license to an applicant under this subsection if the applicant or any person responsibly connected with the applicant is prohibited from employment with a licensee under section 499h(b) of this title.

. . . .

§ 499h. Grounds for suspension or revocation of license

(a) Authority of Secretary

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

(b) Unlawful employment of certain persons; restrictions; bond assuring compliance; approval of employment without bond; change in amount of bond; payment of increased amount; penalties

Except with the approval of the Secretary, no licensee shall employ any person, or any person who is or has been responsibly connected with any person–

(1) whose license has been revoked or is currently suspended by order of the Secretary;

(2) who has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect; or

(3) against whom there is an unpaid reparation award issued within two years, subject to his right of appeal under section 499g(c) of this title.

The Secretary may approve such employment at any time following nonpayment of a reparation award, or after one year following the revocation or finding of flagrant or repeated violation of section 499b of this title, if the licensee furnishes and maintains a surety bond in form and amount satisfactory to the Secretary as assurance that such licensee's business will be conducted in accordance with this chapter and that the licensee will pay all reparation awards, subject to its right of appeal under section 499g(c) of this title, which may be issued against it in connection with transactions occurring within four years following the approval. The Secretary may approve employment without a surety bond after the expiration of two years from the effective date of the applicable disciplinary order. The Secretary, based on changes in the nature and volume of business conducted by the licensee, may require an increase or authorize a reduction in the amount of the bond. A licensee who is notified by the Secretary to provide a bond in an increased amount shall do so within a reasonable time to be specified by the Secretary, and if the licensee fails to do so the approval of employment shall

> automatically terminate. The Secretary may, after thirty days[']
> notice and an opportunity for a hearing, suspend or revoke the
> license of any licensee who, after the date given in such notice,
> continues to employ any person in violation of this section. The
> Secretary may extend the period of employment sanction as to a
> responsibly connected person for an additional one-year period
> upon the determination that the person has been unlawfully
> employed as provided in this subsection.

7 U.S.C. §§ 499a(b)(9), 499b(4), 499d(a), (b)(A)-(B), (c), 499h(a)-(b).

DECISION

Preliminary Statement

Responsibly connected liability is triggered when a company has its PACA license revoked or suspended or when the company has been found to have committed flagrant or repeated violations of section 2 of the PACA (7 U.S.C. § 499b). During the period November 23, 2002, through February 7, 2003, Bayside Produce, Inc., committed willful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly of the agreed purchase prices to 22 produce sellers for 74 lots of perishable agricultural commodities, in the total amount of $163,102.70.[4] Thus, an individual who was responsibly connected with Bayside Produce, Inc., when Bayside Produce, Inc., violated the PACA 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)).

The term *responsibly connected* means affiliated or connected with a commission merchant, dealer, or broker as a partner in a partnership or an officer, a director, or a holder of more than 10 percent of the outstanding stock of a corporation or association.[5] Petitioner Beucke was an officer, a director, and a holder of more than 10 percent of the outstanding stock of Bayside Produce, Inc., during the period November 23, 2002, through February 7, 2003, when Bayside Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). The burden is on Petitioner Beucke to demonstrate by a preponderance of the evidence that he was not responsibly connected with Bayside Produce,

[4] *In re Bayside Produce, Inc.*, 63 Agric. Dec. 1029 (2004).

[5] 7 U.S.C. § 499a(b)(9).

Inc., despite being an officer, a director, and a holder of more than 10 percent of the outstanding stock of Bayside Produce, Inc. Petitioner Keyeski was a holder of more than 10 percent of the outstanding stock of Bayside Produce, Inc., during the period November 23, 2002, through February 7, 2003, when Bayside Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). The burden is on Petitioner Keyeski to demonstrate by a preponderance of the evidence that he was not responsibly connected with Bayside Produce, Inc., despite being a holder of more than 10 percent of the outstanding stock of Bayside Produce, Inc.

Section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) provides a two-prong test which a petitioner must meet in order to demonstrate that he or she was not responsibly connected. First, a petitioner must demonstrate by a preponderance of the evidence that he or she was not actively involved in the activities resulting in a violation of the PACA. If a petitioner satisfies the first prong, then for the second prong, the petitioner must demonstrate by a preponderance of the evidence one of two alternatives: (1) the petitioner was only nominally a partner, an officer, a director, or a shareholder of the violating PACA licensee or entity subject to a PACA license; or (2) the petitioner was not an owner of the violating PACA licensee or entity subject to a PACA license, which was the alter ego of its owners.

Petitioner Beucke failed to carry his burden of proof that he was not actively involved in the activities resulting in Bayside Produce, Inc.'s violations of the PACA. Petitioner Beucke also failed to carry his burden of proof that he was only nominally an officer, a director, and a holder of more than 10 percent of the outstanding stock of Bayside Produce, Inc. Petitioner Keyeski failed to carry his burden of proof that he was not actively involved in the activities resulting in Bayside Produce, Inc.'s violations of the PACA. Petitioner Keyeski also failed to carry his burden of proof that he was only nominally a holder of more than 10 percent of the outstanding stock of Bayside Produce, Inc. Moreover, as Petitioner Beucke and Petitioner Keyeski were owners of Bayside Produce, Inc., the defense that they were not owners of Bayside Produce, Inc., which was the alter ego of its owners, is not available to Petitioner Beucke or Petitioner Keyeski.[6] As Petitioner Beucke and

[6] *In re Donald R. Beucke*, 65 Agric. Dec. ___, slip op. at 13-14 (Sept. 28, 2006); *In re Edward S. Martindale*, 65 Agric. Dec. ___, slip op. at 9 (July 26, 2006); *In re James E. Thames, Jr.* (Decision as to James E. Thames, Jr.), 65 Agric. Dec. 429, 439(2006), *aff'd per curiam*, 2006 WL 2351839 (11th Cir. Aug. 15, 2006); *In re Benjamin Sudano*, (continued...)

Petitioner Keyeski have failed to carry their burden of proof regarding the first prong and second prong of the two-prong test, I conclude Petitioner Beucke and Petitioner Keyeski were responsibly connected with Bayside Produce, Inc., when Bayside Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, Petitioner Beucke and Petitioner Keyeski are 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)).

Facts

During the period when Bayside Produce, Inc., was violating the PACA, Petitioner Beucke was the vice president, the secretary, and a director of Bayside Produce, Inc. (RX 1). Petitioner Keyeski had been a vice president and a director of Bayside Produce, Inc., but resigned those positions prior to November 23, 2002 (EX 1 at 3; KK 5). Petitioner Keyeski did however continue to manage the San Diego, California, office of Bayside Produce, Inc., until December 13, 2002. Petitioner Beucke and Petitioner Keyeski each held 33-1/3 percent of the outstanding shares of Bayside Produce, Inc. (RX 1; EX 1 at 3; KK 1).

Petitioner Beucke and Petitioner Keyeski argue they were not actively involved in the activities resulting in Bayside Produce, Inc.'s violations of the PACA, asserting the financial aspects of the business were handled exclusively by Wayne Martindale, the president of Bayside Produce, Inc., and owner of the 33-1/3 percent of the shares of the corporation not owned by Petitioner Beucke and Petitioner Keyeski. The testimony of numerous witnesses called by Petitioner Beucke and Petitioner Keyeski supports their position only to the extent that it establishes Wayne Martindale was the individual that those that did business with Bayside Produce, Inc., regarded as responsible for payment of invoices.

Petitioner Beucke and Petitioner Keyeski have significant experience and lengthy involvement with the produce industry. Petitioner Beucke has approximately 26 years of experience in the produce industry, starting initially as a field inspector and later progressing to the positions of buyer and broker (Tr. 213-14). Petitioner Beucke has served as the president of Martindale Distributing Company, a produce business

[6](...continued)
63 Agric. Dec. 388, 411 (2004), *aff'd per curiam*, 131 F. App'x 404 (4th Cir. 2005); *In re Anthony L. Thomas*, 59 Agric. Dec. 367, 390 (2000), *aff'd*, No. 00-1157 (D.C. Cir. Jan. 30, 2001); *In re Steven J. Rodgers*, 56 Agric. Dec. 1919, 1956 (1997), *aff'd per curiam*, 172 F.3d 920, 1998 WL 794851 (D.C. Cir. 1998) (Table), printed in 57 Agric. Dec. 1464 (1998).

founded by his late stepfather, Dale Martindale (Tr. 218, 312), and as vice president of another produce company, Garden Fresh Produce, Inc. In addition to his ownership interest in Bayside Produce, Inc.,[7] Petitioner Beucke owned 33-1/3 percent of the outstanding stock of Martindale Distributing Company and 20 percent of the outstanding stock of Garden Fresh Produce, Inc. (Tr. 312-14; RX 1).

Petitioner Beucke acknowledged that he was authorized to sign and did sign Bayside Produce, Inc., checks (Tr. 234-35),[8] but testified he only signed checks when directed to do so by Wayne Martindale or Edward Shane Martindale, both of whom are his stepbrothers, or Kathy Walker, the executive coordinator of Bayside Produce, Inc. (Tr. 235-40). Petitioner Beucke testified his involvement with Bayside Produce, Inc., was limited to purchases and sales for one account, Produce People, and that he last took an order from Produce People in February 2003 (Tr. 243-47). Petitioner Beucke resigned as vice president and director of, and from any position of employment with, Bayside Produce, Inc., by letter dated April 11, 2003, and executed a document entitled "Resignation and Acknowledgment of Stock Redemption" dated October 23, 2003, which surrendered his shares in Bayside Produce, Inc., effective April 4, 2003 (CX 6, CX 7).

Petitioner Keyeski started his career in the produce business in 1985 or 1986 working in the warehouse and later working in sales. Petitioner Keyeski had become acquainted with Wayne Martindale and Petitioner Beucke through his industry contacts and sometime around August of 1997 started working for them out of his home and later opening an office for Bayside Produce, Inc., in San Diego, California. Petitioner Keyeski testified that he joined Bayside Produce, Inc., in an arrangement that was "[b]asically a three-way partnership" with "equal duties, equal opportunity, equal money, equal everything." (Tr. 358-62, 393.) Except for writing checks for produce and other major expenses, Petitioner Keyeski ran Bayside Produce, Inc.'s day-to-day operation in the San

[7]Petitioner Beucke testified that he initially owned 50 percent of the outstanding stock of Bayside Produce, Inc., before he and Wayne Martindale each sold enough shares to Petitioner Keyeski to enable Petitioner Keyeski to acquire a one-third interest in Bayside Produce, Inc. (Tr. 312-14).

[8]CX 39 contains 20 checks written by Petitioner Beucke during the period November 23, 2002, through February 7, 2003, on Bayside Produce, Inc.'s Community Bank of Central California account, including two payable to himself (Tr. 239-40).

Diego, California, office.[9] Once Petitioner Keyeski managed to accumulate a necessary $7,000 investment, he became a shareholder, a director, and an officer of Bayside Produce, Inc., in February 2000; however, Petitioner Keyeski testified nothing really changed after he became a shareholder, director, and officer of the corporation (Tr. 361-68; RX 4). The San Diego, California, operation grew significantly and by 2002 the San Diego operation generated the bulk of Bayside Produce, Inc.'s sales (Tr. 376).[10] In October 2002, by then convinced that Wayne Martindale was not "pulling his weight" and unhappy with the monetary return from his own efforts, Petitioner Keyeski contacted William Trask, an attorney, for advice (Tr. 374). Mr. Trask drafted a letter for Petitioner Keyeski to Wayne Martindale and Petitioner Beucke dated October 18, 2002, which confirmed his verbal notice of October 8, 2002, that he was resigning as vice president and as a director of Bayside Produce, Inc., and that, effective December 31, 2002,[11] he would be resigning all positions at Bayside Produce, Inc. Petitioner Keyeski's October 18, 2002, letter also proposed that Petitioner Beucke, Wayne Martindale, and Petitioner Keyeski continue to contribute to the business as usual and suggested three alternatives, one of which was Petitioner Keyeski's offer to purchase Bayside Produce, Inc. (Tr. 374-75; KK 5). Petitioner Keyeski did not receive a written response to his October 18, 2002, letter, but sometime in November 2002 Wayne Martindale advised that he had conferred with Petitioner Beucke and that they wanted to retain Bayside Produce, Inc. (Tr. 375-78). Thereafter, Petitioner Keyeski's contact with Wayne Martindale became difficult, with little or no information being provided by Wayne Martindale (Tr. 377-78). As he had suggested in his October 18, 2002, letter, Petitioner Keyeski continued to run Bayside Produce, Inc.'s San Diego, California, office and processed orders as usual until December 13, 2002 (Tr. 385). On December 15, 2002, Petitioner Keyeski obtained his own PACA license and commenced operation from Bayside Produce, Inc.'s former San Diego, California, location as New Horizon Distributing, Inc. (Tr. 380-81). Still anticipating some return from his investment, as he thought Bayside

[9]Bayside Produce, Inc., did have an account at Bank of America on which Petitioner Keyeski was able to write checks; however, only a minimal balance was maintained in the account which was used only for payroll, rent, and incidental expenses (Tr. 362-63).

[10]According to Petitioner Keyeski, Petitioner Beucke generated income for Bayside Produce, Inc., but Wayne Martindale did not (Tr. 371-72).

[11]Petitioner Keyeski verbally amended the effective date of his resignation from all positions at Bayside Produce, Inc., to December 13, 2002 (KK5).

Produce, Inc., was financially sound, Petitioner Keyeski retained his shares in Bayside Produce, Inc., until March 2003 (KK 1, KK 2).[12]

The evidence introduced through multiple witnesses called by Petitioner Beucke and Petitioner Keyeski demonstrates that the produce sellers that dealt with Bayside Produce, Inc., lodged the blame for Bayside Produce, Inc.'s payment problems on Wayne Martindale's misconduct and not on either Petitioner Beucke or Petitioner Keyeski. Those witnesses professed to remain willing to do business with both Petitioner Beucke and Petitioner Keyeski. Both Petitioner Beucke and Petitioner Keyeski are regarded as honorable and have contributed significant amounts of money to attempt to correct Bayside Produce, Inc.'s failures to pay for produce in accordance with the PACA. There is no evidence that either Petitioner Beucke or Petitioner Keyeski personally engaged in any affirmative action designed to leave produce suppliers unpaid. Neither Petitioner Beucke nor Petitioner Keyeski however acted upon the reports to them that invoices were not being paid in a timely manner.[13] The failure to exercise their oversight obligations owed by them to Bayside Produce, Inc., as shareholders, if not as officers and directors, does not establish that Petitioner Beucke's and Petitioner Keyeski's roles were nominal.

Discussion

I. Petitioner Beucke and Petitioner Keyeski Were Actively Involved in Activities Resulting in Bayside Produce, Inc.'s PACA Violations

The United States Department of Agriculture's standard for determining whether a petitioner is actively involved in the activities resulting in a violation of the PACA was first set forth in *In re Michael Norinsberg* (Decision and Order on Remand), 58 Agric. Dec. 604, 610-11 (1999), as follows:

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[12]Petitioner Keyeski's letter of March 11, 2003, requested that minutes of the corporation be forwarded to him that reflected that he was not affiliated with Bayside Produce, Inc., "other than as a shareholder" after December 14, 2002 (KK 1).

[13]Petitioner Keyeski denied hearing any reports of nonpayment until the second or third week of January 2003, which was after he had resigned as vice president and director of Bayside Produce, Inc. (Tr. 385). Petitioner Keyeski however remained a shareholder until March 2003, noting in his letter dated March 11, 2003, that "as of December 14, 2002, other than as a shareholder, I was not affiliated in any way with Bayside Produce, Inc." (KK 1).

> The standard is 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.

Petitioner Beucke did not meet his burden of showing, by a preponderance of the evidence, that he was not actively involved in the activities resulting in Bayside Produce, Inc.'s PACA violations. Petitioner Beucke purchased produce on behalf of Bayside Produce, Inc., on at least 33 occasions during the period November 23, 2002, through February 7, 2003, for which produce suppliers were not paid in accordance with the PACA (Tr. 248-52, 300-05, 323-24; CX 21, CX 23, CX 26, CX 32, CX 33, CX 35). Petitioner Beucke was authorized to draw funds on Bayside Produce, Inc.'s Community Bank of Central California account number 1361955 and, during the period November 23, 2002, through February 7, 2003, Petitioner Beucke signed 20 checks on that account, including two checks payable to himself (Tr. 239-40; RX 24; CX 39 at 222, 272, 274, 296, 332, 334, 360, 413, 421, 505, 539, 567, 571, 589, 595, 597, 605, 607, 615, 619). Petitioner Beucke, as an officer of Bayside Produce, Inc., signed a corporate resolution to borrow money from Community Bank of Central California for a loan dated January 31, 2002, with a maturity date of January 28, 2003 (RX 24 at 18-19).

Petitioner Keyeski did not meet his burden of showing, by a preponderance of the evidence, that he was not actively involved in the activities resulting in Bayside Produce, Inc.'s PACA violations. Petitioner Keyeski purchased produce on behalf of Bayside Produce, Inc., on at least four occasions during the period November 23, 2002, through February 7, 2003, for which produce suppliers were not paid in accordance with the PACA (Tr. 161-64, 167-68; CX 16, CX 28, CX 41, CX 44). In addition, during the period November 23, 2002, through December 13, 2002, Petitioner Keyeski was the general manager of Bayside Produce, Inc.'s San Diego, California, office. Petitioner Keyeski controlled all aspects of Bayside Produce, Inc.'s San Diego, California, operation, except for depositing receivables and paying for produce purchases. Petitioner Keyeski's duties included managing

payroll and paying rent and other incidental expenses.

Petitioner Beucke's and Petitioner Keyeski's purchases of produce for which Bayside Produce, Inc., failed to pay produce sellers in accordance with the PACA constitutes active involvement in activities resulting in Bayside Produce, Inc.'s violations of the PACA. Moreover, by payment of certain creditors, Petitioner Beucke and Petitioner Keyeski were in effect choosing which debts to pay. In *In re Lawrence D. Salins*, 57 Agric. Dec. 1474 (1998), I held that choosing which debts to pay "can cause an individual to be actively involved in failure to pay promptly for produce." *Id*. at 1489.

II. Petitioner Beucke Was Not Merely a Nominal Officer, Director, and Shareholder of Bayside Produce, Inc.; Petitioner Keyeski Was Not Merely a Nominal Shareholder of Bayside Produce, Inc.

Petitioner Beucke did not meet his burden of showing, by a preponderance of the evidence, that he was only a nominal 33-1/3 percent shareholder, director, secretary, and vice president of Bayside Produce, Inc. Similarly, Petitioner Keyeski did not meet his burden of showing, by a preponderance of the evidence, that he was only a nominal 33-1/3 percent shareholder of Bayside Produce, Inc. In order for a petitioner to show that he or she was only nominally an officer, a director, and a stockholder, the petitioner must show by a preponderance of the evidence that he or she did not have an actual, significant nexus with the violating company during the violation period. Under the actual, significant nexus standard, responsibilities are placed upon corporate officers, directors, and stockholders, even though they may not actually have been actively involved in the activities resulting in violations of the PACA, because their status with the company requires that they knew, or should have known, about the violations being committed and they failed to counteract or obviate the fault of others.[14] The record establishes Petitioner Beucke and Petition Keyeski each had an actual, significant nexus with Bayside Produce, Inc., during the violation period.

Petitioner Beucke was a co-founder of Bayside Produce, Inc., who invested $7,000 as part of the initial capitalization of Bayside Produce,

[14]*Bell v. Department of Agric.*, 39 F.3d 1199, 1201 (D.C. Cir. 1994); *Minotto v. United States Dep't of Agric.*, 711 F.2d 406, 408-09 (D.C. Cir. 1983); *Quinn v. Butz*, 510 F.2d 743, 756 n.84 (D.C. Cir. 1975).

Inc. (RX 1-RX 3). Petitioner Beucke's relationship to Bayside Produce, Inc., is much different than an individual who is listed as an owner, an officer, or a director because his or her spouse or parent put him or her on corporate records and who has no involvement in the corporation or experience in the produce business. Rather, Petitioner Beucke is an experienced, savvy individual who has worked in the produce business for approximately 26 years, who has worked for years with some or all of the principals in Bayside Produce, Inc., and who is fully aware of the significance of having a valid PACA license and the importance of complying with the prompt payment provision of the PACA. Congress' utilization of ownership of more than 10 percent of the outstanding stock of a corporation as sufficient to trigger the presumption that the owner was responsibly connected is a strong indication that a 33-1/3 percent owner does not serve in a nominal capacity.[15]

There is no evidence that Petitioner Beucke was other than a voluntary investor, who undertook the responsibilities associated with being a director, a vice president, the secretary, and a co-owner in an attempt to establish a profitable business. Petitioner Beucke presumably would have shared in Bayside Produce, Inc.'s profits when there were some. Petitioner Beucke participated in a number of corporate matters, including the initial board of directors' meeting on September 15, 1997 (RX 2), the board of directors' meeting on February 22, 2000 (RX 4), allowing himself to be authorized to draw funds on Bayside Produce, Inc.'s Bank of America account number 01719-21437 (RX 23), allowing himself to be authorized to draw funds on Bayside Produce, Inc.'s Community Bank of Central California account number 1361955 (RX 24 at 17), signing Bayside Produce, Inc.'s resolution to borrow from Community Bank of Central California (RX 24 at 18-25),

[15] *Siegel v. Lyng*, 851 F.2d 412, 417 (D.C. Cir. 1988) (stating this court has held, most clearly in *Martino*, that approximately 20 percent stock ownership would suffice to make a person accountable for not controlling delinquent management); *Veg-Mix, Inc. v. United States Dep't of Agric.*, 832 F.2d 601, 611 (D.C. Cir. 1987) (stating with approval, in *Martino*, we found ownership of 22.2 percent of the violating company's stock was enough support for a finding of responsible connection); *Martino v. United States Dep't of Agric.*, 801 F.2d 1410, 1414 (D.C. Cir. 1986) (holding ownership of 22.2 percent of the stock of a company formed a sufficient nexus to establish the petitioner's responsible connection to the company); *In re Joseph T. Kocot*, 57 Agric. Dec. 1517, 1544-45 (1998) (stating the petitioner's ownership of a substantial percentage of the outstanding stock of the violating company alone is very strong evidence that the petitioner was not a nominal shareholder); *In re Steven J. Rodgers*, 56 Agric. Dec. 1919, 1956 (1997) (stating the petitioner's ownership of 33.3 percent of the outstanding stock of the violating entity alone is very strong evidence that the petitioner was responsibly connected with the violating entity), *aff'd per curiam*, 172 F.3d 920, 1998 WL 794851 (D.C. Cir. 1998) (Table), printed in 57 Agric. Dec. 1464 (1998).

purchasing produce on behalf of Bayside Produce, Inc. (Tr. 248-52, 300-05, 323-24; CX 21, CX 23, CX 26, CX 32, CX 33, CX 35), and deciding which Bayside Produce, Inc., debts to pay (Tr. 239-40; RX 24; CX 39 at 222, 272, 274, 296, 332, 334, 360, 413, 421, 505, 539, 567, 571, 589, 595, 597, 605, 607, 615, 619). The record indicates Petitioner Beucke failed to exercise authority consistent with his positions as 33-1/3 percent owner, a director, the secretary, and a vice president to counteract or obviate the fault of others. That Petitioner Beucke chose not to take action to counteract or obviate the fault of others does not establish that his role was nominal.

In approximately August 1997, Petitioner Keyeski entered into an arrangement with Wayne Martindale and Petitioner Beucke with respect to Bayside Produce, Inc., that was "[b]asically a three-way partnership, . . . equal duties, equal opportunity, equal money, equal everything." (Tr. 358-59.) In February 2000, after Petitioner Keyeski invested $7,000 in Bayside Produce, Inc., Petitioner Keyeski attended a Bayside Produce, Inc., board of directors' meeting in which he became a vice president, a director, and holder of 33-1/3 percent of the outstanding shares of Bayside Produce, Inc. (RX 4; EX 6). Petitioner Keyeski's relationship to Bayside Produce, Inc., is much different than an individual who is listed as an owner, an officer, or a director because his or her spouse or parent put him or her on corporate records and who has no involvement in the corporation or experience in the produce business. Rather, Petitioner Keyeski is an experienced, savvy individual who has worked in the produce business since 1985 or 1986, who has worked for years with some or all of the principals in Bayside Produce, Inc., and who is fully aware of the significance of having a valid PACA license and the importance of complying with the prompt payment provision of the PACA. Congress' utilization of ownership of more than 10 percent of the outstanding stock of a corporation as sufficient to trigger the presumption that the owner was responsibly connected is a strong indication that a 33-1/3 percent owner does not serve in a nominal capacity.[16]

There is no evidence that Petitioner Keyeski was other than a voluntary investor, who undertook the responsibilities associated with being a director, a vice president, and a co-owner in an attempt to establish a profitable business. Petitioner Keyeski presumably would have shared in Bayside Produce, Inc.'s profits when there were some. Petitioner Keyeski participated in a number of corporate matters,

[16]See note 15.

including the board of directors' meeting on February 22, 2000 (RX 4), controlling all aspects of Bayside Produce, Inc.'s San Diego, California, office as general manager, except for depositing receivables and paying for purchases of produce (Tr. 364-65, 397), purchasing produce on behalf of Bayside Produce, Inc. (Tr. 161-64, 167-68; CX 16, CX 28, CX 41, CX 44), and managing payroll and paying rent and other incidental expenses related to Bayside Produce, Inc.'s San Diego, California, operation (Tr. 364-65, 397). The record establishes Petitioner Keyeski resigned as director and officer of Bayside Produce, Inc., prior to Bayside Produce, Inc.'s violations of the PACA. However, Petitioner Keyeski retained his ownership of 33-1/3 percent of the outstanding stock of Bayside Produce, Inc., until March 2003 because of what Petitioner Keyeski believed to be its economic value (KK 1; Tr. 190-91). Moreover, Petitioner Keyeski continued his role as general manager of Bayside Produce, Inc.'s San Diego, California, office until December 13, 2002 (Tr. 364-65, 397). The record indicates Petitioner Keyeski failed to exercise authority consistent with his position as 33-1/3 percent owner to counteract or obviate the fault of others. That Petitioner Keyeski chose not to take action to counteract or obviate the fault of others does not establish that his role was nominal.

Petitioner Beucke's and Petitioner Keyeski's Appeal Petitions

Petitioner Beucke and Petitioner Keyeski raise 12 issues in "Petitioner Beucke's Appeal Petition to Department Judicial Officer and Supporting Brief" [hereinafter Petitioner Beucke's Appeal Petition] and "Petitioner Keyeski's Appeal Petition to Department Judicial Officer and Supporting Brief" [hereinafter Petitioner Keyeski's Appeal Petition].

First, Petitioner Beucke and Petitioner Keyeski state the ALJ used an incorrect legal standard as the basis for his determination that they were responsibly connected with Bayside Produce, Inc. Specifically, Petitioner Beucke and Petitioner Keyeski assert the ALJ based his conclusion that they were responsibly connected with Bayside Produce, Inc., on the findings that Petitioner Beucke and Petitioner Keyeski were actively involved with Bayside Produce, Inc., when Bayside Produce, Inc., was committing violations of the PACA. (Petitioner Beucke's Appeal Pet. at 4, 14-15; Petitioner Keyeski's Appeal Pet. at 2, 4-5.)

Section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) provides that for the first prong of the responsibly-connected test, a petitioner must demonstrate by a preponderance of the evidence that he or she was not actively involved in the activities resulting in a violation of the PACA. Petitioner Beucke and Petitioner Keyeski base their contention that the

ALJ erroneously used an incorrect legal standard on the ALJ's findings that "Petitioner Beucke was actively involved with Bayside at the time it was committing violations of the PACA" and "Petitioner Keyeski was actively involved with Bayside during at least a portion of the time it was committing violations of the PACA" (Initial Decision at 11). I do not find the ALJ's findings that Petitioner Beucke and Petitioner Keyeski were actively involved with Bayside Produce, Inc., when Bayside Produce, Inc., violated the PACA indicates the ALJ applied an incorrect legal standard when concluding Petitioner Beucke and Petitioner Keyeski were responsibly connected with Bayside Produce, Inc.

The ALJ correctly cites section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) as the statutory provision applicable in this proceeding (Initial Decision at 3). Moreover, the ALJ, citing *In re Lawrence D. Salins*, 57 Agric. Dec. 1474, 1487-88 (1998), states the first prong of the two-prong test requires a petitioner to demonstrate by a preponderance of the evidence that the petitioner was not actively involved in the activities resulting in a violation of the PACA (Initial Decision at 3-4). Finally, the ALJ cites case law relevant to the proper statutory standard. After reading the entire Initial Decision, I find the ALJ's findings that "Petitioner Beucke was actively involved with Bayside at the time it was committing violations of the PACA" and "Petitioner Keyeski was actively involved with Bayside during at least a portion of the time it was committing violations of the PACA" (Initial Decision at 11) are merely the ALJ's shorthand manner of stating Petitioner Beucke and Petitioner Keyeski were actively involved in the activities resulting in Bayside Produce, Inc.'s violations of the PACA and the ALJ applied the proper legal standard when concluding Petitioner Beucke and Petitioner Keyeski were responsibly connected with Bayside Produce, Inc.

Second, Petitioner Beucke and Petitioner Keyeski contend the facts established in the record do not support the ALJ's conclusion that Petitioner Beucke and Petitioner Keyeski were actively involved in the activities resulting in Bayside Produce, Inc.'s PACA violations. Petitioner Beucke and Petitioner Keyeski assert the record supports the ALJ's finding that there is no evidence Petitioner Beucke or Petitioner Keyeski engaged in any affirmative action designed to leave suppliers unpaid. (Petitioner Beucke's Appeal Pet. at 4, 15-19; Petitioner Keyeski's Appeal Pet. at 2, 6-8.)

I agree with the ALJ's finding that the record does not contain evidence that Petitioner Beucke or Petitioner Keyeski engaged in activities designed to leave Bayside Produce, Inc.'s produce suppliers

unpaid. However, evidence that a petitioner has not engaged in activities designed to leave produce suppliers unpaid is not sufficient to prove by a preponderance of the evidence that the petitioner was not actively involved in activities resulting in a violation of the prompt payment provision of the PACA. The record establishes that Petitioner Beucke and Petitioner Keyeski purchased produce on behalf of Bayside Produce, Inc., during the period November 23, 2002, through February 7, 2003, for which produce suppliers were not paid in accordance with the PACA (Tr. 161-64, 167-68, 248-52, 300-05, 323-24; CX 16, CX 21, CX 23, CX 26, CX 28, CX 32, CX 33, CX 35, CX 41, CX 44). Purchasing produce when there are insufficient funds to pay for that produce leads to a violation of the prompt payment provision of the PACA,[17] even if the person purchasing the produce fully intends to make full payment promptly in accordance with the PACA. The record also establishes that during the period November 23, 2002, through February 7, 2003, Petitioner Beucke signed checks on Bayside Produce Inc.'s Community Bank of Central California account (Tr. 239-40; CX 39 at 222, 272, 274, 296, 332, 334, 360, 413, 421, 505, 539, 567, 571, 589, 595, 597, 605, 607, 615, 619), and during the period November 23, 2002, through December 13, 2002, Petitioner Keyeski was the general manager of Bayside Produce, Inc.'s San Diego, California, office. Petitioner Keyeski controlled all aspects of Bayside Produce, Inc.'s San Diego, California, operation, except for depositing receivables and paying for produce purchases. Petitioner Keyeski's duties included managing payroll and paying rent and other incidentals. By the payment of certain creditors, Petitioner Beucke and Petitioner Keyeski were in effect choosing which debts to pay; thus, Petitioner Beucke and Petitioner Keyeski were actively involved in activities resulting in Bayside Produce, Inc.'s violations of the prompt payment provision of the PACA.[18]

Petitioner Beucke also argues that his circumstance is similar to that of the petitioner in *Maldonado v. Department of Agric.*, 154 F.3d 1086 (9th Cir. 1998), who the Court held was not responsibly connected with W. Fay, a company which had violated the PACA. However, the question in *Maldonado* was whether the petitioner, a putative officer of W. Fay, was only a nominal officer. Therefore, I find *Maldonado* inapposite to the question of Petitioner Beucke's active involvement in the activities resulting in Bayside Produce, Inc.'s violations of the PACA.

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[17]*In re Lawrence D. Salins*, 57 Agric. Dec. 1474, 1488 (1998).

[18]*In re Lawrence D. Salins*, 57 Agric. Dec. 1474, 1489 (1998).

Third, Petitioner Beucke and Petitioner Keyeski contend the ALJ erroneously concluded they were responsibly connected with Bayside Produce, Inc., based on the theory that Petitioner Beucke and Petitioner Keyeski failed to constrain Wayne Martindale's misconduct and that such failure resulted in Bayside Produce, Inc.'s PACA violations (Petitioner's Beucke's Appeal Pet. at 4, 19-22; Petitioner Keyeski's Appeal Pet. at 8-9).

The ALJ states Petitioner Beucke's and Petitioner Keyeski's "failure . . . to constrain and halt the misconduct of Wayne Martindale did leave suppliers unpaid." (Initial Decision at 7.) Based on that statement, I infer the ALJ concluded Petitioner Beucke's and Petitioner Keyeski's failure to constrain Wayne Martindale's misconduct constitutes active involvement in the activities resulting in Bayside Produce, Inc.'s violations of the PACA. I disagree with the ALJ. Generally, active involvement in activities resulting in a violation of the PACA requires more than an act of omission.[19] While I disagree with the ALJ's assertion that Petitioner Beucke's and Petitioner Keyeski's acts of omission support the conclusion that Petitioner Beucke and Petitioner Keyeski were actively involved in the activities resulting in Bayside Produce, Inc.'s violations of the PACA, I do not hold that an act of omission can never constitute active involvement in the activities resulting in a violation of the PACA. I only conclude, based on the record before me, that Petitioner Beucke's and Petitioner Keyeski's acts of omission do not constitute active involvement in the activities resulting in Bayside Produce, Inc.'s violations of the PACA.

Fourth, Petitioner Beucke contends the ALJ erroneously concluded Petitioner Beucke was not a nominal officer, director, and shareholder of Bayside Produce, Inc., during the period November 23, 2002, through February 7, 2003, when Bayside Produce, Inc., violated the PACA (Petitioner Beucke's Appeal Pet. at 4, 23-26).

I agree with the ALJ's conclusion that Petitioner Beucke failed to establish by a preponderance of the evidence that he was only nominally an officer, a director, and a stockholder of Bayside Produce, Inc. In order for a petitioner to show that he or she was only nominally an officer, a director, and a stockholder, the petitioner must show by a preponderance of the evidence that he or she did not have an actual,

[19]*See generally In re Donald R. Beucke*, 65 Agric. Dec. ___, slip op. at 22-23 (Sept. 28, 2006) (discussing the Judicial Officer's disagreement with the Chief Administrative Law Judge's assertion that the petitioner's acts of omission support the conclusion that the petitioner was actively involved in the activities resulting in violations of the PACA).

significant nexus with the violating company during the violation period. Under the actual, significant nexus standard, responsibilities are placed upon corporate officers, directors, and stockholders, even though they may not actually have been actively involved in the activities resulting in violations of the PACA, because their status with the company requires that they knew, or should have known, about the violations being committed and they failed to counteract or obviate the fault of others.[20] The record establishes Petitioner Beucke had an actual, significant nexus with Bayside Produce, Inc., during the violation period.

During the period when Bayside Produce, Inc., violated the PACA, Petitioner Beucke owned 33-1/3 percent of the outstanding stock of Bayside Produce, Inc. Petitioner Beucke's ownership of a substantial percentage of stock alone is very strong evidence that he was not a nominal shareholder.[21] Petitioner Beucke has not demonstrated by a preponderance of the evidence that he was only a nominal shareholder of Bayside Produce, Inc.

Moreover, Petitioner Beucke had the appropriate business experience to be a corporate officer and director. At the time of the October 2005 hearing, Petitioner Beucke had approximately 26 years of experience in the produce industry. Petitioner Beucke began working at Martindale Distributing Company. Petitioner Beucke started in Martindale Distributing Company as a field inspector and later progressing to the positions of buyer and broker. At one point, Petitioner Beucke was the president of Martindale Distributing Company and held 33-1/3 percent of the outstanding shares of Martindale Distributing Company. Petitioner Beucke was also the vice president and a holder of 20 percent of the outstanding stock of Garden Fresh Produce, Inc. (Tr. 213-14, 218, 312-14.)

A person's active participation in corporate decision-making is an important factor in the determination that the person was not merely a nominal corporate officer and director.[22] In 1997, Petitioner Beucke, along with Wayne Martindale, founded Bayside Produce, Inc. Petitioner invested $7,000 in Bayside Produce, Inc., and became a 50 percent shareholder, a director, the vice president, and the secretary of the new company. Petitioner Beucke remained a stockholder, a director, a vice

[20]See note 14.

[21]See note 15.

[22]*In re Donald R. Beucke*, 65 Agric. Dec. ___, slip op. at 25 (Sept. 28, 2006); *In re Edward S. Martindale*, 65 Agric. Dec. ___, slip op. at 30 (July 26, 2006); *In re Lawrence D. Salins*, 57 Agric. Dec. 1474, 1494 (1998).

president, and the secretary until he submitted his resignation and reassigned his stock in April 2003. (RX 1-RX 6; Tr. 222, 313-14.)

Petitioner Beucke purchased produce on behalf of Bayside Produce, Inc., on at least 33 occasions during the period November 23, 2002, through February 7, 2003, for which produce suppliers were not paid in accordance with the prompt payment provision of the PACA (Tr. 248-52, 300-05, 323-24; CX 21, CX 23, CX 26, CX 32, CX 33, CX 35). Petitioner Beucke's name and signature appeared on the bank signature card for Bayside Produce, Inc.'s Bank of America account number 01719-21437, and Petitioner Beucke was authorized to draw funds on that account during the period November 23, 2002, through February 7, 2003 (RX 23). Petitioner Beucke's name and signature appeared on the bank authorizations for Bayside Produce, Inc.'s Community Bank of Central California account number 1361955, and Petitioner Beucke was authorized to draw funds on that account during the period November 23, 2002, through February 7, 2003. During that period, Petitioner Beucke signed 20 checks on the account, including two checks payable to himself (Tr. 239-40; RX 24; CX 39 at 222, 272, 274, 296, 332, 334, 360, 413, 421, 505, 539, 567, 571, 589, 595, 597, 605, 607, 615, 619). Petitioner Beucke, as an officer of Bayside Produce, Inc., signed a corporate resolution to borrow under loan number 160087672 from Community Bank of Central California for the loan dated January 21, 2002, with a maturity date of January 28, 2003 (RX 24 at 18-19).

Petitioner Beucke made decisions about which Bayside Produce, Inc., debts to pay. Petitioner Beucke became aware in December 2002 that Bayside Produce, Inc., was not making full payment promptly for produce (Tr. 72, 268-70). Even though Petitioner Beucke knew Bayside Produce, Inc., was failing to pay for produce in accordance with the prompt payment provision of the PACA, Petitioner Beucke continued purchasing produce and issuing checks on Bayside Produce, Inc.'s Community Bank of Central California account.

In short, I find Petitioner Beucke had an actual, significant nexus with Bayside Produce, Inc. Petitioner Beucke was a major stockholder of Bayside Produce, Inc.; Petitioner Beucke had the appropriate business experience to be a corporate officer and director; and Petitioner Beucke participated in corporate decision-making.

Fifth, Petitioner Beucke and Petitioner Keyeski contend the ALJ erroneously failed to address their assertions that Respondent violated the Rules of Practice and the due process clause of the Fourteenth Amendment to the Constitution of the United States (Petitioner

Beucke's Appeal Pet. at 4, 26-33; Petitioner Keyeski's Appeal Pet. at 2, 10).

I agree with Petitioner Beucke and Petitioner Keyeski that the ALJ did not address their assertions that Respondent violated the Rules of Practice and the due process clause of the Fourteenth Amendment to the Constitution of the United States. However, I find, based upon the ALJ's disposition of the proceeding, the ALJ rejected Petitioner Beucke's and Petitioner Keyeski's assertions that Respondent violated the Rules of Practice and the due process clause of the Fourteenth Amendment to the Constitution of the United States. I find no purpose would be served by remanding this proceeding to the ALJ to address Petitioner Beucke's and Petitioner Keyeski's assertions that Respondent violated the Rules of Practice and the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Sixth, Petitioner Beucke and Petitioner Keyeski contend the ALJ erroneously failed to conclude Respondent violated the Rules of Practice. Petitioner Beucke and Petitioner Keyeski contend Respondent failed, prior to instituting the formal disciplinary complaint against Bayside Produce, Inc., on April 26, 2004, to provide Petitioner Beucke and Petitioner Keyeski with written notice of the facts involved and to provide Petitioner Beucke and Petitioner Keyeski an opportunity to correct Bayside Produce, Inc.'s PACA violations, as required by section 1.133 of the Rules of Practice (7 C.F.R. § 1.133). (Petitioner Beucke's Appeal Pet. at 4, 26-33; Petitioner Keyeski's Appeal Pet. at 2, 10.)

Section 1.133(b)(3) of the Rules of Practice provides that the administrator[23] attempt to effect settlement of proceedings, as follows:

> **§ 1.133 Institution of proceedings.**
>
> . . . .
>
> (b) *Filing of complaint or petition for review*. . . .
>
> . . . .
>
> (3) As provided in 5 U.S.C. 558, in any case, except one of willfulness or one in which public health, interest, or safety otherwise requires, prior to the institution of a formal proceeding

[23]The term *administrator* is defined in section 1.132 of the Rules of Practice (7 C.F.R. § 1.132) as the administrator of the agency administering the statute involved or any officer or employee of the agency to whom authority has been delegated, or may be delegated, to act for the administrator. The statute involved in the administrative disciplinary proceeding instituted against Bayside Produce, Inc., is the PACA, and the administrator of the agency administering the PACA is the Administrator, Agricultural Marketing Service, United States Department of Agriculture.

> which may result in the withdrawal, suspension, or revocation of a "license" as that term is defined in 5 U.S.C. 551(8), the Administrator, in an effort to effect an amicable or informal settlement of the matter, shall give written notice to the person involved of the facts or conduct concerned and shall afford such person an opportunity, within a reasonable time fixed by the Administrator, to demonstrate or achieve compliance with the applicable requirements of the statute, or the regulation, standard, instruction or order promulgated thereunder.

7 C.F.R. § 1.133(b)(3).

As an initial matter, Respondent is not the Administrator, Agricultural Marketing Service, United States Department of Agriculture, and Respondent is not the United States Department of Agriculture employee who was delegated authority to institute the disciplinary proceeding against Bayside Produce, Inc.[24] Therefore, even if I were to find Petitioner Beucke and Petitioner Keyeski were entitled to written notice of the facts regarding the disciplinary proceeding instituted against Bayside Produce, Inc., and an opportunity to demonstrate or achieve Bayside Produce, Inc.'s compliance with the PACA, I would not find Respondent responsible for providing Petitioner Beucke and Petitioner Keyeski with the notice and opportunity to demonstrate or achieve compliance, as Petitioner Beucke and Petitioner Keyeski assert.

Further, I find section 1.133(b)(3) of the Rules of Practice (7 C.F.R. § 1.133(b)(3)) inapplicable to the disciplinary proceeding instituted against Bayside Produce, Inc. The requirement in section 1.133(b)(3) of the Rules of Practice (7 C.F.R. § 1.133(b)(3)) that the administrator attempt to effect a settlement is not applicable to cases involving willfulness. The Chief Administrative Law Judge explicitly concluded that Bayside Produce, Inc., willfully violated the prompt payment

[24]The Chief Administrative Law Judge states *In re Bayside Produce, Inc.*, was instituted by a complaint filed on April 26, 2004, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. *In re Bayside Produce, Inc.*, 63 Agric. Dec. 1029, 1030 (2004).

provision in section 2(4) of the PACA (7 U.S.C. § 499b(4)).[25] Therefore, I reject Petitioner Beucke's and Petitioner Keyeski's contention that Respondent failed to comply with section 1.133 of the Rules of Practice (7 C.F.R. § 1.133).

Petitioner Beucke and Petitioner Keyeski also contend Respondent failed to join the instant responsibly connected proceeding with the disciplinary proceeding instituted against Bayside Produce, Inc., as required by section 1.137 of the Rules of Practice (7 C.F.R. § 1.137) (Petitioner Beucke's Appeal Pet. at 31; Petitioner Keyeski's Appeal Pet. at 10).

Section 1.137(b) of the Rules of Practice requires the administrative law judge to consolidate for hearing any proceeding alleging a PACA licensee's violation of the PACA, with any petitions for review of determinations of responsible connection with that PACA licensee, as follows:

> **§ 1.137 Amendment of complaint, petition for review, or answer; joinder of related matters.**
>
> . . . .
>
> (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(b)(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).

As an initial matter, Respondent was not the judge[26] in the disciplinary proceeding instituted against Bayside Produce, Inc.

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[25] *In re Bayside Produce, Inc.*, 63 Agric. Dec. 1029, 1031 (2004).

[26] The term *judge* is defined in section 1.132 of the Rules of Practice (7 C.F.R. § 1.132) as any administrative law judge appointed pursuant to 5 U.S.C. § 3105 and assigned to the proceeding involved.

Therefore, even if I were to find the disciplinary proceeding instituted against Bayside Produce, Inc., and the instant proceeding were required to be consolidated for hearing, I would not find Respondent had any duty to consolidate the proceedings, as Petitioner Beucke and Petitioner Keyeski assert.

The Chief Administrative Law Judge issued a decision without hearing by reason of default in the disciplinary proceeding instituted against Bayside Produce, Inc., for violations of the payment provision of the PACA on August 25, 2004, and the decision became final on September 29, 2004.[27] Since the Chief Administrative Law Judge never conducted a hearing in the disciplinary proceeding instituted against Bayside Produce, Inc., I reject Petitioner Beucke's and Petitioner Keyeski's contention that *In re Bayside Produce, Inc.*, 63 Agric. Dec. 1029 (2004), was required to be consolidated for hearing with the instant proceeding.

Further, Petitioner Beucke and Petitioner Keyeski contend Respondent failed to serve the proposed default decision in *In re Bayside Produce, Inc.*, on Petitioner Beucke and Petitioner Keyeski, as required by section 1.139 of the Rules of Practice (7 C.F.R. § 1.139) (Petitioner Beucke's Appeal Pet. at 31-32; Petitioner Keyeski's Appeal Pet. at 10).

Section 1.139 of the Rules of Practice requires that the Hearing Clerk serve the respondent with any proposed default 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 for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk.

7 C.F.R. § 1.139.

[27] *In re Bayside Produce, Inc.*, 63 Agric. Dec. 1029, 1031-32 (2004).

Respondent was not the Hearing Clerk[28] and Petitioner Beucke and Petitioner Keyeski were not the respondents[29] in the disciplinary proceeding instituted against Bayside Produce, Inc. Therefore, I reject Petitioner Beucke's and Petitioner Keyeski's contention that Respondent was required to serve Petitioner Beucke and Petitioner Keyeski with the proposed default decision filed in *In re Bayside Produce, Inc.*, 63 Agric. Dec. 1029 (2004).

Seventh, Petitioner Beucke and Petitioner Keyeski contend the ALJ erroneously failed to conclude Respondent violated the due process clause of the Fourteenth Amendment to the Constitution of the United States (Petitioner Beucke's Appeal Pet. at 4, 26-33; Petitioner Keyeski's Appeal Pet. at 2, 10).

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;[30] it is not a state. Therefore, as a matter of law, Respondent could not have violated the due process clause of the Fourteenth Amendment to the Constitution of the United States, as Petitioner Beucke and Petitioner Keyeski contend.[31]

Eighth, Petitioner Beucke and Petitioner Keyeski contend the ALJ erroneously failed to address their assertion that any employment prohibition resulting from the instant proceeding began August 25, 2004, the date the Chief Administrative Law Judge filed *In re Bayside Produce, Inc.*, 63 Agric. Dec. 1029 (2004) (Petitioner Beucke's Appeal Pet. at 5, 33-36; Petitioner Keyeski's Appeal Pet. at 2, 10).

I agree with Petitioner Beucke's and Petitioner Keyeski's contention that the ALJ did not address their assertion that the bar on Petitioner Beucke's and Petitioner Keyeski's employment by PACA licensees began August 25, 2004. However, in accordance with the terms of the Initial Decision, the bar on Petitioner Beucke's and Petitioner Keyeski's employment by PACA licensees would have become effective as to

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[28]The term *Hearing Clerk* is defined in section 1.132 of the Rules of Practice (7 C.F.R. § 1.132) as the Hearing Clerk, United States Department of Agriculture, Washington, DC 20250.

[29]The term *respondent* is defined in section 1.132 of the Rules of Practice (7 C.F.R. § 1.132) as the party proceeded against. The party proceeded against in *In re Bayside Produce, Inc.*, 63 Agric. Dec. 1029 (2004), was Bayside Produce, Inc.

[30]See 5 U.S.C. §§ 101, 551(1).

[31]*In re Glenn Mealman*, 64 Agric. Dec. 1987, 1990 (2005) (Order Denying Pet. to Reconsider); *In re Bodie S. Knapp*, 64 Agric. Dec. 253, 303-04 (2005).

Petitioner Beucke 35 days after service of the Initial Decision on Petitioner Beucke and as to Petitioner Keyeski 35 days after service of the Initial Decision on Petitioner Keyeski had Petitioner Beucke and Petitioner Keyeski not appealed the ALJ's decision to the Judicial Officer (Initial Decision at 12). I find this effective date clearly establishes that the ALJ rejected Petitioner Beucke's and Petitioner Keyeski's contention regarding the timing of the employment bar, and I find no purpose would be served by remanding this proceeding to the ALJ to address Petitioner Beucke's and Petitioner Keyeski's timing issue.

Ninth, Petitioner Beucke and Petitioner Keyeski contend the ALJ erroneously failed to conclude that any employment prohibition imposed on Petitioner Beucke and Petitioner Keyeski began August 25, 2004, the date the Chief Administrative Law Judge filed *In re Bayside Produce, Inc.*, 63 Agric. Dec. 1029 (2004). Petitioner Beucke and Petitioner Keyeski argue the plain language of section 8(b) of the PACA (7 U.S.C. § 499h(b)) requires that the Secretary of Agriculture impose the employment prohibition on responsibly connected individuals beginning on the date the person with whom the individuals are responsibly connected is found to have violated the PACA. Thus, under Petitioner Beucke's and Petitioner Keyeski's reading of the PACA, the bar on Petitioner Beucke's and Petitioner Keyeski's employment by PACA licensees began August 25, 2004, even though a final determination that Petitioner Beucke and Petitioner Keyeski were responsibly connected with Bayside Produce, Inc., had not been issued. (Petitioner Beucke's Appeal Pet. at 5, 33-36; Petitioner Keyeski's Appeal Pet. at 2, 10.)

Petitioner Beucke's and Petitioner Keyeski's reading of section 8(b) of the PACA (7 U.S.C. § 499h(b)) would thwart the remedial purposes of the PACA. Using Petitioner Beucke's and Petitioner Keyeski's interpretation of the PACA, principals of a violating PACA licensee would, in many cases, avoid the employment bar because the period of employment bar would conclude before a determination is made that the principals were responsibly connected. The United States Court of Appeals for the Second Circuit stated that section 8(b) of the PACA (7 U.S.C. § 499h(b)) is designed to prevent circumvention of the PACA by forbidding responsibly connected persons from employment by PACA licensees, as follows:

> Legislative history indicates that Section 499h(b) was enacted in order to prevent circumvention of the purposes behind the Act by persons currently under suspension or by persons whose

> licenses had been revoked and who, by the subterfuge of acting as an "employee" of a nominal licensee nevertheless continued in business. It was felt that the only way to prevent this flouting of the purposes of the Act was to forbid persons under suspension, persons whose licenses were revoked, and persons who had been or were currently responsibly connected with them from all employment in the industry.

Zwick v. Freeman, 373 F.2d 110, 118 (2d Cir.) (footnote omitted), *cert. denied*, 389 U.S. 835 (1967). Petitioner Beucke's and Petitioner Keyeski's reading of section 8(b) of the PACA (7 U.S.C. § 499h(b)) would result in the very circumvention of the PACA that section 8(b) of the PACA (7 U.S.C. § 499h(b)) was designed to prevent.

Petitioner Beucke and Petitioner Keyeski cite two cases, *Frank Tambone, Inc. v. U.S. Dep't of Agric.*, 50 F.3d 52 (D.C. Cir. 1995), and *Farley and Calfee, Inc. v. U.S. Dep't of Agric.*, 941 F.2d 964 (9th Cir. 1991), in support of their argument that an employment bar must commence as soon as a PACA licensee is found to have violated the PACA. In *Tambone*, the Court addressed the timing of a license bar where a company had been without a license prior to the final determination that the company had violated the PACA, as follows:

> The Judicial Officer rendered his decision on February 2, 1994. By that time Tambone, Inc. already had been without a license for more than a year. The order has not yet become effective; publication will result in a prospective bar under § 499d(b)(B), preventing the company from obtaining a license for two years. The bar will run from the effective date of this publication order, which will occur after we render our decision here. Why the bar necessarily should be entirely prospective—why, in other words, the effective date cannot be made retroactive—is a matter the Judicial Officer did not address, doubtless because no one raised the point. Even before *S.S. Farms*, at least one ALJ made the effective date of a publication order retroactive. *See Farley & Calfee*, 941 F.2d at 966. But, as we have said, the point was not raised in the administrative proceedings and it has not been argued here.

Frank Tambone, Inc. v. U.S. Dep't of Agric., 50 F.3d 52, 56 n.† (D.C. Cir. 1995).

Tambone does not address the timing of an employment bar imposed on responsibly connected individuals. *Tambone* merely stands for the

proposition that the bar on an applicant obtaining a PACA license runs from the effective date of a court order finding that the applicant has flagrantly or repeatedly violated the PACA. The Court declined to address the issue of retroactive application of the license bar. I find *Tambone* inapposite.

Farley and Calfee, Inc. v. U.S. Dep't of Agric., 941 F.2d 964 (9th Cir. 1991), involved the application of the employment bar to an individual who had been determined to be responsibly connected with a company prior to the final determination that the company had violated the PACA. The instant proceeding involves the application of the employment bar to an individual who is determined to be responsibly connected with a company after the final determination that the company had violated the PACA. I find *Farley and Calfee* inapposite.

Tenth, Petitioner Beucke contends the ALJ failed to order Respondent to produce prior written and recorded statements of Respondent's witness, as required by the Rules of Practice (Petitioner Beucke's Appeal Pet. at 5, 36-45).

Section 1.141(h)(1)(iii) of the Rules of Practice provides that a party may request and obtain the production of any statement, or part of a statement, of a witness called by the complainant and in the possession of the complainant, as follows:

> **§ 1.141 Procedure for hearing.**
>
> . . . .
>
> (h) *Evidence*—(1) *In general*. . . .
>
> . . . .
>
> (iii) After a witness called by the complainant has testified on direct examination, any other party may request and obtain the production of any statement, or part thereof, of such witness in the possession of the complainant which relates to the subject matter as to which the witness has testified. Such production shall be made according to the procedures and subject to the definitions and limitations prescribed in the Jencks Act (18 U.S.C. 3500).

7 C.F.R. § 1.141(h)(1)(iii). Petitioner Beucke seeks an investigation report written by Everet Gonzales and in the possession of Charles L. Kendall (Petitioner Beucke's Appeal Pet. at 39). The record clearly establishes that Evert Gonzales was a witness called by Respondent, not the complainant, and Charles L. Kendall represents Respondent, not the

complainant (Tr. 2, 205, 405-06). Therefore, by its terms, section 1.141(h)(1)(iii) of the Rules of Practice (7 C.F.R. § 1.141(h)(1)(iii)) is not applicable since it provides that a party is entitled only to statements of a witness called by the *complainant* in the possession of the *complainant*.

Eleventh, Petitioner Keyeski contends the ALJ erroneously concluded, because Petitioner Keyeski was actively involved with Bayside Produce, Inc., he cannot be considered a nominal shareholder (Petitioner Keyeski's Appeal Pet. at 6).

The ALJ concludes "[b]y reason of his active involvement with Bayside, Petitioner Keyeski was not only nominally a . . . shareholder of Bayside during the period November 23, 2002 to February 7, 2003" (Initial Decision at 12). I agree with the ALJ's conclusion that Petitioner Keyeski failed to prove by a preponderance of the evidence that he was only a nominal shareholder of Bayside Produce, Inc., during the period November 23, 2002, through February 7, 2003, when Bayside Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). In order for a petitioner to show that he or she was only nominally an officer, a director, or a stockholder, the petitioner must show by a preponderance of the evidence that he or she did not have an actual, significant nexus with the violating company during the violation period. Active involvement with a company is one indicator of an actual, significant nexus with that company. Here, the record establishes that Petitioner Keyeski participated in a number of corporate matters, including controlling all aspects of Bayside Produce, Inc.'s San Diego, California, office as general manager, except for depositing receivables and paying for purchases of produce (Tr. 364-65, 397), purchasing produce on behalf of Bayside Produce, Inc. (Tr. 161-64, 167-68; CX 16, CX 28, CX 41, CX 44), and managing payroll and paying rent and other incidental expenses related to Bayside Produce, Inc.'s San Diego, California, operation (Tr. 364-65, 397). I agree with the ALJ that active involvement of the nature displayed by Petitioner Keyeski is a basis for concluding that Petitioner Keyeski was not only nominally a shareholder of Bayside Produce, Inc.

Twelfth, Petitioner Keyeski contends the ALJ erroneously found that he (Petitioner Keyeski) was a shareholder of Bayside Produce, Inc., until March 11, 2003. Petitioner Keyeski asserts the record establishes that he ceased being a shareholder of Bayside Produce, Inc., November 8, 2002. (Petitioner Keyeski's Appeal Pet. at 9-10.)

I disagree with Petitioner Keyeski's contention that the record establishes that he ceased being a shareholder of Bayside Produce, Inc., on November 8, 2002. While Petitioner Keyeski testified that he did not consider himself an owner of Bayside Produce, Inc., after November 8,

2002, and introduced some evidence to indicate that by December 18, 2002, he was no longer a stockholder of Bayside Produce, Inc. (Tr. 380; KK 8), the preponderance of the evidence supports the ALJ's finding that Petitioner Keyeski retained his shares of Bayside Produce, Inc., until March 2003 (KK 1, KK 2; Tr. 190-96). Therefore, I reject Petitioner Keyeski's contention that the ALJ erroneously found Petitioner Keyeski was a shareholder of Bayside Produce, Inc., until March 11, 2003.

Findings of Fact

1. Bayside Produce, Inc., is a California corporation, incorporated on August 6, 1997. Bayside Produce, Inc., applied for and received PACA license number 19981824. Bayside Produce, Inc., annually renewed PACA license number 19981824 on or before its annual anniversary date through 2002 for the year ending August 26, 2003. (RX 1, RX 2.)

2. Bayside Produce, Inc.'s shareholders and directors consisted of Wayne Martindale and Petitioner Beucke, with each of them owning 50 percent of the shares of outstanding stock until February 22, 2000, when Bayside Produce, Inc., amended its bylaws to increase the number of directors from two to three and added Petitioner Keyeski as an equal shareholder, an officer, and a member of the board of directors (RX 4; EX 6).

3. Chief Administrative Law Judge Marc R. Hillson found that Bayside Produce, Inc., willfully, flagrantly, and repeatedly violated the PACA by failing to timely pay $163,102.70 for 74 lots of produce purchased in interstate commerce from 22 sellers during the period November 23, 2002, through February 7, 2003 (CX 1; RX 22).

4. Petitioner Beucke has significant experience with over 26 years in the produce industry and has owned, and held positions as a corporate officer in, two other produce companies, in addition to Bayside Produce, Inc. Petitioner Beucke was listed on Bayside Produce, Inc.'s PACA license and PACA license certificate as a vice president, the secretary, a director, and a 33 percent shareholder during the period November 23, 2002, through February 7, 2003. Petitioner Beucke's signature appears on the minutes of Bayside Produce, Inc.'s initial board of directors' meeting on September 15, 1997, the stock certificate issued in his name, and the minutes of Bayside Produce, Inc.'s board of directors' February 22, 2000, meeting. (Tr. 213-14, 218, 312; RX 1-RX 4; CX 9-CX 12.)

5. Petitioner Beucke purchased produce on behalf of Bayside Produce, Inc., on at least 33 occasions during the period November 23, 2002, through February 7, 2003, for which the suppliers of the produce were not paid (Tr. 248-52, 300-05, 323-24; CX 21, CX 23, CX 26, CX 32, CX 33, CX 35).

6. Petitioner Beucke's name and signature appeared on the bank signature card for Bayside Produce, Inc.'s Bank of America account number 01719-21437, and Petitioner Beucke was authorized to draw funds on that account during the period November 23, 2002, through February 7, 2003 (RX 23).

7. Petitioner Beucke's name and signature appeared on the bank authorizations for Bayside Produce, Inc.'s Community Bank of Central California account number 1361955, and Petitioner Beucke was authorized to draw funds on that account during the period November 23, 2002, through February 7, 2003. During that period, Petitioner Beucke signed 20 checks on Bayside Produce, Inc.'s Community Bank of Central California account, including two checks payable to himself (Tr. 239-40; RX 24; CX 39 at 222, 272, 274, 296, 332, 334, 360, 413, 421, 505, 539, 567, 571, 589, 595, 597, 605, 607, 615, 619).

8. Petitioner Beucke, as an officer of Bayside Produce, Inc., signed a corporate resolution to borrow under loan number 160087672 from Community Bank of Central California for the loan dated January 21, 2002, with a maturity date of January 28, 2003 (RX 24 at 18-19).

9. By letter dated April 30, 2003, from his attorney, Lester W. Shirley, to Wayne Martindale, Petitioner Beucke tendered his resignation as a director and vice president of Bayside Produce, Inc., as well as from any position of employment with Bayside Produce, Inc. (RX 1 at 2; CX 6).

10. On October 23, 2003, Petitioner Beucke executed documents entitled "Resignation and Acknowledgment of Stock Redemption" and "Stock Assignment Separate From Certificate," both of which purported to be effective April 4, 2003 (RX 5, RX 6; CX 7).

11. Petitioner Keyeski has been involved in the produce business since 1985 or 1986, starting first in the warehouse before moving into sales. From sometime in 1990 until July of 1997, Petitioner Keyeski was the sales manager of Coast Citrus Distributors, a San Diego, California, company. (Tr. 357, 393.)

12. Starting in approximately August 1997, Petitioner Keyeski joined Bayside Produce, Inc., in an arrangement with Wayne Martindale and Petitioner Beucke that was "basically a three-way partnership, . . . equal duties, equal opportunity, equal money, equal everything." (Tr. 358-59.)

13. Once he managed to accumulate the necessary $7,000 investment

on February 22, 2000, Petitioner Keyeski attended a Bayside Produce, Inc., board of directors' meeting in Salinas, California, and became a 33-1/3 percent shareholder, vice president, and director of Bayside Produce, Inc. (KK 6; Tr. 368).

14. Petitioner Keyeski ran the San Diego, California, office of Bayside Produce, Inc., as a general manager, controlling all aspects of its operation, including managing the payroll and paying the rent and other incidental expenses, except for depositing receivables and paying for purchases of produce (Tr. 364-65, 397).

15. Petitioner Keyeski purchased produce on behalf of Bayside Produce, Inc., on at least four occasions during the period November 23, 2002, through February 7, 2003, for which suppliers of the produce were not paid (Tr. 161-64, 167-68; CX 16, CX 28, CX 41, CX 44).

16. By letter dated October 18, 2002, Petitioner Keyeski confirmed his verbal notice of October 8, 2002, that he was resigning as vice president and as a director of Bayside Produce, Inc., and that, effective December 31, 2002, he would be resigning all positions at Bayside Produce, Inc. Petitioner Keyeski verbally amended the effective date of his resignation from all positions at Bayside Produce, Inc., to December 13, 2002. (Tr. 375; KK 5; EX 5.)

17. Petitioner Keyeski retained his shares in Bayside Produce, Inc., until March 3, 2003, when he executed a document entitled "Declaration of Lost Stock and Assignment of Shares," which was forwarded to Bayside Produce, Inc., by letter dated March 11, 2003 (Tr. 386; KK 1, KK 2; EX 8).

Conclusions of Law

1. During the period November 23, 2002, through February 7, 2003, Bayside Produce, Inc., committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly of the agreed purchase prices to 22 produce sellers for 74 lots of perishable agricultural commodities, in the total amount of $163,102.70. *In re Bayside Produce, Inc.*, 63 Agric. Dec. 1029 (2004).

2. Petitioner Beucke was the vice president, the secretary, a director, and a holder of 33-1/3 percent of the outstanding stock of Bayside Produce, Inc., during the period November 23, 2002, through February 7, 2003.

3. Petitioner Beucke failed to prove by a preponderance of the evidence that he was not actively involved in the activities resulting in

Bayside Produce, Inc.'s violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), during the period November 23, 2002, through February 7, 2003.

4. Petitioner Beucke failed to prove by a preponderance of the evidence that he was only nominally an officer, a director, and a shareholder of Bayside Produce, Inc., during the period November 23, 2002, through February 7, 2003, when Bayside Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

5. Petitioner Beucke failed to prove by a preponderance of the evidence that he was not an owner of Bayside Produce, Inc., during the period November 23, 2002, through February 7, 2003, when Bayside Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

6. Petitioner Beucke was *responsibly connected*, as that term is defined in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with Bayside Produce, Inc., during the period November 23, 2002, through February 7, 2003, when Bayside Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

7. Petitioner Keyeski was a holder of 33-1/3 percent of the outstanding stock of Bayside Produce, Inc., during the period November 23, 2002, through February 7, 2003.

8. Petitioner Keyeski failed to prove by a preponderance of the evidence that he was not actively involved in the activities resulting in Bayside Produce, Inc.'s violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), during the period November 23, 2002, through February 7, 2003.

9. Petitioner Keyeski failed to prove by a preponderance of the evidence that he was only nominally a shareholder of Bayside Produce, Inc., during the period November 23, 2002, through February 7, 2003, when Bayside Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

10. Petitioner Keyeski failed to prove by a preponderance of the evidence that he was not an owner of Bayside Produce, Inc., during the period November 23, 2002, through February 7, 2003, when Bayside Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

11. Petitioner Keyeski was *responsibly connected*, as that term is defined in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with Bayside Produce, Inc., during the period November 23, 2002, through February 7, 2003, when Bayside Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

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

ORDER

1. I affirm Respondent's August 13, 2004, determination that Petitioner Keyeski was responsibly connected with Bayside Produce, Inc., when Bayside Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, Petitioner Keyeski 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)), effective 60 days after service of this Order on Petitioner Keyeski.

2. I affirm Respondent's August 17, 2004, determination that Petitioner Beucke was responsibly connected with Bayside Produce, Inc., when Bayside Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, Petitioner Beucke 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)), effective 60 days after service of this Order on Petitioner Beucke.

RIGHT TO JUDICIAL REVIEW

Petitioner Beucke and Petitioner Keyeski have the right to seek judicial review of the Order in this Decision and Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341-2350. Petitioner Beucke and Petitioner Keyeski must seek judicial review within 60 days after entry of the Order in this Decision and Order.[32] The date of entry of the Order in this Decision and Order is November 8, 2006.

In re: DENNIS E. HUTCHINS, d/b/a HUTCHINS DISTRIBUTING COMPANY.
PACA. Docket No. D-05-0014.
Decision Without Hearing by Reason of Admissions.
Filed November 24, 2006.

PADA – Admission – Failure to pay, no defense to – Willful – No pay status.

Kristna Ramarju for Complainant.
Respondent Pro se.
Decision and Order by Administrative Law Judge Jill S. Clifton.

[32]28 U.S.C. § 2344.

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.; hereinafter "PACA") and the regulations promulgated pursuant to the PACA (7 C.F.R. §§ 46.1-46.45), instituted by a Complaint filed on June 6, 2005, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service (hereinafter "Complainant").

Complainant alleged that Respondent Dennis E. Hutchins, an individual doing business as Hutchins Distributing Company (hereinafter "Respondent"), committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to 46 sellers in the amount of $317,520.55 for 175 lots of perishable agricultural commodities that Respondent purchased, received, and accepted in interstate commerce during the period October 2003 through February 2004. Since Respondent's license had terminated due to Respondent's failure to pay the required annual renewal fee, Complainant requested the issuance of a finding that Respondent committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), and order that the facts and circumstances be published. Complainant has filed a Motion for a Decision Without Hearing by Reason of Admissions pursuant to section 1.139 of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.139; hereinafter "Rules of Practice").

On August 5, 2005, Respondent, acting through counsel, filed an Answer to Complaint admitting that Respondent failed to make full payment promptly to the 46 sellers listed in the Complaint for produce purchases. (Answer ¶ 4.) Respondent set forth no defenses to the nonpayment allegations in the Complaint, nor did he make any assertion that he had achieved compliance with the PACA. However, Respondent did deny that his failures to pay were intentional, willful, or flagrant. (*Id.*)

Respondent's failures to pay are willful, flagrant, and repeated as a matter of law. A finding of repeated violations is warranted when there are multiple, non-simultaneous violations of the PACA. *See Zwick v. Freeman,* 373 F.2d 110, 115 (2d Cir. 1967); *In re: Scarpaci Bros.*, 60 Agric. 874, 882 (2001); *In re: Five Star Food Distribs., Inc.*, 56 Agric. Dec. 880, 895 (1997). Whether a violation is flagrant is determined by looking at "the number of violations, the amount of money involved, and the lengthy time period during which the violations occurred." *In re: Five Star Food Distribs., Inc.*, 56 Agric. Dec. at 895; *see also Reese Sales Co. v. Hardin,* 458 F.2d 183, 185, 187 (9th Cir. 1972) (finding that a respondent who failed to pay $19,059.08 to nine sellers involving 26 separate transactions over two and one-half months committed repeated

and flagrant violations of the PACA). Decisions have held "that whenever the total amount due and owing for produce exceeds $5,000, an order should be entered finding the indebted produce dealer to have committed a flagrant violation of the Act." *In re: Veg-Mix., Inc.*, 48 Agric. Dec. 595, 599 (1989) *(citing Fava & Co.*, 46 Agric. Dec. 79, 81 (1984)). By failing to pay $317,520.55, a sum well over $5,000, to 46 sellers in 175 separate transactions over a five month period, Respondent committed repeated and flagrant violations of the PACA.

The Department's policy regarding willfulness is that "[a] violation is willful under the Administrative Procedure Act, (5 U.S.C. § 558(c)), if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements." *In re: Hogan Distrib., Inc.,* 55 Agric. Dec. 622, 629 (1996). Willfulness is determined by looking at a respondent's violations of PACA provisions and the Regulations, the length of the time period in which the violations occurred, and the number and total dollar amount of the transactions at issue. *In re: Scamcorp, Inc.*, 57 Agric. Dec. 527, 552-53 (1998). Based on the large number of transactions, the size of the debt, and the continuation of these violations over a five month period, Respondent knew or should have known that he could not make full payment promptly for the large amount of produce that he ordered. As a licensee under the PACA since 1989 (Compl. ¶ II(b).; Answer ¶ 3.), "Respondent was aware of the requirements of the PACA, or should have been aware of the requirements of the PACA, yet [he] continued to buy, knowing that each purchase would result in another violation." *In re: PMD Produce Brokerage Corp.*, 60 Agric. Dec. 780, 789 (1991); *see also* 7 C.F.R. § 46.26 ("The responsibility is placed on each licensee to fully perform any specification or duty, express or implied, in connection with any transaction handled subject to the Act."). Under these circumstances, Respondent intentionally violated the PACA and operated in careless disregard of the payment requirements of the PACA. *See In re: Tolar Farms and/or Tolar Sales, Inc.*, 57 Agric. Dec. 775, 782-83 (1998) (finding that a respondent who failed to pay seven sellers for 46 lots of produce totaling $192,089.03 over a three month period committed willful violations by both intentionally violating the PACA and acting in reckless disregard of its payment requirements); *In re: Five Star Food Distribs., Inc.*, 56 Agric. Dec. at 896-97 (finding that a respondent who failed to pay 14 sellers for 174 lots of produce totaling $238,374.08 over an 11 month period committed willful violations by both intentionally violating the PACA and acting in reckless disregard of its payment requirements).

The Secretary's policy with respect to admissions in PACA disciplinary cases in which a respondent is alleged to have failed to make full payment promptly for produce purchases is as follows:
In any PACA disciplinary proceeding in which it is alleged that a respondent has failed to pay in accordance with the PACA and respondent admits the material allegations in the complaint and makes no assertion that the respondent has achieved full compliance or will achieve full compliance with the PACA within 120 days after the complaint was served on the respondent, or the date of the hearing, whichever occurs first, the PACA case will be treated as a "no-pay" case. In any "no-pay" case in which the violations are flagrant or repeated, the license of a PACA licensee, shown to have violated the payment provisions of the PACA, will be revoked.

In re: Scamcorp, Inc., 57 Agric. Dec. at 562 n.13. In this instance, Respondent has admitted in his Answer that he has failed to pay the 46 sellers referenced in the Complaint for the produce that he purchased, and over 120 days have elapsed since the service of this Complaint without any assertion from Respondent that he has achieved compliance with the requirements of the PACA. Therefore, this case must be treated as a "no-pay" case, which warrants the revocation of Respondent's license. *See id*. However, since Respondent's license was terminated due to his failure to pay the required annual renewal fee, the appropriate sanction is a finding that Respondent committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), and the publication of the facts and circumstances of the violations. *E.g., In re: D & C Produce, Inc.*, 62 Agric. Dec. 373, 379 (2002); *In re: Scarpaci Bros.*, 60 Agric. Dec. at 886; *In re: Hogan Distrib., Inc.*, 55 Agric. Dec. at 633.

Based on careful consideration of the pleadings and the precedent cited by the parties, Complainant's Motion for a Decision Without Hearing by Reason of Admissions is granted and the following Decision and Order is issued in the disciplinary case against Respondent 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. Dennis E. Hutchins is an individual doing business as Hutchins Distributing Company (hereinafter "Respondent"), a company organized and existing under the laws of the state of Oklahoma. Respondent's business mailing address for Hutchins Distributing Company was 3632 NW 51st Street, Suite 208, Oklahoma City, Oklahoma 73112-5672.

Respondent's mailing address, through counsel, is c/o Gary D. Hammond, Hammond & Associates, P.L.L.C., 1320 E. 9th Street, Suite 4, Edmond, Oklahoma 73034.

2. At all times material herein, Respondent was licensed under the provisions of the PACA. License number 19891585 was issued to Respondent on July 18, 1989. This license was suspended on February 6, 2004, when Respondent failed to satisfy a reparation order. This license subsequently terminated on July 18, 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. Respondent failed to make full payment promptly to 46 sellers in the amount of $317,520.55 for 175 lots of perishable agricultural commodities that Respondent purchased, received, and accepted in interstate commerce during the period October 2003 through February 2004.

Conclusions

Respondent's failure to make full payment promptly with respect to the transactions referred to in Findings 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 is found to have committed willful, flagrant, and repeated violations of section 2(4) of the PACA (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 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139, 1.145).

Copies hereof shall be served upon the parties.

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In re: LUSK ONION, INC.
PACA Docket No. D-06-0007.
Decision and Order Based upon Admissions.
Filed November 29, 2006.

PACA – Admission of monies owed– Bankruptcy not a bar to sanction.

Gary Ball for Complainant.
Respondent Pro se.
Decision and Order by Administrative Law Judge Peter M. Davenport.

Decision Without Hearing Based on Admissions

In this disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (hereinafter, "PACA"), Complainant has filed a Motion for Decision Without Hearing Based on Admissions, pursuant to section 1.139 of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary (7 C.F.R. § 1.139) (hereinafter, "Rules of Practice").

This proceeding was initiated by a complaint filed on March 14, 2006, alleging that Respondent committed willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to two sellers in the amount of $256,943.25 for 43 lots of perishable agricultural commodities that Respondent purchased, received and accepted in interstate commerce. Respondent accepted produce shipments from September 2004 through March 2005 with payments due during the period of October 2004 through April 2005. The Complaint requested the issuance of a finding that Respondent committed willful, repeated and flagrant violations of section 2(4) of the PACA and the revocation of Respondent's PACA license.

Respondent, through counsel, filed an answer admitting the jurisdictional allegations of the Complaint. In the Answer, Respondent admitted that the two sums owed to two produce suppliers alleged in the Complaint have not been paid. Respondent further admitted a Voluntary Petition filed pursuant to a Chapter 11 bankruptcy proceeding, that it owes the two produce sellers listed in the Complaint a total of $225,076.25.

Respondent's actions were willful, repeated, and flagrant as a matter of law. A violation is willful under the Administrative Procedure Act (5 U.S.C. § 558(c)) if a prohibited act is done intentionally, irrespective of evil intent, or if it is done with careless disregard of statutory requirements. *In re: PMD Produce Brokerage Corp.*, 60 Agric. Dec 780 (2001). *See also Cox v. United States Department of Agriculture*, 925

F. 2d 1102 (8th Cir. 1991). Respondent knew, or should have known, that it could not make full payment promptly for the large amounts of perishable agricultural commodities it ordered, yet Respondent continued to make purchases. Respondent was aware of, or should have been aware of, the payment requirements of the PACA, yet continued to buy, knowing that each purchase would result in another violation. Under these circumstances, Respondent intentionally violated the PACA and operated in careless disregard of the payment provisions of the PACA.

The violations were flagrant due to the number of violations, the amount of money involved and the length of time over which the violations occurred. As stated in *In re: Veg-Mix, Inc.,* 48 Agric. Dec. 595, 599 (1989), "[Relevant decisions] hold that whenever the total amount due and owing exceeds $5,000, an order should be entered finding the indebted produce dealer to have committed a flagrant violation of the Act." *Id. (citing In re: Fava & Co.,* 46 Agric. Dec. 79, 81 (1984)). Because Respondent's failure to pay violations involve numerous, non-simultaneous instances, they are also repeated. *See, e.g., Zwick v. Freeman*, 373 F.2d 110, 115 (2d Cir. 1967).

The Department's policy in PACA disciplinary cases with respect to the alleged failure to make full payment promptly is set forth in *In re: Scamcorp, Inc*., 57 Agric. Dec 527, 549 (1988), as follows:

> "In any PACA disciplinary proceeding in which it is alleged that a respondent has failed to pay in accordance with the PACA and respondent admits the material allegations in the complaint and makes no assertion that the respondent has achieved full compliance or will achieve full compliance with the PACA within 120 days after the complaint was served on the respondent, or the date of the hearing, whichever occurs first, the PACA case will be treated as a "no-pay" case. In any "no-pay" case in which the violations are flagrant or repeated, the license of a PACA licensee, shown to have violated the payment provisions of the PACA, will be revoked.

Respondent has admitted in its Answer that it failed to pay the sellers the amount alleged in the Complaint, and confirmed through its Chapter 11 bankruptcy filing that it failed to pay produce creditors in amounts similar to the amounts alleged in the Complaint. Because 120 days have elapsed since the service of the Complaint, without any assertion from Respondent that it has achieved compliance with the requirements of the PACA, this case must be treated as a "no-pay" case, which warrants the

revocation of Respondent's PACA license. Since Respondent's license terminated pursuant to section 4(a) of the PACA (7 U.S.C. § 499(a)), Complainant requests a finding of willful, repeated, and flagrant violations of the Act and the publication of the facts and circumstances of the violations.

Based on careful consideration of the facts of this case and relevant precedent, Respondent's admissions in both its Answer and bankruptcy filing warrant the immediate issuance of a Decision Without Hearing Based on Admissions.

Finding of Fact

1. Respondent, Lusk Onion, Inc., is a corporation organized and existing under the laws of the State of New Mexico. Respondent's business mailing address is 5700 Mabry Drive, Clovis, New Mexico 88101.

2. At all times material herein, Respondent was licensed under the provisions of the PACA. License number 1988-0844 was issued to Respondent on March 15, 1988. Based on Respondent's bankruptcy adjudication, in accordance with section 4(e) of the Act, Respondent's license was terminated on August 1, 2006.

3. Respondent filed a bankruptcy schedule, Schedule F- Creditors Holding Unsecured Non-Priority Claims, in which Respondent admitted that it owes both sellers named in paragraph III of the Complaint a total of $255,076.25.

4. Respondent failed to make full payment promptly to two sellers in the amount of $256,943.25 for lots of perishable agricultural commodities that Respondent purchased, received and accepted in interstate commerce during the period September 2004 through March 2005.

Conclusions

Respondent's failure to make full payment promptly with respect to the transactions referred to in Finding of Fact 4 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 is found to have committed willful, repeated and flagrant violations of section 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)), and the facts and circumstances of the PACA violations shall be published.

Pursuant to the Rules of Practice governing procedures under the PACA, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139, 1.145).

Copies hereof shall be served upon the parties.

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PERISHABLE AGRICULTURAL COMMODITIES ACT

REPARATION DECISIONS

STEVE ALMQUIST d/b/a STEVE ALMQUIST SALES & BROKERAGE V. MOUNTAIN HIGH POTATOES & ONION, INC.
PACA -R-05-095.
Decision and Order.
Filed July 26, 2006.

PACA-R - Reparations – Jurisdiction - Interstate Commerce- Movement of a commodity across a state border not a prerequisite.

Respondent, located in Oregon, purchased one trucklot of onions from Complainant, whose business was located in the southern part of California. Complainant arranged for the shipment to be sent from Brawley, California to Respondent's customer located in Bakersfield, California.
The jurisdictional prerequisite of interstate commerce was found even though the commodity never physically left the state of California during the course of this transaction. When parties to a transaction are located in different states PACA jurisdiction exists even if there is no evidence that the commodity physically crossed a state line. Additional factors, including the type of commodity shipped, the interstate nature of the businesses involved, and the contemplation of interstate commerce, combined with the PACA's status as remedial legislation to be broadly interpreted, contributed to a finding of interstate commerce jurisdiction.

Presiding Officer Gary Ball.
Decision and Order by Judicial Officer, William G. Jenson.

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter referred to as the Act. A timely Complaint was filed with the Department within nine months of the accrual of the cause of action, in which Complainant seeks an award of reparation in the amount of $1,350.00 in connection with the sale of one trucklot of onions.
Copies of the Report of Investigation prepared by the Department were served upon the parties. A copy of the formal complaint was served upon Respondent which filed an Answer thereto, denying liability to Complainant.

The amount claimed in the formal Complaint does not exceed $30,000.00, and therefore the documentary procedure provided in 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 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, and to file Briefs. Complainant filed an Opening Statement and a Statement in Reply. Respondent filed an Answering Statement. Neither party elected to submit a Brief.

Findings of Fact

1. Complainant is an individual, Steve Almquist, doing business as Steve Almquist Sales & Brokerage, whose post office address is 14510 S. Broadway, Blythe, California 92226.
2. Respondent, Mountain High Potato & Onion, Inc., is a corporation whose post office address is 440 McVary Heights Drive, N.E., Kaizer, Oregon 97303. At the time of the transaction involved herein, Respondent was licensed under the Act.
3. On or about May 6, 2004, Complainant, by oral contract, sold to Respondent, and shipped from loading point in Brawley, California, to Respondent's customer in Bakersfield, California, 250-50 lb. bags of medium white onions at $5.75 per bag, or $1,437.50, and 200-50 lb. bags of medium white onions at $5.75 per bag, or $1,150.00, for a total f.o.b. contract price of $2,587.50.
4. On May 13, 2004, Respondent issued a ATrouble Notification@ for the onions mentioned in Finding of Fact 3, advising Complainant to re-invoice for the onions at a price of $2.75 per bag, net f.o.b., to account for market decline.
5. On June 4, 2004, Respondent paid Complainant $1,237.50 for the onions with check number 09747, based on a price of $2.75 per bag.
6. The informal complaint was filed on September 23, 2004, which was within nine months after the cause of action alleged herein accrued.

Conclusions

Complainant brings this action to recover the unpaid balance of the agreed purchase price for one trucklot of onions sold to Respondent. Complainant states that Respondent accepted the onions in compliance with the contract of sale, but that he has been paid only $1,237.50 of the agreed purchase price of $2,587.50. In response to Complainant's allegations, Respondent submitted a sworn Answer wherein it admits purchasing the onions for the amount claimed, but alleges that, following delivery, the parties orally agreed to modify the terms of the original sales contract. Respondent asserts that the oral agreement was

to reduce the sales price per bag from $5.75 to $2.75 to account for a significant decline in the market price of white onions.

Before considering the merits of this claim the Department must establish whether it has jurisdiction, under the Act, over the disputed transaction. Relevant to establishing the existence of jurisdiction in this case, we must determine whether the subject transaction was in interstate commerce. The term "interstate commerce" is defined in section 1 of the Act as: "...commerce between any State or Territory, or the District of Columbia and any place outside thereof; or between points within the same State or Territory, or the District of Columbia but through any place outside thereof; or within the District of Columbia." (7 U.S.C.§ 499a (3)).

Under the same section the Act states:

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

(7 U.S.C.§ 499a (8))

As an initial matter, the jurisdictional question in this case can be readily resolved by looking at the business transaction that gave rise to this dispute. Respondent, located in Oregon, entered into an agreement with Complainant, located in California, to purchase a load of onions.[1] (Answer at 1). *In Tulelake Potato Distributors, Inc. v. John M. Guistino, d/b/a Grand Slam Produce,* 52 *Agric. Dec*. 752, 757 (1993), the Department established that: "[w]hen the parties to a transaction are in different states, the purchase or sale transaction is in interstate commerce even if there is no evidence that the commodity physically

[1] Though Respondent apparently has business locations in Oregon, California, and Idaho, the subject transaction was entered into out of Respondent's Keizer, Oregon office.

crossed a state line." Under *Tulelake*, because the Complainant and Respondent were in two different states when they entered into their transaction, the shipment resulting from that transaction is deemed to be in interstate commerce, regardless of whether it actually moved between states.

While the interstate nature of the transaction itself triggers Departmental interstate commerce jurisdiction, there are a number of other elements of this transaction that cause this shipment to come under PACA jurisdiction.

It is reasonable to conclude that the shipment in this case was made in the course of interstate commerce. The Respondent is a PACA licensee and appears to regularly conduct business in interstate commerce. This transaction was arranged between offices in California and Oregon, and the record indicates that a subsequent transaction between the Complainant and Respondent involved a shipment to Saskatchewan, Canada. (Answer Ex. 5) Additionally, this transaction involves onions, a commodity that regularly moves in interstate commerce. These factors, combined with the fact the Respondent has business locations in three different states, reasonably indicates that the Respondent does a significant part of its business in interstate commerce. Under the D.C. Circuit court's decision in *The Produce Place v. United States Department of Agriculture,* 319 U.S. App. D.C. 369 (1996), the Department need only show that the commodity was of the type that regularly moves in interstate commerce and was shipped to or from a dealer that does a substantial portion of its business in interstate commerce. The transaction between Complainant and Respondent satisfies both of these jurisdictional elements and, thus, properly falls within the Department's jurisdiction under the Act.

The jurisdictional issue in this matter was only briefly addressed by the Complainant and Respondent. In his Complaint, Complainant asserts that the agreement to sell to the Respondent and the subsequent shipment under that agreement were made "in the contemplation and the course of interstate commerce." (Complaint at 1) As discussed above, if this contemplation were reasonably held by the Complainant, then this shipment can be fairly considered to have been "in commerce" for the purpose of establishing Departmental jurisdiction under the Act.

Respondent acknowledges Complainant's interstate commerce claim in its Answer, but provides very little in the way of amplifying information or persuasive argument on the matter. Respondent states: "the load of onions never moved into or out of the State of California therefore was not in the course of interstate commerce." (Answer at 1) As noted

above, in *The Produce Place*, the U.S. Court of Appeals for the D.C. Circuit made it quite clear that actual movement between states is not required for PACA jurisdiction to exist. Likewise, the notion that "limiting the provisions of PACA to commodities that have physically crossed state lines, or to situations where the parties specifically envisioned such a crossing" has been soundly rejected. *Fishgold v. Onbank & Trust Co*., 43 F. Supp. 2d 346 (1999). Without some additional information suggesting that the transaction in question was not entered into in the course of interstate commerce, we are not persuaded by Respondent's argument.

Given all of the information above, it was reasonable for the Complainant to view the Respondent's company as an interstate business, and it was similarly reasonable for him to conclude that the transaction in question would be considered "in commerce" as defined by the PACA. The sale in this case was not explicitly "for shipment to another State" and, therefore, is not covered by that portion of the definition of interstate commerce requiring such actual interstate movement. However, this shipment would be within our jurisdiction if it were made in contemplation of interstate commerce. The Department has determined that the provisions of the PACA apply to intrastate transactions that contemplate future movement in interstate commerce. *Bacon Brothers v. Cad Heaton Fruit Co*., 5 *Agric. Dec*. 547 (1946). Based on this concept, it is now well settled that any transaction in which interstate movement is contemplated is considered in interstate commerce under the PACA. *Tulelake* at 757.

The bill of lading for the shipment shows that the Complainant sourced the onions from a shipper located in Brawley, California, and that the onions were destined for Respondent's customer in Bakersfield, California. (Complaint Ex. 4) The record in this proceeding does not reveal the place of origin of this commodity, nor does it tell us the ultimate destination of the 450 bags of onions in this shipment. The record does show that the Complainant, located in California, and the Respondent, located out-of-state in Keizer, Oregon, entered into an agreement for the sale of produce. (Complaint at 1; Answer at 1) Respondent, according to its own letterhead, operates a multi-state business having its main office in Oregon and additional operations in Idaho and California. (See Respondent correspondence dated 7/2/2004 & 10/12/2004 in ROI) The Department's decision in *Tulelake* states: "[t]he Department reasoned that if a party sells a commodity to someone who does business in other states, the selling party could not argue that it was sold without contemplating interstate commerce." *Tulelake* at 756-757 (referencing *Troyer v. Blue Star Potato Chip Corp*., 27 *Agric. Dec*. 301 (1968)). Because Complainant entered into a transaction with

a business operating in several different states, under Tulelake, it is reasonable to conclude that the Complainant, arranged and dispatched this produce shipment "in contemplation of interstate commerce." In addition to finding jurisdiction based on the interstate nature of the sales transaction, there is ample evidence to find, as asserted in Complainant's sworn Complaint, that the transaction was entered into in contemplation of interstate commerce under the Act. As such, the Complainant may rightly make use of the protections afforded him by the PACA, and the Department may properly exercise its jurisdiction in resolving this matter.

The basic facts regarding the transaction between Complainant and Respondent are fairly simple and are not in controversy. The Complainant and Respondent agree that 450 bags of onions of the kind, quality, and size called for under the contract were delivered to, and accepted by, the Respondent. (Answer at 1-2) Having accepted the produce, Respondent became liable for the full purchase price thereof, less any damages resulting from any breach of warranty by Complainant. *Norden Fruit Co. v. E D P Inc*., 50 *Agric. Dec*. 1865 (1991); *Granada Marketing Inc. v. Jos. Notarianni & Co.*, 47 *Agric. Dec*. 329 (1988); *Jerome M. Mathews v. Quong Yuen Shing & Co.*, 46 *Argic. Dec*. 1681 (1987). Respondent does not allege a breach by Complainant. As previously stated, the dispute between the Complainant and Respondent revolves around a conversation that took place between Complainant's sales representative, Mike Cyr, and Respondent's sales representative, Lance Renfrow, after the delivery and acceptance of the shipment in question. Keeping in mind that the party alleging the modification of original contract terms has the burden of proof in establishing its existence, the essential question in this case is whether the conversation between the two sales representatives effectively modified the original contract. *F. H. Hogue Produce Company v. M. Singer's Sons Corp*., 33 *Agric. Dec*. 451 (1974).

Respondent's President, Paul B. Butler, filed the sworn Answer to the formal Complaint. Mr. Butler does not assert that he was personally involved in this particular produce transaction. With respect to the contract terms, the Respondent's Answer asserts that three days after the shipment was accepted, "Respondent's salesman, Lance Renfrow, and Complaint's salesman, Mike Cyr, verbally agreed to modify the terms of the original sales contract and reduce the sales price from $5.75 per sack to $2.75." (Answer at 2) According to Mr. Butler, Mr. Cyr consented to this reduction based on Respondent's agreeing to purchase additional loads at $2.75 per sack. In the Answer, Mr. Butler

additionally states that sales representative Renfrow "confirmed the adjustment on the first load in writing by faxing to Complainant a memorandum showing the agreed upon price and the reason for the adjustment."

As its Opening Statement, Complainant submitted a sworn affidavit of his sales associate, Mike Cyr. Mr. Cyr confirms that he negotiated the contested sales transaction with Respondent's sales representative, Lance Renfrow. (Opening Statement at 1) Mr. Cyr states that, while he discussed the possibility of making a market-decline adjustment on the load shipped to the Respondent, no such adjustment was promised or granted. (Opening Statement at 2) Mr. Cyr asserts that he told Respondent's sales representative, Lance Renfrow, that, "if [Mr. Renfrow] would order another load for the same customer; [he] would consider adjusting this particular invoice." Mr. Cyr goes on to state that because Mr. Renfrow did not order another load for that customer, no adjustment was granted on the previous contract. Mr. Cyr further points out that there is nothing documented in the record indicating that the adjustment alleged by the Respondent was ever actually granted. There is no indication that Mr. Cyr dealt with anyone at Respondent's business other than Lance Renfrow.

In its Answering Statement, Respondent's President, Paul Butler points out that the market was in decline around the time of this transaction, that Complainant's sales representative did grant market declines for some contracts, and that there was a post-delivery discussion between the two sales representatives about market adjustments. (Answering Statement at 1) Respondent also notes that it has submitted a "Trouble Memo detailing the adjustment and fax logs confirming the memo was sent...." (Answering Statement at 1)

In Complainant's Statement in Reply, Complainant's sales associate, Mike Cyr, points out two significant facts. First, Mr. Cyr notes that, though he dealt with Lance Renfrow on the disputed shipment, Respondent did not submit any evidence from Mr. Renfrow regarding the contract modification allegedly agreed to by the two sales representatives. Second, Mr. Cyr denies receiving any trouble memo from the Respondent and notes that there is nothing in the record indicating that Mr. Cyr agreed to a post-delivery price reduction on the shipment in question. (Statement in Reply at 1-2)

Respondent contends that Mr. Cyr and Mr. Renfrow agreed to an oral modification that reduced Respondent's obligation under the original contract. Though the Respondent submitted a copy of a trouble memo purportedly sent to the Complainant, there is nothing to suggest that the memo was acknowledged, or agreed to, by the Complainant. (Answer Ex. 2) In fact, the Respondent's trouble notification form has a space

for the recipient to sign in acknowledgment and fax back to Respondent. The copy submitted by Respondent is unsigned and not acknowledged by the Complainant. (Answer Ex. 2). Assertions made by the Respondent that the market was in decline around the time of this transaction, that Complainant"s sales representative did grant market declines for some contracts, and that there was a post-delivery discussion between the two sales representatives about market adjustments are of little assistance in determining the actual existence of an enforceable contract-modifying agreement between Mr. Cyr and Mr. Renfrow.

In claiming the existence of an agreement between two parties, testimony from the parties themselves can be a critical factor in determining whether a binding agreement was or was not reached. *See Senter Bros. v. Rene N. Moreau*, 18 *Agric. Dec.* 145 (1959). While Complainant submitted a sworn affidavit with a first-hand account of the conversation between Mr. Cyr and Mr. Renfrow, Respondent did not put forth testimony from Mr. Renfrow as to the contents of his disputed communication with Mr. Cyr. Because this matter turns on the very contents of the conversation between the two sales representatives, the importance of testimony from Mr. Renfrow cannot be overstated. Because he was not directly involved in the disputed transaction or subsequent communications between the two sales representatives, Mr. Butler's statements are not of his own knowledge and should be afforded very little weight. Applying case precedent to this dispute we can conclude, with regard to Mr. Butler's testimony, that "[i]n the absence of written testimony by [Mr. Renfrow] or any other person having actual knowledge of the facts, such statements are insufficient to satisfy respondent's burden of proof with respect to proving his allegations." *Id*. at 147.

The Respondent has failed to meet its burden in proving the existence of a modification of the original contract. Therefore, Respondent is obligated to perform in accordance with the original contract terms.

The Complainant was due a total of $2,587.50 under the terms of the contract with Respondent. Respondent paid Complainant $1,237.50 of that amount on June 4, 2004. Therefore, Respondent owes Complainant the difference between these two sums, or $1,350.00.

Respondent's failure to pay Complainant $1,350.00 is a violation of Section 2 of the Act. Section 5(a) of the Act requires that we award to the person or persons injured by a violation of Section 2 of the Act "the full amount of damages sustained in consequence of such violations." Such damages include interest. *Louisville & Nashville Railroad Co. v.*

Sloss-Sheffield Steel & Iron Co., 269 U.S. 217 (1925); *Louisville & Nashville Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916). Because the Secretary is charged with the duty of awarding damages, he/she also has the duty, where appropriate, to award interest at a reasonable rate as part of each reparation award. ., 62 Agric. Dec. 331, 341-42 (2003); *Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Co.*, 29 Agric. Dec. 978 (1970); *Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335 (1970); *W.D. Crockett v. Producers Marketing Ass'n, Inc.*, 22 *Agric. Dec.* 66 (1963). Interest will be determined in accordance with the method set forth in 28 U.S.C. § 1961, i.e., the rate of interest will equal the weekly average one-year constant maturity treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week ending prior to the date of the Order.

Complainant was required to pay a $300.00 handling fee to file its formal Complaint. Pursuant to 7 U.S.C. § 499e(a), the party found to have violated section 2 of the Act is liable for any handling fees paid by the injured party.

Order

Within 30 days from the date of this Order Respondent shall pay to Complainant, as reparation, $1,350.00 with interest thereon at the rate of 5.22% per annum from June 1, 2004, until paid, plus the amount of $300.00.

Copies of this Order shall be served upon the parties.

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AMERIFRESH, INC., V. WILLIAMS AG COMMODITIES BROKERAGE, INC.
PACA Docket No. R-05-076.
Decision and Order.
Filed October 31, 2006.

PACA-R – Jurisdiction –-Interstate Commerce.

Where there is no indication that the commodity involved in the complaint ever physically crossed state lines, the transaction is nevertheless considered as entering the current of interstate and foreign commerce where the commodities involved are commodities that commonly move in interstate commerce, and where the parties involved regularly engage in interstate purchases and sales of produce.

Presiding Officer Patricia Harps.
Decision and Order by Judicial Officer, William G. Jenson..

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.), hereinafter referred to as the Act. A timely complaint was filed with the Department within nine months of the accrual of the cause of action, in which Complainant seeks a reparation award against Respondent in the amount of $3,000.00 in connection with one trucklot of cherries shipped in the course of interstate commerce.

Copies of the Report of Investigation prepared by the Department were served upon the parties. A copy of the formal Complaint was served upon the Respondent, which filed an Answer thereto, denying liability to Complainant.

The amount claimed in the formal Complaint does not exceed $30,000.00. Therefore, the documentary procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered part of the evidence of the case, as is the Department's Report of Investigation. In addition, the parties were given the opportunity to file evidence in the form of verified statements and to file briefs. Complainant filed an Opening Statement and a Statement in Reply. Respondent filed an Answering Statement. Respondent also submitted a Brief.

Findings of Fact

1. Complainant, Amerifresh, Inc., is a corporation whose post office address is 4025 Delridge Way S.W., Suite 550, Seattle, Washington, 98106. At the time of the transaction involved herein, Complainant was licensed under the Act.
2. Respondent, Williams AG Commodities Brokerage, Inc., is a corporation whose post office address is 698 Anita Street #A, Chula Vista, California, 91911-4020. At the time of the transaction involved herein, Respondent was licensed under the Act.
3. On or about May 4, 2004, Complainant, by oral contract, sold to Respondent, and shipped from loading point in the state of California, to Respondent in Chula Vista, California, 300 cartons of cherries at $10.00 per carton, for a total f.o.b. contract price of $3,000.00.
4. On May 6, 2004, Respondent sold and shipped the cherries mentioned in Finding of Fact 3 to Premier Produce Company, Inc., who reported selling the cherries for gross proceeds of $1,300.00, $800.00 of

which was returned to Respondent as the net proceeds from the resale.
5. Respondent has not made any payments to Complainant toward the agreed purchase price of the cherries.
6. The informal complaint was filed on August 7, 2004, which is within nine months from the accrual of the cause of action.

Conclusions

Complainant brings this action to recover the agreed purchase price for one trucklot of cherries sold and shipped to Respondent. Complainant states Respondent accepted the cherries in compliance with the contract of sale, but that it has since failed, neglected and refused to pay Complainant the agreed purchase price of $3,000.00. In response to Complainant's allegations, Respondent submitted a sworn Answer wherein it admits purchasing the cherries for the amount claimed, but alleges that Complainant breached the contract by shipping 300-18 pound cartons of "bulk double cc" cherries, rather than the 300 cartons of "11 row USA-A" 20-pound cartons of cherries called for in the contract of sale.

Before we consider Respondent's allegation of a breach of contract on the part of Complainant, we must first consider whether the Department has jurisdiction to adjudicate this claim.[1] Although Complainant is headquartered in the state of Washington, it secured the cherries through its branch office located in the state of California, from Grower Direct Marketing, LLC, of Stockton, California. Complainant then resold the cherries to Respondent, who is also located in California, and shipped the cherries to Respondent's customer, Produce Plus, in Chula Vista, California. This means that the shipment of cherries from Complainant to Respondent's customer never physically left the state of California. Goods must be sold in or in contemplation of interstate [or foreign] commerce for this forum to have jurisdiction. *Miller Farms & Orchards v. C.B. Overby*, 26 *Agric. Dec.* 299 (1967).

The term "interstate or foreign commerce" is defined in the Act (7 U.S.C. § 499a (3)), as meaning:

…commerce between any State or Territory, or the District of Columbia and any place outside thereof; or between points within the same State or Territory, or the District of Columbia but through any place outside thereof; or within the District of Columbia.

Section 1(a)(8) of the Act provides further that:

[1] Jurisdictional issues are raised by the Secretary *sua sponte*. *DeBacker Potato Farms, Inc. v. Pellerito Foods, Inc*., 57 Agric. Dec. 770 (1998); *Provincial Fruit Company Limited v. Brewster Heights Packing, Inc*., 39 Agric. Dec. 1514 (1980).

… a transaction in respect of any perishable agricultural commodity shall be considered in interstate or foreign commerce if such commodity is part of that current of commerce usual in the trade in that commodity whereby such commodity and/or the products of such commodity are sent from one State with the expectation that they will end their transit, after purchase, in another … (7 U.S.C. § 499a (8)).

As we mentioned, the cherries were shipped to a receiver located in Chula Vista, California, which is near the California border with Mexico. Based on the receiver's close proximity to Mexico, the parties could reasonably expect that at least some of the fruit would be purchased and carried across the border into Mexico. This expectation is sufficient to establish that the cherries were shipped in contemplation of interstate or foreign commerce. Moreover, the fact that cherries regularly move in interstate commerce, and that the parties involved regularly engage in interstate purchases and sales of produce, suggests that the cherries entered the "current of commerce" mentioned in the statute. On this basis we conclude that the transaction was in interstate or foreign commerce, and that the Secretary therefore has jurisdiction to consider this claim.

There is no dispute that Respondent accepted the subject load of cherries. 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). Where goods are accepted the buyer has the burden of proof to establish a breach of contract. See UCC 2-607(4). See also *The Grower-Shipper Potato Co. v. Southwestern Produce Co.*, 28 *Agric. Dec*. 511 (1969).

As we mentioned, Respondent alleges that Complainant breached the contract by shipping 300-18 pound cartons of "bulk double cc" cherries, rather than the 300 cartons of "11 row USA-A" 20-pound cartons of cherries called for in the contract of sale. The record contains a sworn statement from Respondent's Mr. Clint Williams[2], wherein Mr. Williams asserts, in pertinent part, as follows:

On May 5, 2004 Williams AG had ordered and picked up 11 Row Cherries. Williams AG unloaded cherries May 6th and called Jim Anderson at Amerifresh/Fresno and reported problems. Spur, doubles and decay were factors. Jim Anderson advised work for Grower's

[2] See Report of Investigation, Exhibit Nos. 4a and 4b.

account.

Complainant's Sales Associate Mr. James M. Anderson, in an affidavit submitted as Complainant's Opening Statement, states that when he described the cherries to Respondent's Clint Williams, he advised that the cherries had doubles and spurs. Mr. Anderson states that if nothing else, this is evidenced by the $10.00 per carton sales price, since 11-row cherries were selling for $30.00 to $33.00 per carton on the Los Angeles Wholesale Market at the time of sale. Mr. Anderson also denies receiving timely notice from Respondent of the alleged breach.

Upon review, we note first that the evidence submitted by Respondent is insufficient to establish that Complainant authorized Respondent to handle the cherries for Complainant's account. The only proof submitted by Respondent in this regard is the sworn allegation of Mr. Clint Williams that he received such authorization from Complainant's James Anderson. This allegation is, in effect, denied by Mr. Anderson in an affidavit submitted as Complainant's Statement in Reply, wherein Mr. Anderson denies receiving verbal or written notice regarding any problems with the cherries and states the telephone conversations he had with Mr. Williams during the time period in question regarded a problem with a load of onions shipped to Canada. The record also fails to substantiate Respondent's allegation of a breach of contract by Complainant. While we note that the passing issued by Complainant describes the packaging of the cherries as "20# CTN" and the size as "11 ROW,"[3] whereas the bill of lading describes the cherries as "BULK 18 DBL CC,"[4] Respondent has not complained that the cherries were not shipped in the correct packaging, or that they were not the correct size. Rather, Respondent asserts that the cherries had doubles, spurs and decay. Complainant has acknowledged that the cherries had spurs and doubles. Complainant also alleges that Respondent was aware of these defects at the time of sale. Respondent denies this allegation. Nevertheless, spurs and doubles are considered quality or "grade" defects, which are only applicable where goods are sold with a U.S. Grade specification, and there is no indication in the record that a U.S. Grade was specified in the contract in question. An exception is made where the quality defects are so severe so as to establish that the goods were not merchantable at the time of shipment;[5]

[3] See Formal Complaint, Exhibit No. 2.

[4] See Formal Complaint, Exhibit No. 3.

[5] See, e.g., *Martori Bros. Distributors v. Olympic Wholesale Produce & Foods, Inc.*, 53 *Agric. Dec*. 887 (1994), where a timely inspection showing 37% quality defects in broccoli in the form of hollow stem, with a range of 7 to 79%, was held to show a

(continued...)

however, Respondent did not secure a USDA inspection to show the extent to which the cherries were affected by doubles and spurs. Without an inspection, there is also no proof to substantiate Respondent's allegation that the cherries were affected by decay.

Having failed to sustain its burden to prove a breach of contract on the part of Complainant, Respondent is liable to Complainant for the cherries it accepted at the agreed purchase price of $3,000.00. Respondent's failure to pay Complainant $3,000.00 is a violation of section 2 of the Act. Section 5(a) of the Act requires that we award to the person or persons injured by a violation of section 2 of the Act "the full amount of damages sustained in consequence of such violations." Such damages include interest. *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 at a reasonable rate as a part of each reparation award. 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). The interest that is to be applied shall be determined in accordance with 28 U.S.C. § 1961, i.e., the interest rate shall be calculated at a rate equal to the weekly average one-year constant maturity treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the Order. *PGB International, LLC v. Bayche Companies, Inc.*, PACA Docket No. R-05-118, Order on Reconsideration, 65 *Agric. Dec.* 669 (2006).

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 $3,000.00, with interest thereon at the rate of _____% per annum from June 1, 2004, until paid, plus the amount of $300.00.

Copies of this Order shall be served upon the parties.

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[5](...continued)
breach of the warranty of merchantability where the broccoli was sold f.o.b. without reference to any grade.

VINCENT CHIODO, D/B/A CHIODO FARMS V. FARMING TECHNOLOGY, INC.
PACA Docket No. R-05-132.
Decision and Order.
Filed November 2, 2006.

PACA-R – Jurisdiction-Interstate Commerce.

Where Complainant shipped commodities that commonly move in interstate commerce, and the evidence establishes that the Respondent ships a substantial portion of the produce it purchases in interstate commerce, all of the transactions at issue in the complaint are considered as entering the current of interstate commerce, regardless of whether each individual shipment ever physically crossed state lines. The Secretary is therefore able to exercise P.A.C.A. jurisdiction over the complaint in its entirety.

Goode, Casseb, Jones for Complainant.
Presiding Officer Patricia Harps.
Decision and Order by Judicial Officer, William G. Jenson.

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 $48,654.01, in connection with Complainant's 2003 South Texas potato crop.

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.

Although the amount claimed in the formal Complaint exceeds $30,000.00, the parties waived oral hearing and elected to follow the documentary procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20). 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. Respondent also submitted a Brief.

Following the submission of evidence and briefs, the Department advised Complainant by letter dated December 6, 2005, that a forum selection clause included in the written contract signed by both parties appeared to limit jurisdiction in this case to the civil courts of Harris

County, Texas. Both parties subsequently advised the Department in writing of their intent to waive their right to enforce the forum selection clause in the contract and to submit to the jurisdiction of the Secretary. Accordingly, the case is now ripe for decision.

Findings of Fact

1. Complainant is an individual, Vincent Chiodo, doing business as Chiodo Farms, whose post office address is 1415 County Road 4857, Dilley, Texas, 78017. Complainant is not licensed under the Act.
2. Respondent, Farming Technology, Inc., is a corporation whose post office address is 6950 Neuhaus, Houston, Texas, 77061. At the time of the transactions involved herein, Respondent was licensed under the Act.
3. During the month of January 2003, Complainant and Respondent entered a written contract involving the sale by Complainant to Respondent of Complainant's 2003 South Texas potato crop, the details of which are set forth below:

2003 PURCHASE AGREEMENT
SOUTH TEXAS POTATO CROP

Buyer: Farming Technology, Inc.
6950 Neuhaus
Houston, Texas 77061

Seller: Chiodo Farms
Route 1 Box 28
Dilley, Texas 78017

Variety: Red LaSoda, Yukon Gold, Asterix, and Bildstar Potatoes

Quantity: Approximately 39,000 CWT. of Red LaSodas (approximately 208 acres), 30,000 CWT. of Yukon Golds (approximately 160 acres), 1000 CWT. of Asterix (approximately 5 acres), and 2600 CWT. of Bildstars (approximately 14 acres). Seller agrees to deliver and Buyer agrees to purchase all of the potatoes harvested from all the acreage described above even if those quantities exceed the CWT. listed above.

Delivery Dates: Approximately April 28, 2003 – May 31, 2003 at

Buyer's option provided growing conditions permit.

Grade Standards: 85% or better US #1 – with no more than 15% US #2 – practically no skinning.

Size Standards: Red LaSodas – No minimum diameter with 3 ½ " maximum diameter. All other varieties – 2 " minimum diameter with 3 ½ " maximum diameter.

Price: Red LaSodas – Market price on the date of arrival in Houston, Texas (as determined by price paid by Farming Technology, Inc. on the same date for comparable potatoes).
Yukon Golds, Asterix, and Bildstar potatoes - $10.50 per CWT. fob Dilley, Texas.

Special Terms: (A) Seller will harvest potatoes as per the schedule and instruction of Buyer. Seller agrees to use its best efforts to plant and grow the potatoes such that, to the extent growing conditions permit, the Red LaSodas can be harvested and shipped at the rate of approximately 7,000 CWT. for each of the weeks that begin April 28, 2003, May 5, 2003, and May 12, 2003; at the rate of 11,000 CWT. for the week that begins May 19, 2003, and at the rate of 7,000 CWT. for the week that begins May 26, 2003.

Seller further agrees to use its best efforts to plant and grow the Yukon Golds so they can be harvested at the rate of 10,000 CWT. per week for each of the weeks that begin May 12, 2003, May 19, 2003, and May 26, 2003.

The harvest schedule for the other varieties covered under this Agreement will be based on growing conditions and crop maturity.

Seller warrants that it is capable of harvesting and loading a minimum of 14 trailer loads (450 CWT./load) of potatoes per day. Buyer shall have no obligation to accept any potatoes not harvested by May 31, 2003. Seller agrees to load potatoes on trucks furnished by Buyer and in accordance with Buyer's instructions.

(B) Buyer shall pay Seller within ten (10) days after receipt and acceptance of potatoes and payment shall be based on the weight received in Houston, Texas.

(C) Seller hereby authorizes Buyer to deduct from its

remittance to Seller the cost of the Asterix and Bildstar potatoes provided to Seller at a price of $12.25 per CWT. delivered to Dilley, Texas. Buyer makes no warranty as to the merchantability or fitness of the potatoes sold to Seller and Seller's only remedy shall be a refund of the FOB purchase price paid.

In the event the Parties agree that the growing conditions in the Dilley, Texas area are not suitable for growing one or both of the varieties set out in C above, then the cost of the potatoes provided by Buyer to Seller for the specific variety(ies) that is (are) unsuitable to grow will not be deducted from Seller's payment.

(D) Seller agrees to apply Ridomil, in compliance with the product label for control of Pink Rot and Pythium Leak to all of the potato acreage under this agreement.

(E) Buyer agrees to make its agronomist Dr. Robert Thornton available to Seller to assist in growing the potatoes under this agreement. All costs and expenses of Dr. Thornton will be paid by Buyer.

(F) This Agreement shall be governed by and construed in accordance with the laws of the State of Texas and the applicable laws of the United States of America. This Agreement has been entered into and is performable in Harris County, Texas. Seller hereby irrevocably: (a) submits to the nonexclusive jurisdiction of such courts; and (b) waives any objection it may now or hereafter have as to the venue of any such action or proceeding brought in such court or that such court is an inconvenient forum. Any action or proceeding on this Agreement shall be brought only in a court located in Harris County, Texas.

(G) Any provision of this Agreement which is prohibited or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability without invalidating the remaining provisions of this Agreement, and any such prohibition or unenforceability in any jurisdiction shall not invalidate or render unenforceable such provision in any other jurisdiction.

(H) This Agreement embodies the final, entire agreement among the parties hereto and supersedes any and all prior commitments, agreements, relating to the subject matter hereof and may not be contradicted or varied by evidence or prior, contemporaneous, or

subsequent oral agreements or discussions of the parties hereto. The provisions of this Agreement may be amended or waived only by an instrument in writing signed by the parties hereto.

In witness of their acceptance of all of the terms and conditions of this Purchase Agreement as outlined above, Buyer has indicated acceptance by signing below. This Agreement shall be binding once Seller has indicated acceptance by signing below, provided, however, that Seller must accept and return one (1) copy of this Agreement to Buyer no later than January 24, 2003.

FARMING TECHNOLOGY, INC. BUYER	**CHIODO FARMS, SELLER SELLER**
by: /s/	by: /s/
Date: 9 JAN 2003	Date: 1/21/03

4. Between May 9 and 22, 2003, Complainant shipped seventy loads of potatoes to Respondent, nine of which were rejected, and the remaining sixty-one loads were sold for a total of $141,993.81, according to a "Vendor Account Detail" prepared by Respondent on October 10, 2003 (Formal Complaint Exhibit 9). From the total sales of $141,993.81, Respondent deducted $7,773.00 for the freight expense it incurred in connection with the nine loads of potatoes that were rejected, and $16,229.50 for the cost of the Asterix and Bildstar seed potatoes, and paid Complainant the balance of $117,991.31.
5. The informal complaint was filed on November 26, 2003, which is within nine months from the accrual of the cause of action.

Discussion

This dispute concerns Respondent's liability under a written agreement with Complainant for the purchase of potatoes from Complainant's 2003 South Texas crop. Complainant alleges that Respondent breached the agreement in the following respects: (1) by failing to pay Complainant for potatoes it received and accepted from Complainant in the amount of $35,666.26; (2) by improperly deducting from the remittance to Complainant $16,229.50 for the cost of the Asterix and Bildstar seed potatoes when the parties had previously agreed that the growing conditions in the Dilley, Texas area were not suitable for growing those varieties, in violation of paragraph (C) of the

agreement; and (3) by improperly deducting from the remittance to Complainant freight charges in the amount of $7,773.00, without Complainant's authorization and without any contractual right to do so under the agreement.

Turning first to Complainant's allegation that Respondent failed to pay $35,666.26 for potatoes it received and accepted, Complainant states specifically that Respondent accepted eighteen truckloads of potatoes between May 20 and 22, 2003 (Respondent's purchase order numbers 119481, 119482, 119488, 119489, 119490, 119491, 119510, 119514, 119515, 119521, 119522, 119526, 119533, 119534, 119535, 119536, 119537 and 119554), after which Respondent made a determination of the percentage of damaged potatoes in each shipment and sold the potatoes without paying Complainant for the potatoes purchased.

In response to this allegation, Respondent states in its Answer that during the processing of Complainant's potatoes, Respondent determined that the potatoes involved were not suitable for shipping to destinations beyond a few hundred miles. Respondent states further that it was compelled to use extra labor in order to process the potatoes, and that the sales and shipments of the potatoes were made intrastate to retail customers who used a volume of product and made prompt retail sales. On this basis, Respondent asserts that the transactions were not involved in interstate commerce.

Goods must be sold in or in contemplation of interstate commerce for this forum to have jurisdiction. *Miller Farms & Orchards v. C.B. Overby,* 26 *Agric. Dec.* 299 (1967). Respondent has thus raised a jurisdictional challenge to this portion of Complainant's claim. In response, Complainant submitted additional evidence in the form of an Opening Statement, attached to which are copies of the bills of lading and trucking invoices for all loads of Yukon Gold, Red, and Asterix potatoes shipped from Respondent's facility between May 1 and 31, 2003.[1] Slightly more than half of the bills of lading supplied list consignees located outside the state of Texas.

The Act defines "interstate commerce" as "…commerce between any State or Territory, or the District of Columbia and any place outside thereof; or between points within the same State or Territory, or the District of Columbia but through any place outside thereof; or within the District of Columbia." 7 U.S.C. § 499a(b)(3). The Act also contains a guide to its interpretation:

(8) A transaction in respect of any perishable agricultural commodity shall be considered in interstate or foreign commerce if such commodity

[1]See Opening Statement Exhibit A, pages 1 through 437.

is part of that current of commerce usual in the trade in that commodity whereby such commodity and/or the products of such commodity are sent from one State with the expectation that they will end their transit, after purchase, in another, including, in addition to cases within the above general description, all cases where sale is either for shipment to another State, or for processing within the State and the shipment outside the State of the products resulting from such processing. Commodities normally in such current of commerce shall not be considered out of such commerce through resort being had to any means or device intended to remove transactions in respect thereto from the provisions of this Act. 7 U.S.C. § 499a(b)(8).

The language of the statute has been subject to interpretation in several federal court cases and in published reparation decisions issued by the Department. In *Troyer v. Blue Star Potato*, 27 *Agric. Dec*. 301 (1968), we held that there is interstate commerce when there is evidence that a substantial portion of the buyer's products are eventually sold out of state, even if the commodity subject to the particular transaction in question never left the state. Similarly, in *In re: The Produce Place,* 53 *Agric. Dec*. 1715 (1994), we held that the six shipments of strawberries and raspberries in question entered the current of interstate commerce because: (1) strawberries and raspberries regularly move in interstate commerce; (2) the petitioner regularly engaged in interstate purchases and sales of produce; and (3) some of the strawberries and raspberries were sold to a national hotel chain. On appeal, the D.C. Circuit Court of Appeals concurred, concluding that to establish jurisdiction over a transaction, the Department need only show that the commodity was of the type that regularly moves in interstate commerce and was shipped to or from a dealer that does a substantial portion of its business in interstate commerce. *The Produce Place v. United States Department of Agriculture*, 91 F.3d 173, 175-76 (D.C. Cir. 1996).

The various types of potatoes at issue here regularly move in interstate commerce. Moreover, as we already mentioned, the record contains evidence showing that approximately half of Respondent's business, at least during the time period in question, consisted of shipping potatoes to customers located outside the state of Texas. The same evidence also shows that many of Respondent's customers were large retailers with locations in multiple states. On this basis, we conclude that the preponderance of the evidence supports Complainant's contention that the subject potatoes were sold in the current of interstate commerce. Therefore, the Secretary has jurisdiction to consider Complainant's claim.

There is no dispute that Respondent accepted the eighteen truckloads of potatoes in question. 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). Although Respondent did not supply any evidence of a breach of contract by Complainant with respect to these shipments, Complainant submitted copies of thirty-one USDA inspection certificates for inspections performed at Respondent's place of business[2], five of which pertain to the shipments in question. For those five shipments, the inspection results show that the potatoes failed to meet the grade requirements set forth in the written contract signed by the parties, i.e., the potatoes failed to grade 85% U.S. No. 1 or better due to excessive soft rot. Complainant's failure to ship potatoes in compliance with the contract requirements constitutes a breach of contract for which Respondent is entitled to recover provable damages.

The general measure of damages for a breach of contract 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. UCC § 2-714(2). The value of accepted goods is best shown by the gross proceeds of a prompt and proper resale as evidenced by a proper accounting prepared by the ultimate consignee. Respondent did not submit any accounts of sales or other proof to show the prices at which these potatoes were sold.

Absent an accounting, the value of the goods accepted may be shown by use of the percentage of condition defects disclosed by a prompt inspection. *Fresh Western Marketing, Inc. v. McDonnell & Blankfard, Inc.*, 53 *Agric. Dec.* 1869 (1994).[3] We note, however, that Complainant has based the amount of its claim on the much more generous "percentage write downs" reflected on the accounting prepared by Respondent.[4] Specifically, the record shows that for each of the shipments in question, as well as the other thirteen shipments that comprise this portion of Complainant's claim, Respondent claimed an

[2] See Report of Investigation, Exhibits 1h through 1ll.

[3] See also *South Florida Growers Association, Inc. v. Country Fresh Growers And Distributors, Inc.*, 52 Agric. Dec. 684 (1993); *V. Barry Mathes, d/b/a Barry Mathes Farms v. Kenneth Rose Co., Inc.*, 46 Agric. Dec. 1562 (1987); *Arkansas Tomato Co. v. M-K & Sons Produce Co.*, 40 Agric. Dec. 1773 (1981); *Ellgren & Sons v. Wood Co.*, 11 Agric. Dec. 1032 (1952); and *G&T Terminal Packaging Co., Inc. v. Joe Phillips, Inc.*, 798 F. 2d 579 (2d Cir. 1986).

[4] See Formal Complaint, Paragraph 15.

allowance for the percentage of soft rot in the potatoes, as well as an additional allowance of 50% for heat and water damage.[5] Since Complainant has apparently acquiesced to these allowances, we will determine Respondent's liability for the potatoes accordingly. Moreover, since Complainant applied the allowance to each of the eighteen shipments, including those that were not federally inspected, we will do so as well.

The first and best method of ascertaining the value the goods would have had if they had been as warranted is to use the average price as shown by USDA Market News Service Reports. *Pandol Bros., Inc. v. Prevor Marketing International, Inc*., 49 *Agric. Dec*. 1193 (1990). We look at the Market News prices for the nearest reporting location to the Respondent, which in this case is the Dallas Terminal Market. The reports issued during the time period in question, however, do not show prices for Yukon Gold or Asterix potatoes produced in the state of Texas. Alternatively, we will use the contract price of $10.50 per cwt. as the value these potatoes would have had if they had been as warranted.

For the 454.00 cwt. of Yukon Gold potatoes shipped under purchase order number 119481, we will reduce the contract price of $10.50 per cwt. by 61% (11% for soft rot and 50% for heat and water damage) in accordance with the accounting prepared by Respondent. This results in a contract price for these potatoes of $4.10 per cwt., or a total of $1,861.40.

For the 501.60 cwt. of Yukon Gold potatoes shipped under purchase order number 119482, we will reduce the contract price of $10.50 per cwt. by 58% (8% for soft rot and 50% for heat and water damage) in accordance with the accounting prepared by Respondent. This results in a contract price for these potatoes of $4.41 per cwt., or a total of $2,212.06.

For the 579.60 cwt. of Yukon Gold potatoes shipped under purchase order number 119488, we will reduce the contract price of $10.50 per cwt. by 59% (9% for soft rot and 50% for heat and water damage) in accordance with the accounting prepared by Respondent. This results in a contract price for these potatoes of $4.31 per cwt., or a total of $2,495.18.

For the 390.40 cwt. of Yukon Gold potatoes shipped under purchase order number 119482, we will reduce the contract price of $10.50 per cwt. by 59% (9% for soft rot and 50% for heat and water damage) in accordance with the accounting prepared by Respondent. This results in a contract price for these potatoes of $4.31 per cwt., or a total of $1,682.62.

[5] See Formal Complaint, Exhibit 7.

For the 474.80 cwt. of Yukon Gold potatoes shipped under purchase order number 119490, we will reduce the contract price of $10.50 per cwt. by 56% (6% for soft rot and 50% for heat and water damage) in accordance with the accounting prepared by Respondent. This results in a contract price for these potatoes of $4.62 per cwt., or a total of $2,193.58.

For the 516.80 cwt. of Yukon Gold potatoes shipped under purchase order number 119491, we will reduce the contract price of $10.50 per cwt. by 57% (7% for soft rot and 50% for heat and water damage) in accordance with the accounting prepared by Respondent. This results in a contract price for these potatoes of $4.52 per cwt., or a total of $2,335.94.

For the 447.00 cwt. of Asterix potatoes shipped under purchase order number 119510, we will reduce the contract price of $10.50 per cwt. by 52% (2% for soft rot and 50% for heat and water damage) in accordance with the accounting prepared by Respondent. This results in a contract price for these potatoes of $5.04 per cwt., or a total of $2,252.88.

For the 335.40 cwt. of Yukon Gold potatoes shipped under purchase order number 119514, we will reduce the contract price of $10.50 per cwt. by 70% (20% for soft rot and 50% for heat and water damage) in accordance with the accounting prepared by Respondent. This results in a contract price for these potatoes of $3.15 per cwt., or a total of $1,056.51. For the 120.00 cwt. of Asterix potatoes shipped under the same purchase order number, we will reduce the contract price of $10.50 per cwt. by 52% (2% for soft rot and 50% for heat and water damage) in accordance with the accounting prepared by Respondent. This results in a contract price for these potatoes of $5.04 per cwt., or a total of $604.80. The total contract price for this shipment of potatoes is therefore $1,661.31.

For the 448.80 cwt. of Yukon Gold potatoes shipped under purchase order number 119515, we will reduce the contract price of $10.50 per cwt. by 60% (10% for soft rot and 50% for heat and water damage) in accordance with the accounting prepared by Respondent. This results in a contract price for these potatoes of $4.20 per cwt., or a total of $1,884.96.

For the 491.00 cwt. of Yukon Gold potatoes shipped under purchase order number 119521, we will reduce the contract price of $10.50 per cwt. by 60% (10% for soft rot and 50% for heat and water damage) in accordance with the accounting prepared by Respondent. This results in a contract price for these potatoes of $4.20 per cwt., or a total of $2,062.20.

For the 501.20 cwt. of Yukon Gold potatoes shipped under purchase

order number 119522, we will reduce the contract price of $10.50 per cwt. by 60% (10% for soft rot and 50% for heat and water damage) in accordance with the accounting prepared by Respondent. This results in a contract price for these potatoes of $4.20 per cwt., or a total of $2,105.04.

For the 456.00 cwt. of Yukon Gold potatoes shipped under purchase order number 119526, we will reduce the contract price of $10.50 per cwt. by 60% (10% for soft rot and 50% for heat and water damage) in accordance with the accounting prepared by Respondent. This results in a contract price for these potatoes of $4.20 per cwt., or a total of $1,915.20.

For the 486.20 cwt. of Yukon Gold potatoes shipped under purchase order number 119533, we will reduce the contract price of $10.50 per cwt. by 60% (10% for soft rot and 50% for heat and water damage) in accordance with the accounting prepared by Respondent. This results in a contract price for these potatoes of $4.20 per cwt., or a total of $2,042.04.

For the 436.20 cwt. of Yukon Gold potatoes shipped under purchase order number 119534, we will reduce the contract price of $10.50 per cwt. by 60% (10% for soft rot and 50% for heat and water damage) in accordance with the accounting prepared by Respondent. This results in a contract price for these potatoes of $4.20 per cwt., or a total of $1,832.04.

For the 537.40 cwt. of Asterix potatoes shipped under purchase order number 119535, we will reduce the contract price of $10.50 per cwt. by 60% (10% for soft rot and 50% for heat and water damage) in accordance with the accounting prepared by Respondent. This results in a contract price for these potatoes of $4.20 per cwt., or a total of $2,257.08.

For the 431.00 cwt. of Asterix potatoes shipped under purchase order number 119536 we will reduce the contract price of $10.50 per cwt. by 60% (10% for soft rot and 50% for heat and water damage) in accordance with the accounting prepared by Respondent. This results in a contract price for these potatoes of $4.20 per cwt., or a total of $1,810.20.

For the 420.40 cwt. of Yukon Gold potatoes shipped under purchase order number 119537, we will reduce the contract price of $10.50 per cwt. by 65% (15% for soft rot and 50% for heat and water damage) in accordance with the accounting prepared by Respondent. This results in a contract price for these potatoes of $3.68 per cwt., or a total of $1,547.07.

For the 479.00 cwt. of Yukon Gold potatoes shipped under purchase order number 119554, we will reduce the contract price of $10.50 per cwt. by 65% (15% for soft rot and 50% for heat and water damage) in

accordance with the accounting prepared by Respondent. This results in a contract price for these potatoes of $3.68 per cwt., or a total of $1,762.72.

The total amount due Complainant for the eighteen loads of potatoes that Respondent received and accepted and reported a zero return without supplying sufficient proof to establish that the potatoes were without commercial value is $35,913.52.[6]

We next turn to Complainant's allegation that Respondent breached the contract by improperly deducting from the remittance to Complainant $16,229.50 for the cost of the Asterix and Bildstar seed potatoes supplied by Respondent. Under the terms of the written contract, Complainant states Respondent was not entitled to a deduction for the cost of these potatoes if the parties agreed that the growing conditions in the Dilley, Texas area were not suitable for growing these varieties. Complainant states further that prior to the harvest of the potatoes, Respondent sent an agronomist, Dr. Robert Thornton, to the fields to inspect the potato crop. During his inspection, Complainant states Dr. Thornton met with Complainant's Vincent Chiodo and Grayson Wilmeth in one of Complainant's fields. Complainant states they discussed the Asterix and Bildstar potatoes that Respondent had previously provided Complainant pursuant to the agreement, and Mr. Chiodo advised Dr. Thornton that the Asterix and Bildstar potatoes were not producing. According to Complainant, Dr. Thornton agreed and acknowledged that the conditions in the area were not suitable for growing those varieties of potatoes.[7]

In its sworn Answering Statement, Respondent refutes Complainant's contention that the parties agreed that the conditions in the Dilley, Texas area were not suitable for growing the Asterix and Bildstar potatoes. Respondent asserts to the contrary that Dr. Thornton stated the Asterix and Bildstar potatoes could be grown in the Dilley, Texas area. In support of this contention, Respondent attached to its Answering Statement an affidavit from Dr. Robert Thornton, wherein Dr. Thornton states, in relevant part, as follows:

…I visited the Chiodo facility at the direction of Farming Technology, Inc. during the early months of 2003 (February - May)…I talked to

[6] This figure differs slightly from the amount sought by Complainant because in some instances, Respondent's accounting showed a percentage of soft rot that differed from the percentage shown on the USDA inspection certificate. We used the figures shown on the certificate.

[7] Formal Complaint, Paragraph 17.

Grayson Wilmeth and Jack Chiodo on each and every visit. On an early visit I noted that the planting of the Asterix, Bildstar, Illona, and Yukon Golds in Field #11 was late for planting in that area. I came to that conclusion based on conversations with other growers in that area. I commented to Mr. Chiodo and Mr. Wilmeth that for the Asterix and Bildstar to reach their full yield and size potential, they should have been planted earlier. However, samples I hand dug in late April and early May indicated that the yield of both varieties was high for the area or at least normal compared to the other varieties I sampled…

…At no time did I ever tell Mr. Chiodo, Mr. Wilmeth, or anyone else employed by Mr. Chiodo, that the Asterix and Bildstar were not suitable for growing in the area where Mr. Chiodo was growing and in my opinion, these varieties could have been successfully grown in the Dilley, Texas area had they not been planted late.

In response to the Answering Statement and Thornton affidavit, Complainant submitted a sworn Statement in Reply with attached affidavits from Vincent Chiodo and Grayson Wilmeth. The Chiodo affidavit reads, in relevant part, as follows:

… As part of the contract FTI [Respondent] requested and I agreed to plant and attempt to produce certain varieties of potatoes, Asterix and Bildstar, which are not typically grown in this area, to determine whether the climate and other growing conditions in the area are suitable for producing these varieties ("experimental potatoes"). Pursuant to the terms of the contract I authorized FTI to deduct from my remittance the cost of the experimental potatoes provided by FTI, unless we agreed that the growing conditions in the Dilley area are not suitable for growing these varieties, in which case the cost of the experimental potatoes would not be deducted from the remittance.

FTI agreed to make its agronomist, Rob Thornton, available to assist us in growing the potatoes under the contract, including the experimental potatoes. FTI was responsible for timely delivering the experimental potatoes to us for planting. The planting period for potatoes in the Dilley, Texas area is from on or about January 10 through about mid-February.

In January, 2003, after the potato planting season was well underway, I contacted FTI because we had not received the experimental potatoes, to ask when we could expect to receive them for planting. My copies of the Loading/Delivery Report, Bill of Lading, and Federal-State Inspection Certificate relating to FTI's shipment of the experimental potatoes show that they were shipped by FTI from its farm in Colorado to Chiodo Farms on Wednesday, January 22, 2003, and therefore were

delivered to us at the earliest on Thursday, January 23, 2003, or Friday, January 24, 2003. Attached as Exhibits 1, 2 and 3 are copies of the Loading/Delivery Report, Bill of Lading, and Federal-State Inspection Certificate. After the potatoes were received they had to be prepared for planting and left out for at least a day before planting to allow them to wake up.

I keep a journal in which I record on a daily basis the activities on the farm, including the planting and harvesting of crops. My daily journal shows that the Asterix potatoes were planted on Monday, January 27, 2003, in field 11, and the Bildstar potatoes were planted in the same field on the next day, January 28, 2003. Attached as Exhibit 4 is a copy of the page of my journal for the week of January 27, 2003, showing the farm activities which took place that week, including the planting of the Asterix potatoes on January 27 and the planting of the Bildstar potatoes on the following day.

I have read the affidavit of Rob Thornton ("Thornton") attached to FTI's Verified Answering Statement. Thornton's statement that the experimental potatoes were planted late is false. They were planted well within the window for the planting of potatoes in this area. Moreover, if there was any delay in the planting of the experimental potatoes it was the result of FTI's delay in shipping them to us, not from any delay on our part in planting them after delivery.

Thornton claims he came to the conclusion that the potatoes were planted late based on conversations he had with other growers in the area, however, he does not identify any of these growers; nor does he identify any grower in the area who successfully produced these experimental potatoes in 2003. I am not aware of any grower in the area who successfully produced Asterix or Bildstar potatoes in 2003; nor am I aware of any grower in the area who has successfully produced these experimental potatoes since 2003.

Thornton' s statement that he commented to me "that for the Asterix and Bildstar potatoes to reach their full yield and size potential, they should have been planted earlier," is also false. He never indicated to me that the experimental potatoes were planted late. As I stated in the verified Formal Complaint, while conducting an inspection during the 2003 season, Thornton did admit to Grayson Wilmeth and me that the climate conditions in the area were not suitable for growing the experimental potatoes…

The Wilmeth affidavit reads, in relevant part, as follows:

…Vincent R. Chiodo is my great uncle. From June 1, 2002, until

January 1, 2005, we were partners in the agricultural business, growing and producing various crops in Frio County, including potatoes.
I grew up in the Dilley area and have been involved in farming in Frio County, including planting and producing potatoes, for most of my life. I am familiar with the planting period for potatoes in the Dilley, Texas area, which is from on or about January 10 through about mid-February. I have read the affidavit of Rod Thornton ("Thornton") attached to FTI's Verified Answering Statement. Thornton's statement that the Asterix and Bildstar potatoes ("experimental potatoes") were planted late is false. They were planted well within the window for the planting of potatoes in this area. My recollection is that we were waiting for FTI to deliver the experimental potatoes to us for planting and that they were planted within two (2) days after they were delivered to Chiodo Farms. After the potatoes were received they had to be prepared for planting and left out for at least a day before planting to allow them to wake up. FTI was responsible for timely delivering the experimental potatoes to Chiodo Farms for planting. Therefore, if there was any delay in the planting of the experimental potatoes it was the result of FTI's delay in shipping them to us, not from any delay on our part in planting them after delivery.

Thornton claims he came to the conclusion that the potatoes were planted late based on conversations he had with other growers in the area, however, he does not identify any of these growers; nor does he identify any grower in the area who successfully produced these experimental potatoes in 2003. I am not aware of any grower in the area who successfully produced Asterix or Bildstar potatoes in 2003; nor am I aware of any grower in the area who has successfully produced these experimental potatoes since 2003.

Thornton' s statement that he commented to me that for the Asterix and Bildstar potatoes to reach their full yield and size potential, they should have been planted earlier, is also false. He never indicated to me that the experimental potatoes were planted late. As I stated in my previous affidavit dated January 27, 2005, while conducting an inspection during the 2003 season, Thornton did admit to my great uncle and me that the climate conditions in the area were not suitable for growing the experimental potatoes because they cannot survive the south Texas heat…

Notwithstanding the dispute between Dr. Thornton and Complainant's Vincent Chiodo and Grayson Wilmeth concerning whether the "experimental potatoes" were planted late, Complainant's allegation that Dr. Thornton agreed that the climate conditions in the Dilley, Texas area are not suitable for growing Asterix and Bildstar potatoes is refuted by the sworn testimony of Dr. Thornton. Moreover,

Dr. Thornton was not employed by Respondent, but was merely acting as a consultant, so any agreement reached between Dr. Thornton and Complainant would not be legally binding upon Respondent in the absence of proof that the scope of Dr. Thornton's agreement with Respondent included the authority to decide contractual matters on Respondent's behalf. Since Complainant offers no further proof aside from the alleged agreement with Dr. Thornton to substantiate its claim that Respondent agreed that conditions in the Dilley, Texas were not suitable for growing the Asterix and Bildstar potatoes, we find that Complainant has failed to sustain its burden to prove the existence of such an agreement. Respondent is therefore entitled to deduct from its remittance to Complainant the cost of the Asterix and Bildstar potatoes, or a total of $16,229.50.[8]

Finally, Complainant alleges that Respondent breached the contract by improperly deducting freight charges in the amount of $7,773.00, without Complainant's authorization and without any contractual right to do so under the agreement. The freight expenses deducted by Respondent were incurred in connection with nine loads of potatoes that were rejected to Complainant. In the formal Complaint, Complainant states that on or about May 21, 2003, Vincent Chiodo spoke with Respondent's Kent Ellsworth and asked him whether he had any concerns about the condition of the potatoes shipped that day. Complainant states Mr. Chiodo also advised Mr. Ellsworth that the remaining potatoes looked bad and questioned whether any more potatoes should be shipped. According to Complainant, Mr. Ellsworth denied having any concerns about the quality or condition of the recently shipped potatoes and instructed Mr. Chiodo to ship the remaining potatoes. Complainant states Mr. Ellsworth failed to tell Mr. Chiodo that Respondent had rejected a load delivered the same day and had written down the purchase prices for the potatoes it accepted by an average of approximately 65%. Had Mr. Chiodo been informed of the rejected loads and write-downs, Complainant states he would not have loaded and shipped any more potatoes. On May 22, 2003, in accordance with Mr. Ellsworth's instructions, and without knowledge of Respondent's rejection and write-downs, Complainant states Mr. Chiodo shipped nine truckloads of potatoes to Respondent, eight of which were

[8] Respondent apparently billed Complainant this amount for the seed under invoice numbers 8883-A and 11347-A (see Formal Complaint Exhibit 9). Although copies of the invoices were not submitted, Complainant's claim does not concern the amount of the deduction, but merely whether Respondent was entitled to make such a deduction under the terms of the written contract. We therefore accept the deduction amount as stated.

rejected. Complainant states Respondent failed to inform Mr. Chiodo of the rejections or dispose of the potatoes. Instead, Complainant states that Respondent, without authorization or any contractual right to do so under the agreement, shipped most of the rejected potatoes back to Complainant and deducted freight charges from the amount due Complainant in the sum of $7,773.00.

In response to Complainant's allegations, Respondent asserts in its Answer that Complainant made the decision to ship the loads, and as such Respondent was justified in deducting the freight on the rejected loads. Respondent is at least partially correct in this assertion. Complainant acknowledges that it was aware that the potatoes in question were in poor condition prior to shipment, and asserts that it advised Respondent of this fact. Nevertheless, in the absence of proof that Complainant renegotiated the grade terms of the contract to provide, for example, that the sale of the potatoes in question would be "as is" or "with all faults," Complainant was still obligated to ship potatoes that complied with the grade requirements of the contract. Therefore, assuming Respondent promptly notified Complainant that it was rejecting the potatoes, and without any evidence showing that the potatoes complied with the contract requirements thereby making the rejection unlawful, Complainant is responsible for the expenses Respondent incurred in connection with the rejected potatoes, including freight.

Complainant has alleged, however, that it was not given timely notice of the rejections. In response to this allegation, Respondent attached to its sworn Answering Statement an affidavit from its Vice President of Field Operations, Mr. Kent Ellsworth, wherein Mr. Ellsworth states, in relevant part, as follows:

> After the first week of harvest, Mr. Chiodo and I discussed the quality problems. I asked Mr. Chiodo if he had a different field he could get into and if so, did he think the quality would improve. He told me he did have a new field but that I should talk to Grayson in the morning to see about the quality. We agreed to that plan and decided to switch fields. The next morning, I called Grayson early and asked his opinion on the new field. He said that although it looked better, it still had some problems. He said he was running slow and trying to grade out the problems. I immediately contacted Mr. Chiodo and gave him Grayson's report. We decided to continue to harvest. We were harvesting eight to fourteen (8-14) loads per day at this time to keep up with the ad commitments.
>
> Two days later, the quality of the potatoes quickly worsened to the point that we could no longer use them. I called Mr. Chiodo and told him of the situation. He agreed that it was time to quit. At that point I

informed him that we had some loads that we could not use and would have to reject. We discussed the options. The best cost alternative was to send the rejected loads to the food bank in San Antonio. However, they could only take two loads. The disposal cost in Houston was higher than the return freight to Dilley, Texas so Mr. Chiodo and I decided to send the remaining loads back to Dilley for him to unload. After the fifth (5^{th}) truck was sent back, Mr. Chiodo notified me not to send any more back to Dilley. The remaining two (2) trucks were disposed of in Houston.

In response to Mr. Ellsworth's statements, Vincent Chiodo states in the affidavit submitted with Complainant's Statement in Reply, the following, in pertinent part:

…Ellsworth's statements that I agreed to the shipment of the rejected potatoes from FTI's facility in Houston back to Dilley, and did not object to the deduction of the freight charges from the remittance, are false.

What actually happened is that toward the end of the potato harvest, on May 21 or 22, 2003, Grayson Wilmeth and I called Ellsworth on a speaker phone from our produce shed. We told Ellsworth that the quality of the remaining potatoes was bad and questioned whether any more potatoes should be shipped. Ellsworth instructed us to ship the rest of the potatoes, told us he needed them and they would cull them out at the other end, and sent purchase orders for the potatoes. In accordance with these instructions and the purchase orders, on May 22, 2003, we shipped nine (9) loads of potatoes to FTI.

On Friday, May 23, 2003, which was Memorial Day weekend, Ellsworth called me, stated that the potatoes were no good, had been rejected, and the rejected loads were being sent back to Dilley. I objected to FTI shipping the rejected potatoes back to Dilley but Ellsworth stated they were already in transit. As a result, I had to hire a crew to unload and dispose of the rejected potatoes. We spent most of Memorial Day weekend unloading and disposing of these potatoes. Later, when I found out FTI had deducted from my remittance the freight charges for the shipment of the rejected loads, I complained about the deduction to Ellsworth, to no avail.

Contrary to the statements in Ellsworth's affidavit, I never agreed to the shipment of the rejected loads back to Dilley and never agreed to pay the freight charges for the rejected loads.

The Regulations (7 C.F.R. § 46.2(bb)) provide that a rejection must

be made within a reasonable amount of time. For truck shipments, a reasonable amount of time is defined as not exceeding eight hours after the receiver or a responsible representative is given notice of arrival and the produce is made accessible for inspection. 7 C.F.R. § 46.2(cc)(2). In computing this time period, for shipments arriving on non-work days or after the close of regular business hours on workdays when a representative of the receiver having authority to reject shipments is not present, non-working hours preceding the start of regular business hours on the next working day are not included. For shipments arriving during regular business hours when a representative of the receiver having authority to reject shipments customarily is present, the period runs without interruption except that, for shipments arriving less than two hours before the close of regular business hours, the unexpired balance of the time period is extended and runs from the start of regular business hours on the next working day. (See 7 C.F.R. § 46.2(cc)(4)).

Of the nine loads of potatoes rejected by Respondent, one was reportedly received on May 22, 3003, and the remaining eight loads were reportedly received on May 23, 2003.[9] Complainant's Vincent Chiodo has testified that he was told on May 23, 2003 that the potatoes were being rejected. Such notice, in the absence of evidence to the contrary, seems to fall within the parameters outlined above for timely notice of a rejection. Moreover, notwithstanding Mr. Chiodo's alleged objection to the return of the potatoes to Dilley, Texas, Mr. Chiodo does not assert that this was not the most cost effective means of disposing of the potatoes under the circumstances. Mr. Chiodo's frustration at incurring the associated freight cost seems to stem primarily from the fact that the potatoes were ever shipped, given that they were already in poor condition prior to shipment. However, as we already mentioned, in the absence of proof that the contract terms were renegotiated, Complainant was still obligated to ship potatoes that complied with the grade requirements of the contract. Therefore, if Complainant made the decision to ship based on Respondent's acceptance of previous shipments, rather than its own estimation as to whether the potatoes in question were suitable for shipment, it did so at its own peril. Accordingly, we conclude that Complainant is responsible for the freight charges incurred by Respondent for the nine loads of potatoes that Respondent rejected, which total $7,773.00.

We have determined that Respondent is entitled to deduct from its remittance to Complainant the seed cost of the Asterix and Bildstar potatoes in the amount of $16,229.00, and the freight charges incurred in connection with the rejected potatoes in the amount of $7,773.00. These deductions were already taken when Respondent made its

[9] See Formal Complaint, Exhibit 7.

remittance to Complainant in the amount $117,991.31.[10] This remittance does not, however, include any return on the eighteen loads of potatoes that we have considered here and determined an amount due of $35,913.52. Therefore, there remains a balance due Complainant from Respondent of $35,913.52.

Respondent's failure to pay Complainant $35,913.52 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). The interest that is to be applied shall be determined in accordance with 28 U.S.C. § 1961, i.e., the interest rate shall be calculated at a rate equal to the weekly average one-year constant maturity treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the Order. *PGB International, LLC v. Bayche Companies, Inc*., PACA Docket No. R-05-118, Order on Reconsideration, 65 Agric. Dec. 669 (2006).

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 $35,913.52, with interest thereon at the rate of 5.07 % per annum from July 1, 2003, until paid, plus the amount of $300.00.

Copies of this Order shall be served upon the parties.

———————

[10] See Formal Complaint, Exhibit 9.

FRU-VEG MARKETING, INC V. J. F. PALMER & SONS PRODUCE, INC.
PACA Docket No. R-06-083.
Decision and Order.
Filed November 15, 2006.

PACA-R – Damages – Not Proven.

Where Complainant sought damages for Respondent's repudiation, but failed to establish that its resale of the goods was commercially reasonable, Complainant was relegated to the measure of damages set forth in U.C.C. § 2-708, i.e., the difference between the prevailing market price at the time and place for tender and the unpaid contract price. Complainant was, however, unable to prove it was damaged according to this method because the relevant prices reported by U.S.D.A. Market News were higher than the contract price. Accordingly, the complaint was dismissed.

Presiding Officer Patricia Harps.
Decision and Order by Judicial Officer, William G. Jenson.

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.), hereinafter referred to as the Act. A timely Complaint was filed with the Department within nine months of the accrual of the cause of action, in which Complainant seeks a reparation award against Respondent in the amount of $13,724.10 in connection with two trucklots of asparagus shipped in the course of 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.

The amount claimed in the formal Complaint does not exceed $30,000.00. Therefore, the documentary procedure provided in Section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered part of the evidence of the case, as is the Department's Report of Investigation. In addition, the parties were given the opportunity to file

evidence in the form of verified statements and to file Briefs. Complainant filed an Opening Statement. Respondent filed an Answering Statement. Both parties also submitted a Brief.

Findings of Fact

1. Complainant, Fru-Veg Marketing, Inc., is a corporation whose post office address is 2300 N.W. 102nd Avenue, Miami, Florida, 33172-2220. At the time of the transactions involved herein, Complainant was licensed under the Act.
2. Respondent, J. F. Palmer & Sons Produce, Inc., is a corporation whose post office address is P.O. Box 518, Pharr, Texas, 78577-0518. At the time of the transactions involved herein, Respondent was licensed under the Act.
3. On April 26, 2005, Respondent faxed to Complainant purchase order number 281903, listing 1,200 cartons of standard/large asparagus at $18.00 per carton, to be picked up on Monday, May 2, 2005, under pick up number 25862.
4. On April 27, 2005, Respondent faxed to Complainant purchase order number 281933, listing 480 cartons of standard/large asparagus at $18.00 per carton. This asparagus was also scheduled to be picked up on Monday, May 2, 2005, under pick up number 25875. On the same date, the quantity for purchase order number 281903 was changed to 840 cartons, and the quantity for purchase order number 281933 was changed to 720 cartons.
5. On April 29, 2005, 1,835 cartons of asparagus were shipped via airfreight from the country of Peru to Complainant in Miami, Florida.
6. Respondent did not send a truck to pick up the asparagus referenced in Findings of Fact 3 and 4 on Monday, May 2, 2005, as scheduled.
7. On Tuesday, May 3, 2005, Complainant agreed to reduce the price of the asparagus to $17.25 per carton.

8. On Wednesday, May 4, 2005, at 9:22 a.m., Complainant's Steve White faxed Respondent's John Backer a message stating as follows:

After our phone conversation late Tuesday afternoon to cancel our contracts to load 1560 cases of asparagus, Palmer PO#'s 219933 [sic] and 281903, I am putting you on notice that I will sell the above-mentioned asparagus, for your account, to recover my losses, and will seek damages for the difference of our final sale price and our agreed price of $17.25 FOB Miami.

9. Between May 4, 2005, and May 6, 2005, Complainant sold 1,835 cartons of large and standard asparagus as detailed below:

Invoice No.	Ship Date	Description	Qty.	Price	Amount
10025939-4	05/04/05	Green Asparagus Large	120	$16.00	$1,920.00
10025937-4	05/04/05	Green Asparagus Standard	78	$12.00	$936.00
		Green Asparagus Standard	28	$12.00	$336.00
		Green Asparagus Standard	192	$0.00	$0.00
		Green Asparagus Large	372	$12.00	$4,464.00
		Green Asparagus Large	50	$1.00	$50.00
10025968-3	05/04/05	Green Asparagus Large	40	$15.00	$600.00
10025969-3	05/04/05	Green Asparagus Standard	50	$16.00	$800.00
		Green Asparagus Large	50	$16.00	$800.00
10025954-3	05/06/05	Green Asparagus Standard	60	$15.50	$930.00
		Green Asparagus Large	60	$15.00	$900.00
10025999-4	05/06/05	Green Asparagus Standard	140	$9.75	$1,365.00
		Green Asparagus Large	140	$2.10	$294.00

10025995-4	05/06/05	Green Asparagus Standard	140	$1.00	$140.00
		Green Asparagus Large	55	$5.00	$275.00
10025997-3	05/06/05	Green Asparagus Standard	40	$12.00	$480.00
		Green Asparagus Large	20	$12.00	$240.00
		Green Asparagus Large	35	$12.00	$420.00
		Green Asparagus Large	25	$15.50	$387.50
10026003-4	05/06/05	Green Asparagus Large	140	$4.75	$665.00
		Totals	1,835		$16,002.50
		Average $8.72 per carton			

10. The informal complaint was filed on July 8, 2005, which is within nine months from the accrual of the cause of action.

Conclusions

Complainant brings this action to recover damages allegedly suffered as a result of Respondent's failure to pick up 1,560 cartons of asparagus that Respondent contracted to purchase from Complainant in the course of foreign commerce. Complainant states specifically that Respondent agreed to purchase 1,560 cartons of asparagus at an agreed price of $18.00 per carton, f.o.b., which was later amended to $17.25 per carton, for a total contract price of $26,910.00. Complainant states further that following Respondent's failure to pick up the asparagus, Complainant notified Respondent on May 4, 2005, that it did not have a choice but to sell the 1,560 cartons for their account. Complainant states it sold the asparagus for total proceeds of $13,185.90, or $13,724.10 less than the contract price negotiated with Respondent. Complainant seeks to recover the latter amount as damages resulting from Respondent's breach.

In response to Complainant's allegations, Respondent submitted a sworn Answer wherein it denies all of the allegations of the formal Complaint, including its alleged agreement to purchase the two lots of asparagus in question. In addition, Respondent specifically denies Complainant's claim for damages on the basis that Complainant did not segregate and assign a lot number to the asparagus allegedly sold to Respondent in order to establish that the subsequent sales of asparagus were of the same cartons that were originally intended for shipment to Respondent. Respondent also asserts that Complainant failed to secure a U.S.D.A. inspection to justify sales at less than half the market price, or to show that the cartons that were dumped had no commercial value.

First, with respect to Respondent's denial that it contracted to purchase the asparagus, we find that the two purchase orders issued by Respondent, which also include pick up numbers, are sufficient evidence to establish Respondent's agreement to purchase the two lots of asparagus in question.[1] Respondent's failure to pick up the asparagus that it contracted to purchase constitutes a breach of contract for which Complainant is entitled to recover provable damages. Complainant seeks to recover $13,724.10 based on its resale of the asparagus to

[1] See Formal Complaint, Exhibits A and A-1

various receivers between May 4 and May 6, 2005. The Uniform Commercial Code, section 2-706, provides, in relevant part, that:

(1) Under the conditions stated in Section 2-703 on seller's remedies, the seller may resell the goods concerned or the undelivered balance thereof. Where the resale is made in a commercially reasonable manner the seller may recover the difference between the resale price and the contract price together with any incidental damages allowed under the provisions of this Article (Section 2-710), but less expenses saved in consequence of the buyer's breach.
(2) Except as otherwise provided in subsection (3) or unless otherwise agreed resale may be at public or private sale including sale by way of one or more contracts to sell or of identification to an existing contract of the seller. Sale may be as a unit or in parcels and at any time and place and on any terms but every aspect of the sale including the method, manner, time, place and terms must be commercially reasonable. . . .

While Complainant's resale of the asparagus was certainly prompt, we must nevertheless consider whether the resale was proper in light of Respondent's concerns regarding the identity of the product that was resold, and the failure of Complainant to secure a U.S.D.A. inspection to justify below-market sales and dumped product.

As we mentioned, Respondent maintains that Complainant failed to properly segregate the asparagus intended for sale to Respondent by assigning a lot number that could be traced through the subsequent resale of the product. In response, Complainant asserts in its Opening Statement that the asparagus in question was assigned lot number 16669.[2] In addition, Complainant attached to the Opening Statement a copy of an airway bill allegedly referring to the asparagus in question, which shows that Complainant imported 1,835 cartons of asparagus from Peru on April 29, 2005.[3] The number 16669 is handwritten on the airway bill. Complainant also submitted copies of its invoices showing that it sold 1,835 cartons of large or standard asparagus between May 4 and May 6, 2006.[4] Although Complainant fails to explain why it imported 1,835 cartons of asparagus when Respondent's order was only for 1,560 cartons, we nevertheless find that the evidence submitted by Complainant is sufficient to establish that the documented resales were from the same lot of asparagus that Complainant originally sold to

[2] See Opening Statement, paragraph 4.

[3] See Opening Statement, Exhibit #4.

[4] See Report of Investigation, Exhibits 6-F through 6-M.

Respondent.[5]

The invoices submitted by Complainant show that the asparagus was sold at prices ranging from $0.00 to $16.00 per carton. By comparison, Respondent submitted copies of the Miami Wholesale Fruit and Vegetable Reports issued by U.S.D.A. Market News for May 4, 2005 though May 6, 2005, which show that standard and large asparagus originating from Peru were selling for $20.00 to $22.00 per carton.[6] In response to this evidence, Complainant's Chief Executive Officer, Conchita Espinosa, asserts in her sworn Opening Statement that "[t]he Miami 'wholesale' market report does not represent the FOB market at that time. I have included copies of the actual e-mail correspondence sent to our growers along with market reports for the same days. The e-mail price lists are documents that are used by Fru-Veg Marketing, Inc. in the course of day-to-day business to inform our growers of market conditions."[7] Upon reviewing these documents, we note that the e-mailed price lists, like Complainant's invoices, only establish the prices at which Complainant was selling asparagus. If those prices are significantly below the prices reported by U.S.D.A. Market News, Complainant must still secure independent evidence, such as a U.S.D.A. inspection, to show that the condition of the asparagus was such that prevailing market prices could not be obtained.

In this regard, Complainant submitted one U.S.D.A. inspection certificate covering 140 cartons of standard asparagus and 140 cartons of large asparagus shipped to Cooseman's Tampa Inc., in Tampa, Florida, on May 6, 2005.[8] The inspection, which took place on May 9, 2005 at 2:00 p.m., and disclosed 4% average decay in the standard asparagus and 15% average defects, including 9% limp and wilted and 6% decay, in the large asparagus, is not sufficiently timely for a May 6th shipment from Miami to Tampa, Florida. Absent any other evidence to justify Complainant's failure to sell a substantial portion of the lot of asparagus in question, 857 cartons, at more than half of the prevailing market price, we conclude that Complainant has failed to establish that its resale of the asparagus was commercially reasonable.

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[5] Subsection 2 to U.C.C. § 2-706 states that "[t]he resale must be reasonably identified as referring to the broken contract, but it is not necessary that the goods be in existence or that any or all of them have been identified to the contract before the breach."

[6] See Answer, Exhibits A though C.

[7] See Opening Statement, paragraph 7.

[8] See Opening Statement, Exhibit 7.

As stated in Comment 2 to U.C.C. § 2-706, failure to act in a commercially reasonable manner "deprives the seller of the measure of damages here provided and relegates him to that provided in Section 2-708." Section 2-708 provides in relevant part:

(1) Subject to subsection (2) and to the provisions of the Article with respect to proof of market price (Section 2-723), the measure of damages for non-acceptance or repudiation by the buyer is the difference between the market price at the time and place for tender and the unpaid contract price together with any incidental damages provided in this Article (Section 2- 710), but less expenses saved in consequence of the buyer's breach.

As we mentioned, the prevailing market price in Miami, Florida for standard and large asparagus imported from Peru during the time period in question was $20.00 to $22.00 per carton, or an average of $21.00 per carton. The contract price of the asparagus was $17.25 per carton. Since the market price of the asparagus at the time of the breach was greater than the contract price, Complainant should have been able to resell the asparagus for as much or more than the price negotiated with Respondent. Consequently, Complainant has not established that it was damaged as a result of Respondent's failure to pick up the asparagus. The Complaint should, therefore, be dismissed.

Order

The Complaint is dismissed.
Copies of this Order shall be served upon the parties

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HARVEST LOGISTICS, INC. V. MOBILE PRODUCE, INC.
PACA Docket No. R-06-093.
Decision and Order.
Filed December 20, 2006.

PACA-R – Suitable Shipping Condition – When Applicable at a Secondary Destination.

Where the contract destination for a load of watermelons was Houston, Texas, and Respondent diverted the shipment to South Carolina, held that the inspection of the watermelons in South Carolina nevertheless established a breach of warranty by Complainant, as the inspection was performed only a day later than it would have been if the watermelons had been delivered to Texas, and the inspection report disclosed such condition defects that it could be concluded with assurance that if the watermelons had been delivered to, and inspected at the contract destination, a breach of the suitable shipping condition warranty would have been found.

Presiding Officer Patricia Harps.
Decision and Order by Judicial Officer, William G. Jenson.

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.), hereinafter referred to as the Act. A timely Complaint was filed with the Department within nine months of the accrual of the cause of action, in which Complainant seeks a reparation award against Respondent in the amount of $5,820.00 in connection with one truckload of watermelons shipped in the course of interstate commerce.

Copies of the Report of Investigation prepared by the Department were served upon the parties. A copy of the formal Complaint was served upon the Respondent, which filed an Answer thereto, denying liability to Complainant.

The amount claimed in the formal Complaint does not exceed $30,000.00. Therefore, the documentary procedure provided in Section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered part of the evidence of the case, as is the Department's Report of Investigation. In addition, the parties were given the opportunity to file evidence in the form of verified statements and to file Briefs. Neither party elected to file any additional evidence. Respondent submitted a Brief.

Findings of Fact

1. Complainant, Harvest Logistics, Inc., is a corporation whose post office address is 557 E. Frontage Road #27, Nogales, Arizona, 85621-9504. At the time of the transaction involved herein, Complainant was not licensed, but was operating subject to license under the Act.
2. Respondent, Mobile Produce, Inc., is a corporation whose post office address is 9402 Big Bear Lake Court, Bakersfield, California, 93312. At the time of the transaction involved herein, Respondent was licensed under the Act.
3. On or about March 5, 2006, Complainant, by oral contract, sold to Respondent 39,240 pounds (616 cartons) of U.S. No. 1 seedless watermelon 3's at $0.20 per pound, for a total contract price of $7,848.00. On the same date, the watermelons were shipped from loading point in Nogales, Arizona to Houston, Texas.
4. On March 7, 2006, a U.S.D.A. inspection was performed on the

watermelons mentioned in Finding of Fact 3 at the place of business of Country Fresh, in Mauldin, South Carolina, the report of which disclosed the following, in pertinent part:

TEMPERATURE	PRODUCT	BRAND/MARKINGS	ORIGIN	NO. of CONTAINERS
58 TO 59 F.	Watermelons	"Tommy Brand," 3 count, seedless	MX	616 cartons

AVERAGE DEFECTS	including SER DAM.	OFFSIZE/DEFECTS
29%	17%	Quality (25 to 35%)(Hollow heart, second growth)
20%	20%	Overripe (10 to 30%)
03%	01%	Bruising
04%	04%	Decay (0 to 10%)
56%	42%	Checksum

Size not determined.

GRADE: Fails to grade U.S. No. 1 account quality defects.

REMARKS: Inspected on U.S. No. 1 basis at applicant's request.

5. Respondent paid Complainant $2,028.00 for the watermelons with check number 6524, dated April 12, 2006.
6. The informal complaint was filed on April 17, 2006, which is within nine months from the accrual of the cause of action.

Conclusions

Complainant brings this action to recover the unpaid balance of the agreed purchase price for one truckload of watermelons sold to Respondent. Complainant states Respondent accepted the watermelons as agreed in the contract of sale, but that it has since paid only $2,028.00 of the agreed purchase price, leaving a balance due Complainant of $5,820.00. In response to Complainant's allegations, Respondent submitted a sworn Answer wherein it admits purchasing and accepting the subject load of watermelons, but asserts that the watermelons were not in suitable shipping condition at the time of shipment.

There is no dispute that the watermelons were sold under f.o.b. terms. The Regulations (7 C.F.R. § 46.43(i)) define f.o.b. as meaning:

. . . that the produce quoted or sold is to be placed free on board the boat, car, or other agency of the through land transportation at shipping point, in suitable shipping condition . . . , and that the buyer assumes all risk of damage and delay in transit not caused by the seller irrespective of how the shipment is billed.

Suitable shipping condition is defined in the Regulations (7 C.F.R. § 46.43(j)) as meaning:

. . . that the commodity, at time of billing, is in a condition which, if the shipment is handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the contract destination agreed upon between the parties.[1]

[1]The suitable shipping condition provisions of the Regulations (7 C.F.R. § 46.43(j)) which require delivery to contract destination "without *abnormal* deterioration", or what is elsewhere called "good delivery" (7 C.F.R. § 46.44), are based upon case law predating the adoption of the Regulations. See Williston, *Sales §* 245 (rev. ed. 1948). Under the rule it is not enough that a commodity sold f.o.b., U. S. No. 1, actually be U. S. No. 1 at time of shipment. It must also be in such a condition at the time of shipment that it will make good delivery at contract destination. It is, of course, possible for a commodity that grades U. S. No. 1 at the time of shipment, and is shipped under normal transportation service and conditions, to fail to make good delivery at destination due to age or other inherent defects which were not present, or were not present in sufficient degree to be cognizable by the federal inspector, at shipping point. Conversely, since the inherently perishable nature of commodities subject to the Act dictates that a commodity cannot remain forever in the same condition, the application of the good

(continued...)

By definition, the warranty of suitable shipping condition only extends to the contract destination agreed upon between the parties. According to Complainant, Respondent re-routed the load from the contract destination in Houston, Texas, first to San Antonio, Texas, and then to Mauldin, South Carolina. On this basis, Complainant refuses to recognize the inspection performed in South Carolina as evidence of a breach of warranty. In its sworn Answer, Respondent acknowledges that the load was "misdirected" to South Carolina. Hence, we conclude that the load was diverted from the contract destination of Houston, Texas, to Mauldin, South Carolina.

Nevertheless, in *A. A. Corte & Sons v. J. Lerner & Son*, 14 *Agric. Dec*. 320 (1955), where a shipment of potatoes was diverted from Chicago to Pittsburgh, thereby extending the transit time for approximately one day, the Judicial Officer stated:

> It is a misinterpretation of the regulation quoted above to hold that the diversion of a shipment to any point other than the destination specified in the contract of sale automatically and arbitrarily voids the implied warranty of suitable shipping condition. If it can be established by reliable evidence that a shipment which has been so diverted is so deteriorated upon arrival that it can be concluded with assurance that it would also have been abnormally deteriorated had it been delivered at the destination specified in the contract, the requirements of the regulation are met and the implied warranty is applicable. Cf. *United Packing Co. v Schoenburg*, 13 A.D. 175. (emphasis supplied).

The U.S.D.A. inspection of the watermelons in Mauldin, South Carolina, which took place at 11:00 a.m., on March 7, 2006, or

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[1](...continued)
delivery concept requires that we allow for a "normal" amount of deterioration. This means that it is entirely possible for a commodity sold f.o.b. under a U. S. grade description to fail, at destination, to meet the published tolerances of that grade, and thus fail to grade at destination, and nevertheless make good delivery. This is true because under the f.o.b. terms the grade description applies only at shipping point, and the applicable warranty is only that the commodity thus sold will reach contract destination without abnormal deterioration, not that it will meet the grade description at destination. If the latter result is desired then the parties should effect a delivered sale rather than an f.o.b. sale. For all commodities other than lettuce (for which specific good delivery standards have been promulgated) 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).

approximately one day after the watermelons would have arrived and been available for inspection in Houston, Texas, disclosed 56% average defects, including 29% quality defects, 20% overripe, 3% bruising, and 4% decay.[2] The United States Standards for Grades of Watermelons[3] provide a tolerance at shipping point for watermelons sold under a U.S. Grade designation of 10% for watermelons in any lot that fail to meet the requirements of the grade, including therein not more than 5% for defects causing serious damage, and not more than 1% for watermelons that are affected by decay. For watermelons sold f.o.b., we increase these percentages to allow for normal deterioration in transit, up to a maximum of 15% for average defects for a shipment in transit for five days. Since the inspection of the watermelons in question disclosed more than triple this percentage of defects after only two days in transit, we can be reasonably certain that an inspection performed one day earlier at the contract destination in Houston, Texas would have revealed defects in excess of the applicable suitable shipping condition allowance. We therefore find that the preponderance of the evidence supports Respondent's contention that the watermelons were not in suitable shipping condition.

We also note that even if the diversion had prevented us from concluding that the watermelons were not in suitable shipping condition, the U.S.D.A. inspection would still show a breach of contract on the part of Complainant because the inspection shows that the watermelons failed to grade U.S. No. 1 due to excessive quality defects. Complainant sold the watermelons under the terms f.o.b. U.S. No. 1, which means that Complainant warranted that the watermelons were U.S. No. 1 at shipping point. The quality defects disclosed by the inspection are permanent defects that were also present at shipping point. Hence, the failure of the watermelons to grade U.S. No. 1 at destination on account of quality defects means that the watermelons also failed to meet the requirements of the U.S. No. 1 grade at shipping point.

Complainant's failure to ship watermelons that complied with the contract requirements constitutes a breach of warranty for which Respondent is entitled to recover provable damages. 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

[2] See Report of Investigation, Exhibit No. 6a.

[3] The United States Standards for Grades of Watermelons, § 51.1970 through 51.1987, published by the United States Department of Agriculture, Agricultural Marketing Service, Fruit and Vegetable Division, Fresh Products Branch, and available in printed form from that source, or on the Internet at http://www.ams.usda.gov/standards/stanfrfv.htm.

circumstances show proximate damages of a different amount. U.C.C. § 2-714(2). The value of accepted goods is best shown by the gross proceeds of a prompt and proper resale as evidenced by a proper accounting prepared by the ultimate consignee. Respondent reported a return from its customer of $2.48 per carton for the watermelons.[4]

Respondent did not, however, submit a detailed account of sales to show how its customer arrived at this return.[5] Without such evidence, we cannot accept the reported return as evidence of the value of the watermelons as accepted.

Absent an accounting, the value of goods accepted may be shown by use of the percentage of condition defects disclosed by a prompt inspection. See, e.g., *Fresh Western Marketing, Inc. v. McDonnell & Blankfard, Inc*., 53 *Agric. Dec*. 1869 (1994). Under this method, the value of the goods as warranted is reduced by the percentage of condition defects disclosed by a prompt inspection to arrive at the value of the goods as accepted. In the instant case, since the watermelons were sold as U.S. No. 1, we will use the combined percentage of quality and condition defects for this calculation. See *C. J. Prettyman, Jr., Inc. v. American Growers, Inc*., 55 *Agric. Dec*. 1352 (1996).

The first and best method of ascertaining the value the goods would have had if they had been as warranted is to use the average price as shown by USDA Market News Service Reports. *Pandol Bros., Inc. v. Prevor Marketing International, Inc*., 49 *Agric. Dec*. 1193 (1990). The reports issued on or around March 6, 2006 for Dallas, Texas, the nearest reporting location to the contract destination of Houston, Texas, does not show list prices for 3-count seedless watermelons originating from Mexico. A less precise means of ascertaining the value the goods would have had if they had been as warranted is to use the delivered price of the commodity (f.o.b. plus freight). *Rogelio C. Sardina v. Caamano Bros., Inc.*, 42 *Agric. Dec*. 1275 at 1278-79 (1983). The f.o.b. contract price of the watermelons was $7,848.00, to which we will add $1,900.00 for freight, which is the rate listed on the Market News Fruit and Vegetable Truck Rate Report for the week ending March 7, 2006, for a shipment from Nogales, Arizona, to Dallas, Texas, the latter of which is approximately the same distance from Nogales as Houston. This results in a value for the watermelons if they had been as warranted of $9,748.00.

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[4] See Formal Complaint, Exhibit No. 6.

[5] The settlement sheet prepared by Respondent's customer (see Report of Investigation , Exhibit No. 6b) shows only the price at which the parties settled, less freight, but does not list individual sales prices or dates of sale.

To determine the value of the watermelons as accepted, we will reduce the value they would have had if they had been as warranted by 56%, or $5,458.88, to account for the quality and condition defects disclosed by the U.S.D.A. inspection. This results in a value for the watermelons as accepted of $4,289.12. As we mentioned, Respondent's damages are measured as the difference between the value of the watermelons as accepted, $4,289.12, and the value they would have had if they had been as warranted, $9,748.00, or $5,458.88. In addition, Respondent may recover the $150.00 U.S.D.A. inspection fee as incidental damages. Respondent's total damages therefore amount to $5,608.88. When we deduct Respondent's damages of $5,608.88 from the contract price of the watermelons of $7,848.00, there remains an amount due Complainant for the watermelons of $2,239.12. Respondent paid Complainant $2,028.00 for the watermelons. Therefore, there remains a balance due Complainant from Respondent of $211.12.
Respondent's failure to pay Complainant $211.12 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). The interest that is to be applied shall be determined in accordance with 28 U.S.C. § 1961, i.e., the interest rate shall be calculated at a rate equal to the weekly average one-year constant maturity treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the Order. *PGB International, LLC v. Bayche Companies, Inc.*, PACA Docket No. R-05-118, Order on Reconsideration, 65 Agric. Dec. 669 (2006).

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 $211.12, with interest thereon at the rate of _____% per annum from April 1, 2005, until paid, plus the amount of $300.00.

Copies of this Order shall be served upon the parties.

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PERISHABLE AGRICULTURAL COMMODITIES ACT

MISCELLANEOUS ORDERS

In re: KOAM PRODUCE, INC.
PACA Docket No. D-01-0032.
Order Denying Petition to Reconsider.
Filed August 21, 2006.

PACA – Perishable agricultural commodities – Motive for bribery irrelevant – Publication of facts and circumstances appropriate sanction.

The Judicial Officer denied KOAM Produce, Inc.'s (Respondent) petition to reconsider *In re KOAM Produce, Inc.*, 65 Agric. Dec. 589 (2006). The Judicial Officer concluded: (1) the Judicial Officer's conclusion that Respondent violated 7 U.S.C. § 499b(4) was not based exclusively on a plea of guilty to bribery; (2) Complainant's witness, William Cashin, testified truthfully regarding the reasons for Respondent's bribery; (3) the Judicial Officer did not erroneously omit Respondent's material and relevant proposed findings of fact; and (4) the publication of the facts and circumstances of Respondent's violations of the PACA was an appropriate sanction.

Ann K. Parnes, Andrew Y. Stanton, and Christopher P. Young-Morales, for Complainant.
Paul T. Gentile, New York, NY, for Respondent.
Initial decision issued by Jill S. Clifton, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

James R. Frazier, Acting Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture, instituted this administrative proceeding by filing a Complaint on September 17, 2001. Complainant instituted the proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. pt. 46); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151). On May 3, 2002, Eric Forman, Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], filed an Amended Complaint.

Complainant alleges: (1) during the period April 1999 through July 1999, KOAM Produce, Inc. [hereinafter Respondent], through its employee, Marvin Friedman, made illegal payments to a United States

Department of Agriculture produce inspector in connection with 42 federal inspections of perishable agricultural commodities which Respondent purchased from 11 sellers in interstate or foreign commerce; (2) on September 20, 2000, the United States District Court for the Southern District of New York entered a judgment in which Marvin Friedman pled guilty to 10 counts of bribery of a public official, relating to the illegal payments to a United States Department of Agriculture produce inspector in connection with 42 federal inspections of perishable agricultural commodities; (3) Respondent made illegal payments to a United States Department of Agriculture produce inspector on numerous occasions prior to April 1999; and (4) Respondent willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing, without reasonable cause, to perform a specification or duty, express or implied, arising out of an undertaking in connection with transactions involving perishable agricultural commodities purchased, received, and accepted in interstate or foreign commerce (Amended Compl. ¶¶ III-VI). On July 29, 2002, Respondent filed an "Answer to Amended Complaint" denying the material allegations of the Amended Complaint.

On March 25, 2003, and November 17 and 18, 2003, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] conducted an oral hearing in New York, New York. Ann K. Parnes, Andrew Y. Stanton, and Christopher P. Young-Morales, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented Complainant. Paul T. Gentile, Gentile & Dickler, LLP, New York, New York, represented Respondent.

On April 18, 2005, after Complainant and Respondent filed post-hearing briefs, the ALJ issued a decision. On June 1, 2005, Respondent filed a "Petition to Rehear and Reargue," and on July 1, 2005, Complainant filed "Complainant's Response to Respondent's Petition to Rehear and Reargue." On January 6, 2006, the ALJ issued a Decision and Order Following Reargument [hereinafter Initial Decision] which supercedes the ALJ's April 18, 2005, decision. The ALJ: (1) concluded, during the period April 1999 through July 1999, Respondent, through its employee and agent, Marvin Friedman, paid unlawful bribes and gratuities to a United States Department of Agriculture produce inspector in connection with 42 federal inspections of perishable agricultural commodities which Respondent received or accepted from 11 sellers in interstate or foreign commerce; (2) concluded Respondent willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing, without reasonable cause, to perform a specification or duty, express or implied, arising out of an undertaking in connection with transactions involving

perishable agricultural commodities received or accepted in interstate or foreign commerce; and (3) revoked Respondent's PACA license (Initial Decision at 25-27).

On March 30, 2006, Respondent appealed to the Judicial Officer, and on April 18, 2006, Complainant filed a response to Respondent's appeal petition. On April 19, 2006, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision. On June 2, 2006, I issued a Decision and Order: (1) concluding Respondent, through its employee and agent, Marvin Friedman, paid bribes to a United States Department of Agriculture produce inspector, during the period April 1999 through July 1999, in connection with 42 federal inspections of perishable agricultural commodities which Respondent received or accepted from 11 sellers in interstate or foreign commerce; (2) concluding Respondent willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing, without reasonable cause, to perform a specification or duty, express or implied, arising out of an undertaking in connection with transactions involving perishable agricultural commodities received or accepted in interstate or foreign commerce; and (3) ordering the publication of the facts and circumstances of Respondent's violations of the PACA.[1]

On July 17, 2006, Respondent filed a Petition to Reconsider. On August 9, 2006, Complainant filed a response to Respondent's Petition to Reconsider. On August 11, 2006, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Respondent's Petition to Reconsider. References to Complainant's exhibits are designated in this Order Denying Petition to Reconsider by "CX." References to the transcript are designated in this Order Denying Petition to Reconsider by "Tr."

CONCLUSIONS BY THE JUDICIAL OFFICER ON RECONSIDERATION

Respondent raises four issues in its Petition to Reconsider. First, Respondent contends my conclusion that Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) is exclusively based on Marvin Friedman's plea of guilty to bribing a United States Department of Agriculture produce inspector to influence the outcome of inspections of perishable agricultural commodities conducted for Respondent (Respondent's Pet. to Reconsider at 2-3).

Respondent fails to cite any portion of *In re KOAM Produce, Inc.*, 65 Agric. Dec. 589 (2006), in which I indicate my conclusion that Respondent violated the PACA is exclusively based on Marvin

[1]*In re KOAM Produce, Inc.*, 65 Agric. Dec. 589, 596, 621 (2006).

Friedman's guilty plea. While I reference Marvin Friedman's guilty plea in *In re KOAM Produce, Inc.*, I also make clear that my conclusion that Respondent violated the PACA is not exclusively based on Marvin Friedman's guilty plea:

> I disagree with Respondent's contention that Complainant did not prove Marvin Friedman bribed William Cashin. The only testimony as to the reason for Marvin Friedman's payments to William Cashin is the testimony of William Cashin that he was being paid bribes to provide Respondent "help" with respect to the inspections. William Cashin identified the ways in which he would falsify United States Department of Agriculture inspection certificates to help Respondent with respect to 75 percent to 80 percent of the inspections he conducted for Respondent (Tr. 125-32). Marvin Friedman, the person who actually made the payments, did not testify to contradict William Cashin. Moreover, Marvin Friedman pled guilty to 10 counts of bribery in connection with his payments to William Cashin for inspections of Respondent's produce (CX 4, CX 18).

In re KOAM Produce, Inc., 65 *Agric. Dec.* 589, 596, 621(2006).

Therefore, I reject Respondent's contention that my conclusion that Respondent violated the PACA is exclusively based on Marvin Friedman's guilty plea.

Second, Respondent asserts William Cashin testified untruthfully because he did not state "Respondent had no choice but to pay him or otherwise the inspections would have been very slow and never in the Respondent's favor." (Respondent's Pet. to Reconsider at 4.)

The only testimony as to the reason for Marvin Friedman's payments to William Cashin is the testimony of William Cashin that he was being paid bribes to provide Respondent "help" with respect to the inspections. William Cashin identified the ways in which he would falsify United States Department of Agriculture inspection certificates to help Respondent with respect to 75 percent to 80 percent of the inspections he conducted for Respondent (Tr. 125-32). Marvin Friedman, the person who actually made the payments, did not testify to contradict William Cashin. Moreover, Marvin Friedman pled guilty to a 10-count indictment for bribery which charges that Marvin Friedman made cash payments to a United States Department of Agriculture produce inspector in order to influence the outcome of inspections of fresh fruit and vegetables conducted at Respondent's place of business (CX 3, CX 4, CX 18).

The ALJ found William Cashin credible (Initial Decision at 3). 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).[2] The

[2]*See also In re Southern Minnesota Beet Sugar Cooperative*, 64 Agric. Dec. 580, 605 (2005); *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*, 543 U.S. 810 (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. 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* § (continued...)

Administrative Procedure Act provides that, on appeal from an administrative law judge's initial decision, the agency has all the powers it would have in making an initial decision, as follows:

> **§ 557. Initial decisions; conclusiveness; review by agency; submissions 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.

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[2](...continued)
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).

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.[3]

I have examined the record and find no basis to reverse the ALJ's credibility determination with respect to William Cashin. Therefore, I reject Respondent's contention that William Cashin testified untruthfully with respect to the reasons for Respondent's payments.

Even if I were to find Marvin Friedman made payments to William Cashin to obtain prompt inspection of Respondent's produce and to avoid receipt of false, unfavorable United States Department of Agriculture inspection certificates, I would conclude Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). A commission merchant's, dealer's, or broker's payment of bribes to a United States Department of Agriculture produce inspector, whatever the motive, in and of itself negates, or gives the appearance of negating, the impartiality of the United States Department of Agriculture produce inspector and undermines the confidence produce industry members and consumers place in quality and condition determinations rendered by the United States Department of Agriculture produce inspector.

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[3] *In re Southern Minnesota Beet Sugar Cooperative*, 64 Agric. Dec. 580, 608 (2005); *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*, 543 U.S. 810 (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 F. App'x 718 (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).

Commission merchants, dealers, and brokers have a duty to refrain from making payments to United States Department of Agriculture produce inspectors in connection with the inspection of perishable agricultural commodities which will or could undermine the trust produce sellers place in the accuracy of United States Department of Agriculture inspection certificates and the integrity of United States Department of Agriculture produce inspectors. A PACA licensee's payment to a United States Department of Agriculture produce inspector, even if it is only to obtain prompt inspection of perishable agricultural commodities and an accurate United States Department of Agriculture inspection certificate, undermines the trust produce sellers place in the accuracy of the United States Department of Agriculture inspection certificate and the integrity of the United States Department of Agriculture produce inspector. I have consistently interpreted section 2(4) of the PACA (7 U.S.C. § 499b(4)) to prohibit payment of bribes and gratuities to United States Department of Agriculture produce inspectors.[4]

Third, Respondent contends I erroneously omitted findings of fact previously proposed by Respondent that are material and relevant (Respondent's Pet. to Reconsider at 5).

I infer the omitted proposed findings of fact to which Respondent refers are the same proposed findings of fact which Respondent asserts in Respondent's Appeal Petition the ALJ erroneously omitted, namely: (1) William Cashin was unable to identify which United States Department of Agriculture inspection certificates he falsified for Respondent; (2) when William Cashin inspected produce at Respondent's premises, Marvin Friedman made payments to William Cashin even on occasions in which Marvin Friedman had not requested inspection; (3) William Cashin received gifts from wholesalers for his birthday, for Christmas, and upon leaving the Hunts Point Terminal Market; (4) William Cashin spent large sums of money on a car, care for his 19 cats, payments to his supervisor, and gifts for his girlfriend and sister; (5) William Cashin accepted money from wholesalers during his entire 20-year career as a United States Department of Agriculture produce inspector; (6) the United States Department of Agriculture permitted William Cashin to retire with a pension; and (7) William

[4] *In re Kleiman & Hochberg, Inc.*, 65 Agric. Dec. 482 (2006); *In re M. Trombetta & Sons, Inc.*, 65 Agric. Dec. 1869 (2005); *In re G & T Terminal Packaging Co.*, 65 Agric. Dec. 1839 (2005), *appeal docketed*, No. 05-5634 (2d Cir. Oct. 18, 2005); *In re Post & Taback, Inc.*, 62 Agric. Dec. 802 (2003), *aff'd*, 123 F. App'x 406 (D.C. Cir. 2005).

Cashin is a felon.[5]

Respondent fails to cite the portions of the record that support the above-listed proposed findings of fact, and I cannot locate evidence that supports findings that: (1) William Cashin received gifts from wholesalers for his birthday, for Christmas, and upon leaving the Hunts Point Terminal Market and (2) William Cashin spent large sums of money on a car, care for his 19 cats, payments to his supervisor, and gifts for his girlfriend and sister. Moreover, I do not find any of the above-listed proposed findings of fact relevant to the issue of whether Respondent violated the PACA.

Respondent also contends I erroneously failed to note that Complainant conceded Respondent's proposed findings of fact by not disputing them (Respondent's Pet. to Reconsider at 5). However, the record reveals Complainant has continually and consistently disputed Respondent's proposed findings of fact.[6]

Fourth, Respondent contends the publication of the facts and circumstances of Respondent's violations of the PACA is not an appropriate sanction because: (1) Marvin Friedman's principal was not aware that Marvin Friedman was making payments to William Cashin; (2) Marvin Friedman's motive for making payments to William Cashin may have been to benefit himself; (3) Marvin Friedman's payments to William Cashin may have been mere gratuities and not bribes; and (4) none of the United States Department of Agriculture inspection certificates that are the subject of the instant proceeding was false (Respondent's Pet. to Reconsider at 6).

Publication of the facts and circumstances of Respondent's PACA violations is commensurate with the seriousness of Respondent's violations of the PACA. Respondent's violations were so egregious as to warrant publication of the facts and circumstances of Respondent's PACA violations whether Marvin Friedman's unlawful cash payments (a) were bribes or gratuities; (b) were associated with United States Department of Agriculture inspection certificates that were falsified or with United States Department of Agriculture inspection certificates that were accurate; (c) were paid to benefit Marvin Friedman or Respondent; and (d) were or were not known to Jung Yong "C.J." Park, Kimberly S. Park, or anyone else at Respondent.

For the foregoing reasons and the reasons set forth in *In re KOAM Produce, Inc.*, 65 Agric. Dec. 589 (2006), Respondent's Petition to Reconsider is denied.

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[5]Respondent's Appeal Pet. at 3-4.

[6]See Complainant's Reply Brief at 4-10; Complainant's Response to Appeal Pet. at 2-8; and Complainant's Response to Respondent's Petition to Rehear and Reargue at 4.

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. Respondent's Petition to Reconsider was timely filed and automatically stayed *In re KOAM Produce, Inc.*, 65 Agric. Dec. 589 (2006). Therefore, since Respondent's Petition to Reconsider is denied, I hereby lift the automatic stay, and the Order in *In re KOAM Produce, Inc.*, 65 Agric. Dec. 589 (2006), is reinstated; except that the effective date of the Order is the date indicated in the Order in this Order Denying Petition to Reconsider.

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

ORDER

Respondent has committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). The facts and circumstances of Respondent's violations shall be published. The publication of the facts and circumstances of Respondent's violations shall be effective 60 days after service of this Order on Respondent.

RIGHT TO JUDICIAL REVIEW

Respondent has the right to seek judicial review of the Order issued in this Order Denying Petition to Reconsider in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341-2350. Respondent must seek judicial review within 60 days after entry of the Order issued in this Order Denying Petition to Reconsider.[7] The date of entry of the Order in this Order Denying Petition to Reconsider is August 21, 2006.

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[7]See 28 U.S.C. § 2344.

PERISHABLE AGRICULTURAL COMMODITIES ACT

DEFAULT DECISIONS

In re: WR FOODS, INC., d/b/a WESTERN ROSE FOODS.
PACA Docket No. D-06-0005.
Decision Without Hearing by Reason of Default.
Filed August 2, 2006.

PACA-Default.

Eric Paul for Complainant.
Respondent Pro se.
Decision and Order 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 February 13, 2006, 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 1998 through March 2003, failed to make full payment promptly to four sellers of the agreed purchase prices, or balances thereof, in the total amount of $422,421.54 for 457 lots of perishable agricultural commodities which it purchased, received, and accepted in interstate and or foreign commerce or in contemplation of interstate or 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 find that Respondent willfully, flagrantly and repeatedly violated section 2(4) of the PACA, and order that the facts and circumstances of Respondent's violations be published.

Respondent, on April 30, 2003, filed a Voluntary Petition in bankruptcy pursuant to Chapter 7 of the Bankruptcy Code (11 U.S.C. § 701 *et seq*.) in the United States Bankruptcy Court, Middle District of Pennsylvania, Case No. 03-02568, and the complaint was mailed, by certified mail, to Respondent's bankruptcy trustee, Leon P. Haller, Bankruptcy Trustee, Purcell, Krug and Haller, 1719 North Front Street, Harrisburg, Pennsylvania 17102.[1] The complaint was received and

[1] When a respondent is no longer operating and has filed for bankruptcy, service of the complaint by certified mail upon the respondent's bankruptcy trustee is considered proper service. *See In re: Scarpaci Brothers, Inc*., 60 Agric. Dec. 874 (2001); *In re:* (continued...)

accepted on February 21, 2006. 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. 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. WR Foods, Inc., d/b/a Western Rose Foods (hereinafter "Respondent"), is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania. Respondent ceased operations in April 2003. While Respondent was operating, its business address was 1302 Slate Hill Road, Camp Hill, Pennsylvania 17011. Respondent's current business address is c/o Leon P. Haller, Bankruptcy Trustee, Purcell, Krug and Haller, 1719 North Front Street, Harrisburg, Pennsylvania 17102.

2. At all times material herein, Respondent was licensed or operating subject to license under the provisions of the PACA. PACA license number 19941063 was issued to Respondent on April 22, 1994, which terminated on April 22, 1996, pursuant to section 4(a) of the PACA (7 U.S.C.§ 499d(a)), when Respondent failed to pay the required renewal fee. Respondent was issued PACA license number 19970355, on November 25, 1996, which terminated on November 25, 1997, when Respondent failed to pay the required renewal fee. Respondent was issued PACA license number 19980726, on March 3, 1998, which terminated on March 3, 2000, when Respondent failed to pay the required renewal fee. Respondent was issued PACA license number 20001299, on June 27, 2000, which terminated on June 27, 2003, when Respondent failed to pay the required renewal fee.

3. As more fully set forth in paragraph III of the complaint, Respondent, during the period January 1998 through March 2003, failed to make full payment promptly to four sellers the agreed purchase

[1](...continued)
Golden Phoenix Trading, Inc., 59 Agric. Dec. 894 (2000).

prices, or balances thereof, in the total amount of $422,421.54 for 457 lots of perishable agricultural commodities which it purchased, received, and accepted in interstate and or foreign commerce or in contemplation of interstate or foreign commerce.

4. On April 30, 2003, 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, Middle District of Pennsylvania. This petition was designated Case No. 03-02568. The Petition contains Schedule F, "Creditors Holding Unsecured Nonpriority Claims", in which Respondent admits that three of the four produce sellers set forth in Paragraph III herein have claims that are equal to the amounts alleged in Paragraph III, and admits that the fourth seller, Penn Produce, Inc., has a claim of $325,000, which is less than the $388,816.54 alleged in Paragraph III. Respondent does not allege in Schedule F that any of the claims set forth therein are disputed.

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.

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In re: ADAMS APPLE PRODUCE, INC.
PACA Docket No. D-05-0016.
Default Decision.
Filed August 5, 2006.

PACA – Default.

Chris Young-Morales for Complainant.
Respondent Pro se.
Decision and Order by Administrative Law Judge Peter M. Davenport

Decision Without Hearing by Reason of Default

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 July 22, 2005, 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 2003 through September 2004, Respondent purchased, received, and accepted, in interstate and foreign commerce, from 37 sellers, 164 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices in the total amount of $887,507.77.

A copy of the complaint was mailed by the Hearing Clerk to Respondent by certified mail and was signed for by Respondent's representative on August 3, 2005. Subsequently, however, a copy of the complaint was returned by the U.S. Postal Service with a forwarding address. Although the complaint had already been signed for by certified mail, Complainant re-served the complaint to that forwarding address by certified mail, and the complaint was signed for by Respondent's representative on April 11, 2006. Therefore, the Hearing Clerk 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 August 3, 2005. 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 the complaint 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 Tennessee. Its business address is 3625 County Road, Flatrock, Alabama 35966. Its mailing address is P.O. Box 219, Higdon, Alabama 35979-0219. The corporation's Registered Agent is Paul Thornton. Mr. Thornton's address is 719 Kentucky Avenue, Signal Mountain, Tennessee 37377. Mr. Thornton's alternate address is 1107 Montvale Circle, Signal Mountain, Tennessee 37377.

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 1997-2047 was issued to Respondent on August 25, 1997. This license terminated pursuant to Section 4(a) of the Act (7 U.S.C. § 499d(a)) when Respondent failed to pay the required annual renewal fee on August 25, 2004.

3. During the period May 2003 through September 2004, Respondent purchased, received, and accepted, in interstate and foreign commerce, from 37 sellers, 164 lots of perishable agricultural commodities, and failed to make full payment promptly of the agreed purchase prices in the total amount of $887,507.77.

Conclusions

Respondent's failure to make full payment promptly with respect to the 164 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: JOE'S VEGETABLES, INC.
PACA Docket No. D-06-0008
Decision Without Hearing by Reason of Default.
Filed October 25, 2006.

PACA– Default.

Jonathan Gordy 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*.) ("PACA"), instituted by a Complaint filed on July 26, 2005, 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 November 2002 through March 2004, Respondent Joe's Vegetables, Inc. ("Respondent") failed to make full payment promptly to a seller of the agreed purchase prices in the total amount of $473,641.53 for 36 invoices of perishable agricultural commodities which Respondent sold in the course of interstate and foreign commerce.

A copy of the Complaint was sent to Respondent by certified mail on April 5, 2006, and it was returned to the Hearing Clerk as "unclaimed" on May 11, 2006. Accordingly, pursuant to the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.130 *et seq*.) ("Rules of Practice"), the Hearing Clerk re-mailed the Complaint using regular mail on May 22, 2006. That mailing by regular mail is deemed to constitute service on Respondent pursuant to section 1.147(c) of the Rules of Practice (7 C.F.R. § 1.147(c)). Respondent has not answered the Complaint. The time for filing an answer having run, and upon the motion of Complainant for the issuance of a decision without hearing by reason of default, the following decision and order is issued without further investigation or hearing pursuant to section 1.139 (7 C.F.R. §

1.139) of the Rules of Practice.

Findings of Fact

1. Joe's Vegetables, Inc., ("Respondent") is a corporation organized and existing under the laws of the State of California. Respondent ceased operating on January 31, 2005. Its business address was 454 San Felipe Road, Hollister, California 95023. Its mailing address was P. O. Box 2494, Hollister, California 95024-2494.

2. At all times material to this Decision, Respondent was licensed under the provisions of the PACA. License number 1994-1439 was issued to Respondent on June 20, 1994. This license terminated on June 20, 2005, pursuit to Section 4(a) of the PACA (7 U.S.C. §499(a)) when Respondent failed to pay the required annual renewal fee.

3. Respondent picked, and took delivery in the field, of multiple lots of mixed vegetables, which are perishable agricultural commodities, from the grower, Mission Ranches, in King City, California, during the period of November 2002 through February 2004. The grower later invoiced Respondent for those vegetables on dates from November 19, 2002, through March 10, 2004. Respondent has failed to make full payment promptly of the agreed purchase prices in the total amount of $473,641.53 for those 36 invoices of perishable agricultural commodities, which Respondent processed and sold in the course of interstate and foreign commerce.

Conclusions

Respondent's failure to make full payment promptly with respect to the 78 transactions set forth in Finding of Fact 3 above, constitutes 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 it is served unless a party to the proceeding appeals the Decision to the Secretary within 30 days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies of this Decision shall be served upon the parties.

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In re: MCGEE PRODUCE, INC.
PACA Docket No. D-05-0012.
Default Decision.
Filed November 28, 2006.

PACA – Default.

Christopher Young-Morales for Complainant.
Respondent Pro se.
Decision and Order by Chief Administrative Law Judge Marc R. Hillson.

Decision Without Hearing by Reason of Default

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 23, 2005, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The complaint alleges that during the period August 31, 2003 through July 23, 2004, Respondent purchased, received, and accepted, in interstate and foreign commerce, from 7 sellers, 148 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices in the total amount of $392,289.31.

A copy of the complaint was mailed by the Hearing Clerk to Respondent by certified mail on May 24, 2005, and was returned as undeliverable. On February 13, 2006, a copy of the complaint was personally served upon Respondent's registered agent 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"). "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 the complaint 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. McGee Produce, Inc., (hereinafter "Respondent") is a corporation organized and existing under the laws of the state of North Carolina. Its business address is 4423 Wilkinson Boulevard, Charlotte, North Carolina 28208-5528. Its mailing address is P.O. Box 19323, Charlotte, North Carolina 28219-9323. The address of Jeffrey A. McGee, Respondent's registered agent, is 5409 Pecan Bluff Court, Charlotte, NC 28216.

2. Respondent is not and has never been licensed under the PACA. At all times material herein, Respondent has conducted business subject to the PACA.

3. During the period August 31, 2003 through July 23, 2004, Respondent purchased, received, and accepted, in interstate and foreign commerce, from 7 sellers, 148 lots of perishable agricultural commodities, and failed to make full payment promptly of the agreed purchase prices in the total amount of $392,289.31.

Conclusions

Respondent's failure to make full payment promptly with respect to the 148 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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Consent Decisions

PERISHABLE AGRICULTURAL COMMODITIES ACT

Flint River Foods, LLC PACA Docket No. D-06-0003 09/06/06

Keith A. Pillow d/b/a Fluvanna Fruits and Vegetables PACA Docket No. D-06-0001 09/18/06

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

AGRICULTURE DECISIONS

Agriculture Decisions is an official publication by the Secretary of Agriculture consisting of decisions and orders issued in adjudicatory administrative proceedings conducted for the Department under various statutes and regulations. Selected court decisions concerning the Department's regulatory programs are also included. The Department is required to publish its rules and regulations in the *Federal Register* and, therefore, they are not included in *Agriculture Decisions*.

Beginning in 1989, *Agriculture Decisions* is comprised of three Parts, each of which is published every six months. Part One is organized alphabetically by statute and contains all decisions and orders other than those pertaining to the Packers and Stockyards Act and the Perishable Agricultural Commodities Act, which are contained in Parts Two and Three, respectively.

The published decisions and orders may be cited by giving the volume number, page number and year, e.g., 1 Agric. Dec. 472 (1942). It is unnecessary to cite a decision's docket number, e.g., AWA Docket No. 99-0022, and the use of such references generally indicates that the decision has not been published in *Agriculture Decisions*.

Consent decisions entered subsequent to December 31, 1986, are no longer published 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.

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Direct all inquiries regarding this publication to: Editor, Agriculture Decisions, Office of Administrative Law Judges, U.S. Department of Agriculture, Room 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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